

CHILDHOOD OBESITY, THE UNHEALTHY SCHOOL LUNCH AND SCHOOL LIABILITY UNDER 42 U.S.C. § 1983

I. INTRODUCTION

Angry and discouraged, a young girl sits down at her desk. With no change on the foreseeable horizon, and feeling like there is nothing else that she can do, she decides to write a letter. A concerned sixth grader living in New Jersey, Gabe Slon, penned a letter to the “People in Charge of the School Lunches,” sending it to a local blog, in hopes that her frustrations over the meals served at her school would be heard by someone who could make a difference.¹

You wait in line for a couple of minutes, only to be disappointed. The options are more or less the same. An almost empty ham and cheese sandwich, something completely unappetizing like nachos with ground beef or one of those chicken patties, and of course, the salad bar that is only 25% salad. The school lunches are disgusting. They are unappetizing, unhealthy, and need to change.²

In today’s cafeterias, health has been replaced by convenience, with schools focusing more on meals they can serve to their students with the most amount of ease.³ The overall healthiness of the food being served has become merely an afterthought, if it is a thought at all.⁴ Childhood obesity has increased dramatically in the last few decades, to the point that it is practically a full-fledged epidemic.⁵ In 2009, nearly one-third of

¹ Gabe Slon, *Letter from 6th Grader About Quality of School Lunches*, MONTCLAIRPATCH (June 3, 2011), <http://montclair.patch.com/articles/letter-from-6th-grader-about-quality-of-school-lunches-2>.

² *Id.*

³ See ANN COOPER & LISA M. HOLMES, LUNCH LESSONS 80 (2006) (noting that many cafeterias do not even have functioning kitchens, instead the cafeteria is equipped with the basics to prep and reheat food).

⁴ See Alice Waters and Katrina Heron, *No Lunch Left Behind*, N.Y. TIMES (Feb. 19, 2009), <http://www.nytimes.com/2009/02/20/opinion/20waters.html>.

⁵ See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 1 (2010),

children in the United States were overweight or obese.⁶ With twenty-seven percent of all Americans between the ages of seventeen and twenty-four too overweight to join the military, some retired officers have described childhood obesity as a threat to our national security.⁷ As obesity-related health care exceeds \$145 billion a year in the United States, this problem is one that will only get worse over time if action is not taken now.⁸

This Comment will show that due to the nexus between school lunches and childhood obesity, school districts can be liable for the numerous health, psychological, and economic problems that are proximately caused by the unhealthy meals served in schools.⁹ Part II will introduce the crisis of childhood obesity facing the youth of America. Part III will examine the history of the National School Lunch Program (“NSLP”) and the responsibilities of the program. Part IV introduces the role of the United States Department of Agriculture (“USDA”) and the Commodities Program that supplies the raw food materials to schools. Part V explores what legal action may be taken against school districts for their part in the unhealthy meals that are served in cafeterias.¹⁰ Part VI and VII discuss possible solutions to reversing the remaining inadequacies of school lunches, including the benefits of improving school menus and monitoring nutritional regulations and standards. Finally, this Comment will discuss whether legal action is the logical next step in remedying the current status of the school lunch.

II. THE RISE OF CHILDHOOD OBESITY

The Centers for Disease Control and Prevention (“CDC”) determines if a child’s weight is within a healthy range by using an age and sex-specific percentile for body mass index (“BMI”).¹¹ For children and ado-

available at http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf.

⁶ JEFFREY LEVI ET AL., *F AS IN FAT: HOW OBESITY THREATENS AMERICA’S FUTURE* 2009, 21 (July 2009), available at <http://healthyamericans.org/reports/obesity2009/Obesity2009Report.pdf> [hereinafter LEVI I].

⁷ Courtney Hutchison, *School Lunches are a Threat to National Security*, *Retired Officials Say*, ABC NEWS (Apr. 21, 2010), <http://abcnews.go.com/Health/Wellness/school-lunches-pose-national-security-threat-ret-military/story?id=10424313>.

⁸ *Id.*; See also JEFFREY LEVI ET AL., *F AS IN FAT: HOW OBESITY THREATENS AMERICA’S FUTURE* 2011 54 (July 2011), available at <http://healthyamericans.org/assets/files/TFAH2011FasInFat10.pdf> [hereinafter LEVI II].

⁹ See LEVI ET AL., *supra* note 6, at 21.

¹⁰ See U.S. CONST. amend. XIV, § 1.

¹¹ *Basics about Childhood Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/obesity/childhood/basics.html> (last visited June 30, 2011).

lescents aged two to nineteen years, “overweight is defined as [having] a BMI at or above the eighty-fifth percentile and lower than the ninety-fifth percentile for children of the same age and sex.”¹² Under the definition of the CDC, a child or adolescent is obese if he or she has “a BMI at or above the ninety-fifth percentile for children of the same age and sex.”¹³ Unlike the first-half of the twentieth century, it is not malnourishment that is the leading nutritional issue among children, as the issue has shifted to that of “overconsumption, poor dietary quality, and food choices.”¹⁴ The rise in childhood obesity is nothing if not staggering. As of 2009, nearly thirty-two percent of children were categorized as overweight or obese, meaning almost one-third of our nation’s youth were at or above the eighty-fifth percentile of BMI for their age.¹⁵ Obesity has been known to increase health problems among children and adolescents, leading to very serious chronic problems such as cardiovascular disease, high cholesterol, high blood pressure, type-2 diabetes, metabolic problems, sleep disturbances, orthopedic problems, hypertension, hypercholesterolemia, poor bone health, and dental cavities.¹⁶ Also, unsurprisingly, overweight youth “are likely to remain overweight as adults.”¹⁷ In the past two decades alone the number of children whose BMI classifies them as being obese has tripled among those in the two to nineteen year age bracket, rising from five percent in a 1976-1980 study to seventeen percent in 2006.¹⁸ Even more discouraging is the fact the childhood obesity has the potential for this generation to be the first to have a life expectancy lower than their parent’s generation.¹⁹

A finding that school lunches can be identified as a risk factor for childhood obesity may explain how this grave health issue could skyrocket in such a short amount of time.²⁰ A recent study conducted among

¹² *Id.*

¹³ *Id.*

¹⁴ COMM. ON NUTRITION STANDARDS FOR FOODS IN SCHOOLS, NUTRITION STANDARDS FOR FOODS IN SCHOOLS: LEADING THE WAY TOWARD HEALTHIER YOUTH 29 (Virginia A. Stallings & Ann L. Yaktine eds., 2007), available at <http://www.nap.edu/catalog/11899.html>.

¹⁵ LEVI I, *supra* note 6, at 21.

¹⁶ See COMM. ON NUTRITION STANDARDS FOR FOODS IN SCHOOLS, *supra* note 14, at 15, 30.

¹⁷ *Id.* at 30.

¹⁸ *Data and Statistics*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/obesity/childhood/data.html> (last visited July 26, 2011); COMM. ON NUTRITION STANDARDS FOR FOODS IN SCHOOLS, *supra* note 14, at 31.

¹⁹ LEVI I, *supra* note 6, at 3.

²⁰ See Roni Caryn Rabin, *Childhood: Obesity and School Lunches*, N.Y. TIMES (Feb. 4, 2011), <http://www.nytimes.com/2011/02/08/health/research/08childhood.html>.

1,003 sixth graders examined the children's BMI, blood pressure, glucose, and heart rate recovery after a three-minute step test.²¹ The study found that obese children are more likely to eat school-provided lunches on a consistent basis, and that a child's lifestyle, not genetics, is more related to obesity.²² The study gives glaring reason to doubt the overall healthiness of lunches that are provided to children at schools, by showing that the children who regularly ate the school lunch are twenty-nine percent more likely to be obese than the children who regularly brought their lunch from home.²³ The conclusion of the study suggests that in addition to programs that emphasize physical activity, improving nutritional value in school lunches is an important component in improving childhood health and lowering obesity rates.²⁴ This study alone, however, does not highlight all problems contributing to childhood obesity.

According to a 2007 study, implementation of nutritional requirements is inconsistent among school districts across the country, meaning that some districts do not meet the requirements.²⁵ For example, Los Angeles Unified School District ("LAUSD") has had a difficult time complying with the most recent USDA dietary guidelines.²⁶ Instead, LAUSD has been following the 2005 dietary guidelines for school lunches.²⁷ Although the meals that LAUSD serves to its students provide the recommended servings of calcium, iron, and vitamins A and C, the district does not have a restriction on sugar content, which is a known contributor to obesity.²⁸

²¹ *Health Status and Behavior Among Middle-School Children in a Midwest Community: What are the Underpinnings of Childhood Obesity?*, AMERICAN HEART JOURNAL, [http://www.ahjonline.com/article/S0002-8703\(10\)00888-4/abstract](http://www.ahjonline.com/article/S0002-8703(10)00888-4/abstract) (last visited July 30, 2011).

