

# YOU ARE WHAT YOU SERVE: ARE SCHOOL DISTRICTS LIABLE FOR SERVING UNHEALTHY FOOD AND BEVERAGES TO STUDENTS?

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## INTRODUCTION

The United States is in the throes of a public health crisis of epidemic proportions.<sup>1</sup> In 2002, America had the highest obesity rate of all industrialized countries.<sup>2</sup> Government studies indicate that approximately sixty-one percent of U.S. adults, or approximately 108 million people, are either overweight or obese.<sup>3</sup> Children are also

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<sup>1</sup> PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY XIII (2001) [hereinafter CALL TO ACTION]; see also Press Release, National Institutes of Health, National Heart, Lung, and Blood Institute, NHLBI's Framingham Heart Study Finds Strong Link Between Overweight/Obesity and Risk for Heart Failure (July 31, 2002) (on file with author) [hereinafter Press Release, NIH]; Cara B. Ebbeling et al., *Childhood Obesity: Public Health Crisis, Common Sense Cure*, 360 THE LANCET 473 (2002); Centers for Disease Control, Obesity Trends 1991–2001 Prevalence of Obesity Among U.S. Adults by State, available at [http://www.cdc.gov/nccdphp/dnpa/obesity/trend/prev\\_reg.htm](http://www.cdc.gov/nccdphp/dnpa/obesity/trend/prev_reg.htm) (showing the Center for Disease Control's statistics for the prevalence of and trends towards the spread of the obesity epidemic by state and by region) (last visited Mar. 15, 2004).

<sup>2</sup> CENTER FOR NUTRITION POLICY AND PROMOTION, U.S. DEP'T OF AGRICULTURE, CHILDHOOD OBESITY: CAUSES & PREVENTIONS, SYMPOSIUM PROCEEDINGS 8 (1998), available at <http://www.usda.gov/cnpp/Seminars/obesity.PDF>.

<sup>3</sup> OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PHYSICAL ACTIVITY FUNDAMENTAL TO PREVENTING DISEASE 4 (2002) [hereinafter PHYSICAL ACTIVITY]. "Overweight" and "obesity" are medical terms denoting weight categories. The body mass index ("BMI") formula determines overweight and obesity. CALL TO ACTION, *supra* note 1, at 4. "BMI is a measure of weight in relation to height. BMI is calculated as weight in pounds divided by the square of the height in inches, multiplied by 703." *Id.* It is limited as an accurate gauge in some instances in which an individual is either very muscular or elderly. *Id.* The National Institute of Health ("NIH") developed *Clinical Guidelines* to define overweight as having a BMI of between 25.0 and 29.9, and obesity as having a BMI of greater than or equal to 30.0 in adults. *Id.* In children aged two to twenty, the calculations for overweight and obesity differ. *Id.* at 6. "Overweight has been defined as a sex- and age-specific BMI at or above the 95<sup>th</sup> percentile, based on

affected by the obesity epidemic.<sup>4</sup> Childhood obesity is a serious problem that impinges on physical and psychological health,<sup>5</sup> and

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revised CDC growth charts.” *Id.* Obesity is not specifically defined as it is for adults, and is used interchangeably with overweight when describing children. *Id.*

There has been a dramatic rise in overweight and obesity rates in the American population in the last decade. Ali Mokdad et al., *The Spread of the Obesity Epidemic in the United States, 1991-1998*, 282 JAMA 1519, 1520 (1999) (“These data show that obesity increased in every state, in both sexes, and across all age groups, races, educational levels, and smoking statuses. Rarely do chronic conditions such as obesity spread with the speed and dispersion characteristic of a communicable disease epidemic.”). Dr. David Satcher, former Surgeon General, recently declared that left unabated, obesity will rival cigarette smoking in its causal connection to preventable disease and death. CALL TO ACTION, *supra* note 1, at XIII. The U.S. Department of Health and Human Services (“DHHS”) estimates that 300,000 deaths a year are the result of obesity. *Id.* at 1; *see also* David B. Allison et al., *Annual Deaths Attributable to Obesity in the United States*, 282 JAMA 1530 (1999) (estimating the number of adults dying specifically from obesity at 280,000 per annum). “In 2000, the total cost of overweight and obesity was estimated to be \$117 billion.” PHYSICAL ACTIVITY, *supra*, at 4; *see also* Guijing Wang & William H. Dietz, *Economic Burden of Obesity in Youths Aged 6 to 17 Years: 1979 - 1999*, 109 PEDIATRICS e81 (2002), at <http://www.pediatrics.org> (last visited Oct. 5, 2002). President George W. Bush recently acknowledged the problem on June 20, 2002, by issuing Executive Order 13266 which authorized “improv[ing] the Federal Government’s assistance of individuals, private organizations, and State and local governments to (i) increase physical activity; [and] (ii) promote responsible dietary habits . . . .” Exec. Order No. 13266, 67 Fed. Reg. 42467 (June 24, 2002).

<sup>4</sup> *See* PHYSICAL ACTIVITY, *supra* note 3, at 13. From 1974 to 1999, the percentage of children aged six to eleven years suffering from serious weight gain increased from four percent to thirteen percent, and for children aged twelve to nineteen years the rate rose from six percent to fourteen percent. *Id.* Another recent study revealed that ten percent of children aged two to five are overweight and that fifteen percent of children between six and nineteen years are overweight. Cynthia L. Ogden et al., *Prevalence and Trends in Overweight Amount US Children and Adolescents, 1999 - 2000*, 288 JAMA 1728, 1729 (2002). This study used the most recent statistics from the 1999-2000 National Health and Nutrition Examination Study (“NHANES”). *Id.* at 1728. The information was collected from “a nationally representative cross-sectional survey of the total civilian noninstitutionalized population in the United States.” *Id.* African-American children and children of Hispanic descent have a greater risk of becoming obese than white children, although all three population segments have realized a significant increase in obesity as measured by the body mass index (BMI) over the past ten years. *Id.* at 1730-31. For an explanation of BMI, *see supra* note 3. Studies comparing variables such as parents’ education levels and family income suggest that obesity is more prevalent among lower socioeconomic classes of minority racial and ethnic groups. Charlotte A. Schoenborn et al., *Body Weight Status of Adults: United States, 1997 - 1998*, 330 ADVANCE DATA FROM VITAL AND HEALTH STATISTICS 1, 3-7 (2002); *see also* Katherine M. McTigue et al., *The Natural History of the Development of Obesity in a Cohort of Young U.S. Adults between 1981 and 1998*, 136 ANNALS OF INTERNAL MED. 857 (2002). The authors of this study suggest that “race or ethnicity and sex are likely surrogates, totally or in part, for other factors, such as dietary and exercise standards, income, education, and parity.” McTigue et al., *supra*, at 863.

<sup>5</sup> *See infra* notes 222-23 and accompanying text. American children are contracting nutrition-related diseases such as obesity, gallbladder disease, and type-II

foreshadows severe health consequences in adulthood.<sup>6</sup>

In attempting to counteract the trend in weight gain among American children, legislators, government agencies, and public-health advocates have increasingly turned to schools as a prime arena in which to promote good nutrition and eating behaviors.<sup>7</sup> Schools are recognized “as a key setting for public health strategies to prevent and decrease the prevalence of overweight and obesity.”<sup>8</sup> Yet, schools are playing a culpable role in fostering obesity among American children. Many schools serve unhealthy food and beverages à la carte in school cafeterias, including soft drinks, candy, and fast-food items, the daily consumption of which can lead to serious health problems.<sup>9</sup> Rather than working to counteract childhood obesity and poor

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diabetes, as well as bone fractures, an early warning sign of osteoporosis, at startling rates.

<sup>6</sup> See Mary K. Serdula et al., *Do Obese Children Become Obese Adults? A Review of the Literature*, 22 PREVENTATIVE MED. 167 (1993) (examining epidemiologic literature published from 1970 to 1992 which studied the relationship between childhood obesity and the prevalence of the condition in adulthood). Results of the examination of the literature indicate that

[a]bout a third (26 to 41%) of obese preschool children were obese as adults, and about half (42 to 63%) of obese school-age children were obese as adults. For all studies and across all ages, the risk of adult obesity was at least twice as high for obese children as for nonobese children. The risk of adult obesity was greater for children who were at higher levels of obesity and for children who were obese at older ages.

*Id.* at 167.

<sup>7</sup> See Public Health Service, U.S. Dep’t of Health and Human Services, *Guidelines for School Health Programs to Promote Lifelong Healthy Eating*, 45 MMWR 1 (1996) (“The U.S. Department of Agriculture’s (USDA) Nutrition Education and Training (NET) Program urges ‘nutrition education [to] be a major educational component of all child nutrition programs and offered in all schools, child care facilities, and summer sites’ by the year 2000.”) [hereinafter *Guidelines for School Health Programs*]; Howell Wechsler et al., *Food Service and Food and Beverages Available at School: Results from the School Health Policies and Programs Study 2000*, 71 J. SCH. HEALTH 313 (2001). The report stated:

Schools are in a unique position to promote healthy dietary behaviors and help ensure appropriate nutrient intake. More than one-half of young people in the United States get either breakfast or lunch, and one in ten get both, from a school meal program. In addition, students at many schools obtain snacks from a variety of venues (e.g., à la carte sales, vending machines, school stores, snack bars, classroom parties, and concession stands). School food service staff can promote healthy eating through the food they make available each day in the school cafeteria and the opportunities they have to reinforce nutrition education taught in the classroom.

Wechsler et al., *supra*.

<sup>8</sup> CALL TO ACTION, *supra* note 1, at 19.

<sup>9</sup> See *infra* Part I.B for a discussion of the types of food served in school cafeterias, and Part III.C for a discussion of the subsequent health consequences of a diet of food high in fats, sugars, salt, cholesterol.

nutrition, schools are increasingly ignoring their students' health as they seize opportunities to profit from the sale of candy, soda, salty snacks, and fast food—all high in calories, fat, and cholesterol.

Presumably, schools have a duty to maintain a safe and healthy environment for their students.<sup>10</sup> Schools have a responsibility to schoolchildren because children, while at school, are a captive audience, and in most jurisdictions students are not permitted to leave the premises during lunch period. Moreover, schools are deemed to act *in loco parentis*,<sup>11</sup> and thus they have a duty to act as a reasonable parent in making decisions that affect the health and well-being of their students. Schools may well breach that duty by serving, and thereby implicitly endorsing, unhealthy fast food, beverages, and snacks in order to generate a profit.

This Comment analyzes whether schools may be found negligent for serving unhealthy, harmful food in their cafeterias. Part I of this Comment identifies the current practices and policies concerning the availability of food to schoolchildren. Part II discusses whether federal preemption or the doctrine of municipal immunity provides local public school districts with an absolute defense from suit. Part II concludes that neither federal preemption nor municipal immunity is likely to bar a claim for negligence in the school food context.

Part III explains how a school district that provides unhealthy à la carte fast food or food of minimal nutritional value (snacks and sodas) may be found liable for negligence. This section examines the elements of negligence—duty, breach, causation, and damages—to determine the structure and the viability of such a claim. This section concludes that a school district has a duty to maintain a healthful environment, and consequently breaches this duty by permitting access to fast food, candy, salty snacks, and sugared beverages.

## I. SCHOOL MEAL PRACTICES

### A. *The National School Lunch Act*

During the Great Depression of the early 1930s, despite a surplus of food in agricultural markets, large numbers of American families were unable to procure adequate food. As a result, the federal government commenced a national school lunch program to

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<sup>10</sup> See *infra* Part III.A.1 for an explanation of the duty of a school or board of education to its schoolchildren.

<sup>11</sup> *In loco parentis* is translated as “in the place of the parent.” BLACK’S LAW DICTIONARY 791 (7th ed. 1999). The term applies to someone who acts in the capacity of a parent as a temporary guardian of a child. *Id.*

provide schoolchildren with nutritious food<sup>12</sup> as well as to “dissipate the glut in the agricultural markets.”<sup>13</sup> Food donations to schools lasted only until the early 1940s, however, when the demand for food in World War I increased to the point that surplus food donations were virtually eliminated.<sup>14</sup> In place of food donations, the federal government offered schools cash reimbursements to purchase food locally.<sup>15</sup>

In 1946, Congress enacted the National School Lunch Act (“NSLA”).<sup>16</sup> The purpose of the NSLA was “to safeguard the health and well-being of the Nation’s children and to encourage the domestic consumption of nutritious agricultural commodities and other food” by assisting states to establish and expand nonprofit school lunch programs.<sup>17</sup> In passing the NSLA, the federal government thereby provided needy schoolchildren with free or low-cost lunches.<sup>18</sup> Although the Department of Agriculture oversaw the NSLA during the first decade of its existence, inadequate funds and poor administration plagued the program.<sup>19</sup>

The structure of the present-day school lunch program derives from amendments to the NSLA beginning in the 1960s. In the 1962 amendments, Congress changed the apportionment formula for funds thereby encouraging states to extend the program to include more schools and more children.<sup>20</sup> In 1966, Congress passed the Child Nutrition Act (“CNA”), an act with a parallel purpose that established both breakfast and milk programs.<sup>21</sup> Since the 1960s, Congress has broadened the NSLA to encompass other nonprofit organizations, such as day-care centers<sup>22</sup> and adult-care facilities.<sup>23</sup> Congress has also extended the NSLA to cover the provision of after-

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<sup>12</sup> S. REP. NO. 2016 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3244, 3245.

