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NORCOTT, J., with whom PALMER and ZARELLA, Js, join, dissenting. I believe that the majority opinion in this case misreads and misapplies the line of governmental immunity decisions by this court starting with *Burns* v. *Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994), and culminating with our most recent opinion in *Prescott* v. *Meriden*, 273 Conn. 759, 873 A.2d 175 (2005). In my view, the "evolving expectations of a maturing society"; *Burns* v. *Board of Education*, supra, 647; require us to conclude that young children attending day care programs held at public schools pursuant to General Statutes § 17b-737,[1] and by association, their parents or parent-designees picking them up from such programs, are an identifiable class of persons subject to imminent harm. This deprives the defendants[2] of their governmental immunity under General Statutes § 52-557n for the performance of their discretionary functions in maintaining the school.[3] Thus, the Appellate Court properly concluded, in a thoughtful and well reasoned majority opinion, that the plaintiff, Sharon Durrant, who was injured in a fall on a back staircase while picking up her son and nephew from an after school day care program held at West Middle School in Hartford, was a member of an identifiable class of persons subject to imminent harm. See generally *Durrant* v. *Board of Education*, 96 Conn. App. 456, 457–58, 900 A.2d 608 (2006). Accordingly, I respectfully dissent from the majority's decision reversing the judgment of the Appellate Court.

At the outset, I note my complete agreement with the majority's focus on the plaintiff's six year old son, rather than on the plaintiff alone, in its determination of whether she was a member of an identifiable class of persons subject to imminent harm. The plaintiff's legal fate necessarily is linked to her son because, as common sense dictates, any six year old child should have adult supervision during his or her travel home from school.[4]

Thus, my disagreement begins with the majority's rejection of the "underlying premise of the Appellate Court's reasoning that the plaintiff's child was an identifiable member of a foreseeable class of persons . . . ."[5] The majority, citing *Prescott* v. *Meriden*, supra, 273 Conn. 764, notes correctly that "[t]he only identifiable class of foreseeable victims that we have recognized for these purposes is that of school children attending public schools during school hours." The majority, however, declines to extend this class further because, unlike during the regular school day, "the plaintiff was not compelled statutorily to relinquish protective custody of her child" or "enroll [him] in the after school program" or to "allow her child to remain after school

on that particular day. . . . The plaintiff's actions were entirely voluntary, and none of her voluntary choices imposes an additional duty of care on school authorities pursuant to the *Burns* standards." (Citations omitted.) In my view, the majority's conclusion, which is based on an inappropriately narrow reading of the governing case law, inequitably penalizes Connecticut citizens who have no real choice but to avail themselves of the day care programs offered by our state's public schools pursuant to § 17b-737.

My analysis begins with the *Burns* standards also relied upon by the majority. In that case, this court concluded that a fourteen year old student, injured at a public school during the school day, was a member of a foreseeable class of victims owed a special duty of care by the superintendent of schools, thus abrogating the defendants' governmental immunity. *Burns* v. *Board of Education*, supra, 228 Conn. 650. We noted that "[t]he ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . Foreseeability in this context is a flexible concept, and may be supported by reasonable reliance, impeding others who might seek to render aid, statutory duties, property ownership or other factors. . . . *Moreover, just as the doctrine of governmental immunity and its exceptions are the product of the policy considerations that aid the law in determining whether the interests of a particular type are entitled to protection . . . so may evolving expectations of a maturing society change the harm that may reasonably be considered foreseeable. . . .*

"In delineating the scope of a foreseeable class of victims exception to governmental immunity, our courts have considered numerous criteria, including the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care, and the identifiability of the particular victim. . . . Other courts, in carving out similar exceptions to their respective doctrines of governmental immunity, have also considered whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts . . . whether the relationship was of a voluntary nature . . . the seriousness of the injury threatened . . . the duration of the threat of injury . . . and whether the persons at risk had the opportunity to protect themselves from harm." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 647–48.

In *Burns*, this court applied these factors and "note[d] that statutory and constitutional mandates demonstrate that school children attending public schools during school hours are intended to be the beneficiaries of certain duties of care. Statutes describe the responsibilities of school boards and superintendents to maintain and care for property used for school

purposes. The supervisory responsibilities of the superintendent of schools are not automatically abrogated by the designation of a head custodian to undertake immediate responsibility for the salting and sanding of the school campus on any particular day.

"Statutes also describe the responsibilities of school children to attend school. The presence of the plaintiff child on the school premises where he was injured was not voluntary. As a fourteen year old at the time of the accident, he was statutorily compelled to attend school and to obey school rules and discipline formulated and enforced pursuant to statute. His corresponding entitlement to a public education has constitutional underpinnings in this state.