²² *Childhood Obesity Linked to Health Habits, Not Heredity: U-M Study*, EUREKAALERT!, http://www.eurekaalert.org/pub_releases/2011-01/uomh-col012811.php (last visited June 30, 2011).

²³ Rabin, *supra* note 20.

²⁴ *Health Status and Behavior Among Middle-School Children in a Midwest Community: What are the Underpinnings of Childhood Obesity?*, *supra* note 21.

²⁵ COMM. ON NUTRITION STANDARDS FOR FOODS IN SCHOOLS, *supra* note 14, at 1 ("[G]iven that each local education agency establishes its own local wellness policy, there is great variety, with policies ranging from very detailed and well-defined, to less detailed and more vague.").

²⁶ See Gendy Alimurung, *Why Los Angeles Schoolkids Get Lousy Meals*, L.A. WEEKLY (June 16, 2011), <http://www.laweekly.com/2011-06-16/news/why-los-angeles-school-kids-get-lousy-meals/>; see also WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, *supra* note 5, at 38.

²⁷ Alimurung, *supra* note 26.

²⁸ *Id.*

Over seventy percent of students in LAUSD come from households with incomes that are below the federal poverty line, which means that a vast majority of students within the district are receiving school lunches on a regular basis.²⁹ An in-depth look at the current status of LAUSD's school lunch program showed that the sodium content in a typical week of lunches was far beyond recommended levels:

Over the course of five recent days, students at Los Angeles High School were given menu offerings of an orange chicken bowl (1,120 milligrams), followed the next day by a cheese sandwich with chicken noodle soup (2,226 milligrams), then by meat and cheese sauce (1,217 milligrams), then a deli turkey sub (958 milligrams) and, finally, a kung pao chicken bowl (602 milligrams). Wash each main dish down with two cartons of 1 percent white milk (150 milligrams each) and kids are consuming a daily average of 1,525 milligrams of sodium.³⁰

These numbers are incredibly disappointing, considering the fact that the USDA dietary guidelines recommend no more than a maximum of 2,300 milligrams of sodium for a whole day.³¹ The sugar content of LAUSD's meals do not fare much better – their orange chicken bowl with brown rice, for example, contains 31.5 grams of sugar; over half of the daily recommended fifty gram total.³² Although school lunches are not the only factor contributing to the rise in childhood obesity, what children eat for lunch plays a significant role in their daily caloric intake, making it extremely important for schools to serve nutritious and healthy school meals.³³

III. THE NATIONAL SCHOOL LUNCH PROGRAM

Nearly thirty-two million students, about fifty percent, in over 101,000 public schools receive their lunches from the NSLP.³⁴ The NSLP is a program created by the federal government in 1946, giving permanent funding to the Secretary of Agriculture with two specific goals in mind, to “assist with the health of the nation’s children, and ensure a market for farmers.”³⁵ Before the NSLP came into effect, individualized programs

²⁹ *See id.*

³⁰ *Id.*

³¹ COMM. ON NUTRITION STANDARDS FOR FOODS IN SCHOOLS, *supra* note 14, at 44-45 (citing sodium as a known cardiovascular disease and high blood pressure trigger).

³² Alimurung, *supra* note 26.

³³ COMM. ON NUTRITION STANDARDS FOR FOODS IN SCHOOLS, *supra* note 14, at 22.

³⁴ *The Basics About School Lunch: A Brief Overview*, JAMIE OLIVER'S FOOD REVOLUTION, http://www.jamieoliver.com/us/foundation/jamiesfoodrevolution/__cms/uploads/4_Support%20Tool_The%20Basics.pdf (last visited Aug. 11, 2011).

³⁵ COOPER & HOLMES, *supra* note 3, at 35.

served meals that emphasized vegetables and milk, and served lunches to students for a penny, or free if the child was needy.³⁶ Some districts even demanded that their school lunch program “be under the direction of a home economics graduate” who had knowledge of nutrition.³⁷ Funding for these programs was often based on charitable donations or from the funding of the school districts themselves.³⁸

However, once the Great Depression of the 1930’s hit, a course of action was set in motion that would change the way schools provided low-cost and free lunches to their students.³⁹ Due to the drastic decline of the market, many families were unable to adequately feed their children without some form of assistance, and farmers were unable to provide for their families from the meager income they received from the sale of their crops.⁴⁰ These problems were answered in 1936 with legislation providing the Secretary of Agriculture with funds to “encourage the domestic consumption of certain agricultural commodities (usually those in surplus supply) by diverting them from the normal channels of trade and commerce.”⁴¹ By the onset of World War II, approximately five million of the nation’s school children participated in the program.⁴² Seeing that a year-to-year program was not enough to adequately manage the demand, in 1946 Congress created legislation that would create a permanent program: the National School Lunch Act.⁴³

The legislation governed how federal funds would be allocated between the states, with the Secretary of Agriculture disbursing funds to each state based on the number of school-aged children, between the ages of five and seventeen, in the state and requiring assistance based on

³⁶ See generally Gordon W. Gunderson, *The National School Lunch Program Background and Development*, USDA, http://www.fns.usda.gov/cnd/lunch/AboutLunch/ProgramHistory_2.htm (last modified Nov. 30, 2011) [hereinafter Gunderson I].

³⁷ See *id.*

³⁸ See *id.*

³⁹ See COOPER & HOLMES, *supra* note 3, at 34.

⁴⁰ See Gordon W. Gunderson, *The National School Lunch Program Background and Development*, USDA, http://www.fns.usda.gov/cnd/lunch/AboutLunch/ProgramHistory_4.htm (last modified Nov. 30, 2011) [hereinafter Gunderson II].

⁴¹ See *id.* (“The object of this legislation was to remove price-depressing surplus foods from the market through government purchase and dispose of them through exports and domestic donations to consumers in such a way as not to interfere with normal sales.”).

⁴² *Id.*

⁴³ See 42 U.S.C. § 1751 (2011) (“It is 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 foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.”).

the per capita income within the state.⁴⁴ In addition to monetary funds and the continuation of commodity donations, the legislation also called for funds to be apportioned to help purchase kitchen equipment for school districts, along with the funds that would be available to reimburse schools for food and preparation costs of serving lunches to children for a low or non-existent cost.⁴⁵ However, funds and reimbursements were to be supplied on the condition that schools agree that all lunches served would “meet minimum nutritional requirements set by the Secretary of Agriculture.”⁴⁶

A handful of amendments were made to the NSLP through the course of the latter half of the twentieth century, mainly minor revisions to nutritional standards and funding.⁴⁷ In 2004, a new requirement was created, mandating that the USDA issue nutrition guidelines for schools to ensure that the meals being provided adhered to current dietary standards.⁴⁸ However, no significant changes to nutritional standards were proposed until 2010, when the Healthy, Hunger-Free Kids Act was introduced to Congress.⁴⁹ A reauthorization of federal funding to school meal and child nutrition programs, the Act is arguably the most radical change since the NSLP’s inception. Signed into law by President Obama on December 13, 2010, it gives the USDA more authority to regulate nutritional standards and puts more safeguards in place to make sure that schools are meeting the new requirements, such as requiring school districts to be audited every three years.⁵⁰ Thanks to the efforts of First Lady Michelle Obama, who has crusaded to improve nutritional standards and reduce childhood obesity, the new law is a gigantic step in the right direction.⁵¹

The law provides incentives for schools to meet the higher nutrition standards, including an additional reimbursement of six cents per meal

⁴⁴ See Gordon W. Gunderson, *The National School Lunch Program Background and Development*, USDA, http://www.fns.usda.gov/cnd/lunch/AboutLunch/ProgramHistory_5.htm#28 (last modified Nov. 30, 2011) [hereinafter Gunderson III].

⁴⁵ See *id.*

⁴⁶ See COOPER & HOLMES, *supra* note 3, at 36.

⁴⁷ See Gunderson III, *supra* note 44; see also COOPER & HOLMES, *supra* note 3, at 37-38.

⁴⁸ LEVI I, *supra* note 6, at 33.

⁴⁹ See generally Gunderson III, *supra* note 44.