<sup>13</sup> Sheila A. Taenzler, *The National School Lunch Program*, 119 U. PA. L. REV. 372 (1970).

<sup>14</sup> S. REP. NO. 2016 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3244, 3245.

<sup>15</sup> *Id.*

<sup>16</sup> ch. 281, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C §§ 1751-1769(h) (2000)); *see generally* S. REP. NO. 553 (1945) (describing the historical background and the policies considered in enacting the National School Lunch Act).

<sup>17</sup> 42 U.S.C. § 1751 (2000).

<sup>18</sup> *See* 42 U.S.C. § 1758(b)(1)(A) (2000).

<sup>19</sup> Taenzler, *supra* note 13, at 373.

<sup>20</sup> S. REP. NO. 2016 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3244, 3248.

<sup>21</sup> Pub. L. No. 89-642, 80 Stat. 885 (1966) (codified as amended at 42 U.S.C. §§ 1771-1791(f) (2000)).

<sup>22</sup> 42 U.S.C. § 1766(a) (2000); *see also* 7 C.F.R. § 226 (2002).

<sup>23</sup> 42 U.S.C. § 1766(o) (2000); *see also* 7 C.F.R. § 226 (2002).

care snacks<sup>24</sup> and summer food service programs.<sup>25</sup>

The Healthy Meals for Healthy Americans Act of 1994<sup>26</sup> amended the CNA and NSLA to require that school meals conform to the Dietary Guidelines for Americans (“DGA”). A notable provision in that amendment directed the following:

State educational agencies, schools, and school food service authorities shall, to the maximum extent practicable, inform students who participate in the school lunch and school breakfast programs, and parents and guardians of the students, of - (A) the nutritional content of the lunches and breakfasts that are served under the programs; and (B) the consistency of the lunches and breakfasts with the guidelines contained in the most recent “Dietary Guidelines for Americans” . . . including the consistency of the lunches and breakfasts with the guideline for fat content.<sup>27</sup>

This stringent requirement mandating parental notification of the nutritional value of food no longer exists in the current version of the NSLA;<sup>28</sup> instead, a more general provision requires that the food served in school meals meet the current DGA allowances, as well as daily recommended dietary allowances (“RDA”).<sup>29</sup> The deletion of the parental notification requirement is a significant change in the statute, especially when coupled with additional modifications to the NSLA that permit schools to outsource food service to food-service management companies.<sup>30</sup> Therefore, in eliminating parental oversight of food-service companies’ meal offerings, the current statutory regime undermines the ability of parents and caregivers to plan properly for the dietary care of schoolchildren.<sup>31</sup> Schoolchildren and parents must now rely on their local school boards to ensure that healthy food choices are provided for lunch, rather than a menu of unhealthy fast-food selections.

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<sup>24</sup> 42 U.S.C. § 1766a(a) (2000); *see also* 7 C.F.R. § 210.2 (2002).

<sup>25</sup> 42 U.S.C. § 1761 (2000); *see also* 7 C.F.R. § 225 (2002).

<sup>26</sup> Pub. L. No. 103-448, 108 Stat. 4699 (1994) (codified as amended at 42 U.S.C §§ 1751-1769g(h) (1994)).

<sup>27</sup> 42 U.S.C. §1758 (f) (1) (1994).

<sup>28</sup> The 1994 provision was stricken in 1996 in amendments to the National School Lunch Act, Pub. L. No. 104-193, § 702(c), 110 Stat. 2287, 2288-89 (1996).

<sup>29</sup> 42 U.S.C. § 1758(f) (1) (A)-(B) (2000).

<sup>30</sup> *See infra* Part I.B for a discussion of the current federal regulations and the provisions permitting schools to out-source their meal programs.

<sup>31</sup> Only federally-subsidized meals, those made available to financially-eligible children, must comport with RDA and DGA guidelines. Wechsler et al., *supra* note 7. All other food, those served à la carte, for example, do not have to meet these nutritional guidelines. *Id.*

*B. Current Federal Regulations and the Rise of Food-Service Contracts*

Today, the NSLA and the CNA provide a comprehensive meal program serving millions of eligible schoolchildren each year.<sup>32</sup> In 2001, an estimated 46,972,000 American children attended public elementary and secondary schools in the United States,<sup>33</sup> with an overwhelming majority of the elementary schools (94%), middle schools (89.4%), and high schools (73.4%) requiring students to remain on school grounds during lunch period.<sup>34</sup> Through the National School Lunch Program (“NSLP” or “the Program”),<sup>35</sup> public schools served 27,123,419 federally subsidized, daily lunches in 2000–2001.<sup>36</sup> During the same year, however, it was reported that “almost 80% of schoolchildren did not consume the recommended 5 or more servings of fruit and vegetables per day.”<sup>37</sup> In fact, although the U.S. Department of Agriculture (“USDA”) requires schools to serve meals that meet the DGA standards,<sup>38</sup> “the average total fat and

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<sup>32</sup> 42 U.S.C. § 1758(b) (2002). The eligibility requirements for free or reduced-price school meals are adjusted annually. *See, e.g.*, Child Nutrition Programs—Income Eligibility Guidelines, 67 Fed. Reg. 8933-34 (Feb. 27, 2002). Schools serve meals free of charge

to children whose household income is at or below 130 percent of the Federal poverty guidelines. Children are entitled to pay a reduced price (a maximum of 40 cents for lunch, 30 cents for breakfast and 15 cents for a snack) if their household income is above 130 percent but at or below 185 percent of the guidelines.

Food Nutrition Service, U.S. Dep’t Agriculture, Answers to Frequently Asked Questions, at <http://www.fns.usda.gov/cnd/menu/faqs/faqs.htm> (last visited Feb. 17, 2003).

<sup>33</sup> U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF UNITED STATES: 2002 146 (122d ed. 2002).

<sup>34</sup> Centers for Disease Control, School Health Policies and Programs Study 2000, available at [http://www.cdc.gov/nccdphp/dash/shpps/factsheets/fs01\\_food\\_sold\\_outside\\_school.htm](http://www.cdc.gov/nccdphp/dash/shpps/factsheets/fs01_food_sold_outside_school.htm) (last visited Mar. 16, 2004) (on file with author).

<sup>35</sup> “Program” refers to the National School Lunch Program. 7 C.F.R. § 210.1 (2002).

<sup>36</sup> FOOD RESEARCH AND ACTION CENTER, STATE OF THE STATES: A PROFILE OF FOOD AND NUTRITION PROGRAMS ACROSS THE NATION 1 (2002). The above figures are for federally-subsidized meals only and do not take into account the à la carte menu items available during breakfast, lunch, and snack times at school. *Id.*; *see also* Food Nutrition Service, U.S. Dep’t Agriculture, School Lunch Program Fact Sheets, at <http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPFactSheet.htm> (last visited Jan. 14, 2004). The federal meal program currently operates in approximately 99,800 schools. *Id.*

<sup>37</sup> Ogden et al., *supra* note 4, at 1731.

<sup>38</sup> The Dietary Guidelines for Americans recommend limiting consumption of total fat to no more than thirty percent of calories and saturated fat to less than ten percent of calories, and includes recommended daily allowances for vitamins and minerals. U.S. DEP’T AGRICULTURE & U.S. DEP’T HEALTH AND HUMAN SERVICES, DIETARY GUIDELINES FOR AMERICANS 29-30 (5th ed. 2000); *see also* SCHOOL LUNCH

saturated fat content of school breakfasts and lunches are still above DGA targets.”<sup>39</sup>

Even though school meal programs throughout the United States provide millions of federally sponsored lunches daily, these meal plans experience significant waste and relatively low participation among eligible students because of the “notoriously poor taste[] [and] appearance” of the food.<sup>40</sup> Notably, the participation rate among eligible schoolchildren in the NSLP is declining at the same time school enrollment is increasing.<sup>41</sup> This paradox can be explained by examining a 1986 change in the NSLA. That year, the NSLA was amended to permit schools to contract privately with food-service companies to serve à la carte food, as long as those food suppliers also agreed to offer free and reduced-price meals to eligible children.<sup>42</sup> Since then, an increasing number of school districts in the United States have contracted with corporate food-service companies to manage their meal programs.<sup>43</sup> The inclusion of à la carte competitive food in meal programs, however, has been criticized. The Food, Nutrition and Consumer Services (“FNCS”) division of the USDA recently declared in a report to Congress that “competitive foods [offered à la carte or through vending machines] undermine the nutrition integrity of the

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PROGRAM FACT SHEETS, *supra* note 36 (“School lunches must meet Federal nutrition requirements, but decisions about what specific food to serve and how they are prepared are made by local school food authorities.”).

<sup>39</sup> Wechsler et al., *supra* note 7.

<sup>40</sup> MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 192 (2002). Nestle states that only fifty-eight percent of eligible children participate. *Id.* See generally RESOURCES, COMMUNITY, & ECONOMIC DEVELOPMENT DIV., U.S. GENERAL ACCOUNTING OFFICE, WASTE FROM SCHOOL LUNCHES, GAO/RCED-96-128R (1996) (providing an in-depth, statistical analysis of school lunch waste).

<sup>41</sup> See FOOD NUTRITION AND CONSUMER SERVICES, U.S. DEP’T AGRICULTURE, FOOD SOLD IN COMPETITION WITH USDA SCHOOL MEAL PROGRAMS: A REPORT TO CONGRESS (2001) [hereinafter REPORT TO CONGRESS]; see also Food Nutrition Service, U.S. Dep’t Agriculture, National School Lunch Current Participation (providing a state-by-state account of participation rates in the NSLP between November 2002 and November 2003), available at <http://www.fns.usda.gov/pd/slcurrent.htm> (last visited Jan. 16, 2004).

<sup>42</sup> Pub. L. No. 99-500, § 324, 100 Stat. 1783, 361 (1986) (amending 42 U.S.C. § 1758 to add section (e)). This subsection pertains to schools that provide federally subsidized meals. Schools that meet an exemption, such as N.J. STAT. ANN. § 18A:33-5 (1999), which exempts schools with less than 5 percent of pupils meeting federal eligibility requirements, are not so regulated. Aramark is an example of a food service company that services school districts. See Aramark website, at <http://www.aramark.com> (last visited Mar. 11, 2003).

<sup>43</sup> NESTLE, *supra* note 40, at 193-94.



programs and discourage participation.”<sup>44</sup>

The Food and Nutrition Service (“FNS”) of the USDA promulgated the current federal regulations for the administration of the NSLP. These regulations adhere to the provisions of the NSLA with regard to the DGA and RDA nutritional standards for federally subsidized meals.<sup>45</sup> The regulations, however, also permit the sale of competitive food (food offered à la carte) and food of minimal nutritional value (“FMNV”), neither of which is required to meet DGA and RDA nutritional standards.<sup>46</sup> The regulations define competitive food as “any food sold in competition with the Program to children in food service areas during the lunch periods.”<sup>47</sup> Although any food sold, other than federally sponsored lunches, falls into the “competitive” category, competitive foods are typically popular fast food offered to entice children to pay more and waste less,<sup>48</sup> including name-brand items from McDonald’s, Pizza Hut, and Taco Bell, as well as generic, unbranded selections of hamburgers, cheeseburgers, French fried potatoes, sandwiches, salty snacks, chocolate candy, and ice cream.<sup>49</sup>

The only restriction on the sale of competitive food is that “all income from the sale of such food accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school.”<sup>50</sup> This provision, therefore, creates a strong financial justification for school boards to approve the service of non-nutritional food during school lunch periods. Furthermore, this regulation also has the effect of placing “schools in the position of competing with their own [federal] school meal programs for revenue, contributing to decreases in student participation in the [federal] school meals programs with the related loss of revenue to

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<sup>44</sup> REPORT TO CONGRESS, *supra* note 41.

<sup>45</sup> 7 C.F.R. § 210.10 (2002).

<sup>46</sup> 7 C.F.R. § 210.11 (2002); *see also* Wechsler et al., *supra* note 7 (“Nutritional standards of the USDA’s School Meals Initiative for Healthy Children do not apply to food sold outside of the USDA federally funded school breakfasts and lunch programs.”).

<sup>47</sup> 7 C.F.R. § 210.11(a)(1) (2002).

