# 14-2410

## United States Court of Appeals for the Second Circuit

**ORSON D. MUNN, III, AS PARENT & NEXT FRIEND OF C.M. & IND., CHRISTINE MUNN, AS PARENT & NEXT FRIEND OF C.M. & IND., CARA MUNN,**

**Plaintiffs-Appellees,**

**v.**

**THE HOTCHKISS SCHOOL,**

**Defendant-Appellant.**

On Appeal from the United States District Court
for the District of Connecticut

**BRIEF OF AMICI CURIAE THE ASSOCIATION OF BOARDING SCHOOLS AND THE NORTH AMERICAN MONTESSORI TEACHERS' ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT THE HOTCHKISS SCHOOL AND REVERSAL**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), The Association of Boarding Schools and the North American Montessori Teachers' Association hereby state that they are non-stock, non-profit corporations. They have no parent corporations, and no publicly-held corporation owns 10% or more of either The Association of Boarding Schools or the North American Montessori Teachers' Association.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**



**Other Authorities**

**Rules**

## INTEREST OF AMICI[1]

Amicus Curiae, The Association of Boarding Schools ("TABS"), serves as the voice for independent boarding schools, their historic contribution to our world, and the current and compelling benefits of living and learning in an academic community. TABS serves college-preparatory boarding schools in the United States, Canada, and around the globe. TABS' membership consists of 287 boarding schools. TABS is the comprehensive, indispensable resource for educators seeking training, research, guidance, and support on all issues pertaining to the residential school experience. Though institutionally diverse, TABS member schools share a commitment to balancing adult oversight with student independence and responsibility—to the end of graduating young people prepared for college and life. Virtually 100% of TABS graduates attend university, where they are substantially more likely than their peers to persist and complete their degrees—after adjusting for family socio-economic status. As adults, TABS alumni are leaders in every domain, including the arts, business, politics, the law, and academia.

[1] No party or counsel for a party authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person, other than amici, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief. The Hotchkiss School is a member of TABS, and an officer of The Hotchkiss School serves on TABS' Executive Committee. However, neither he nor any other agent or employee of The Hotchkiss School took part in the unanimous decision of the TABS Executive Committee to file this brief.

Amicus Curiae, the North American Montessori Teachers' Association ("NAMTA"), promotes the pedagogy of Maria Montessori throughout North America. NAMTA counts, among its members, hundreds of Montessori schools, and thousands of Montessori teachers and parents.

Among its initiatives, NAMTA's Adolescent Project has for decades provided documentation, leadership, and guidance in establishing Montessori adolescent education and programs. Montessori education for adolescents highly emphasizes independence, personal initiative, and the benefits of agricultural work.

TABS and NAMTA are concerned that the case at bar, if left undisturbed, will negatively impact the ability of institutions that work with children to provide the type of educational experience sought by many parents as best for their children. Many member schools of amici offer parents the choice of educational methods that prefer adolescent independence to adult micromanagement, including in the outdoors. Yet the district court's imposition of a duty to avoid insect-borne illnesses by closely controlling adolescent behavior, under threat of $40 million in potential damages, would severely impair the pedagogy of the schools and thus the right of parents to choose this pedagogy.

## SUMMARY OF THE ARGUMENT

The district court's judgment necessarily implies that parents and those they entrust with their children are routinely negligent by permitting children to go outdoors without extensive precautions against common insects. Amici contend that the district court's conclusion is mistaken and that the imposition of a duty so broad in scope violates the public policy, enshrined in both our national Constitution and in state tort law, that secures the liberty of parents to choose an educational approach favoring limited adult supervision and adolescent independence.[2]

## ARGUMENT

In the decision below, the district court found that the Hotchkiss School had a duty to protect the Plaintiff and other students from the harms of insect-borne diseases, both by warning the students of the risk of such diseases and by ensuring that the students use insect-repellant and other protective measures. The court further concluded that public policy was consistent with the imposition of such a duty. Amici submit, however, that strong public policies militate against, if not prohibit, the imposition of a duty so broad in scope.