⁵⁰ *Child Nutrition Reauthorization: Healthy, Hunger-Free Kids Act of 2010*, THE WHITE HOUSE (2010), http://www.whitehouse.gov/sites/default/files/Child_Nutrition_Fact_Sheet_12_10_10.pdf; see also Press Release, The White House, President Obama Signs Healthy, Hunger-Free Kids Act of 2010 Into Law (Dec. 13, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/13/president-obama-signs-healthy-hunger-free-kids-act-2010-law>.

⁵¹ Press Release, *supra* note 50.

for schools who are in compliance with the new regulations.⁵² However, it is not yet clear whether any of these amendments to the NSLP will have a significant impact on the overall nutrition of meals served in various school districts, or, if after the attention that has been brought to the issue wanes, it will go back to the status quo.⁵³

IV. USDA AND THE COMMODITIES CONFLICT

Many have argued that there is a conflict of interest in having the USDA, which has close ties to the agricultural industry, food companies, and the lobbyists who represent them, determine which commodities the NSLP should be selecting and feeding to children.⁵⁴ Much misconception has surrounded the relationship between the USDA and the NSLP commodities in recent years.⁵⁵ In fact, great strides have been made at the federal level to improve the food supplies that are offered within the commodities program and, the USDA, in particular, has been at the forefront of efforts in the past year to improve the overall nutrition of meals served to school children.⁵⁶

Arguably the greatest misconception regarding the conflicts within the USDA and the NSLP are that the commodities that are available are all surplus, and the NSLP is receiving the leftovers of the agricultural industry.⁵⁷ Many journalists have cited the commodity foods as a main cause of the unhealthiness of the meals served in schools.⁵⁸ An article in the *New York Times* stated that “[t]he long list of options include high-fat,

⁵² See Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 201(c-d), 124 Stat. 3183, 3215 (2010).

⁵³ See generally WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY: ONE YEAR PROGRESS REPORT (2011), available at http://www.letsmove.gov/sites/letsmove.gov/files/Obesity_update_report.pdf.

⁵⁴ See LYNN PARKER, COMMODITY FOODS AND THE NUTRITIONAL QUALITY OF THE NATIONAL SCHOOL LUNCH PROGRAM: HISTORICAL ROLE, CURRENT OPERATIONS, AND FUTURE POTENTIAL 25 (September 2008), available at <http://frac.org/newsite/wp-content/uploads/2009/09/commodities08.pdf>; see also *USDA Wants to Update Nutrition Standards for School Lunches? Great Idea! – Except for the Terrible Nutrition Plans and the Glaring Conflict of Interest...*, ALLIANCE FOR NATURAL HEALTH - USA (Jan. 25, 2011, 10:30 AM), <http://www.anh-usa.org/usda-wants-to-update-nutrition-standards-for-school-lunches/>; see also Jane Black, *USDA to Offer Members of Congress a Taste of School Lunches*, THE WASHINGTON POST (Dec. 11, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR2009121001956.html>.

⁵⁵ See PARKER, *supra* note 54, at 43.

⁵⁶ See generally WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY: ONE YEAR PROGRESS REPORT, *supra* note 53; see also PARKER, *supra* note 54, at 41-42.

⁵⁷ See PARKER, *supra* note 54, at 41.

⁵⁸ *Id.*

low-grade meats and cheeses and processed foods . . . [with schools receiving] periodic, additional ‘bonus’ commodities from the USDA, which pays good money for what are essentially leftovers from big American food producers.”⁵⁹ In the early days of the NSLP, the commodities were made up largely of surplus crops as a way to help American farmers during the Depression era and balance out the market, but in today’s program, the way commodities are purchased has evolved.⁶⁰ Although the USDA’s commodity purchases do still help stabilize and support pricing within the market, much of the items that are purchased are selected and ordered up to a year in advance, and are not surplus or leftovers of the agricultural industry as many believe.⁶¹

No food, unhealthy or not, is *forced* upon school districts.⁶² School districts are not required to use any specific kind or amount of food from the lists of commodity foods available.⁶³ Today, the commodity program works as a hierarchy; after the USDA chooses what to buy from farmers at the national level, the decision about what school districts will receive is then decided by the state distributing agencies.⁶⁴ This improvement in the quality of commodity foods can be credited in great part to President Barack Obama and his administration’s push to take affirmative action against childhood obesity.⁶⁵

Many of the improvements that the Healthy, Hunger-Free Kids Act brought to the NSLP this year are from the recommendations of the White House Task Force on Childhood Obesity, which was created in the spring of 2010.⁶⁶ Such recommendations include reducing sugar, fat, and sodium in commodity foods, aligning the nutritional standards with the

⁵⁹ Waters & Heron, *supra* note 4.

⁶⁰ COOPER & HOLMES, *supra* note 3, at 34-35.

⁶¹ See PARKER, *supra* note 54, at 45.

⁶² *Id.* at 25.

⁶³ *Id.*

⁶⁴ *Id.* at 24; see also USDA, Section on Schools/CN Commodity Programs, *Single NLSP Fact Sheets for Meat/Meat Alternates*, http://www.fns.usda.gov/fdd/schfacts/allfacts_rpts_bytitle_meats.htm (last modified Nov. 30, 2011); see also USDA, Section on Schools/CN Commodity Programs, *Single NLSP Fact Sheets for Grains/Breads*, http://www.fns.usda.gov/fdd/schfacts/allfacts_rpts_bytitle_grains.htm (last modified Nov. 30, 2011) (currently listed are items such as whole wheat flour, brown rice, whole grain spaghetti and tortillas, natural almonds, reduced-fat cheese, salmon, and many other health-conscious options).

⁶⁵ See generally Press Release, *supra* note 50.

⁶⁶ See generally *White House Task Force on Childhood Obesity Report to the President*, LET’S MOVE!, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited July 26, 2011).

2005 *Dietary Guidelines* and implementing “Farm to School” programs.⁶⁷

Prior to the Healthy, Hunger-Free Kids Act, two individual studies cited the vast improvements made to the commodity program and the misconceptions of a major conflict of interest existing with the USDA heading the commodity program.⁶⁸ The Food Research and Action Center (“FRAC”) and California Food Policy Advocates (“CFPA”) reports each reached the conclusion that “school districts fail to take advantage of the healthier foods offered by the federal nutrition commodity program, despite improvements made by the program to provide schools with more nutritious options.”⁶⁹ In particular, the CFPA report examined California school districts and their role in the commodities program, and found that “in California more than eighty-two percent of the entitlement dollars spent on commodities ordered by school districts went to meat and cheese items, both relatively high in fats and saturated fats.”⁷⁰ In comparison, “fruit, fruit juice, vegetables, and legumes” only amounted to a mere thirteen percent.⁷¹ As federal agencies take action to eradicate many of the factors that make school lunches unhealthy, many school districts are still utilizing the same meals and procedures that have escalated childhood obesity.⁷²

A. *Processing and School Districts’ Role in Commodities*

After the USDA selects the commodities that will be available for the next school year, each state then designates an agency that will administer the commodities at the state level.⁷³ Typically, the task is assigned to the state education agency, then, at the local level, school districts are usually tasked with managing the program.⁷⁴ In addition to the raw food

⁶⁷ See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, *supra* note 5, at 39, 41.

⁶⁸ See generally Press Release, Food Research & Action Ctr., Reports Show Fed. Commodity Food Program Could do Much More to Improve Nutritional Quality of School Meals (Sept. 9, 2008), *available at* <http://frac.org/reports-show-federal-commodity-food-program-should-do-much-more-to-improve-nutritional-quality-of-school-meals/> (alteration in original).

⁶⁹ *Id.*

⁷⁰ See KENNETH HECHT ET AL., THE FEDERAL CHILD NUTRITION COMMODITY PROGRAM: A REPORT ON NUTRITIONAL QUALITY SEPTEMBER 2008 2 (September 2008), *available at* http://cfpa.net/ChildNutrition/ChildNutrition_CFPAPublications/CommoditiesSchoolMeals-FullReport_2008.pdf.

⁷¹ *Id.*

⁷² See generally Alimurung, *supra* note 26.

⁷³ PARKER, *supra* note 54, at 24.