<sup>48</sup> *See* NESTLE, *supra* note 40, at 194. Students pay more because schools charge more money for à la carte food. *Id.* Furthermore, students waste less food because fast-food choices, whether name-brand or generic, are more appealing to them. *See id.* at 194; *see also* Elizabeth Becker & Marian Burros, *Eat Your Vegetables? Only at a Few Schools*, N.Y. TIMES, Jan. 13, 2003, at A1, A14 (“[C]afeterias also serve à la carte food that are higher in fat, sugar[,] and calories, but are what students prefer over the more nutritious federally subsidized meals.”).

<sup>49</sup> Wechsler et al., *supra* note 7.

<sup>50</sup> 7 C.F.R. § 210.11(b) (2002).

support the viability of the programs.”<sup>51</sup>

The federal regulations define FMNV as soda water (commonly known as carbonated soft drinks), water ices not containing fruit or fruit juice, chewing gum, and certain candies such as hard candy, jellies and gums, marshmallow candies, fondant, licorice, spun candy, and candy-coated popcorn.<sup>52</sup> The federal regulations only prohibit the sale of some FMNV in food-service areas during lunch periods.<sup>53</sup> For example, carbonated soft drinks cannot be sold in the cafeteria, but may be offered just outside the entrance to the cafeteria. There are no restrictions on the sale of “chips, most candy bars, and noncarbonated, high-sugar drinks that are not 100% juice.”<sup>54</sup>

Food and beverages from soft drink vending machines, ice cream vending machines, and candy vending machines are widely available in public schools.<sup>55</sup> Increasingly, school districts across the nation are forming lucrative, multi-million dollar “pouring rights” contracts with soft drink manufacturers for access to the student market.<sup>56</sup> These contracts often specify annual sales quotas that the school district must achieve in order to maintain payment levels from the soft-drink companies.<sup>57</sup> These sales goals, however, place schools

<sup>51</sup> REPORT TO CONGRESS, *supra* note 41.

<sup>52</sup> 7 C.F.R. § 210 app. B (2002).

<sup>53</sup> 7 C.F.R. § 210.11(b) (2002). Restrictions apply only to those items listed in Appendix B. *Id.*

<sup>54</sup> Wechsler et al., *supra* note 7.

<sup>55</sup> ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 51-57 (2002).

<sup>56</sup> *Id.* at 53; *see also* NESTLE, *supra* note 40, at 197–218. Companies such as Coca-Cola, PepsiCo, and Cadbury-Schweppes bid aggressively on school district business. *Id.* at 203. In Charleston County, South Carolina, the school district formed a pouring rights contract with Pepsi Bottling Group valued at eight million dollars over five years. *NOW with Bill Moyers: Buying Access* (PBS television broadcast, Oct. 18, 2002), at [http://www.pbs.org/now/transcript/transcript\\_schools.html](http://www.pbs.org/now/transcript/transcript_schools.html) (last visited Oct. 21, 2002). The contract terms were described as follows:

The [school] district gets an annual fifty thousand dollars cash, after year one of the five-year contract. There’s also scholarship money, free drinks for some events, and as if the district were a pro-sports superstar, it gets a signing bonus—one million dollars cash just for closing the deal. But for all the up front money, the real pop to the contract is the commissions. More than half that potential 8 million dollars depends on the success of soda sales. Schools get 40 cents every time someone spends a dollar on a drink from a vending machine. That jumps to 43 cents if the school installs on machine for every 125 students. West Ashley High School [in Charleston County] has far surpassed that. It has one machine for every fifty students—44 machines in all.

*Id.*

<sup>57</sup> SCHLOSSER, *supra* note 55, at 57. For example, in Colorado, “School District 11 was obligated to sell at least seventy thousand cases of Coca-Cola products a year,

and school officials in conflict with their duty to promote a healthy environment for their students.<sup>58</sup> Indeed, schools may have a financial incentive to disregard federal time-and-place regulations<sup>59</sup> in order to increase access to FMNV.<sup>60</sup> School districts, confronted with mounting financial pressures, are tempted to permit students to “drink Coca-Cola during class,” or if not soda, to “drink fruit juices, teas, and bottled waters also sold in the Coke machines.”<sup>61</sup> Instead of fostering the lessons of good nutrition taught in most school health classes, schools are “teaching excess.”<sup>62</sup> Thus, actions taken by school districts to realize their full contractual benefits are inimical to their duty to provide a safe and healthy environment for their students.<sup>63</sup>

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within the first three years of the contract, or it would face reduced payments by Coke.” *Id.* More recently, Coca-Cola has revised its financial arrangements with schools so that it no longer pays upfront money. Coca-Cola Co., Model Guidelines for School Beverage Partnerships: Contracts and Financial Arrangements, at [http://www2.coca-cola.com/ourcompany/hal\\_school\\_guidelines\\_contracts.html](http://www2.coca-cola.com/ourcompany/hal_school_guidelines_contracts.html). Its corporate guidelines state that contracts between Coca-Cola and schools should “[b]e structured to offer schools a steady stream of resources for the length of the partnership, as opposed to relying on an advance payment.” *Id.* According to Coca-Cola, “[t]his approach frees school officials from stipulations that beverage sales must meet an expected revenue goal and evens out budget fluctuations from year to year.” *Id.*

<sup>58</sup> See SCHLOSSER, *supra* note 55, at 56-57; *infra* Part III.A.1 and accompanying notes on a school’s duty.

<sup>59</sup> The federal regulations state that “the sale of food of minimal nutritional value, as listed in appendix B of this part” shall be prohibited “in the food service areas during the lunch periods.” 7 C.F.R. § 210.11(b) (2002).

<sup>60</sup> There is substantial concern that school districts are not following the federal regulations with regard to the provision of competitive food and FMNV. For example, a memorandum to State Directors of childhood nutrition programs notified the State Directors that the Department of Agriculture’s Office of the Inspector General had concluded an audit of food service management company (FSMC) participation in the NSLP. Memorandum from Food Nutrition Service, to State Agency Directors (Apr. 2002) (on file with author). The memorandum states that “FNS is concerned with the audit’s conclusion that existing regulations, policy and guidance are not followed by State agencies, school food authorities (SFAs) and FSMCs in operating the NSLP.” *Id.* This memorandum echoes an earlier one written by the Director of the Child Nutrition Division of the FNS in January 2001, which encouraged state agencies to “disallow all meals served by a school on any day that a violation of the regulations [pertaining to FMNV] is observed and to be diligent in monitoring compliance with corrective action plans.” Memorandum from Stanley C. Garnett, Director Child Nutrition Division of FNS, to Regional Directors Special Nutrition Programs 4 (Jan. 16, 2001) (on file with author).

<sup>61</sup> SCHLOSSER, *supra* note 55, at 57. Schlosser also reports that a school administrator in Colorado suggested to district school principals to “move Coke machines to places where they would be accessible to students all day.” *Id.*

<sup>62</sup> *NOW with Bill Moyers: Buying Access*, *supra* note 56.

<sup>63</sup> See *infra* Part III.A. for a discussion of schools’ duty and breach of duty to maintain a safe and healthy environment.

## II. FEDERAL PREEMPTION AND MUNICIPAL IMMUNITY AS A BAR TO STATE LAW CLAIMS FOR NEGLIGENCE AGAINST SCHOOL DISTRICTS THAT SERVE UNHEALTHY FOOD AND BEVERAGES

If faced with a negligence suit, schools might assert two potential defenses—federal preemption and municipal immunity. Each defense is discussed below, as it would relate to a school’s liability for serving harmful food and beverages in schools.

### A. Federal Preemption

The Constitution provides that “Laws of the United States . . . shall be the Supreme Law of the Land.”<sup>64</sup> Consequently, federal preemption analysis acts as a persistent reminder of the inherent conflicts that can arise between federal enactments and state laws;<sup>65</sup> indeed, “[p]reemption principles have . . . been at the center of many hard-fought legal battles involving important issues of economic and social policy.”<sup>66</sup> The issue here is whether the NSLA preempts a negligence claim against a local school district for its decision to serve schoolchildren unhealthy à la carte food and FMNV.

Preemption analysis falls into two categories: express preemption and implied preemption.<sup>67</sup> Express preemption occurs when Congress has spoken directly to the preemptive effect of a statute.<sup>68</sup> In analyzing express preemption, the Supreme Court has required clear evidence of congressional intent to preempt state law.<sup>69</sup> Therefore, the statutory language must provide a solid basis upon which to conclude, after further examining legislative history, that Congress intended its statute to preempt state law.<sup>70</sup> If no intent to preempt can be detected from the express text of the statute and legislative history, a court may still invoke the doctrine of implied preemption to determine legislative intent inferentially.<sup>71</sup> “[I]mplied

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<sup>64</sup> U.S. CONST. art. VI, § 1, cl. 2.

<sup>65</sup> KENNETH STARR ET AL., *THE LAW OF PREEMPTION* 1 (1991).

<sup>66</sup> *Id.* at 1-2.

<sup>67</sup> *Id.* at 14-15.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 377 (2d ed. 2002).

<sup>70</sup> STARR ET AL., *supra* note 65, at 18.

<sup>71</sup> *Id.* (noting that implied preemption is in conflict with the Court’s oft-stated requirement that there be a “‘clear and manifest’ expression of congressional intent”); *see also* New York State Dep’t of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (“[I]f Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the

preemption is often a function of both perceived congressional intent and the language used in the statute or regulation.”<sup>72</sup> Thus, the boundaries between express and implied preemption are not easily delineated.<sup>73</sup>

Implied preemption is further divided into several subcategories: field preemption; conflict preemption; and administrative preemption. These categories also frequently overlap in the attempt to discern congressional intent.<sup>74</sup> Field preemption occurs “where the scheme of federal law and regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”<sup>75</sup> Indeed, the Court has frequently stated its basic “assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.”<sup>76</sup> Administrative preemption is very similar to field preemption and is potentially deemed to exist when extensive federal regulations serve as an indication that Congress intended to occupy the field.<sup>77</sup> For the purpose of this analysis, administrative preemption will be discussed under the rubric of field preemption.

Conflict preemption exists “where compliance with both federal and state regulations is a physical impossibility or where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>78</sup> The problem here is determining whether a conflict exists between a federal and state law.<sup>79</sup> For example, a federal law that is deemed to set a minimum standard is unlikely to be viewed in conflict with a state law that requires more stringent standards.<sup>80</sup> As a general premise, state laws, that reinforce federal programs, will be enforceable, whereas state

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exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.”) (citing *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

<sup>72</sup> CHEMERINSKY, *supra* note 69, at 377.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> CHEMERINSKY, *supra* note 69, at 378 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>76</sup> *Hillsborough County, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1985) (quoting *Rice*, 331 U.S. at 230).

<sup>77</sup> STARR ET AL., *supra* note 65, at 18-34.

<sup>78</sup> *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal citations omitted).

<sup>79</sup> CHEMERINSKY, *supra* note 69, at 391.

<sup>80</sup> *Id.* at 391-92 (discussing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)).

laws, that impede or limit the government in the administration of federal programs, will be preempted.<sup>81</sup>

With respect to the analysis of the present issue, nothing in the express language of the NSLA, its legislative history, or the federal regulations promulgated to administer the Act indicates that Congress intended the NSLA to preempt state law claims for negligence against local school boards that provide unhealthy food, beverages and snacks to schoolchildren. Indeed, the purpose of the Act demonstrates that Congress intended the federal government to act in concert with the states, by providing financial assistance to states in their pursuit to advance and protect the public health:

It is hereby declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, *by assisting the States*, through grants-in-aid and other means, in providing an adequate supply of food and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.<sup>82</sup>

By providing assistance to states, Congress has recognized the states' primary role as guardians of the health and well-being of their citizenry. Thus, a state law negligence claim against a school district that provides unhealthy food and beverages to the schoolchildren under its supervision promotes and enforces the policies described in the NSLA and its regulations—to provide nutritious food to children in order to preserve their health and well-being<sup>83</sup> and to ensure that children develop a sound understanding of the importance of proper nutrition and good health.<sup>84</sup>

Arguments for field preemption and conflict preemption are also likely to fail. In the case of field preemption, although the FNS

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<sup>81</sup> Donald T. Kramer, Annotation, *Construction and Application of National School Lunch Act and Child Nutrition Act of 1966*, 14 A.L.R. FED 634, § 7 (1973).

<sup>82</sup> 42 U.S.C. § 1751 (2000) (emphasis added). Additionally, the federal regulations state:

the Department provides States with general and special cash assistance and donations of food acquired by the Department to be used to assist schools in serving nutritious lunches to children each school day. In furtherance of Program objectives, participating schools shall serve lunches that are nutritionally adequate, as set forth in these regulations, and shall to the extent practicable, ensure that participating children gain a full understanding of the relationship between proper eating and good health.

7 C.F.R. § 210.1 (2002).

<sup>83</sup> 42 U.S.C. § 1751 (2000).