"The result of this network of statutory and constitutional provisions is that the superintendent of schools bears the responsibility for failing to act to prevent the risk of imminent harm to school children as an identifiable class of beneficiaries of his statutory duty of care. *At least* during school hours on school days, when parents are statutorily compelled to relinquish protective custody of their children to a school board and its employees, the superintendent has the duty to protect the pupils in the board's custody from dangers that may reasonably be anticipated. . . . As a matter of policy, *this conclusion comports with our case law that has traditionally recognized that children require special consideration when dangerous conditions are involved*." (Citation omitted; emphasis added.) Id., 648–50; see also *Purzycki* v. *Fairfield*, 244 Conn. 101, 110, 708 A.2d 937 (1998) (eight year old child injured in hallway while traveling from lunchroom to playground was foreseeable victim).

The Appellate Court majority correctly observes that "*Burns* does not limit its holding to apply only to children attending public school during the regular school day. Although *Burns* decided that such children were a class of foreseeable victims to whom the defendant owed a duty, it did not state that such children were the only class of victims to which the defendant could owe a duty." *Durrant* v. *Board of Education*, supra, 96 Conn. App. 469 n.9. Indeed, *Burns* uses the inclusive phrase "[a]t least" in describing its applicability to children at school during regular school hours. *Burns* v. *Board of Education*, supra, 228 Conn. 649. Thus, I agree with the Appellate Court majority that there is no principled reason why that class of foreseeable victims cannot be expanded beyond the "regular school day" to children who have stayed at school to attend a day care program held there.[6] *Durrant* v. *Board of Education*, supra, 469 n.9.

On the basis of the tender age of the plaintiff's son, the majority and I already have concluded that the plaintiff's legal fate is dependent on whether he was required to be at the school at the time in question. The majority,

however, has failed to consider adequately all of the *Burns* factors in concluding that the legal status of the plaintiff's son changed with respect to the defendants' governmental immunity when the school bell sounded at the end of the day and he transitioned to the day care and homework program. A careful reading of *Burns* reveals that the compulsion factor relied on so heavily by the majority is only one of multiple disjunctive guideposts to consider along with: (1) "the imminency of any potential harm"; (2) "the likelihood that harm will result from a failure to act with reasonable care"; (3) "the identifiability of the particular victim"; (4) "whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts"; (5) "the seriousness of the injury threatened"; (6) "the duration of the threat of injury"; and (7) "whether the persons at risk had the opportunity to protect themselves from harm."[7] *Burns* v. *Board of Education*, supra, 228 Conn. 647–48. When I review the *Burns* factors, the *only* factor that changes is whether the child's attendance was, in some way, legally compulsory, as school no longer was in regular session, which takes him out of the ambit of the mandatory education statutes, General Statutes §§ 10-184 and 10-220.[8] See also footnote 10 of this dissenting opinion. As a six year old child, he remained subject to the same considerations that we concluded required protection for the children at issue in *Burns* and *Purzycki*, including a "limited time period and limited geographical area," a "temporary condition," and a risk of harm that was "significant and foreseeable," given the presence of the children in the school. *Purzycki* v. *Fairfield*, supra, 244 Conn. 110. Once enrolled in the day care program, he also remained obligated to follow the rules set down by the defendants, a consideration that we noted in *Burns*. See *Burns* v. *Board of Education*, supra, 228 Conn. 649. Just as we have noted that "children require special consideration when dangerous conditions are involved"; id., 650; the New Jersey Supreme Court, in concluding that school officials' duty of care and supervision extends to dismissal time, recently stated that "[y]ounger children, in particular are unable to understand and appreciate the perils that may threaten their safe being. . . . Indeed, children have a known proclivity to act impulsively without thought of the possibilities of danger, and it is precisely that lack of mature judgment which makes supervision so vital."[9] *Jerkins* v. *Anderson*, 191 N.J. 285, 296–97, 922 A.2d 1279 (2007) (nine year old child struck by car when walking off school grounds without adult supervision after early dismissal). The ringing of the 3 o'clock bell at the end of the school day does not magically bestow a young child with maturity and sound judgment, and does not, therefore, deprive that child of the "special considerations" to which he is entitled under the law. *Burns* v. *Board of Education*, supra, 650.