⁷⁴ *Id.* at 17.

supplies available through the commodity program, there is also another facet of the NSLP – commodity processing.⁷⁵ Commodity processing occurs when commodity foods are sent to processing plants where the foods can be transformed from a raw form to products that can be easily served at the school level.⁷⁶ The USDA does send some of its commodity purchases to processors, particularly fresh fruits and vegetables, which are converted into frozen fruit bars, fruit pies, tomato paste, and other various shelf-stable items.⁷⁷ However, around half of commodity processing is done by the school districts themselves.⁷⁸

“Nationally, over fifty percent (fifty-five percent in California) of commodity foods are sent to processors before they are delivered to school districts,” where they are converted to unhealthy foods.⁷⁹ The decision to send products for additional processing is made solely on the state or local level.⁸⁰ Each state government makes the decisions regarding food processors conducting business within their respective states.⁸¹ However, the problem with school districts sending raw commodities to food processors not only lies in the end-product being unhealthy food, but also that there is little, if any, oversight.⁸² In California, for example, spokespersons from various entities involved in school lunches stated:

[A]gencies do not oversee commodity processing for purposes of regulating nutritional quality. One stakeholder noted that the outcome of processing “depends on the contract. I mean there are a lot of contracts out there where they are not looking at limits on fat, sodium. There are not specifications that states make on processors.”⁸³

In the past few decades, these ready-to-serve meals have been a favorite of numerous school districts since commodity processing takes away the need for schools to prepare and cook meals on site, thereby eliminat-

⁷⁵ See generally Kate Adamick, *School Lunches: Helping Kids Eat Commodities*, THE ATLANTIC (Apr. 27, 2010), available at <http://www.theatlantic.com/life/archive/2010/04/school-lunches-helping-kids-eat-commodities/39561/>.

⁷⁶ PARKER, *supra* note 54, at 23 (“[c]onverted from a raw input into an end product more usable at the school level – by freezing or cooking and/or through the addition of other ingredients.”)

⁷⁷ PARKER, *supra* note 54, at 29.

⁷⁸ See generally Deborah Lehmann, *How the USDA Helped Bring Processed Food to School Lunch*, THE SLOW FOOD USA BLOG (July 31, 2009) http://www.slowfoodusa.org/index.php/slow_food/blog_post/how_the_usda_helped_bring_processed_food_to_school_lunch/.

⁷⁹ See HECHT ET AL., *supra* note 70, at 2.

⁸⁰ See PARKER, *supra* note 54, at 45.

⁸¹ See *id.* at 48.

⁸² See HECHT ET AL., *supra* note 70, at 27.

⁸³ *Id.*

ing the cost of having to hire a full kitchen staff.⁸⁴ Focus groups have reported that processing raw commodities can “decrease the nutritional quality of foods through the addition of sugar, salt, oils, or preservatives.”⁸⁵

Even though the NSLP is cleaning up its act on the federal level, many school meals still do not meet nutritional standards.⁸⁶ With more than ninety percent of our country’s students eating lunch in our schools, the time for improvement cannot wait.⁸⁷

V. THE DUE PROCESS CLAUSE AND SCHOOL DISTRICT LIABILITY UNDER 42 U.S.C. § 1983

The Fourteenth Amendment of the United States Constitution states that no state shall “deprive any person of life, liberty, or property, without due process of law.”⁸⁸ The Due Process Clause serves to ensure that all government agencies and actors will operate within the law and not infringe on an individual’s constitutional rights.⁸⁹ Due process claims are based on two separate theories: procedural and substantive.⁹⁰

Procedural due process is centered on the procedures the government employs when legally taking away a person’s freedom, property, or life; an assurance that government procedures are fair.⁹¹ In order for a procedural due process claim to have merit, the government must employ unfair practices or procedures while taking away an individual’s life, liberty, or property.⁹² Although the procedure involving the decision of the school districts to send raw foods for processing might subject school districts to liability under a procedural due process claim, for the purposes of this Comment, the procedures implemented by school districts will not be discussed.

Substantive due process, on the other hand, centers around the outcome of the government’s actions, focusing specifically on protecting an individual from the government interfering with basic rights.⁹³ The Supreme Court has the power to protect a substantive right that it believes to be fundamental and “implicit in the concept of ordered liberty,” re-

⁸⁴ See PARKER, *supra* note 54, at 47.

⁸⁵ HECHT ET AL., *supra* note 70, at 26.

⁸⁶ See generally Rabin, *supra* note 20.

⁸⁷ LEVI II, *supra* note 8, at 43.

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ See generally Daniels v. Williams, 474 U.S. 327 (1986).

⁹⁰ See *id.* at 337.

⁹¹ See *id.* at 338-339.

⁹² See *id.* at 339.

⁹³ See Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

ardless of whether the right is explicitly included in the Constitution.⁹⁴ In an action against a school district for the health ramifications resulting from obesity, a substantive due process argument would have merit based on a deprivation of liberty, founded on the “interest in freedom from bodily harm.”⁹⁵

In cases involving a substantive due process claim, the United States Supreme Court has employed a two-prong test to determine if there is a right or liberty that has been violated.⁹⁶ First, an infringement or obstacle must have transpired against a plaintiff’s interest before the Court will analyze whether a fundamental right has indeed been violated under substantive due process.⁹⁷ A fundamental right is a right that is implicit in the concept of ordered liberty such that one would not feel free without it, and is “deeply rooted in this Nation’s history and tradition.”⁹⁸ Research has identified school lunches as a risk factor for childhood obesity, along with showing that lifestyle, not genetics, is more closely related to childhood obesity.⁹⁹ The Court has not explicitly recognized the right to bodily health as a fundamental right, however they may recognize that an individual has a right to be free from harm that is created by actions of the government.¹⁰⁰ A plaintiff may argue that the human interest involved constitutes an invasion of the individual’s liberty interest.¹⁰¹ The second requirement in asserting a liberty interest is that the plaintiff describes why the liberty merits protection.¹⁰² This may be done by providing a “careful description” of both the general and specific right, and also by establishing that the right is “implicit in the concept of ordered liberty.”¹⁰³

⁹⁴ *See id.* at 721-722.

⁹⁵ *Daniels*, 474 U.S. at 341.

⁹⁶ *See generally Glucksberg*, 521 U.S. 721; *see also* James F. Ross, *A Natural Rights Basis for Substantive Due Process of Law in U.S. Jurisprudence*, 2 UNIVERSAL HUMAN RIGHTS 61, 64 (1980).

⁹⁷ *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992); *See also Glucksberg*, 521 U.S. at 702.

⁹⁸ *Glucksberg*, 521 U.S. at 720-721 (giving examples of “liberty” freedoms found to be protected by the Constitution by the Due Process Clause like the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); the right to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).).

⁹⁹ *Childhood Obesity Linked to Health Habits, Not Heredity: U-M Study*, *supra* note 22; Rabin, *supra* note 20.

¹⁰⁰ *Daniels*, 474 U.S. at 341.

¹⁰¹ *See* Ross, *supra* note 96, at 64.

¹⁰² *See id.* at 65 (“additional liberties [to] merit equivalent protection – not as ends in themselves, but as means to the vitality and fullness of the enumerated liberties.”).

¹⁰³ *Glucksberg*, 521 U.S. at 720-721.

The broad concept of this implied liberty would be an individual's general right to good health.¹⁰⁴ A more specific argument would be that the student has the right to be healthy rather than suffer from obesity and other health issues as a result from being fed consistently unhealthy meals that contain obesity triggers.¹⁰⁵ The government has found that a liberty interest exists in an individual's right to bodily integrity, right to an abortion, and right to have children, therefore it would not be far-reaching for the court to find an interest existing in bodily health.¹⁰⁶

Individuals have a substantial interest in their general health, and the right to be protected from agents (in this instance, unhealthy food) that may cause harm to one's health.¹⁰⁷ It should be assumed that just like a person has a right to bodily integrity, or to make reproductive decisions about their own body, each individual should be free from being served harmful fare in their school.¹⁰⁸ Although the government is not forcing a student to eat lunch in their cafeteria, for the students who qualify for free or reduced-price lunches, their only choice may be eating school lunch or going hungry all day.¹⁰⁹ Consequently, there is a compelling liberty interest in the right to bodily health, which gives rise to liability under the substantive due process clause.¹¹⁰

In 1871, Congress enacted the Civil Rights Act of 1871, which was meant to enforce the Due Process Clause of the Fourteenth Amendment.¹¹¹ The text of 42 U.S.C. § 1983 ("§ 1983") reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .¹¹²

In order for a § 1983 claim to have merit, there must be a violation of a constitutional right, such as procedural or substantive due process.¹¹³ A

¹⁰⁴ See LEVI I, *supra* note 6 at 21.

¹⁰⁵ See generally Rabin, *supra* note 20.