<sup>84</sup> 7 C.F.R. § 210.1 (2002).

has developed extensive regulations to govern schools that participate in the NSLP, participation in the federal program is ultimately voluntary.<sup>85</sup> Therefore, schools may serve lunches that are overwhelmingly composed of fast food and other unhealthy snacks and beverages without federal consequences.<sup>86</sup> And, by analyzing conflict preemption, it is clear that a state negligence action would not obstruct the federal objectives of the NSLA,<sup>87</sup> because the federal nutritional requirements do not apply to the competitive food or FMNV served outside the federal program.<sup>88</sup> In fact, the negligence action reinforces the objectives of the federal lunch program. A negligence cause of action in this context addresses, at the local level, the school board's decision to offer an unrestricted diet of fat, cholesterol, salt, and sugar in return for lunchtime profits. Consequently, seeking to enforce good nutrition and the health of schoolchildren by holding local school boards negligent for their decisions to provide regular access to unhealthy food and beverages would not be invalidated by preemption principles.

#### B. *Municipal Immunity*

A further school district defense might be municipal immunity. The law of municipal immunity<sup>89</sup> is complex and murky and varies from state to state.<sup>90</sup> Municipal immunity, derived from English law, relates to the doctrine of sovereign immunity, and is “associated with the idea that ‘the King can do no wrong.’”<sup>91</sup> Historically, municipalities were not recognized as sovereigns, like states or the

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<sup>85</sup> Kramer, *supra* note 81, at § 6a.

<sup>86</sup> Some municipalities are exempted from participation in the NSLP by state statute. See, e.g., N.J. STAT. ANN. § 18A:33-5 (1999) (exempting schools with less than five percent of pupils meeting federal eligibility requirements). These schools may nonetheless provide food for lunches and are not required to adhere to federal nutritional guidelines. See Wechsler et al., *supra* note 7.

<sup>87</sup> See *supra* note 82 and accompanying text.

<sup>88</sup> See Wechsler et al., *supra* note 7 (noting that federal nutritional standards do not apply to food sold outside the federally funded meal programs).

<sup>89</sup> A discussion of the scope and breadth of the law of municipal immunity nationwide is outside the parameters of this Comment. For good overviews of municipal immunity, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984); DAN B. DOBBS, THE LAW OF TORTS §§ 268-71 (2000); 57 AM. JUR. 2D *Municipal, County, School and State Tort Liability* §§ 1-118, 501-10 (2001); Allan E. Korpela, Annotation, *Modern Status of Doctrine of Sovereign Immunity As Applied to Public Schools and Institutions of Higher Learning*, 33 A.L.R. 3D. 703 (1970).

<sup>90</sup> KEETON ET AL., *supra* note 89, § 131, at 1052-53. Where municipal immunity is retained, “it is a fertile source of litigation.” *Id.* § 131, at 1053.

<sup>91</sup> *Id.* § 131, at 1033; see also Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 26-27 (2002).

federal government, but rather were deemed to be state-chartered corporations.<sup>92</sup> This distinction led to a different way of determining municipal immunity, one that was narrower than traditional government immunity, because “municipalities [exhibit] a corporate or proprietary face as well as a governmental face.”<sup>93</sup> As a result, governmental immunity traditionally protected municipalities against liability for “governmental” activities but not for “proprietary” ones.<sup>94</sup> Today, municipal immunity extends to local school districts to protect decisions made or actions taken in a governmental or discretionary capacity, as opposed to those made in a proprietary or ministerial function.<sup>95</sup> Whether applied by statute or common law, some form of municipal immunity is employed in every state to limit the liability of governing school districts.<sup>96</sup>

Courts apply two common tests when adjudicating the immunity defense, depending on the jurisdiction: the “governmental proprietary” test and the “discretionary ministerial” test. The analysis under both tests is essentially the same, and many have criticized both tests as being difficult to apply.<sup>97</sup> Under the governmental proprietary test, a governmental function is defined as

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<sup>92</sup> DOBBS, *supra* note 89, § 269, at 718.

<sup>93</sup> KEETON ET AL., *supra* note 89, § 131, at 1051.

<sup>94</sup> *Id.*; see also Ruth Cook, *Postscript: Tracing the Governmental Proprietary Test*, 53 U. CIN. L. REV. 561 (1984).

<sup>95</sup> KEETON ET AL., *supra* note 89, § 131, at 1053. In New Jersey, as in many other states, schools within a school district are governed by a local board of education. N.J. STAT. ANN. § 18A:10-1 (West 1999). The board of education is created by statute to perform state functions at the local level. N.J. STAT. ANN. § 18A:11-1 (West 1999). Boards of education are legal entities, which have been given the power to sue or be sued in the corporate name. N.J. STAT. ANN. § 18A:11-2 (West 1999). Under the New Jersey Tort Claims Act, local boards of education are considered to be public entities, which can be immune from suit depending on whether the action in question is discretionary or ministerial. N.J. STAT. ANN. § 59:1-3 (West 1992). For the purposes of this discussion the term “school district” will be used to convey the local governing board of education.

<sup>96</sup> *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 889 app. (Pa. 1973).

<sup>97</sup> See *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). Justice Frankfurter described the law surrounding the governmental / non-governmental distinction as a “quagmire.” *Id.* at 65. He further stated that comparing decisions of the forty-eight states would yield “irreconcilable conflict,” “disharmonious decisions,” and “disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.” *Id.* at 65; see also Murray Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936), reprinted in 53 U. CIN. L. REV. 469 (1984); Mary S. Hack, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 MO. L. REV. 743, 748-49 (1993). The governmental proprietary dichotomy has been described as a “maze of inconsistency . . . producing uneven and unequal results which defy understanding.” *Id.* at 751 (internal citations omitted).



one that is discretionary, political, legislative, or public in nature and performed for the public good in [sic] behalf of the state. In contrast, the proprietary activities undertaken by the government are those that are commercial or chiefly for the private advantage of the compact community. Stated simply, if the undertaking of the government is one in which only a governmental agency could engage, it is governmental in nature; it is proprietary and private when any corporation, individual or group of individuals could do the same thing.<sup>98</sup>

The distinction between governmental and proprietary functions has been described as “probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction.”<sup>99</sup> Accordingly, there is no uniform set of factors that courts apply to decide whether an activity is proprietary.<sup>100</sup>

The “discretionary ministerial” dichotomy is similarly difficult to define and to apply.<sup>101</sup> Under the discretionary ministerial test, discretionary acts are deemed to be those that require “high-level” policy decisions, and do not relate merely to operational or day-to-day decisions, which are classified as ministerial.<sup>102</sup> “Generally, ‘high level policy decisions classified as discretionary acts involve planning, and are distinct from ministerial acts, which pertain merely to operations and are not immunized.’”<sup>103</sup>

In *City of Atlanta v. Chambers*,<sup>104</sup> the Georgia Court of Appeals applied a form of the governmental proprietary test to determine whether the City of Atlanta was immune from vicarious liability in a wrongful-death suit for the actions of a municipal employee in operating a city garbage truck.<sup>105</sup> The City argued that the garbage collection fees paid by the public were merely a way to offset collection expenses, and not to generate revenue for the City to use as funding for other activities.<sup>106</sup> The plaintiffs, on the other hand,

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<sup>98</sup> 57 AM. JUR. 2D, *supra* note 89, § 53, at 87-88.

<sup>99</sup> *Ayala*, 305 A.2d at 883-84.

<sup>100</sup> DOBBS, *supra* note 89, § 269, at 718-19. “The governmental proprietary distinction can produce some surprising case outcomes.” *Id.* at 719.

<sup>101</sup> See John A. Gleason & Kenneth Van Winkle, Jr., *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to Judicial Abolishment of Sovereign Immunity*, 55 U. CIN. L. REV. 501, 507 (1986).

<sup>102</sup> *Strauss v. Township of Holmdel*, 711 A.2d 1385, 1393 (N.J. Super. Ct. Law Div. 1997) (citing *Costa v. Josey*, 415 A.2d 337 (N.J. 1980)).

<sup>103</sup> *Id.* (internal citations omitted).

<sup>104</sup> 424 S.E.2d 19 (Ga. Ct. App. 1992).

<sup>105</sup> *Id.* at 20.

<sup>106</sup> *Id.*

attempted to demonstrate that by employing other accounting methods, the garbage collection service would be more profitable, thus characterizing the operation as a source of revenue.<sup>107</sup>

The court noted that “in general, ‘the collection of garbage is a governmental function, for the performance of which a municipality is granted immunity from liability for the negligent acts of its officers and employees.’”<sup>108</sup> The court explained, however, that an exception to this general rule of municipal immunity “may arise where a city operates a garbage collection service primarily as a business enterprise and source of revenue, rather than primarily as a public service.”<sup>109</sup> Utilizing the governmental proprietary test for municipal immunity, the court declared that “what is significant is the character of the [enterprise] as ‘primarily a source of revenue’ rather than being used primarily for the benefit of the public regardless of incidental generation of revenues.”<sup>110</sup> Ultimately, the *Chambers* court found that the garbage collection operation was of primary benefit to the public and therefore imposed no liability on the City.<sup>111</sup>

*Krueger v. Board of Education of City of St. Louis*<sup>112</sup> is another example of a court grappling with the “governmental proprietary” test. Here, the Supreme Court of Missouri dealt with municipal immunity in the context of the school lunchroom. The precise issue before the court was whether “the fact that the defendant [school district] was authorized to operate a lunchroom, but not compelled to do so, ma[d]e its operation other than a governmental function.”<sup>113</sup> In this case, a cafeteria employee was injured while cleaning a food-chopping machine and sued the board of education for negligence.<sup>114</sup> The court held that the school board was immune from liability because the board of education did not receive “pecuniary profit” from the operation of the lunchroom, and the decision to voluntarily undertake the provision of lunches was a discretionary power given by the Legislature.<sup>115</sup> By characterizing the

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<sup>107</sup> *Id.* at 21-22.

<sup>108</sup> *Id.* at 21 (internal citations omitted).

<sup>109</sup> *Id.*

<sup>110</sup> *Chambers*, 424 S.E.2d at 21 (citing *Cleghorn v. City of Albany*, 362 S.E.2d 386 (Ga. Ct. App. 1987)) (noting that the latter would result in no liability).

<sup>111</sup> *Id.* at 22.

<sup>112</sup> 274 S.W. 811 (Mo. 1925).

<sup>113</sup> *Id.* at 812.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 813-14. The court stated:

There is no good reason why a school district should be liable to an action for damages because voluntarily, yet pursuant to a general authority, it furnishes a certain convenience in aid of its schools, when,

board of education's decision to operate a lunchroom as a duty to maintain, operate, or manage a public school in the public good, the court broadly recognized immunity for the school board.<sup>116</sup> The court, however, noted that the school board is an instrument of the state only insofar as it "is entitled to no pecuniary profit from its services."<sup>117</sup>

Applying a "discretionary ministerial" analysis to determine municipal immunity in *Costa v. Josey*,<sup>118</sup> the New Jersey Supreme Court examined whether the New Jersey Department of Transportation was immune from liability in a wrongful-death action for the negligent repair and maintenance of a barrier separating a highway.<sup>119</sup> The administrator of the decedents' estates claimed that the divider separating the eastbound and westbound lanes was negligently repaired when the highway was resurfaced, creating a dangerous condition.<sup>120</sup> The state argued that, despite the creation of a hazardous condition, it was immune from suit "for an injury caused by the plan or design of public property either in its original construction or any improvement thereto, where the plan or design has been approved in advance of construction by a public employee exercising discretionary authority to give such approval."<sup>121</sup> The Supreme Court of New Jersey disagreed, however, holding that summary judgment for the State was inappropriate, since material factual issues existed "as to whether [the] original plan or design of [the] road contemplated that resurfacing would reduce [the] height of [the] dividing barrier and as to whether plans for repairing [the] road constituted an improvement as distinguished from maintenance."<sup>122</sup>

The *Costa* court interpreted the state's statutory discretionary ministerial test.<sup>123</sup> The court stated that "the exercise of discretion in

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if the furnishing of that convenience were made mandatory, there would be no liability under a like charge of negligence. In one case the necessity and expediency would be determined by the Legislature; in the other, the necessity and expediency would be left by the Legislature to be determined by the local governmental agency. In either event, it is the same power that is exercised, and for the same purpose.

*Id.* at 814.

<sup>116</sup> *Id.* at 813.

<sup>117</sup> See *Krueger*, 274 S.W. at 813.

<sup>118</sup> 415 A.2d 337 (N.J. 1980).

<sup>119</sup> *Id.* at 338.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 339 (internal quotations omitted).

<sup>122</sup> *Id.* at 337.