[2] In this case, there is a massive gap between the very high likelihood of insect bites and the extreme unlikelihood of such bites resulting in the kind of harms suffered by Cara Munn. The Hotchkiss School has rightly argued that this extreme improbability made her injuries unforeseeable. Amici here will argue, in contrast, that the likelihood of insect bites is so great, and so well known, that it is against public policy to hold a school liable for failing to protect students against them, through warnings, clothing inspections, etc.

## I. THE DECISION CONFLICTS WITH THE CONSTITUTIONAL RIGHT OF PARENTS TO DIRECT THE EDUCATION OF THEIR CHILDREN, INCLUDING THE RIGHT TO CHOOSE A PEDAGOGY THAT EMPHASIZES ADOLESCENT INDEPENDENCE AND LIMITED ADULT SUPERVISION.

The Due Process Clauses of the Fifth and Fourteenth Amendments protect the "natural duty" and right of parents to educate their children. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). This parental right and duty include the broad discretion to choose the best manner of "direct[ing] the upbringing and education of children." *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925). This discretion includes the right to delegate educational responsibility to private parties, including, but not limited to, foreign-language instructors, *Meyer*, 262 U.S. at 403, religious institutions, *Pierce*, 268 U.S. at 532–33, and military boarding schools, *id*.

The constitutional discretion of parents is broad enough to include not only the delegation of teaching authority to other adults, but also the entrustment of significant independence to the child herself or himself. As this Court held, in striking down a town curfew, the Constitution protects the parent's "discretion whether to allow his or her child to be out [and unsupervised] late at night," *Ramos v. Town of Vernon*, 353 F.3d 171, 182 (2d Cir. 2003).[3] Although not endorsing this "philosophy of parenting," this Court

[3] Not only the Constitution, but the statutory laws of Connecticut establish a strong public policy favoring parental choice. *Saccente v. LaFlamme*, No. CV0100756730, 2003 Conn.

concluded that "a parent may ascribe value to granting children freedom to move about the neighborhood," for such a pedagogy "may be a parent's way of preparing a child for adult life." *Id*.

The government may, of course, limit parental discretion to protect children from anything "inherently harmful," *Pierce*, 268 U.S. at 534; that is, a parental choice "so clearly harmful as to justify its inhibition with the consequent infringement of [parental] rights long freely enjoyed." *Meyer*, 262 U.S. at 403. But as this Court noted in *Ramos*, to justify this interference, the government must show "possible harm to children sufficient to override parental due process rights." *Ramos*, 353 F.3d at 183.

In this case, however, the district court has defined the duty so broadly as to effectively prohibit parents from choosing an intermediate approach: one that emphasizes adolescent independence but provides limited adult supervision. The court held that such a manner of private education is unlawful: instead, schools must carefully (1) prohibit students roaming outside without first warning them of very common dangers, like insect bites, and (2)

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Super. LEXIS 1913, at *22–*23 (Tolland Judicial Dist.) (Conn. Super. Ct., July 11, 2003) ("In recognition of the liberty interest of parents to make important decisions which affect the well being of their children and the principle that fit parents will act in the best interests of their children in making those decisions," the Connecticut legislature has granted explicit statutory authority to parents to make decisions for their children in a wide range of contexts, including education and marriage).

micromanage these students in such personal matters as clothing, insect-repellant, etc.

It seems difficult to square the district court's decision with this Court's holding in *Ramos*. There, a curfew ordinance was held to violate the constitutional right of parents to permit their children to roam at large, even after midnight, and without any adult supervision. Despite the obvious risks associated with roaming unsupervised at such an hour, this Court found that such dangers were insufficient to override parental liberty under the Constitution. *Ramos*, 353 F.3d at 183. In sharp contrast, the district court's holding effectively prohibits parents from choosing a *less* risky approach: to allow children to travel with significant independence, but subject to limited adult supervision. The broad right of parental discretion that encompasses unsupervised nocturnal wandering would also seem to embrace lightly supervised diurnal wandering. If so, the common-law rule announced in this case is no more valid than the ordinance struck down in *Ramos*.