¹⁰⁶ See generally Glucksberg, 521 U.S. at 720.

¹⁰⁷ See Ross, *supra* note 96 at 65-66.

¹⁰⁸ See generally Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

¹⁰⁹ See Valerie Gibbons, *Nutrition Advocates Target Fresno Unified's Menu*, THE FRESNO BEE (Sept. 05, 2011), available at <http://www.fresnobee.com/2011/09/05/v-print/2526201/nutrition-advocates-target-fresno.html>.

¹¹⁰ See generally *Planned Parenthood of Se. Pa.*, 505 U.S. at 834; See also *Washington*, 521 U.S. at 710.

¹¹¹ See *Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 665 (1978).

¹¹² Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (West 2003).

¹¹³ See generally U.S. CONST. amend. XIV, § 1; see also *Monell*, 436 U.S. at 665.

§ 1983 claim for failing to provide adequate nutritional content in school lunches would fit into the category of substantive due process, meaning that the government or its actors took certain action that violated a “substantive” right of an individual, in this instance the right to be free from harm to one’s health.¹¹⁴

A. Basic Elements Required For a 42 U.S.C. § 1983 Action

To establish a cause of action under 42 U.S.C. § 1983, a number of basic elements must be established: (1) plaintiff was deprived of a right secured by the Constitution or laws of the United States; (2) the injury was caused by defendants acting under the color of state law.¹¹⁵ In the past century, a number of United States Supreme Court cases have given us the modern day interpretation of 42 U.S.C. § 1983 claims.¹¹⁶ In *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), the United States Supreme Court addressed whether government agencies qualify as “persons” under § 1983 claims.¹¹⁷ The Court concluded that local government bodies may be sued “directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body’s officers.”¹¹⁸

In terms of establishing a student bringing a § 1983 claim against a school district, a child suffering from obesity and other health conditions as a result of childhood obesity may bring the claim on the basis of a deprivation of a liberty interest in good health. Under the theory that a deprivation of liberty has occurred, the first element of a § 1983 action will be met.¹¹⁹ The best-suited defendant for this claim would be a school district, since school districts themselves make the decision on what commodity foods they will receive from the USDA, if the raw commodities will be processed further to create easy-to-serve foods, and also decide the overall menu of what will be served to the students for

¹¹⁴ See *Daniels v. Williams*, 474 U.S. 327, 327 (1986).

¹¹⁵ See *Mayrides v. Del. Cnty. Com’rs*, 666 F.Supp.2d 861, 866 (S.D. Ohio 2009); *Medina Perez v. Fajardo*, 257 F.Supp.2d 467, 473 (D. P.R. 2003).

¹¹⁶ See generally *Monell*, 436 U.S. at 658; See also *DeShaney v. Winnebago Cnty. Dept. of Soc. Serv.*, 489 U.S. 189 (1989).

¹¹⁷ See generally *Monell*, 436 U.S. at 690.

¹¹⁸ See *id.*

¹¹⁹ See *Was v. Young*, 796 F.Supp. 1041, 1045 (E.D. Mich. 1992) (“[T]he most frequent situation in which a constitutional deprivation occurs is when a state official himself takes affirmative action to violate the protected right.”).

lunch.¹²⁰ For example, in California, school districts are “solely responsible for determining which foods they will receive.”¹²¹

Under the second element required for the action to proceed, the school district must be “acting under color of state law.”¹²² Because “school systems are a local governmental unit, they are ‘persons’ under § 1983 and can be held liable under the statute.”¹²³ Federal regulation specifically states that “[w]ithin the States, the responsibility for the administration of the [National School Lunch] Program in schools . . . shall be in the State educational agency.”¹²⁴ By participating in the NSLP and serving lunches during the school hours, there would be no contest that serving lunches to students would not be acting in the school’s official capacity and under the color of state law.¹²⁵ “The more than 14,000 school districts in the country have primary jurisdiction for setting local school policies.”¹²⁶ If the school districts perform the action of ordering the commodity foods, decide how and where food will be processed, and also plan and serve all meals within the district, then the policies of the district would certainly be the moving force behind the due process violation.¹²⁷ Prima facie, it would appear that a § 1983 action against a school district would meet the basic elements needed to proceed.¹²⁸

While the Supreme Court has reasoned that the government does not have an affirmative duty to protect the life, liberty, and property, against the actions of third parties, “[t]here are two established exceptions to this rule: (1) the custody exception and (2) the state-created danger exception.”¹²⁹

B. Custody Exception

Perhaps the most significant case regarding §1983 claims decided by the Supreme Court in recent years is *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), where the Court held that the Due Process Clause applies to state actions only, and the government

¹²⁰ See generally PARKER, *supra* note 54, at 45.

¹²¹ HECHT ET AL., *supra* note 70, at 12.

¹²² *Mayrides v. Del. Cnty. Com’rs*, 666 F.Supp.2d 861, 866 (S.D. Ohio 2009).

¹²³ William W. Watkinson, Jr., Note, *Shades of DeShaney: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 Case W. Res. L. Rev. 1237, 1245 (Summer 1995).

¹²⁴ 7 C.F.R. § 210.3(b) (2011).

¹²⁵ See generally 7 C.F.R. § 210.3(b).

¹²⁶ LEVI II, *supra* note 8, at 41.

¹²⁷ See PARKER, *supra* note 54, at 25.

¹²⁸ See generally *Medina Perez v. Fajardo*, 257 F.Supp.2d 467, 473 (D. P.R. 2003).

¹²⁹ *Mayrides v. Del. Cnty. Com’rs*, 666 F.Supp.2d 861, 867 (S.D. Ohio 2009).

actor is under no duty to protect its citizens against the actions of third parties if the plaintiff is not in state custody.¹³⁰ The Court determined that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”¹³¹ The meaning behind the Due Process Clause was to ensure that the government did not deprive any individual of his or her rights without due process of the law, but was not meant to extend to the government having an affirmative duty to protect against actions or harm brought on by third parties.¹³²

The Court discussed the possibility that if a “special relationship” existed, then an affirmative duty to protect against danger may exist, thus establishing a violation of the Due Process Clause.¹³³ In order for a special relationship to exist, which invokes an affirmative duty to protect, the government must exercise its power to restrain an individual’s liberty in such a way that it “renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety. . . .”¹³⁴ Only then will the government’s actions or inactions transgress “the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”¹³⁵

In response to sexual abuses in public schools, many cases have looked to the *DeShaney* decision to determine whether a “special relationship” exists between schools and students that would give rise “to an affirmative constitutional duty to protect students.”¹³⁶ The petitioners in *DeShaney* argued that because the Department of Social Services (“DSS”) knew that the petitioner was in danger, and because DSS stated its intention to protect the young petitioner from danger, a special relationship existed.¹³⁷ The Court however, reasoned that:

In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the “deprivation of liberty” triggering the protections of the Due

¹³⁰ See generally *DeShaney v. Winnebago Cnty. Dept. of Soc. Serv.*, 489 U.S. 189, 201-202 (1989).

¹³¹ *Id.* at 195.

¹³² See *id.* at 196.

¹³³ See *id.* at 197.

¹³⁴ *Id.* at 200.

¹³⁵ *Id.* at 200.

¹³⁶ Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools after DeShaney: The “Special Relationship” between School and Student*, 41 UCLA L.Rev. 1101, 1122 (1994).

¹³⁷ See *DeShaney v. Winnebago Cnty. Dept. of Soc. Serv.*, 489 U.S. 189, 197 (189).

Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.¹³⁸

Since the Court's decision in *DeShaney*, many lower courts have refused to accept that a "special relationship" exists between schools and their students and thus refused "to impose liability on schools," choosing a very narrow reading of *DeShaney*.¹³⁹ For example, *Doe v. Sabine Parish School Bd.*, 24 F.Supp.2d 655 (W.D. La.1998) was an action seeking relief under § 1983 "stemming from alleged sexual abuse, harassment and battery by the Doe child's classmates and a lack of proper response by the school officials."¹⁴⁰ In their decision, the District Court decided to follow the Fifth Circuit's application of *DeShaney*, deciding that "the type of 'special relationship' that entitles a citizen to enjoy a clearly established constitutional right to state protection from known threats of harm by private actors does not apply to the student/public-school relationship"¹⁴¹ The plaintiff in the case argued that a claim against a school official is permissible if the official's "deliberate indifference causes the abuse of a student, even if the abuser is not a state actor."¹⁴² Through the inaction of school officials, the sexual abuse of the plaintiff by his classmates was allowed to continue; thus through the defendant's deliberate indifference to the situation, the plaintiff's right to bodily integrity was violated.¹⁴³ This "deliberate indifference" argument was not accepted by the Court, on the belief that "[s]ubjecting school officials to liability for deliberate indifference to the acts of its employees, whether committed on or off duty, is at least one step away from subjecting officials to liability for failure to supervise purely private persons who harm a student."¹⁴⁴

Under this argument, if a "defendant demonstrated *deliberate indifference* toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and [s]uch failure caused a constitutional injury to the student," then the defendant shall be liable.¹⁴⁵ The "deliberate indifference" theory can be employed to establish that a special relationship exists between schools and their students, thus creating an affirmative duty to protect.¹⁴⁶ If one considers

¹³⁸ *Id.* at 200.