<sup>123</sup> *Id.* at 340-43 (referring to N.J. STAT. ANN. § 59:2-3(a) (West 1992)). The

NJSA 59:2-3(a) refers to actual, high-level policymaking decisions involving the balancing of competing considerations.<sup>124</sup> The court then announced a two-step inquiry to determine whether the municipality would be granted immunity for its actions.<sup>125</sup> First, the exercise of discretion had to comprise basic policy-making “at the planning, rather than the operational level of decisionmaking.”<sup>126</sup> After the municipality established that it had made a planning-level policy decision, the municipality would also have to show that “discretion was actually exercised at that level by an official who, faced with alternative approaches, weighed the competing policy considerations and made a conscious choice.”<sup>127</sup>

Applying the two-step inquiry, the *Costa* court reasoned that, “[o]nce the decision to [undertake a road maintenance program] was made, however, the tort immunity would seem to have ended. . . . At that point high-level determinations to provide a program and how to allocate existing resources were complete.”<sup>128</sup> The court emphasized that the basic policy decision was immune, but it refused to expand the immunity to a decision relating to which resurfacing plan to undertake.<sup>129</sup> The court concluded its analysis by stating that “a conscious approval of the details of the plan would not have removed it from the category of an operational decision. . . . [T]here is nothing to indicate that any competing policy choices were actually considered when the resurfacing plan was made and approval given.”<sup>130</sup> Ultimately, the court remanded for a full trial on immunity issues.<sup>131</sup>

Although every jurisdiction has its own version of municipal immunity, these cases illustrate the type of analysis required to determine whether a school board would be immune from suit for

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provision states, “[a] public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity.” *Id.* at 340. This provision was patterned after ones similarly adopted in other jurisdictions, including California and the federal government. *Id.* at 341.

<sup>124</sup> *Costa*, 415 A.2d at 340. One such consideration, according to the court, might be where best to allocate resources. *Id.* at 342.

<sup>125</sup> *Id.* at 342. The court relied on the test adopted by the California Supreme Court in *Johnson v. State*, 447 P.2d 352 (Cal. 1968), to interpret the meaning of “the exercise of discretion,” since the New Jersey statute was modeled after the California statute. *Id.* at 341-42.

<sup>126</sup> *Id.* at 342.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Costa*, 415 A.2d at 343.

<sup>131</sup> *Id.*

unreasonably allowing harmful and unhealthy competitive à la carte food and vending machine snacks and beverages to be served regularly to schoolchildren. The initial decision a school board makes to operate a lunchroom would be immune from suit under either governmental or discretionary analysis because the operation of a lunchroom is performed for the public good, and the decision reflects high-level policy and long-range planning considerations. Additionally, the decision to contract out its food service to a food-service management company can be characterized as governmental or discretionary, and therefore be immune from suit. Not only is contracting with outside food-service companies permitted by federal statute but this decision also resonates with important public policy considerations. Among these concerns are the need for efficiency in meal preparations and the financial benefit of reducing costs by outsourcing food preparation compared to maintaining food-preparation facilities within the school. But, under either test for municipal immunity, a school board likely would not be immune from liability for its decision to provide students daily access to unhealthy à la carte or vending machine food.

A school board's decision to permit a food service management company to regularly serve unhealthy food and beverages cannot be characterized as governmental or discretionary for immunity purposes. The decision to allow non-nutritious food items to pervade the school lunchroom is an operational and commercial one, made for the "private advantage of the compact community:"<sup>132</sup> the profit from the sale of competitive food accrues to the school. Simply put, the more schoolchildren eat hamburgers, French fries, and pizza at lunch, the more the school earns in revenue. Although schools could likewise generate revenue from their students' purchases of healthy food, schools have seemingly adopted the myopic corporate, food-service management model of what "kids like to eat" in approving menus loaded with calories, fat, salt, and sugar.<sup>133</sup>

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<sup>132</sup> See text accompanying *supra* note 98.

<sup>133</sup> FORTUNE magazine featured as its cover story a series of articles on the rising obesity crisis among Americans. The issue included an article about the Calhoun School, a private school in Manhattan, which recently fired its commercial catering service and hired a teacher from the French Culinary Institute, "Chef Bobo," to be its head chef. Timothy K. Smith, *We've Got to Stop Eating Like This*, FORTUNE, Feb. 3, 2003, at 58. The school reports the experience as positive. See *id.* at 58-60. Children are fed a well-balanced diet:

Each day the kids are fed a soup, an animal entrée, a vegetable, a starch, and fresh fruit. Ninety percent of what's served is vegetarian, organic whenever possible. At the start of the school year the students were consuming one case of vegetables a day. Now that's up to four

The analytical, two-step framework articulated in *Costa* can be applied to a school district's decision to contract with a food-service company. The initial decision to outsource meal preparation would necessarily involve competing policy decisions and therefore be immune. Once that decision is made, however, the approval of the menu of à la carte fast food and unhealthy vending machine items would fall within an operational category. The decision to serve unhealthy food and beverages would not be immune unless the school district could somehow show that it considered competing policies in deciding to permit regular access to unhealthy fast food, snacks, and sugared beverages.

Even though the money gained from the sale of competitive food arguably benefits the children, a proprietary or ministerial decision is one that, in the words of the *Chambers* court, can be characterized as "primarily a source of revenue."<sup>134</sup> Lunchtime à la carte fast food fit this description, and so does the sale of FMNV in vending machines. In fact, the outcome in *Chambers*<sup>135</sup> can be distinguished from many school districts' food operations, where schools specifically enter into high-stakes pouring-rights contracts worth millions of dollars with private corporations. In this case, profits are the primary motive. The serving of competitive à la carte fast food and FMNV in vending machines in schools, therefore, is very much a business enterprise, a proprietary activity, from which the schools seek to profit.<sup>136</sup>

Likewise, the outcome in *Krueger*, where the court broadly recognized immunity for the school board, is distinguishable from the situation involving the provision of competitive à la carte food. In reaching its decision, the *Krueger* court emphasized that the school

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cases, and a fifth might be needed.

Calhoun's food costs per child are almost identical to what they were before. The school pays more for ingredients, but servings are smaller, little goes to waste, and because the chefs are employees, there's no catering-company overhead.

*Id.*

<sup>134</sup> *Chambers*, 424 S.E.2d at 21.

<sup>135</sup> The *Chambers* court decided that the city was immune from liability for the operation of its garbage collection services because the services were primarily beneficial to the public, regardless of some incidental generation of revenues. *Id.* at 22.

<sup>136</sup> The author is not suggesting that school districts are pocketing profits gained from food service for personal uses. It is understood that profits accrue to the schools, and that they are then used to supplement school budgets. 7 C.F.R. § 210.11(b) (2002). The insufficiency of school funding, however, should not be alleviated by means that pose serious health risks for children.

did not receive any pecuniary advantage from serving lunches and that the service of food was merely a convenience.<sup>137</sup> In the situation at bar, however, schools are receiving a substantial financial benefit from entering into contracts for vending machine sales and supplemental à la carte food.<sup>138</sup> In fact, the court explicitly stated that “[t]he exercise of the right or power by the local governing body is not of the nature of a contract,”<sup>139</sup> which suggests that if it were of the nature of a contract, the analysis would differ. Thus, the *Krueger* decision supports the notion that if the basis for operating a supplemental food service is profit and the school board contracts for this pecuniary benefit, it is possible that immunity will not attach.

Clearly, municipal immunity is an important hurdle to bringing an action against a school district or school board of education. Whether schools that allow children daily access to unhealthy food and beverages will be immune from responsibility for the ensuing health damage is a question of law dependent upon the jurisdiction’s legal framework. If the school district is not immune, the next issue is whether school districts can be held liable for compounding the public health crisis through their role in increasing obesity and poor nutrition among American schoolchildren.

### III. AN ARGUMENT FOR NEGLIGENCE

The common law tort of negligence is “the dominant cause of action for accidental injury”<sup>140</sup> in America. Negligence is defined as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”<sup>141</sup> Negligent conduct can entail an affirmative act (misfeasance) or a failure or omission to act (nonfeasance).<sup>142</sup> The traditional elements of a

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<sup>137</sup> *Krueger*, 274 S.W. at 813-14. The court further states, “the duty assumed is public in character, and not for profit, but for the public good, and is directly related to and in aid of the general and beneficent purposes of the state.” *Id.* at 814.

<sup>138</sup> See *supra* notes 55-58 and accompanying text.

<sup>139</sup> *Krueger*, 274 S.W. at 814.

<sup>140</sup> KEETON ET AL., *supra* note 89, § 28, at 161.

<sup>141</sup> RESTATEMENT (SECOND) OF TORTS § 282 (1965).

<sup>142</sup> DOBBS, *supra* note 89, § 116, at 276. Liability for misfeasance stems from the defendant’s actions, creating a new risk of harm for the plaintiff. KEETON ET AL., *supra* note 89, § 56, at 373. Liability for nonfeasance, on the other hand, relates to a limited group of relationships wherein “the plaintiff is . . . particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff’s welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant.” *Id.* at 374. Liability for nonfeasance requires a “definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act.” *Id.*

negligence cause of action are duty, breach of this duty, causation, including both “cause in fact” and “proximate cause,” and damages.<sup>143</sup> “An actor is negligent only if his conduct created an unreasonable risk of harm to others and the actor recognized, or as a reasonable person should have recognized that risk.”<sup>144</sup>

The doctrine of foreseeability is also important in the negligence inquiry.<sup>145</sup> “Foreseeability is an attempt to predict at what point the ‘causal relationship between [one person’s] conduct and [another person’s] injury is too attenuated, remote or freakish to justify imposing liability.’”<sup>146</sup> Foreseeability can apply to the identity of the victim: a foreseeable victim is one who is not far removed in time and space from the defendant’s negligent action.<sup>147</sup> Foreseeability can also apply to the harm that occurred. For example, “conduct is not negligent unless harm was foreseen by the actor or would have been foreseeable to a reasonable person, and the harm could reasonably have been avoided.”<sup>148</sup> Consequently, foreseeability acts as a limiting principle to negate a defendant’s liability if the risk of harm is too remote or uncertain to be adjudged within the scope of the defendant’s duty to the plaintiff.<sup>149</sup>

To state a successful claim against a school district (or school board of education) for its decision to serve unhealthy fast food, candy, snacks, and sugared beverages based on the foregoing principles, an injured student would have to prove that the school board knew or reasonably should have known that permitting access to unhealthy cafeteria food, sugared beverages, and FMNV would

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<sup>143</sup> KEETON ET AL., *supra* note 89, § 30, at 164-66; DOBBS, *supra* note 89, §§ 114-15, at 269-73. The duty element is recognized as a legal obligation to conform one’s conduct to a standard of care. KEETON ET AL., *supra* note 89, § 30, at 164. The standard of care is most frequently judged objectively as “the duty to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm to others.” DOBBS, *supra* note 89, § 117, at 277. The second element of the cause of action, breach of the duty, is “[a] failure on the person’s part to conform to the standard required.” KEETON ET AL., *supra* note 89, § 30, at 164. Causation requires analysis of whether the defendant’s conduct is reasonably connected to the plaintiff’s injury. *Id.* at 165. The final element, damages, requires the plaintiff to show injury or actual loss. *Id.*

<sup>144</sup> DOBBS, *supra* note 89, § 143, at 334.

<sup>145</sup> See generally DOBBS, *supra* note 89, § 143, at 334-36. For a criticism of foreseeability, see William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 CUMB. L. REV. 349 (1992/1993).

<sup>146</sup> Patricia K. Fitzsimmons & Bridget Genteman Hoy, *Visualizing Foreseeability*, 45 ST. LOUIS U. L.J. 907, 908 (2001) (internal citations omitted).

<sup>147</sup> See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting).

<sup>148</sup> DOBBS, *supra* note 89, § 143, at 334.

<sup>149</sup> See Hardie, *supra* note 145, at 350.



cause injury and that the school board failed to take reasonable measures to avoid that harm, or worse, even encouraged consumption. The elements that a plaintiff would have to prove are (1) the school authority owed a duty to the plaintiff to provide an environment that furthers the development of good nutrition and healthy eating habits; (2) the school breached that duty by regularly serving, and thus implicitly endorsing, food dangerously high in fats, cholesterol, salt, and sugars; (3) the regular consumption of this food caused adverse health consequences; and (4) the plaintiff was injured thereby. Thus, the inquiry into negligence is articulated as whether a reasonable school board knew or should have known that, by providing daily access to unhealthy fast-food and FMNV, students would be more likely to consume those unhealthy choices, and that the pervasive availability of competitive fast-food would substantially decrease the likelihood that students would make nutritious food choices, thereby causing significant deleterious effects to health.<sup>150</sup>

#### A. *Duty and Breach of Duty*

##### 1. Duty

“A person who has custody of another owes a duty of reasonable care to protect the other from foreseeable harm.”<sup>151</sup> The Restatement (Second) of Torts states that “a child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody of . . . a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.”<sup>152</sup> Thus, the school’s duty stems from its physical custody of the students.<sup>153</sup> The degree of care a school owes to its students is likened to the care that a parent of ordinary prudence would give under similar circumstances.<sup>154</sup> This duty requires

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<sup>150</sup> See Chris Woolston, *School Lunches: Invasion of the Body Fatteners*, CONSUMER HEALTH INTERACTIVE (discussing several rationales behind schools’ decisions to serve unhealthy food and the difficulty that children have in making healthy food choices), at <http://blueprint.bluecrossmn.com/topic/schoollunch> (last visited Sept. 25, 2002) (on file with author).