## II. THE DECISION CONFLICTS WITH THE PUBLIC POLICY, REFLECTED THROUGHOUT TORT LAW, REJECTING LIABILITY IN NEGLIGENCE FOR INJURIES RESULTING FROM INSECT-BORNE INFECTIOUS DISEASES.

The district court's judgment is at odds with the public policy reflected in tort law, both in Connecticut and across the American jurisdictions. Imposing a duty to prevent infection from common insects is inconsistent with

the cases that indicate there is no generalized duty to prevent infection from insect-borne illness. Moreover, the judgment in this case implies, contrary to seemingly all precedent, that parents and caregivers across the country are routinely negligent when they allow children to spend time outdoors without protective clothing.

The Munns contend, and the jury erroneously found, that Hotchkiss was negligent for failing (1) to warn a fifteen-year-old that common insects, such as ticks and mosquitos, can transmit disease, and (2) to require her to take protective measures, such as wearing long sleeves, long pants and bug repellant. There was no evidence that the area in China where Cara allegedly contracted tick-borne encephalitis was more prone to disease-carrying insects than the United States or, for instance, her home in Manhattan or her college in Hartford, Connecticut. Nor was there any evidence that Hotchkiss or any of its employees did anything to attract insects to the area. In addition, there was no evidence that Cara or her classmates experienced an unusual number of biting insects when they visited Mt. Pan, where the disease-carrying tick allegedly bit her. Hotchkiss did not place Cara in some proverbial lion's den. Cara was bitten by a common insect. Unfortunately, that insect allegedly carried a very rare virus, tick-borne encephalitis, and she became seriously ill. Despite the tragic result, these facts do not warrant a finding of negligence.

### A. Public policy, reflected in general tort law, indicates that parties should not be held responsible for common insects.

Allowing children to spend time outdoors is not negligent, even though the outdoors inevitably contains certain dangers, such as insects that can carry disease. As a California appellate court explained, "[i]nsects are a part of life's burdens and it is reasonable to conclude a person cannot be held responsible for their existence." *Butch v. Gay*, 29 Cal. App. 4th 388, 403–404 (Cal. App. 5th Dist. 1994) (rejecting a premises liability claim of negligence based on exposure to a Lyme-disease-carrying tick); *Riley v. Champion Int'l Corp.*, 973 F. Supp. 634, 643 (E.D. Tex. 1997) (same). Much of the United States is endemic[4] for tick-borne Lyme disease and mosquito-borne West Nile Virus, both of which can cause encephalitis.[5]

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[4] That a disease is endemic does not mean that it is an epidemic. According to the Munn's expert, Dr. Stuart Rose, an area is labeled "endemic" if there were at least five cases for each of five years (T.712, lines 7 to 11). Dr. Rose was not able to identify any information indicating that China had more than the minimum number of cases necessary for classification as "endemic" (T.712, lines 12 to 16). In addition, there was no testimony indicating that China or the region of China to which Cara's group traveled was subject to any unusual risk of insect-borne illness. Dr. Rose's testimony was limited to claiming that there was a "disease risk" in the Mt. Pan area, but he did not opine as to the extent of that risk or how that risk compared to the possibility of insect-borne illnesses in other places, such as the United States (T.655-657).