¹³⁹ Kim, *supra* note 136, at 1126.

¹⁴⁰ *Doe v. Sabine Parish School Bd.*, 24 F.Supp.2d 655, 657 (W.D. La. 1998).

¹⁴¹ *Id.* at 661.

¹⁴² *Id.* at 661-662.

¹⁴³ *See id.* at 659.

¹⁴⁴ *Id.* at 664.

¹⁴⁵ *Id.* at 662 (alternation in original).

¹⁴⁶ *See generally* Kim, *supra* note 136.

the food processing plants that school districts send their raw commodity foods to (in order to convert commodity materials into over-processed meals high in fats, sodium and sugar) as the third party, then the deliberate indifference argument may have merit.¹⁴⁷ Sending raw commodity foods to processors and then serving meals to students that do not meet nutritional standards does not correspond with a genuine effort to care or protect the students in their custody.¹⁴⁸ With the rising rate of childhood obesity, and the known effects of an unhealthy diet, it is irresponsible and hazardous to consistently serve meals to students that are so unhealthy.¹⁴⁹ The decision to change is in the hands of the schools, but a refusal to make effective change to the food that is given out in the lunch line is a *deliberate indifference* to the health of students.¹⁵⁰

Actions involving school personnel sexually abusing a student have also failed to establish that a custody exception exists.¹⁵¹ In *Medina Perez v. Fajardo*, 257 F.Supp.2d 467 (D. P.R. 2003), a fourteen-year old eighth grader was sexually assaulted by teacher from her school, both on and off campus.¹⁵² The plaintiff tried to establish a custody exception on the basis of compulsory school attendance, but the Court found the argument “insufficient to impose on public school officials an affirmative duty to protect students from harm by third parties.”¹⁵³ Articles examining liability of schools after *DeShaney* have argued that “truancy laws exert control over the students by forcing them to be in school at the specified time,” and therefore mandatory school attendance is adequate to establish a special relationship between school and student.¹⁵⁴ A broader interpretation of *DeShaney* would allow “for affirmative duties under relationships less restrictive than incarceration or institutionalization,” since while students are in school a student’s ability “to act on his or her own behalf” is restrained.¹⁵⁵ During school hours, a student is “effectively cut off from those outside sources of help and protection . . . [and] parents have little choice but to rely on the school and its staff members for protection of their children during school hours.”¹⁵⁶

¹⁴⁷ See generally Lehmann, *supra* note 78.

¹⁴⁸ See generally Alimurung, *supra* note 26.

¹⁴⁹ *Id.*

¹⁵⁰ See LEVI II, *supra* note 8, at 41.

¹⁵¹ See generally *Medina Perez v. Fajardo*, 257 F.Supp.2d 467, 467 (D. P.R. 2003); *Doe v. Sabine Parish School Bd.*, 24 F.Supp.2d 655, 656 (W.D. La. 1998).

¹⁵² See *Medina Perez*, 257 F.Supp.2d at 470.

¹⁵³ *Id.* at 475.

¹⁵⁴ Watkinson, *supra* note 123, at 1261.

¹⁵⁵ *Id.* at 1261-1262.

¹⁵⁶ Kim, *supra* note 136, at 1130-1131.

Courts have been reluctant to extend the custody exception in cases against schools and their officials for acts done by third parties, or for indifference in the supervision of school officials. But, with the school districts themselves in control of the commodities ordered and served, and possessing exclusive control of the nutritional content and overall health of the meals that they serve to their students, ultimately there is no third party or other state actor culpable.¹⁵⁷ Because the actual harmful act, serving unhealthy meals to students, is not performed by any third party but by the school itself, the school district is in the end the party liable for a due process violation.

C. State-Created Danger Doctrine

The second exception that may establish that the government has an affirmative duty to protect an individual from a deprivation of life, liberty, or property by a third party is the “state-created danger doctrine.”¹⁵⁸ Under this doctrine, the government will be liable if its actions puts an individual at a greater risk of harm from a private person or third party, and then fails to shield the individual from said harm.¹⁵⁹ When the government or its actor takes affirmative actions that create or heighten a danger, they are as much a tortfeasor as the third party that actually causes injury to an individual.¹⁶⁰

A plaintiff could establish that an exception existed under the “state-created danger doctrine” if the claim satisfied a four-element test.¹⁶¹ Some courts have conceded “liability may attach where the state acts to *create* or *enhance* a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process.”¹⁶² Based on the Court’s analysis in *DeShaney*, the Third Circuit held that the following four elements be met for a § 1983 claim under the state-created danger exception to proceed:

- (1) the harm ultimately caused was foreseeable and fairly direct
- (2) a state actor acted with a degree of culpability that shocks the conscience

¹⁵⁷ See PARKER, *supra* note 54, at 25.

¹⁵⁸ See *Mayrides v. Del. Cnty. Com’rs*, 666 F.Supp.2d 861, 867 (S.D. Ohio 2009).

¹⁵⁹ See *Watkinson*, *supra* note 123, at 1279.

¹⁶⁰ See *generally id.* at 1279-1281.

¹⁶¹ See *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006) (explaining that if a state actor did not affirmatively use their authority to create a harm that would have not otherwise have existed, the state actor cannot be liable under the state-created danger doctrine).

¹⁶² *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006) (emphasis in original).

(3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and

(4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.¹⁶³

Under this theory, a school district may be liable based on its affirmative act of sending otherwise nutritious raw commodity foods to food processing plants to be transformed into fast-food fare like chicken nuggets and frozen pizzas.¹⁶⁴ The processing plants act as a third party, where additives, artificial sweeteners, and various preservatives are added to wholesome food.¹⁶⁵ And because the decision to send products for processing is made solely at the state or local level, the school districts that send their raw commodity foods to processors are creating a greater danger to students, thus making the meals that they serve for school lunch a state-created danger.¹⁶⁶

Under the first prong of the test needed to prove liability under the state-created doctrine, a plaintiff could easily prove that harmful obesity and diet-related health issues are a foreseeable result of eating processed food that exceeds standards for total fat, saturated fat, and sodium.¹⁶⁷ In California alone, studies found that during a five-year period from 1998 to 2003, more than half of school lunch menus exceeded the federal guidelines for fat or saturated fat.¹⁶⁸ As stated previously, because school districts are responsible for what commodity foods they receive and planning the meals that they will serve in their schools, any harm that results from said meals can be directly traced to the school districts themselves, thus proving the first element required under the state-created danger.¹⁶⁹

The second element, that the state actor behavior or actions rise to the level of shocking the conscience, is perhaps the most difficult to assess.¹⁷⁰ The need to show that the defendant acted "in a willful disregard for the safety of the plaintiff," and that his or her conduct would be "shocking"

¹⁶³ *Bright*, 443 F.3d at 281; *Sanford*, 456 F.3d at 304-305 (internal quotations omitted).

¹⁶⁴ See *Lehmann*, *supra* note 78 (discussing how sending government commodity foods to processing companies convert commodity items into unhealthy foods).

¹⁶⁵ *COOPER & HOLMES*, *supra* note 3 at 6.

¹⁶⁶ See *PARKER*, *supra* note 54, at 45.

¹⁶⁷ See *HECHT ET AL.*, *supra* note 70, at 6.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 12.

¹⁷⁰ See *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006).

can be proven by three possible elements: “1) deliberate indifference; 2) gross negligence or arbitrariness that indeed shocks the conscience; and 3) intent to cause harm.”¹⁷¹ Like the argument stated in the custody exception discussion, in which a school district’s liability can be established based on their “deliberate indifference,” that standard of the “culpability” element of the state-created danger can be met.