The majority, in stating that "[t]here is a significant distinction . . . between a program in which participation is encouraged and one in which it is compelled,"[10] does not adequately consider the import of § 17b-737, which made the provision of before and after school day care a state endorsed and funded governmental function, at least in part. In enacting § 17b-737, which provides for state grants "to municipalities, boards of education and child care providers to encourage the use of school facilities for the provision of child day care services before and after school," the legislature recognized a shortage of quality day care for children, despite its economic and social significance.[11] While introducing the bill to the human services committee, Representative Frank Esposito, Jr., cited the increasing number of working and single mothers with young children, and stated that "the rise in the number of working mothers will and has had a tremendous effect on our children; our greatest resource. The desire for quality day care services for our children is becoming an ever increasing need as more and more mothers of school age children enter the work force." Conn. Joint Standing Committee Hearings, Human Services, 1986 Sess., p. 37; see also id., pp. 69–70, remarks of Elizabeth Shaw, Christian Community Action of New Haven (noting that quality day care is "critical service that many of our families find lacking in their efforts to find and keep jobs"). Representative Esposito further noted the problems of "availability, high tuition costs and transportation" with respect to day care, and the need for municipalities to provide school facilities, either run by themselves or with the assistance of private providers, to add to the supply of quality facilities. Id., p. 38.

Indeed, public supporters of § 17b-737 emphasized that it was particularly beneficial for children to hold these programs in the schools.[12] See id., p. 61, remarks of Nancy Sconyers, Connecticut Association for Human Services ("[S]trong[ly]" supporting school based programs because of "physical and psychological risks involved in children being left alone after school. Stories abound of children using libraries, the school yard, or a neighborhood store to while away the hours after school, or of lonely and fearful children being virtual prisoners in their homes, told not to go outside or to unlock the doors until their parents return."); see also id., p. 80, remarks of Martha Leonard, a physician representing the Connecticut Chapter of the American Academy of Pediatrics ("the idea of having grants to municipalities so that they can provide some kind of care for children within the schools, before and after the school hours is an important way of making care for these children more affordable and preventing some of the tragedies that happen when children are home alone, fires are set"). Section 17b-737, and the history behind its enactment, demonstrates our legislature's view, as a matter of public policy, of the importance

of quality day care for all of our state's citizens, and of the need for governmental involvement to provide those services adequately.

Moreover, as the Appellate Court majority aptly points out, the legislature apparently realized that providers of after school programs might face liability issues, presumably because of the risks attendant to caring for young children, because it conditioned "the receipt of grants under § 17b-737 on municipalities or boards of education obtaining liability insurance coverage. Liability insurance protects an insured from the payment of funds due in the event of an insured's negligence. . . . If the legislature believed that § 52-557n exempted those in the category of the defendants from liability arising out of programs established pursuant to § 17b-737, there would be no reason for the legislature to have provided for liability insurance in the latter statute." (Citation omitted; internal quotation marks omitted.) *Durrant* v. *Board of Education*, supra, 96 Conn. App. 471. In my view, the majority opinion takes a significant step toward rendering this legislative language surplusage because, if children attending day care programs, let alone their parents, are not in the class of persons subject to imminent harm, the need for day care providers to carry liability insurance is significantly reduced.

I agree with the Appellate Court majority that "there is a direct connection between the reason for the plaintiff's presence and the statutes of Connecticut that provide for the public purpose and establishment of after school programs," and that our state's statutes "condone and encourage the use of public school facilities for the very purpose that the plaintiff's child was in attendance at West Middle School on the day of the plaintiff's fall." Id., 470. Under my reading of this court's previous decisions in this field, I conclude that young children attending day care programs held at public schools pursuant to § 17b-737 and their parents or parent-designees picking them up from such programs, are an identifiable class of persons subject to imminent harm, and the defendants were not, therefore, entitled to governmental immunity for the discretionary function of maintaining the stairwell of the school. The judgment of the Appellate Court should, therefore, be affirmed. Accordingly, I respectfully dissent.

[1] General Statutes § 17b-737 provides: "The Commissioner of Social Services shall establish a program, within available appropriations, to provide grants to municipalities, boards of education and child care providers to encourage the use of school facilities for the provision of child day care services before and after school. In order to qualify for a grant, a municipality, board of education or child care provider shall guarantee the availability of a school site which meets the standards set by the Department of Public Health in regulations adopted under sections 19a-77, 19a-79, 19a-80 and 19a-82 to 19a-87a, inclusive, and shall agree to provide liability insurance coverage for the program. Grant funds shall be used by the municipality, board of education or child care provider for the maintenance and utility costs directly attributable to the use of the school facility for the day care program, for related transportation costs and for the portion of the municipality, board of education or child care provider liability insurance cost and

other operational costs directly attributable to the day care program. The municipality or board of education may contract with a child day care provider for the program. The Commissioner of Social Services may adopt regulations, in accordance with the provisions of chapter 54, for purposes of this section. The commissioner may utilize available child care subsidies to implement the provisions of this section and encourage association and cooperation with the Head Start program established pursuant to section 10-16n."