[5] According to the Center for Disease Control ("CDC") website, there have been a total of 10,596 cases of West Nile Virus and at least 96,142 cases of Lyme disease in the United States over the past five years. *See* Center for Disease Control, *West Nile virus disease cases reported to CDC by state, 1999-2013*, http://www.cdc.gov/westnile/resources/pdfs/cummulative/99_2013_cummulativeHumanCases.pdf (last visited October 21, 2014) and Center for Disease Control, *Reported cases of Lyme disease by state or locality, 2004-2013*, http://www.cdc.gov/lyme/stats/chartstables/reportedcases_statelocality.html (last visited

Despite the prevalence and (frequent) severity of Lyme disease and West Nile Virus, American courts have only rarely imposed liability for negligence in failing to prevent insect bites that resulted in these diseases. Indeed, the absence of cases indicates that plaintiffs have rarely even ventured the argument. *See, e.g.*, *Fix v. United States*, C.A. No. 04-97, 2007 U.S. Dist. LEXIS 59484, at *1 (W.D. Pa. Aug. 17, 2007) (detailing imprisoned plaintiff's allegations of negligently causing his injuries from Lyme disease by negligent medical treatment, but conspicuously omitting any allegation that the defendant, a prison, was negligent in not preventing the initial insect bite).

Those rare cases are exceptions that prove the rule. They have involved one or two circumstances that do not apply here.

First, this liability has arisen only under the extraordinary duty established by the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60. In relevant particular, as this Court has noted, "the concept of foreseeability has been construed somewhat more liberally in FELA cases than it might otherwise be under common law." *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996). Accordingly, citing this Court, a New York appellate court used this more liberal standard of foreseeability in finding

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October 21, 2014). For instance, based on the CDC information, Connecticut, Vermont, and New York are endemic for tick-borne Lyme disease and New York is endemic for West Nile Virus.

an employer liable for failing to prevent an insect bite leading to Lyme disease. *Swartout v. Conrail*, 294 A.D.2d 785, 786–87 (N.Y. App. 3d Div. 2002).

Second, even under the heightened foreseeability standard in FELA cases, courts have generally found such liability only where the defendant's own actions increased the presence of the disease-carrying insects. In *Gallick v. Baltimore & Ohio Railroad Co.*, the United States Supreme Court upheld a jury verdict of negligence against the railroad company because the jury had found it negligent by permitting the accumulation of an infested pool of water on its worksite and further found that a mosquito attracted by that pool had infected the plaintiff, a railroad employee. 372 U.S. 108, 118–119 (1963); *see also Union Pac. R.R. Co. v. Nami*, No. 13-12-00673-CV, 2014 Tex. App. LEXIS 8942, at *19–*21 (Tex. App.—Corpus Christi Aug. 14, 2014, no pet.) (upholding jury verdict of liability for West Nile Virus infection because "Union Pacific's negligent acts created the conditions that attracted the mosquitoes"). Connecticut courts, similarly, have noted that there is no liability for "birds, animals or insects that have not been brought upon [the real property] or attracted by act of man." *Chase v. Tusia*, No. CV044000354S, 2007 Conn. Super. LEXIS 1705, at *7–*8 (Windham Judicial District) (Conn. Super. Ct. May 1, 2007) (unpublished) (citing Restatement (Second) of Torts § 840 in context of nuisance claim); *see also Briere v. Tusia*, No.

WWMCV094009046S, 2011 Conn. Super. LEXIS 2301, at *25 (Windham Judicial District) (Conn. Super. Ct. May 16, 2011) (unpublished) (same).

In the case at bar, there was no evidence that any employee or agent of Hotchkiss brought or increased the presence of insects or disease-carrying insects at Mt. Pan. Rather, insofar as Cara's injury was caused by a tick at Mt. Pan, it was caused by a natural condition that Hotchkiss had no role in creating or maintaining. Public policy indicates that Hotchkiss should not be held liable for Cara's injuries because there was no evidence that any employee or agent of Hotchkiss brought or increased the presence of disease-carrying insects at Mt. Pan.

### B. Holding Hotchkiss responsible for illness caused by common insects would imply, contrary to all precedent, that parents and caregivers throughout the United States are routinely negligent.

The district court's judgment, if left undisturbed, necessarily implies that parents and caregivers of children throughout this Circuit, and throughout the United States more generally, are routinely negligent in the care of children.