Whether action of the state actor “shocks the conscience,” is widely open to interpretation. In *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) the United States Supreme Court stated that “[w]hether the point of conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but ‘less than intentional contact, such as recklessness or gross negligence,’ is a matter for closer calls.”¹⁷² In terms of a § 1983 action against school districts, the culpable nature of a districts’ deliberate negative policy response to meeting nutritional guidelines by changing the level of processed foods served during lunch is arguably sufficient to consider their behavior “conscience-shocking.”¹⁷³

Jennie Cook, co-founder of nonprofit group Food for Lunch, stated that when she brought up the idea of serving plain yogurt to LAUSD administrators, “[t]hey looked at us like we wanted to serve cow eyeballs to the kids.”¹⁷⁴ Emily Ventura, social action chairwoman of Slow Food L.A., a nonprofit organization, says that LAUSD could have made something like plain yogurt a part of the student’s lunches if it was served with complimentary foods such as granola or fresh fruit; but instead the District was “trying to put it with things that just won’t work, like a hard-boiled egg. If you come into it with negative energy, like, ‘Here’s this gross plain yogurt,’ they’re not gonna like it.”¹⁷⁵ Or, consider districts who continue to order perfectly healthy raw commodities like potatoes, and then send them to processing plants to turn them into french fries, serving them so often that “[f]rench fries account for 46 percent of vegetable servings eaten by children between ages two and nine.”¹⁷⁶ Also disturbing is the general lack of portion-control, with one anonymous school worker admitting that “[e]very school I have worked in, without fail, has given the exact same portion size to each child regardless of age, dietary needs or interest . . . a kindergarten student receives the same

¹⁷¹ *Sanford v. Stiles*, 456 F.3d 298, 306 (3d Cir. 2006) (internal quotations omitted).

¹⁷² *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

¹⁷³ *See Was v. Young*, 796 F.Supp. 1041, 1045 (E.D. Mich. 1992).

¹⁷⁴ Alimurung, *supra* note 26.

¹⁷⁵ *Id.*

¹⁷⁶ COOPER & HOLMES, *supra* note 3, at 74.

portion size as a fifth grader.”¹⁷⁷ A refusal to make positive changes, like the few examples stated above, are nothing if not a symbol of many school districts’ intentional disregard for what they serve to their students. When there is no reason other than laziness or indifference to correct a harm that students are being exposed, that is the essence of “shocking.”

Concerning intent to harm, “in cases where deliberation is possible and officials have the time to make ‘unhurried judgments,’ deliberate indifference is sufficient” to satisfy an intent to cause harm.¹⁷⁸ Because school districts order their commodity supplies well before the school year begins, districts have ample time to plan out meals that are nutritious and meet nutritional guidelines, yet they choose to serve unhealthy, processed meals.¹⁷⁹

The third element of the state-created danger claim, that a relationship existed between the government and the plaintiff which makes the plaintiff a foreseeable victim, can be satisfied by the fact that students are the obvious consumers of the unhealthy meals that the schools is providing. If students are eating lunches provided by the school on a regular basis, then it is foreseeable that they will be harmed by the unhealthy food containing obesity triggers such as sugar and sodium, and which exceed suggested amounts of trans and saturated fats.¹⁸⁰

The fourth element of the state created danger theory can be satisfied by the plaintiff proving that because the school district has primary jurisdiction regarding the food that is ordered, processed, and later served to each student, the district is affirmatively using their authority “in a way that created a danger.”¹⁸¹ Only the school and the district are responsible for selecting the end product that ends up on the trays of its students – it is not the student who created the danger, and it is not another classmate – the fault lies in the schools who serve the food and the districts who order it. Because the bodily harm resulting from unhealthy meals can be directly traced to a state actor’s affirmative decision, schools should be liable for obesity, diabetes, hypertension, and the myriad of other health issues.¹⁸²

¹⁷⁷ Anonymous, *Reader email: Portion sizes*, FED UP WITH SCHOOL LUNCH, (July 19, 2011), <http://fedupwithlunch.com/2011/07/reader-email-portions/>.

¹⁷⁸ *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006).

¹⁷⁹ See PARKER, *supra* note 54, at 45.

¹⁸⁰ See Rabin, *supra* note 20; see also Alimurung, *supra* note 26.

¹⁸¹ See LEVI II., *supra* note 8, at 41; see also *Sanford*, 456 F.3d at 305.

¹⁸² *Daniels v. Williams*, 474 U.S. 327, 341 (1986).

D. Will Lunches Alone Be Enough To Establish a Claim?

Skepticism may exist regarding whether or not causation exists for a § 1983 claim due to the fact that school lunches only account for approximately twenty-five percent of a child's weekly meals.¹⁸³ However, studies have found that students who regularly eat school lunch are almost one-third more likely to be obese, establishing that consuming just one unhealthy meal daily can negatively affect a child's health.¹⁸⁴ Furthermore, when schools are serving meals in their cafeterias that contain more than a whole day's worth of recommended sodium or sugar content, the school lunch is in essence setting up the child for failure; anything else they eat throughout the day will only add to the overload.¹⁸⁵ A casual connection can thus be traced from the school district's actions to a student's injuries.¹⁸⁶

For instance, a California law passed in 2010 prohibited child-care workers from serving any chocolate or strawberry-flavored milk.¹⁸⁷ Yet school districts in the state still offer cartons of chocolate milk at lunch. Just one eight-ounce carton contains "twenty-eight grams of sugar, more than half of which is added for flavor or has no nutritional value."¹⁸⁸ This is alarming if one considers that "[t]he American Heart Association recommends children consume no more than twelve grams of sugar a day."¹⁸⁹ For students who qualify for free or reduced-price lunches, "[it] might be the only nutritious meal they eat all day," making the healthiness of school lunches all the more important to a child's overall well-being.¹⁹⁰

VI. BENEFITS OF IMPROVING SCHOOL MENUS AND MONITORING NEW REGULATIONS

It is evident through the Healthy, Hunger-Free Kids Act that the NSLP on the federal level is making an affirmative effort to transform the status-quo school lunch to a meal that is not just performing the mini-

¹⁸³ See generally Julie Gunlock, *Three Squares a Day, Courtesy of the Federal Government*, NATIONAL REVIEW ONLINE, January 17, 2011, <http://www.nationalreview.com/corner/257317/three-squares-day-courtesy-federal-government-julie-gunlock> (based on three meals a day, seven days a week).

¹⁸⁴ See Rabin, *supra* note 20.

¹⁸⁵ See Alimurung, *supra* note 26.

¹⁸⁶ See *Mayrides v. Del. Cnty. Com'rs*, 666 F.Supp.2d 861, 866 (S.D. Ohio 2009).

¹⁸⁷ See Gibbons, *supra* note 109.

¹⁸⁸ *Id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

num task of feeding our school children, but actually providing them with healthy, nutritious meals that will help them become healthy, non-obese adults.¹⁹¹ The USDA's decisions to change the nutritional guidelines of the NLSP to correspond with recommendations made by the Institute of Medicine, along with establishing "calorie maximums (as well as minimums) for the first time" ever are great strides forward.¹⁹² However, there are some areas that could be strengthened, such as heightening guidelines and regulations for commodity processing, requiring that all end products that come from processors adhere to nutritional guidelines.¹⁹³ Improvements can also be made by funding kitchen upgrades for schools, or where no functioning kitchen even exists, building those kitchens.¹⁹⁴ The most critical issue now on the federal level will be how the USDA implements its new rules and regulations for meal guidelines, along with making sure that audits on school meals actually happen and that there will be penalties enforced against school districts that fail to meet the new nutritional standards.¹⁹⁵

It is probably no coincidence that these positive changes are being made now. Recently, some events have made a positive impact on the fight against unhealthy school lunches and childhood obesity.¹⁹⁶ In early 2010, First Lady Michelle Obama launched *Let's Move!*, a comprehensive initiative "dedicated to solving the problem of obesity within a generation so that kids born today will grow up healthier and able to pursue their dreams."¹⁹⁷ The campaign has set a goal to "reduce the childhood obesity rate to just five percent by 2030 – the same rate before childhood obesity first began to rise in the late 1970's."¹⁹⁸ Through the *Let's Move!* Campaign, Michelle Obama has helped bring the problem of childhood obesity to the national forefront.¹⁹⁹

¹⁹¹ See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY: ONE YEAR PROGRESS REPORT, *supra* note 53.

¹⁹² See *id.*; see also Black, *supra* note 54.

¹⁹³ See HECHT ET AL., *supra* note 70, at 33.