<sup>151</sup> DOBBS, *supra* note 89, § 326, at 884.

<sup>152</sup> RESTATEMENT (SECOND) OF TORTS § 320 cmt. b (1965).

<sup>153</sup> Joseph Kelner & Robert S. Kelner, *Liability for Negligent Supervision in the Schools*, 213 N.Y. L.J. 3 (1995).

<sup>154</sup> See, e.g., *Merson v. Syosset Cent. Sch. Dist.*, 286 A.D.2d 668, 669 (N.Y. App. Div. 2001) (citing *Lawes v. Bd. of Educ. of the City of New York*, 213 N.E.2d 667 (N.Y. 1965)). The United States Supreme Court has stated that “[w]hile we 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,’ we have

maintaining reasonable supervision over the students and protecting the students' health, safety, and welfare.<sup>155</sup>

Although attaching liability to the provision of unhealthy food and beverages in schools is novel,<sup>156</sup> based on *in loco parentis*<sup>157</sup> principles, schools have assumed a custodial relationship with their students and should be required to function in their students' best interests, which includes behaving as would ordinarily prudent parents. Arguably, the ordinarily prudent parent would not regularly serve high-fat, high-calorie food and soft drinks for dinner. Thus, a school, acting in the same capacity, would likely be acting unreasonably if it served unhealthy food every day for lunch. Indeed, as one nutritionist has noted, "[n]o sensible parent would take their kid to a fast-food restaurant every day. But if that's available in a cafeteria, that's what kids are going to eat."<sup>158</sup> Ultimately, when a school acts in the capacity of a parent of ordinary prudence, that school must espouse the philosophy of a reasonable parent, which presumably does not include fast food at every meal.

As discussed above, schools are responsible to protect the health and welfare of their students. This duty entails the obligation to maintain a healthy, nutrition-conscious environment in the school.<sup>159</sup> Several arguments support this obligation. First, schools that participate in the NSLP are required by law to "ensure that

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acknowledged that for many purposes 'school authorities ac[t] *in loco parentis*' . . . ." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (internal citations omitted).

<sup>155</sup> See, e.g., *Rogers v. Bd. of Educ. of the City of New Haven*, 749 A.2d 1173, 1176 (Conn. 2000) (noting that the board of education's administrative procedural manual provides that "[s]chool officials have a duty to protect the health, safety and welfare of all students under their authority"); *City of New York v. Keene Corp.*, 505 N.Y.S.2d 782, 786 (N.Y. Sup. Ct. 1986) (stating that plaintiff school district has a "common law duty to provide a safe and healthy environment for school children, which arises from the fact that, in New York, school attendance is compulsory, and from the *parens patriae* obligation of plaintiffs [to] care for their minor charges while at school").

<sup>156</sup> A tort claims statute may require courts to exercise judicial restraint in "accepting novel causes of action against public entities within the scope of the statute." 57 AM. JUR. 2D, *supra* note 89, § 94, at 129. The issue of public health, however, has been recognized as "one, if not the, critical issue in society." *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 517 (S.D.N.Y. 2003). The seriousness of the childhood obesity epidemic and the permanent health disabilities associated with it presents compelling arguments for why a court should recognize a new cause of action, especially in view of a school district's conduct in promoting and encouraging the consumption of certain food and beverages.

<sup>157</sup> See *supra* note 11 for the definition of this term.

<sup>158</sup> Woolston, *supra* note 150.

<sup>159</sup> See *supra* note 82 and accompanying text (discussing the policies behind the NSLA and the federal regulations).

participating children gain a full understanding of the relationship between proper eating and good health,<sup>160</sup> but schools implicitly sanction poor nutrition when they permit wide-scale access to fast food and FMNV. This is contradictory to nutritional lessons that schools teach in classes.<sup>161</sup> Schools have a unique opportunity to implement lessons in nutrition during lunch period by practicing what they preach.<sup>162</sup> In *Bethel School District No. 403 v. Fraser*,<sup>163</sup> the Supreme Court recognized that “[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools much teach by example the shared values of a civilized social order.”<sup>164</sup> Teachers and administrators act as role models to inculcate the values and morals of our society.<sup>165</sup> Although *Fraser* dealt with civil discourse and political expression and was decided under First Amendment precepts, the pedagogical method, “teach by example,” supports the argument that school districts have a duty to promote healthy environments by setting examples of moderation and good health rather than “teaching excess”<sup>166</sup> and poor nutrition.

Second, even though à la carte fast food and FMNV fall outside the federal nutritional regulations, the acknowledged fact that this food undermines the integrity of the NSLP<sup>167</sup> suggests that schools should refrain from serving, or at a minimum, restrict the availability of unhealthy food and beverages in order to maintain their duty to provide healthy and nutrition-oriented meals.

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<sup>160</sup> 7 C.F.R. § 210.1 (2002).

<sup>161</sup> *Guidelines for School Health Programs*, *supra* note 7, at 1-2, 14, 20.

<sup>162</sup> See NESTLE, *supra* note 40, at 196 (“Whether school officials like it or not, they have been delegated the responsibility for teaching children about appropriate food choices and setting an example in practice.”).

<sup>163</sup> 478 U.S. 675.

<sup>164</sup> *Id.* at 683.

<sup>165</sup> *Id.*; see also Martha Y. Kubik et al., *Food-Related Beliefs, Eating Behavior, and Classroom Food Practices of Middle School Teachers*, 72 J. SCH. HEALTH 339 (2002). This study noted that various health behavior theories support the idea that teachers influence the dietary practices of their students and that adults who play significant roles in the lives of children, like teachers, “influence youth behavior through role modeling, normative practices, and social support.” *Id.* The study concluded that, “middle school teachers do not role model healthy eating behavior at school and the prevalent use of vending is a particular concern.” *Id.*

<sup>166</sup> *NOW with Bill Moyers: Buying Access*, *supra* note 56; see also Kubik et al., *supra* note 165 (finding that “the use of food as an incentive/reward for students is a common classroom practice among middle school teachers. Candy was, by far, the most frequently used food item, reported by more than seven of 10 teachers, with one-third of teachers distributing candy to students on an almost weekly basis”).

<sup>167</sup> REPORT TO CONGRESS, *supra* note 41.

## 2. Breach of Duty

Schools breach their duty to maintain a healthy and nutrition-conscious environment by allowing their concern for profits to override their concern for students' health. Breach stems not from the sale of one soda or one hamburger but from the overall pervasiveness of the à la carte fast-food selections, vending machine snacks and beverages, and FMNV available in schools. Since, in the majority of school districts, students are not permitted to leave school grounds during lunch periods,<sup>168</sup> schoolchildren are a captive audience. Schools provide fast food, candy, and sugared beverages for sale to students because they know that schoolchildren will eat it and because "fast food makes money."<sup>169</sup> Similarly, by aggressively promoting soft drink vending machine sales to meet "pouring rights" contract quotas,<sup>170</sup> schools breach their duty to maintain an environment conducive to the health of children out of a concern for generating revenue.

Although not actually forced to eat the school's competitive fast-food meals,<sup>171</sup> it is dubious whether children can resist the enticing assortment of snacks and fast-food selections.<sup>172</sup> One reason that schoolchildren are unable to choose healthy lunches, for example, soup and salad over pizza, tacos, or a hamburger and French fries, is their immaturity. "Because of their lack of maturity, children are not able to foresee situations that might be hazardous to their own well-being, and adults have a responsibility to care for them and to protect

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<sup>168</sup> See *supra* text accompanying note 34.

<sup>169</sup> Woolston, *supra* note 150 (noting several "classic rationales" for the sale of unhealthy food in schools taken from a survey distributed to California schools. Other reasons include the belief that children will only eat fast food and that school children don't have enough time during their lunch period to eat a healthy meal).

<sup>170</sup> See *supra* notes 56-58 and accompanying text. For a recent statement on the problem of soda consumption in schools, see American Academy of Pediatrics, *Soft Drinks in Schools*, 113 PEDIATRICS 152 (2004), available at <http://www.aap.org/advocacy/releases/jansoftdrinks.htm> (last visited Mar. 3, 2004).

<sup>171</sup> Arguably, children could bring their own lunches from home. This argument is baseless because it is unlikely that the millions of children eating school lunches would all start bringing lunch from home.

<sup>172</sup> See Becker & Burros, *supra* note 48, at A1. The authors, Becker and Burros, visited school cafeterias in New York City and Montgomery County, Maryland, where they watched children eating lunch. *Id.* at A14. The authors reported that out of the hundreds of children they observed, "only five children took a green vegetable with their main course." *Id.* At one school in Maryland, purchases during one lunch period included "440 servings of French fries," "187 snack cakes," "118 slices of pizza," and "56 bags of potato chips." *Id.* "At the bottom of the list were three bowls of soup and three fresh salads." *Id.*

them from physical harm.”<sup>173</sup> Schools thus take advantage of schoolchildren’s inability to make nutritionally healthy meal choices by providing pervasive access to tempting fast food and FMNV, high in fat, calories, salt, and sugar.

### 3. School Districts’ Possible Counterarguments

In order to negate the finding of a breach of duty, school districts may argue that students are free to select healthy food,<sup>174</sup> and that students are aware of the poor nutritional quality of fast food and should therefore limit themselves from regularly eating fast food. The recent decision in *Pelman v. McDonald’s Corp.*<sup>175</sup> relies upon these tenuous contentions. In *Pelman*, the plaintiffs, two obese minors who regularly ate at McDonalds’ restaurants, sued McDonald’s Corporation for, among other things, common law negligence.<sup>176</sup> The plaintiffs claimed that they developed “diabetes, coronary heart disease, high blood pressure, [and] elevated cholesterol intake”<sup>177</sup> as a result of consuming McDonald’s fast food. They argued that McDonald’s negligently sold food that was high in fat, salt, sugar, and cholesterol; negligently failed to warn consumers of the potential health hazards of eating its food; and negligently marketed food that was addictive, both physically and psychologically.<sup>178</sup> The court, however, disagreed. In dismissing the plaintiffs’ claim that the food contained negligently high levels of fat, cholesterol, salt, and sugar, the court highlighted plaintiffs’ failure to allege that McDonalds’ products are “so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public.”<sup>179</sup> The court noted that “[n]obody is forced to eat at McDonald’s. . . . Even more pertinent, nobody is forced to supersize their meal or choose less healthy options on the menu. As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach.”<sup>180</sup>

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<sup>173</sup> Lyndon G. Furst, *When Children Assault Children: Legal and Moral Implications for School Administrators*, 102 ED. L. REP. 13, 27 (1995). Although this article discusses school duty in the context of physical assault, the proposition that children lack the ability to foresee situations that could cause them harm arguably applies to the daily consumption of unhealthy food as well.

<sup>174</sup> School meal plans offer a variety of dishes. Telephone Interview with Denise Burgess, Glen Ridge School District Food Service Manager, Aramark (Nov. 2002).

<sup>175</sup> 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

<sup>176</sup> *Id.* at 519.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 520.

<sup>179</sup> *Id.* at 532.

<sup>180</sup> *Id.* at 533. What constitutes a healthy option is in dispute. For example, as

The *Pelman* court's decision to dismiss the negligence claim rested two factors: an individual's common knowledge or understanding about the poor nutritional quality of the fast food and that person's freedom to choose to eat that food.<sup>181</sup> It may be reasonable to believe that the average consumer knows that eating at McDonald's every day means eating food that is high in fat, salt, sugar, and cholesterol and yet freely chooses to do so.<sup>182</sup> It is inappropriate, however, to impute this knowledge and freedom of choice to children in a school cafeteria setting. Schoolchildren have an only limited understanding of the nutritional values of food;<sup>183</sup> and furthermore, they may associate school food with the food that a parent prepares.<sup>184</sup> Schools contracting with outside food-service companies, however, offer à la carte food that is as high in calories, fat, sugar, and salt as those available in fast-food restaurants.<sup>185</sup> Thus, an argument that schools are not liable because schoolchildren have knowledge of the nutritional value of the food served in school and should know better than to eat food high in fat, sugar, and salt is tenuous at best.<sup>186</sup>

In addition to arguing that schoolchildren are aware of the nutritional qualities of the food they eat, schools may also attempt to defend themselves by demonstrating that they serve a diverse selection of à la carte food such as nutritious soups, salads, and sandwiches, from which students are free to choose. But, as has been observed in nutritional studies of lunchroom eating behavior, students are not likely to choose vegetables or salads over pizza,

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noted in the opinion, "Chicken McNuggets, while seemingly a healthier option than McDonald's hamburgers because they have 'chicken' in their names, actually contain twice the fat per ounce as a hamburger. . . . It is at least a question of fact as to whether a reasonable consumer would know—without recourse to the McDonald's website—that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger." *Id.* at 535.