The evidence, instructions, and jury charge imply that caregivers of children, even children who are fifteen-years-old like Cara, have an obligation to (1) warn them that insects can transmit illness to humans, and (2) require that

the children in their care use protective measures.[6] According to the district court, this duty belongs to anyone caring for children, but would especially arise if the caretaker was acting *in loco parentis*, since parents, and those acting in the place of parents, are subject to a more exacting standard (MOD.13). The inference must be that parents would be subject to a duty of supervision at least as strict as the one imposed on The Hotchkiss School.

The district court's implied definition of parental duty is inconsistent with the reasonable expectations of parents throughout the United States. The risk of Lyme disease and West Nile Virus seems far greater in the United States than the risk of tick-borne encephalitis in China.[7] But a quick trip to any park or playground demonstrates that neither parents nor caregivers believe that children must wear long sleeves, long pants and insect repellant any time they are outdoors during spring, summer and fall, when disease-carrying insects are most common. Outdoor activities have been part of the life of children from time immemorial, and neither parents nor caregivers are negligent because a child encounters the normal bumps, bruises, and insect bites that come with

[6] The Munn's expert witness, Peter Tarlow, based his conclusion that Hotchkiss had a duty to make sure that Cara used insect repellant and wore a long sleeve shirt and pants on the fact that insect-borne disease was endemic, not because there was an unusually high risk of illness (T.488-449) (general conclusion of witness about standard of care in a disease endemic area) (T.450, lines 12-25) (applying general conclusion about standard of care to the case at bar).

[7] *See supra* at n. 4-5.

normal, everyday life. The district court's judgment undermines the reasonable expectations of parents and caregivers around the country; mandating protective measures that depart from those followed by reasonable people as they permit children to explore the outdoors.

Moreover, this definition is inconsistent with the general judgment of the legal profession. Despite the prevalence of insect-borne illnesses, there appears to be *no* case in the United States where any parent has been even accused of neglect for failing to satisfy the standard of care demanded by the district court. Counsel for amici have found only two cases where any parent, school, or other parental delegee has been accused of such negligence: the case at bar and the case subsequently filed by counsel for the plaintiffs against the YMCA.[8] The glaringly conspicuous absence of such a claim "indicates the general judgment of the [legal] profession that no such [claim] should be entertained." *Mississippi v. Johnson*, 71 U.S. 475, 500 (1867).

Indeed, counsel for amici have found only one case involving an accusation of parental neglect in connection with Lyme-disease prevention. In

[8] Aditi Mukherji, *Camp Sued for $41.7M Over Girl's Lyme Disease*, Findlaw, Oct. 17, 2013, http://blogs.findlaw.com/injured/2013/10/camp-sued-for-417m-over-girls-lyme-disease.html (last visited October 21, 2014). *Cf.* Anthony P. Calisi, *School Negligence Results in Child Contracting Lyme Disease*, Injury Claim Coach, http://www.injuryclaimcoach.com/school-negligence-results-in-child-contracting-lyme-disease.html (last visited October 21, 2014) (stating a former judge's advice to a parent whose child was bit by a tick at his private school that the school might be liable for negligent treatment of a child's tick bite, but conspicuously failing to suggest any liability arising from failing to prevent the tick bite).

that unreported case, a Connecticut court found a parent negligent and unfit, *in part*, because she was so fearful of Lyme disease that she kept her son indoors. *In re Teddy P.*, 1998 Conn. Super. LEXIS 3700, at *6, *16–*17 (New Haven Judicial Dist.) (Conn. Super. Ct. Dec. 31, 1998) (listing, among the instances of negligence, the mother's "exaggerated response to [her] concern about possible tick bites and the contraction of Lyme disease").

## CONCLUSION

The Association of Boarding Schools and the North American Montessori Teachers' Association urge this Court to reverse the decision of the district court and safeguard to parents and educators the opportunity to make outdoor education available to children.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been emailed via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on this 21st day of October, 2014, to this Court and to all counsel of record as follows:

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and FED. R. APP. P. 29(d) because:

- this brief contains 3,358 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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- This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with a 14 point font named Times New Roman.

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Dated: October 21, 2014