¹⁹⁴ See Waters & Heron, *supra* note 4; See also Kirk Johnson, *Schools Restore Fresh Cooking to the Cafeteria*, N.Y. TIMES (Aug. 16, 2011), available at <http://www.nytimes.com/2011/08/17/education/17lunch.html>.

¹⁹⁵ See generally Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 303-305, 124 Stat. 3183, 3240-3243.

¹⁹⁶ Black, *supra* note 54.

¹⁹⁷ *White House Task Force on Childhood Obesity Report to the President*, *supra* note 66.

¹⁹⁸ *Id.*

¹⁹⁹ WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY: ONE YEAR PROGRESS REPORT, *supra* note 53.

Another personality bringing attention to the obesity epidemic is British celebrity chef Jamie Oliver.²⁰⁰ Oliver, who became known in the United States through his cooking and television specials on the Food Network, is currently invading American homes on his series, *Jamie Oliver's Food Revolution*.²⁰¹ The television series is also accompanied by a popular website of the same name, which offers an online community to parents and school officials who wish to make a difference in what and how kids eat.²⁰² Explaining why a "food revolution" is necessary, Oliver asserts:

We're losing the war against obesity in the U.S. It's sad, but true. Our kids are growing up overweight and malnourished from a diet of processed foods, and today's children will be the first generation ever to live shorter lives than their parents. It's time for change. It's time for a Food Revolution.²⁰³

By visiting school districts in places such as West Virginia and Los Angeles, California to teach school staff how to prepare healthy meals from scratch, Oliver is trying to inspire "moms, dads, kids, teens and cafeteria workers to get back to basics and start cooking good food from scratch."²⁰⁴

With the attention that *Jamie Oliver's Food Revolution* and Michelle Obama's *Let's Move!* campaign have given to the childhood obesity issue, it is increasingly difficult to ignore this staggering problem affecting our nation's children. Thanks to the USDA and the *Let's Move! Salad Bars to Schools* initiative, work began in February 2010 "to provide at least 6,000 salad bars to schools" within three years.²⁰⁵ And as a result of Oliver's recent campaign against flavored-milk in schools, the school board of LAUSD voted to eliminate chocolate and strawberry milk from its schools.²⁰⁶ LAUSD, "the nation's second-largest school district" with approximately 668,000 students, will now serve only plain milk.²⁰⁷

²⁰⁰ Alex Witchel, *Putting America's Diet on a Diet*, N.Y. TIMES (Oct. 6, 2009), available at <http://www.nytimes.com/2009/10/11/magazine/11Oliver-t.html?pagewanted=all>.

²⁰¹ *Id.*

²⁰² See generally *Why We Need A Food Revolution*, JAMIE OLIVER'S FOOD REVOLUTION, <http://www.jamieoliver.com/us/foundation/jamies-food-revolution/why> (last visited Aug. 11, 2011).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ News Release, USDA, USDA Official Joins Congresswoman DeLauro, New England Patriots' Ron Brace and New Haven Students to Unveil New Salad Bars (February 3, 2010), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contented=2011/02/0047.xml>.

²⁰⁶ See Christina Hoag, *L.A. School District Bans Chocolate Milk*, ABC NEWS (last visited August 11, 2011), <http://abcnews.go.com/print?id=13841905>.

²⁰⁷ *Id.*

This is a major feat for Oliver and his *Food Revolution*, who actively campaigned on the most recent season of his television show for LAUSD to ban flavored milk in their schools.²⁰⁸ The elimination of flavored milk is no small accomplishment; the sugar content in an eight-ounce serving of chocolate or strawberry flavored milk is equivalent to the amount of sugar in an eight-ounce soda.²⁰⁹ Unfortunately, only time will truly tell if efforts made by programs like *Jamie Oliver's Food Revolution* and the *Let's Move!* campaign have made enough impact on decision-makers within the NSLP, USDA, and school districts for them to sincerely commit to changing the school lunches.²¹⁰ Meals are shifting from a selection of cheese pizza, canned pineapple, tater tots with ketchup, and low-fat chocolate milk to a more wholesome choice of whole-wheat cheese pizza, applesauce, baked sweet potato fries, and low-fat plain milk.²¹¹

Although there is always room for more improvement, there is only so much that the federal government and its agencies can do.²¹² At some point the responsibility lies on the shoulders of the school districts themselves to take the affirmative steps needed to transform the meals they serve into healthy, nutritious lunches that will be a benefit, rather than a detriment, to the health of school children.²¹³ According to the *Let's Move!* campaign's Healthier US School Challenge ("HUSSC"), "[f]ood service workers in more than 75% of America's schools – along with principals, superintendents, and school board members across America – have committed to work together" to reach the goals of the HUSSC, which include "rigorous standards for schools' food quality."²¹⁴ These schools are showing that they are willing to actively participate in changes that will improve the health of their students, but there are still schools that repudiate the change.²¹⁵ For those schools that refuse to

²⁰⁸ *Id.*

²⁰⁹ See *Hard Facts About Flavored Milk*, JAMIE OLIVER'S FOOD REVOLUTION, http://www.jamieoliver.com/jfr-beta/toolkit/tool_kit-milk.pdf (last visited Aug. 11, 2011).

²¹⁰ See Hoag, *supra* note 206; News Release, *supra* note 205.

²¹¹ See *Before/After Elementary School Lunch Menu*, THE WHITE HOUSE (2010) http://www.whitehouse.gov/sites/default/files/cnr_chart.pdf.

²¹² See PARKER, *supra* note 54, at 45 (explaining because state agencies and school districts choose commodity foods and create the lunch menus, the federal government's reach only goes so far in effectuating change).

²¹³ See *id.*

²¹⁴ *Healthy Schools*, <http://www.letsmove.gov/healthy-schools> (last visited July 26, 2011).

²¹⁵ See Gibbons, *supra* note 109 (The Fresno Unified School District, for example, is refusing to remove chocolate milk from their cafeterias. Although making efforts in

make adequate changes to their school lunch menu and continue to serve students over-processed meals that are saturated in calories, sodium, and sugar, filing § 1983 claims against those school districts is the next logical step in the fight against childhood obesity.

VII. CONCLUSION

It is imperative that *every* school district make an affirmative effort to rid their schools of meals that are over-ridden with fat, sodium, sugar, and other elements that are dangerous to children's health and waistlines. With national attention being brought to the plague known as childhood obesity, change must be made at *all* levels – federal, state, and local – to ensure that our children are being offered meals that are filling, affordable, and also healthy.²¹⁶ It is not enough to just focus on meeting guidelines for calories, everything in the meal must be looked at, and there must be accountability for those culpable school districts that refuse to meet stricter nutritional standards. With research showing that lifestyle, not genetics, is a primary cause of childhood obesity, in addition to school lunches having been identified as a risk factor for childhood obesity, the school districts now have no one to blame but themselves for the damaging food that they put on the meal trays of students day after day.²¹⁷ Children who eat school lunches do not have a choice of what commodity foods are shipped off to processing plants to be turned into sodium and sugar-laced meals; that critical decision falls on school districts and any other state government agent that decides what will be served on the school lunch menu.²¹⁸

Although the efforts of the federal government and campaigns such as *Jamie Oliver's Food Revolution* and *Let's Move!* are helping to set in motion a forceful fight against the childhood obesity epidemic, there is still a long way to go before the approximately thirty-three percent of American children currently overweight becomes a thing of the past. The federal government has begun to make positive changes to the NSLP, but a real "food revolution" cannot succeed until each school district makes the necessary changes to ensure the lunches they serve every

changes in food, the District is still keeping things that are filled with sugar, such as the chocolate milk, on the lunch menu.)

²¹⁶ See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, *supra* note 5, at 1.

²¹⁷ See *Childhood Obesity Linked to Health Habits, Not Heredity: U-M Study*, *supra* note 22; see also Rabin, *supra* note 20.

²¹⁸ See Alimurung, *supra* note 26.

day are nutritious and healthy.²¹⁹ For those districts who rebuff the positive changes and challenges presented by the Healthy, Hunger-Free Kids Act, the Due Process Clause and 42 U.S.C. § 1983 present an individual with a viable remedy for relief. Everyone has a right to be free from bodily harm, and a child should not be forced to eat an unhealthy lunch everyday just because that is all the school offers.²²⁰ As Gabe Slon, the sixth grader from New Jersey, said best about school lunches: “They are unappetizing, unhealthy, and need to change.”²²¹

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²¹⁹ See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, *supra* note 5, at 37.

²²⁰ See *Daniels v. Williams*, 474 U.S. 327, 341 (1986).

²²¹ Slon, *supra* note 1.