<sup>181</sup> *Pelman*, 237 F. Supp. 2d at 533.

<sup>182</sup> *Id.* at 532.

<sup>183</sup> Mahshid Pirouznia, *The Correlation Between Nutrition Knowledge and Eating Behavior in an American School: The Role of Ethnicity*, 14 J. NUTRITION & HEALTH 89 (2000) (testing a group of sixth, seventh, and eighth-grade students to determine their level of nutrition knowledge and whether knowledge of nutrition affected food choices. The students "were not able to identify the food sources of nutrients or nutrient functions, and they did not use a daily food guide to choose food, although they were aware of the importance of milk and vegetable consumption").

<sup>184</sup> *See Pelman*, 237 F. Supp. 2d at 536.

<sup>185</sup> *See Becker & Burros*, *supra* note 48, at A14; Wechsler et al., *supra* note 7.

<sup>186</sup> This statement is additionally supported by the fact that the provision mandating notification of the nutritional content of lunches was repealed. *See supra* notes 27-31 and accompanying text.

French fries, and snacks.<sup>187</sup> Thus, nutritious food, albeit available, is a less attractive option to students, and therefore not a real alternative when served in conjunction with fast food and FMNV.

*B. Causation and the Foreseeability of Harm*

After establishing that schools owe a duty to schoolchildren and have breached that duty, the plaintiff in this proposed cause of action must next prove that the school board's decision to permit pervasive access to unhealthy food caused the harm that the plaintiff alleges, and that the harm was foreseeable to a reasonable school board and thus could have been avoided. In the lexicon of negligence, the plaintiff must demonstrate that "but for" regular, unguided access, the plaintiff would not have eaten such harmful, non-nutritive food, and that eating the unhealthy food on a regular basis was a proximate cause of the plaintiff's harm. Meeting the burden of causation in a negligence action, however, can be a formidable barrier to recovery in cases in which multiple factors or intervening actions muddy the link between the defendant's negligent conduct and the plaintiff's injury.<sup>188</sup>

The *Pelman* court applied a "substantial factor" test to determine whether the plaintiffs had sufficiently alleged proximate cause.<sup>189</sup> The court stated that to demonstrate proximate cause "a plaintiff must establish that the defendant's conduct was a substantial cause in

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<sup>187</sup> Becker & Burros, *supra* note 48, at A1, A14.

<sup>188</sup> The plaintiff must show not only that the defendant's conduct "be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm." RESTATEMENT (SECOND) OF TORTS § 430 (1965); *see also* DOBBS, *supra* note 89, § 183, at 452-53. Dobbs states "[w]ith slight variations in the words, courts usually instruct juries or begin their own appellate discussions with a formal definition asserting that a proximate cause of an injury is one which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury." *Id.* § 183, at 453.

<sup>189</sup> *Pelman*, 237 F. Supp. 2d at 537-38 (internal citation omitted). The Restatement instructs that what constitutes "legal cause" is "(a) conduct [that] is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." RESTATEMENT (SECOND) OF TORTS at § 431. The Restatement further addresses important considerations in the analysis of whether negligent conduct is a substantial factor:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless until acted upon by other forces for which the actor is not responsible; (c) lapse of time.

*Id.* at § 433.

bringing about the harm.”<sup>190</sup> The court noted that several factors bear upon this determination, such as the “number of actors involved which contribute to the harm and the effect which each has in producing it, and whether the situation was acted upon by other forces for which the defendant is not responsible.”<sup>191</sup> The court ultimately held that “[n]o reasonable person could find probable [sic] cause based on the facts in the Complaint without resorting to ‘wild speculation.’”<sup>192</sup> Specifically, the link between eating McDonald’s food and obesity was “wild speculation” because the complaint did not indicate how frequently the plaintiffs ate at McDonald’s.<sup>193</sup> The court granted leave to amend the complaint<sup>194</sup> and suggested that, “[w]hile the assignment of such a frequency is beyond the competency of the Court at this time, it seems like the frequency must be more than once per week, a figure cited by plaintiff’s counsel in oral argument as a potentially unhealthy figure.”<sup>195</sup>

By comparison, a school’s conduct in permitting the sale of fast food and FMNV to its schoolchildren is likely to be a substantial cause of the harm to children’s health. Schoolchildren can consume à la carte fast-food meals, salty snacks, cakes, and sweetened beverages five days a week in their lunchrooms, not to mention trips to the vending machines for FMNV before and after meal times. Schools serve competitive fast food on a daily basis, and do not restrict the number of times that a child can order fast food for lunch or visit a vending machine for a soda and candy after school. Schools thus affirmatively create an environment that is inimical to good health and welfare. Because of the frequency of consumption and the availability of non-nutritious food and beverages, there is a much greater opportunity to find a causal connection between the school’s decision to provide unlimited access to unhealthy food and a plaintiff’s health-related injuries, without having to resort to “wild speculation.”

In continuing its discussion of causation, the *Pelman* court acknowledged that “a number of factors other than diet” could lead to obesity and its related health problems.<sup>196</sup> This point is also

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<sup>190</sup> *Pelman*, 237 F. Supp. 2d at 537-38.

<sup>191</sup> *Id.* at 538.

<sup>192</sup> *Id.* (internal citations omitted).

<sup>193</sup> *Id.* at 538-39.

<sup>194</sup> *Id.* at 543.

<sup>195</sup> *Id.* at 539.

<sup>196</sup> *Pelman*, 237 F. Supp. 2d at 539 (“Obesity is a complex multifactorial chronic disease developing from interactive influences of numerous factors—social,



significant for causation analysis, because intervening factors can break the chain of causation, thereby removing liability. The court warned that to prevail in suit the “Complaint must address these other variables, and if possible, eliminate them or show that a McDiet is a substantial factor despite these other variables.”<sup>197</sup> This requirement holds true in the school context as well. But, merely pointing to other possible socio-economic or medical reasons for obesity is not a sufficient defense because studies have shown that the recent upward trend in obesity is far more likely to be linked to an increase in eating, especially eating food laden with fat, cholesterol, salt, and sugar.<sup>198</sup> Although heredity plays a role in weight gain,<sup>199</sup> studies indicate that the recent “alteration in human weight development is too rapid to reflect a plausible shift in population genetics and more likely reflects a change in societal dietary and exercise patterns.”<sup>200</sup> Thus, by providing an outlet for schoolchildren to purchase unhealthy food on a daily basis, a school not only compounds the likelihood of a student contracting an obesity-related injury, but also creates an environment where poor eating habits are the norm.

Another intervening factor that could defeat causation is the role that parents play with regard to their children’s lunchtime food. A school could argue that parents who provide their children with lunch money to purchase a school lunch instead of making a healthy lunch themselves waive the right to sue because they tacitly accept the school’s decision to serve à la carte fast food. This argument is not viable, however, because of the recognition that schools have a duty to act as an ordinarily prudent parent, and an ordinarily prudent parent would not be likely to serve fast food every day.<sup>201</sup>

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behavioral, physiological, metabolic, cellular, and molecular’ in addition to cultural and genetic factors.”) (internal citations omitted). *But see* McTigue et al., *supra* note 4 (noting that the speed by which the obesity epidemic has affected children cannot be attributed to physiological or genetic permutations and is more likely related to diet and physical activity). Many schools have reduced or eliminated physical education programs in response to budget woes, and have restricted other physical activities. *See, e.g.*, Jerry Barca, *Child’s Play No More—Schools Ban Playground Classics Amid Injury and Self-Esteem Fears*, STAR-LEDGER (Newark, NJ), Nov. 18, 2002, at col. 1. Schools across New Jersey are banning classic outdoor games like tag and dodgeball out of fear of lawsuits resulting from falls and rising insurance premiums. *Id.* Thus, another avenue to exercise is removed from the daily routine of some schoolchildren.

<sup>197</sup> *Pelman*, 237 F. Supp. 2d at 539.

<sup>198</sup> McTigue et al., *supra* note 4, at 863; *see also* Ebbeling et al., *supra* note 1, at 476.

<sup>199</sup> Ebbeling et al., *supra* note 1, at 474-75.

<sup>200</sup> McTigue et al., *supra* note 4, at 863.

<sup>201</sup> *See supra* Part III.A for further discussion.

Furthermore, although a parent may give his or her child lunch money, it does not mean that the parent intends the child to eat unhealthy food. As has been observed, children do not possess self-restraint when confronted with arguably tasty, but nonetheless unhealthy food.<sup>202</sup> Additionally, this argument does not address the culpable role that a school may play in actively encouraging the consumption of unhealthy food and beverages.<sup>203</sup>

Finally, the foreseeability of harm also plays a significant role in the analysis of causation. Foreseeability of harm, again, means that the actor recognizes or, as a reasonable person should recognize, that his actions create unreasonable risk of harm.<sup>204</sup> An unreasonable risk is one that could reasonably be avoided or minimized.<sup>205</sup> Thus, in determining what is foreseeable, a school board's knowledge or recognition of the harm is an important component,<sup>206</sup> as is the ease with which a school board could minimize or avoid the harm. The Restatement (Second) of Torts indicates that actors are required to know "(a) the qualities and habits of human beings . . . so far as they are matters of common knowledge at the time and in the community; and (b) . . . general customs in so far as they are likely to affect the conduct of the other or third persons."<sup>207</sup> Schools, however, are not insurers of students' safety.<sup>208</sup> Based on the theory of negligent supervision, for example, a school district would not be liable where it had no reason to foresee that an injury-producing event would take place.<sup>209</sup> "The possibility of foreseeing an event that brings harm or injury to a student is one of the basic requirements of negligence in situations where a student is injured."<sup>210</sup>

Applying the foregoing principles to the school lunch dilemma, one can argue that school districts have created a foreseeable and unreasonable risk of harm by providing unhealthy food and beverages to schoolchildren. It is foreseeable that children will

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<sup>202</sup> Becker & Burros, *supra* note 48, at A1, A14.

<sup>203</sup> See *supra* notes 56-62.

<sup>204</sup> DOBBS, *supra* note 89, § 143, at 334.

<sup>205</sup> *Id.*

<sup>206</sup> See RESTATEMENT (SECOND) OF TORTS § 290 (1965).

<sup>207</sup> *Id.*

<sup>208</sup> See, e.g., *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. App. Div. 1994).

<sup>209</sup> For example, in the case of a spontaneous and unanticipated attack of a student by a third party. See *Mirand*, 637 N.E.2d at 266. But see, e.g., *Decker v. Dundee Cent. Sch. Dist.*, 151 N.E.2d 866 (N.Y. 1958) (holding a school negligent in the situation where a girl was injured after jumping off bleachers where such activity was a common occurrence).

<sup>210</sup> Furst, *supra* note 184, at 28.

choose unhealthy food over more nutritious options,<sup>211</sup> and it is foreseeable that these choices will lead to known health risks.<sup>212</sup> School boards are deemed to know, or at least reasonably should know, of the health risks associated with fast food.<sup>213</sup> Not only are school boards attributed with this common knowledge because of the intense media attention that the obesity epidemic has received in the last several years,<sup>214</sup> but also because widespread experience with food-related health problems is common in the United States today.

Moreover, schools could easily avoid the harm that they create by restricting or eliminating pervasive access to unhealthy food. This way, school districts can play a pro-active role in battling childhood obesity and at the same time minimize their liability and the costs associated with fighting a lawsuit. Some suggestions to minimize harm include serving healthy, nutritious lunches rather than fast food, or at least severely restricting the service of à la carte fast food. School districts might also consider withdrawing vending machines from school property, or stocking vending machines with healthy drinks and snacks like milk, water, 100 percent fruit juice, and fresh or dried fruits and vegetables.<sup>215</sup> Additionally, by using the statutory provision previously stricken from an earlier version of the NSLA,<sup>216</sup> school districts could adopt policies to inform their constituents of the nutritional values associated with the weekly menu, so that parents and children could participate in planning meals more knowledgeably.<sup>217</sup>

### C. Damages

The health risks associated with obesity for children are

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<sup>211</sup> Becker & Burros, *supra* note 48, at A1, A14.

<sup>212</sup> See *infra* Part III.C.

<sup>213</sup> Dietary programs designed especially for school lunches have been implemented in various states. For example, the "Hearty School Lunch" program propounded by the American Heart Association in 1991 and geared to cafeteria food service directors has been implemented in the past in New Jersey. Jonathan Jaffe, *Program Seeks to Upgrade School Lunches*, STAR-LEDGER (Newark, N.J.), Sept. 8, 1991. An Illinois program called Dietary Guidelines: Best of the Best Kit, was implemented by the Illinois Nutrition Education and Training Program and involved educators and child nutrition staff in fifteen Illinois schools. The full program description can be accessed at <http://www.kidseatwell.org/team/nia.pdf> (last visited Feb. 2, 2004).

<sup>214</sup> See *supra* Introduction and *infra* Part III.C.