[2] "The defendants are Anthony Amato, the superintendent of Hartford public schools; the board of education of the city of Hartford; Fran DiSiores, the principal of West Middle School, a Hartford public school; and Rick Deschenes, the director of maintenance of West Middle School." *Durrant* v. *Board of Education*, 96 Conn. App. 456, 457 n.1, 900 A.2d 608 (2006).

[3] It is well settled that a "municipal employee . . . has a qualified immunity in the performance of a governmental duty, but he may be liable if he misperforms a ministerial act, as opposed to a discretionary act. . . . The word ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . The only exception to a municipal employee's qualified immunity for discretionary acts that is relevant to the present case is where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person [or member of an identifiable class of foreseeable persons] to imminent harm . . . ." (Citation omitted; internal quotation marks omitted.) *Prescott* v. *Meriden*, supra, 273 Conn. 763; see also General Statutes § 52-557n (a) (2) ("[e]xcept as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . [B] negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law").

[4] I am not troubled by the argument of the amicus curiae Connecticut Association of Boards of Education that this premise conceivably increases municipalities' exposure by enlarging the protected class even further from parents to other relatives, friends or babysitters. Indeed, the amicus notes that the plaintiff in this case was picking up her nephew in addition to her own child when she was injured. The municipalities' overall exposure should not change significantly because, if a parent were available to pick up a child from school, there would be no need to send someone in his or her stead. Put differently, I see no realistic possibility that the overall number of individuals actually going to pick children up from school or school programs will *increase*.

[5] Like the majority, I too assume that the puddle in the stairwell satisfies the imminent harm element of the exception because it presented a danger that was limited in duration.

[6] The majority argues that "[t]he Appellate Court [majority] failed to recognize the significance of the enactment of § 52-557n as it affected the common-law authority of trial courts to determine when governmental immunity may be abrogated." The majority notes that this court has assumed, without deciding, that § 52-557n, " 'codifies the common law' " with respect to the abrogation of governmental immunity, and that this court "is not free to expand or alter the scope of governmental immunity" since the enactment of that statute. I disagree with the majority's apparent conclusion that we are statutorily precluded from recognizing new classes of potential victims. A conclusion that the plaintiff, and her son, fall within the relevant class of foreseeable victims does not expand or alter the scope of the common law in derogation of § 52-557n. Put differently, the Appellate Court did not purport to change the applicable common-law rule governing the foreseeable victim/imminent harm exception in the present case, but, just like our decision in *Burns*, which also came subsequent to the enactment of the statute, merely *applied the existing common-law exception* to a new factual situation. Had the legislature wished at any point to restrict the application of that exception only to "schoolchildren on premises during regular school hours," it could have amended the comprehensively drafted immunity statute to do so.

[7] Unlike the majority, I believe that our decision in *Prescott* v. *Meriden*, supra, 273 Conn. 759, does not preclude the plaintiff from recovering in this case solely because of her status as a parent. In *Prescott*, we concluded that the plaintiff, who was injured in the stands on a rainy day while attending a Thanksgiving Day high school football game in which his son was playing, was not a member of a class of foreseeable victims subject to imminent harm. Id., 761–63. Distinguishing our decisions in *Burns* and *Purzycki*, we

emphasized that "the plaintiff's presence at the game was purely voluntary. He was not compelled to attend by any statute, regulation or other legal command. *In this respect, he was no different from any of the other spectators*—whether relatives or friends of the team members, other students at the respective schools, teachers and other school staff members, or simply fans of high school football interested enough to brave any weather to watch a traditional Thanksgiving Day game. Thus, the plaintiff was simply like any other member of the public attending the game. Second, the plaintiff was entitled to no special consideration of care from the school officials because of his status as a parent. Thus, he was unlike the schoolchildren in both *Burns* and *Purzycki*. Third, we have characterized the classes of foreseeable victims as narrowly defined . . . . Recognizing the plaintiff as establishing a cognizable class of foreseeable victims, namely, parents of students on the team, would be contrary to this characterization, especially given the close resemblance of the plaintiff as spectator to all of the other members of the public similarly situated. *Moreover, to do so would mean that all spectators at a public municipal event would constitute a class of foreseeable victims for these purposes, thus making the exception so broad that it would threaten to swallow the rule*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 764–65.

The plaintiff in the present case is distinguishable from the parent in *Prescott*. In that case, we pointed out that any member of the public was welcome to enter the football stands and watch the game. Id., 764. In contrast, in this case, only a very limited group of people were welcome to come to the back entrance of the school building to pick up children attending programs there. Moreover, as both the majority and I agree, the plaintiff had no choice but to pick up her child from the school at the end of the day care program because of his young age, unlike a parent who chooses to attend a high school football game as a spectator.

[8] General Statutes § 10-184 provides: "All parents and those who have the care of children shall bring them up in some lawful and honest employment and instruct them or cause them to be instructed in reading, writing, spelling, English grammar, geography, arithmetic and United States history and in citizenship, including a study of the town, state and federal governments. *Subject to the provisions of this section and section 10-15c, each parent or other person having control of a child five years of age and over and under eighteen years of age shall cause such child to attend a public school regularly during the hours and terms the public school in the district in which such child resides is in session, unless such child is a high school graduate or the parent or person having control of such child is able to show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools*. The parent or person having control of a child sixteen or seventeen years of age may consent, as provided in this section, to such child's withdrawal from school. Such parent or person shall personally appear at the school district office and sign a withdrawal form. The school district shall provide such parent or person with information on the educational options available in the school system and in the community. The parent or person having control of a child five years of age shall have the option of not sending the child to school until the child is six years of age and the parent or person having control of a child six years of age shall have the option of not sending the child to school until the child is seven years of age. The parent or person shall exercise such option by personally appearing at the school district office and signing an option form. The school district shall provide the parent or person with information on the educational opportunities available in the school system." (Emphasis added.)

General Statutes § 10-220 provides in relevant part: "(a) Each local or regional board of education shall . . . cause each child five years of age and over and under eighteen years of age who is not a high school graduate and is living in the school district to attend school in accordance with the provisions of section 10-184, and shall perform all acts required of it by the town or necessary to carry into effect the powers and duties imposed by law. . . ."

[9] As the Appellate Court aptly noted, "we consider it probable that more six year olds leaving the building, having attended an after school program, would be injured if no parent escorted them than if parents accompanied them out of the building. Thus, if the six year old was part of an identifiable class but his parent was not, more litigation rather than less would ensue." *Durrant* v. *Board of Education*, supra, 96 Conn. App. 469–70 n.10.

[10] I disagree with the majority's apparent reading of *Burns*, a majority

opinion in which I joined, as standing for the proposition that municipalities' governmental immunity is abrogated with respect to children attending school because of the compulsory nature of *public* education. In *Burns*, this court stated only that "[s]tatutes also describe the responsibilities of school children to attend *school. The presence of the plaintiff child on the school premises where he was injured was not voluntary.* As a fourteen year old at the time of the accident, *he was statutorily compelled to attend school* and to obey school rules and discipline formulated and enforced pursuant to statute." (Emphasis added.) *Burns* v. *Board of Education*, supra, 228 Conn. 649. Although parents and guardians are statutorily obligated to cause their children "to be instructed in reading, writing, spelling, English grammar, geography, arithmetic and United States history and in citizenship, including a study of the town, state and federal governments"; General Statutes § 10-184; they are not required to satisfy that requirement by sending them to public school. In accordance with well established constitutional restrictions, § 10-184 explicitly permits parents to provide "elsewhere" for "equivalent instruction in the studies taught in the public schools" by, for example, sending children to private school or home schooling them appropriately. Thus, parents are compelled only to educate their children, and not to send them to a particular type of school.

[11] See 29 H.R. Proc., Pt. 20, 1986 Sess., p. 7581, remarks of Representative Peter A. Nystrom (Describing the "basic concepts" of the bill, including "increasing the availability of day care services. We're hoping to make it more affordable to individuals who need that service. We're also hoping to expand parental choice in the type of day care service that they would choose for their child."); see also id., p. 7616 (noting that grants program was intended to provide "before and after school day care to address the problem of latch key children").

[12] I find somewhat troubling two rather dismissive statements contained in the majority opinion. First, in footnote 10, the majority states that it is "mindful that parents often need to place their children in after school care and that the program the plaintiff in the present case chose may have been the most convenient, least expensive and most beneficial, in view of the homework assistance component, of all her options. These factors did not, however, make her child's attendance compulsory." In footnote 11, the majority then posits that "other options could provide homework assistance attendant to after school care, and we cannot imagine that the plaintiff made or will make her choices in the best interest of her child based on the likelihood of recovery of damages in the event of someone's negligence."

Although the majority's observation likely is correct, its opinion nevertheless penalizes those citizens who may well have the fewest options, namely, people who have no choice but to rely on government provided before and after school programming for quality child care. Put differently, the majority opinion has its harshest effect on disadvantaged, frequently single, parents, to whom enrollment in after school programs sponsored by municipalities may not be a choice, but a practical and economic necessity.