<sup>215</sup> For example, school districts in California and New York have begun to implement these changes.

<sup>216</sup> See *supra* note 27.

<sup>217</sup> See *supra* notes 27-31 and accompanying text.

numerous. Medical studies of children<sup>218</sup> have shown that childhood obesity leads to increased risk of cardiovascular disease, gallbladder disease, pulmonary complications such as sleep apnea, asthma, and exercise intolerance, and type II diabetes,<sup>219</sup> which until recently was virtually unrecognized in adolescents.<sup>220</sup> “The increasing prevalence and severity of obesity in children, together with its most serious complication, type 2 diabetes, raise the spectre of myocardial infarction becoming a paediatric disease.”<sup>221</sup> Serious psychosocial problems are also linked to childhood obesity. Children who are overweight are often discriminated against by their peers.<sup>222</sup> “Overweight children as young as age 5 years can develop a negative self-image, and obese adolescents show declining degrees of self [-] esteem associated with sadness, loneliness, nervousness, and high-risk behaviours.”<sup>223</sup>

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<sup>218</sup> David S. Freedman et al., *Relationship of Childhood Obesity to Coronary Heart Disease Risk Factors in Adulthood: The Bogalusa Heart Study*, 108 PEDIATRICS 712 (2001). See generally William H. Dietz, *Health Consequences of Obesity in Youth: Childhood Predictors of Adult Disease*, 101 PEDIATRICS 518 (1998).

In testimony before the House of Representatives Appropriations Committee, Dr. Mohammad Akhter, Executive Director of the American Public Health Association, described statistics related to the adverse health consequences of obesity in children, stating:

The rates of diabetes increased by 50 percent between 1990 and 2000. Due to rising rates among children, type 2 diabetes can no longer be called “adult onset” diabetes. Heart disease is also associated with obesity. Sixty percent of overweight children as young as five to ten years old already have high cholesterol, high blood pressure, or other early warning sign[s] for heart disease.

*Testimony of the National Alliance for Nutrition and Activity Before the House Appropriations Subcommittee on Labor Health and Human Services, Education and Related Agencies*, 107th Cong. (April 30, 2002) (statement of Dr. Mohammad Akhter, Executive Director, American Public Health Assoc.), at <http://www.apha.org/legislative/testimonies/nana.htm> (last visited Oct. 7, 2002) (on file with author).

<sup>219</sup> Type II diabetes is “a chronic, life-long disease that results when the body’s insulin does not work effectively. Insulin is a hormone released by the pancreas in response to increased levels of blood sugar (glucose) in the blood.” MEDLINEPLUS MEDICAL ENCYCLOPEDIA, *Type 2 diabetes* (providing a detailed exegesis of the disease), at <http://www.nlm.nih.gov/medlineplus/ency/article/000313.htm> (last visited Mar. 15, 2004) (on file with author). There is no known cure for type II diabetes and the primary treatment revolves around diet and exercise. *Id.* Complications from type II diabetes include hypertension, atherosclerosis, coronary artery disease, amputation and blindness. *Id.* The medical costs and lost productivity costs associated with type II diabetes nationwide are estimated to be \$132 billion in 2002, up from \$98 billion in 1997. Press Release, U.S. Dep’t of Health & Human Services, *Study Shows Sharp Rise in the Cost of Diabetes Nationwide* (Feb. 27, 2003) (on file with author).

<sup>220</sup> Ebbeling et al., *supra* note 1, at 473.

<sup>221</sup> *Id.* at 478.

<sup>222</sup> Dietz, *supra* note 218.

<sup>223</sup> Ebbeling et al., *supra* note 1, at 474.

Obesity is directly related to food consumption.<sup>224</sup> As noted earlier, obesity contributes significantly to an array of grave medical problems as a consequence of the physical damage to bodily functions. Regular consumption of typical high-calorie and high-fat fast food and FMNV significantly increases the chance of developing an obesity-related medical condition because the food that American schoolchildren consume outside the home is “demonstrably higher in calories, fat, saturated fat, and salt as well as lower in more desirable nutrients.”<sup>225</sup> In addition to the harmful saturated (and trans) fat found in typical fast food served in schools, the consumption of excess refined sugar<sup>226</sup> and caffeine in soft drinks and other non-carbonated, sugar-sweetened beverages also creates serious medical problems with the potential for long-term side effects.<sup>227</sup>

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<sup>224</sup> See McTigue et al., *supra* note 4.

<sup>225</sup> NESTLE, *supra* note 40, at 176 (citing Claude Cavadini et al., *US Adolescent Food Intake Trends from 1965 to 1996*, 83 ARCH. DIS. CHILD. 18 (2000)).

<sup>226</sup> NORTH CAROLINA SCHOOL NUTRITION ACTION COMMITTEE, *SOFT DRINKS AND SCHOOL-AGE CHILDREN: TRENDS, EFFECTS, SOLUTIONS* (2002) [hereinafter *SOFT DRINKS*]. “On average, adolescents get 11% of their calories, or 15 teaspoons of sugar [per day] from soft drinks. This high consumption of sugar is contrary to the Dietary Guidelines for Americans 2000 which recommend choosing sensibly to limit intake of beverages and food that are high in added sugar.” *Id.*; see also Michael F. Jacobson, *Liquid Candy: How Soft Drinks Are Harming Americans’ Health*, at [http://www.cspinet.org/sodapop/liquid\\_candy.htm](http://www.cspinet.org/sodapop/liquid_candy.htm) (last visited Feb. 8, 2004):

The U.S. Department of Agriculture (USDA) recommends that people eating 1,600 calories a day not eat more than six teaspoons a day of refined sugar, 12 teaspoons for those eating 2,200 calories and 18 teaspoons for those eating 2,800 calories. To put those numbers in perspective, consider that the average 12- to 19- year-old boy consumes about 2,750 calories and 1½ cans of soda with 15 teaspoons of sugar a day; the average girl consumes about 1,850 calories and one can with ten teaspoons of sugar. Thus, teens just about hit their recommended sugar limits from soft drinks alone. With candy, cookies, cake, ice cream, and other sugary food, most exceed those recommendations by a large margin.

Jacobson, *supra*.

<sup>227</sup> Jacobson, *supra* note 226. Among the major health concerns associated with the consumption of soft drinks are osteoporosis, tooth decay, heart disease, kidney stones, and behavioral problems linked to caffeine addiction, such as nervousness, irritability, difficulty falling asleep, rapid heart beat, and allergic reactions caused by additives. *Id.* Osteoporosis is especially troubling because although it takes years to develop, “[t]he risk of osteoporosis depends in part on how much bone mass is built early in life. Girls build 92% of their bone mass by age 18, but if they don’t consume enough calcium in their teenage years they cannot ‘catch up’ later.” *Id.* Caffeine compounds the problem because it “increases the excretion of calcium in urine. Drinking 12 ounces of caffeine-containing soft drink causes the loss of about 20 milligrams of calcium, or two percent of the U.S. RDA.” *Id.* Some medical professionals believe that osteoporosis should now be considered as “a pediatric disease with geriatric consequences.” Neville H. Golden, *Osteoporosis Prevention: A Pediatric Challenge*, 154 ARCH. PEDIATR. ADOLESC. MED. 542 (2000); see also Anne-Lise

When milk is replaced by soft drinks, children significantly decrease their intake of magnesium, vitamins A and C, and riboflavin and increase the consumption of phosphoric acid and other additives.<sup>228</sup>

“[S]oft drinks pose health risks both because of what they contain (for example, sugar and various additives) and what they replace in the diet (beverages and food that provide vitamins, minerals and other nutrients).”<sup>229</sup> Moreover, caffeine is “a mildly addictive stimulant drug.”<sup>230</sup> Researchers link classroom behavior problems to consumption of soda containing caffeine.<sup>231</sup>

In a negligence action, damages is an essential element that a plaintiff must prove to prevail on her claim.<sup>232</sup> “Unless she has suffered legally recognized harm, she has no claim for damages and cannot recover even a nominal sum.”<sup>233</sup> Legally recognized harm

Carrié Fässler & Jean-Philippe Bonjour, *Osteoporosis as a Pediatric Problem*, 42 PEDIATR. NUTR. 811, 820 (1995) (noting that although osteoporosis was once considered only a geriatric disease, “there is now a general agreement that predisposition begins in childhood and adolescence”); Grace Wyshak, *Teenaged Girls, Carbonated Beverage Consumption, and Bone Fractures*, 154 ARCH. PEDIATR. ADOLESC. MED. 610 (2000). Wyshak concludes that there is a positive statistical association between carbonated beverage consumption and bone fractures. Wyshak, *supra*, at 610. Wyshak posits that the association stems from the fact that colas contain phosphoric acid. *Id.* at 612. Exposure to phosphorus has been linked to bone fractures since the 19th century. *Id.* Phosphorus interferes with the process of calcium metabolism and the build up of bone mass. *Id.* But see Press Release, The National Soft Drink Association & Georgetown University Center for Food & Nutrition Policy, Two New Studies Refute Assumption That Soft Drink Consumption by School-Aged Children is Contributing to Childhood Obesity (Apr. 17, 2000), at <http://www.nstda.org> (on file with author).

<sup>228</sup> SOFT DRINKS, *supra* note 226; see also Jacobson, *supra* note 226; Lisa Harnack et al., *Soft Drink Consumption Among US Children and Adolescents: Nutritional Consequences*, 99 J. AM. DIET. ASS’N 436, 439 (1999).

<sup>229</sup> Jacobson, *supra* note 226.

<sup>230</sup> *Id.*; see also Gail A. Bernstein et al., *Caffeine Withdrawal in Normal School-Age Children*, 37 J. AM. ACAD. CHILD ADOLESC. PSY. 858 (1998) (“Caffeine is the most common psychoactive drug consumed in the world, and it is capable of causing addiction. Caffeine is also the only psychoactive drug that can be legally purchased by children.”).

<sup>231</sup> Bernstein et al., *supra* note 230, at 864 (“Children who drank a high daily dose of caffeine manifested decreased attention. . . . The findings suggest that withdrawal from caffeine may have detrimental effects on attention and performance in normal children. Decreased attention may create learning difficulties, particularly at school.”).

<sup>232</sup> DOBBS, *supra* note 89, § 377, at 1047. In order to mitigate or eliminate liability, the defendant will likely argue that the plaintiff’s own actions contributed to his or her injury under the theory of contributory negligence, which in most states “will reduce the plaintiff’s damages but not necessarily defeat her claim.” DOBBS, *supra* note 89, § 114, at 269. The defendant may also argue that the plaintiff assumed the risk of her actions. *Id.*

<sup>233</sup> *Id.*

includes physical injury.<sup>234</sup> In the school food context, the plaintiff must therefore allege some physical injury that he or she claims is the result of consuming unhealthy fast food, sodas and snacks while at school. The physical injury necessary to meet the damages element need not be actual obesity but may be a harm associated with obesity or the daily consumption of unhealthy food and beverages, such as the onset of type II diabetes or pulmonary complications,<sup>235</sup> a significant increase in dental caries,<sup>236</sup> a dangerous rise in cholesterol level,<sup>237</sup> bone fractures occurring because of a calcium deficiency linked to soda consumption,<sup>238</sup> or behavioral problems associated with caffeine addiction.<sup>239</sup>

### CONCLUSION

The law should recognize a negligence claim against a school district for allowing the school environment to become a place in which schoolchildren can easily access harmful food high in calories, fat, cholesterol, salt, and sugar. A negligence cause-of-action serves the important social goal of restoring control to parents whose children have been injured by a school board's actions in creating the unhealthy environment. Schoolchildren are a captive audience; schools have physical custody over their students, and in a majority of jurisdictions, children must remain in school during lunch. Because of this level of control over students, schools have a well-recognized duty to provide a safe and healthy environment. This duty includes eschewing profits derived from the sale of unhealthy food, beverages, and snacks and instead supplementing classroom lessons in good nutrition with the service of healthy food at lunchtime. Where schools fail to meet this responsibility, thereby implicitly sanctioning poor nutrition by allowing daily, unregulated access to à la carte fast food, snacks, candy, and sodas, they should be liable for the ensuing health damage.

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<sup>234</sup> *Id.*

<sup>235</sup> See *supra* notes 218-19 and accompanying text.

<sup>236</sup> See Jacobson, *supra* note 226 (discussing tooth decay as a health problem magnified by the consumption of sodas and sugared food and beverages).

<sup>237</sup> For example, "[a] parent of a sixth grader said she took her son for a physical last year and his cholesterol count rose significantly. She stated that he ate lunch everyday last year at the Ridgewood Avenue school and believes that this contributed to the rise in her son's cholesterol count. She also said she would like to see less fried food and more fruit offered to the students." Glen Ridge Bd. of Educ., Food Service Operations Meeting Minutes, Oct. 7, 2003 (on file with author).

<sup>238</sup> See *supra* note 227.

<sup>239</sup> See *supra* notes 230-31 and accompanying text.