

Superior Court Recognizes Breach of Fiduciary Duty Against State and Contractors in Cases Involving Failure to Protect Children

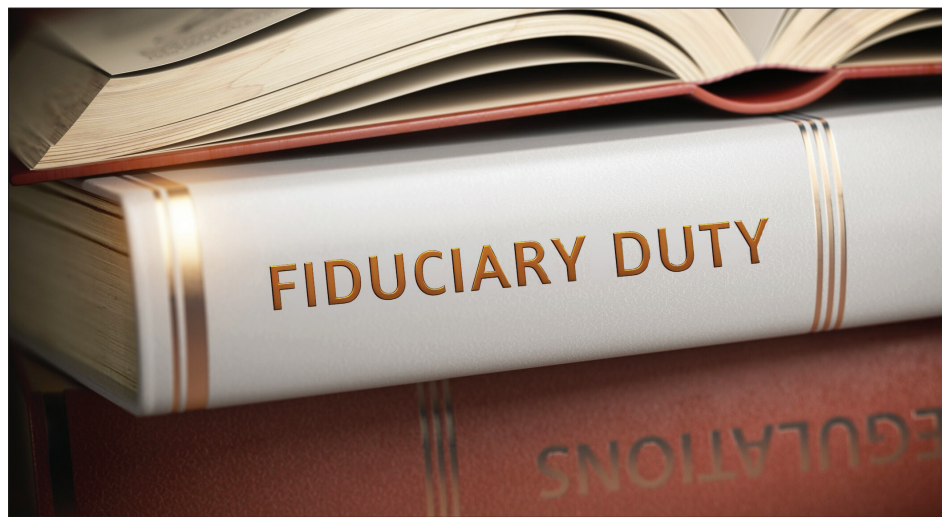
By Michael Lewis

"You can't have it both ways."

The phrase explains two recent cases in which state courts concluded that the power of the government to shape the lives of our children conflicts with the government's desire to avoid responsibility for placing that power in the hands of abusers. One, *Meehan v. State*, 217-2020-CV-00026, slip. op. 10 (Rock. Super. Ct. Aug. 15, 2023) (*Schulman*, J), considered the State's liability for injury caused to children by state employees housed at various state facilities "largely for protective reasons," including the infamous Youth Development Center (YDC).

Another, *Doe #553 v. DHHS*, No. 217-2022-CV-1018, 217-2022-CV-01801, slip. op. 2 (Merr. Super. Ct. Oct. 18, 2023) (*Kissinger*, J.), considered the liability of the State's non-profit contractors, who supply residential housing for a similar population of children "as an alternative to State-operated facilities." Each denied motions by the State and its contractors to dismiss pending civil litigation.

In both cases, the courts held that when the State or its contractors intervene in a child's life by taking custody of a child, that intervention gives rise to duties that exceed those arising from ordinary



negligence. The State and its contractors thus assume a fiduciary role and attending fiduciary duties. *Meehan* at 36; *Doe #553* at 12. The courts held that this conclusion flows from the New Hampshire Supreme Court's (NHSC) decisions presenting under analogous circumstances.

Meehan considered the question of the application of the fiduciary standard at a general level. It observed that the Supreme Court's case law recognizing a fiduciary duty does not turn on a "technical relation created by, or defined in, law," but instead arises from a variety of circumstances in which "a special confidence" is "reposed" giving rise to a special duty. *Id.* at 37 (citing, *inter alia*, *Clark v. Lavey Benefits Solutions, Inc. v. Education Development Center, Inc.*, 157 N.H. 220, 227 (2008)).

Doe #553 echoed this conclusion, and

discussed, at length, the NHSC's decision in *Schneider v. Plymouth State Coll.*, 144 N.H. 458, 462 (1999). There, the Court found that a college owed a fiduciary duty to a student to protect that student from the sexual harassment of a professor. *Doe #553*, at 10.

The *Doe #553* court noted that the NHSC based its decision on the power difference between the faculty and student, the ability of the faculty to control a student's fate through the application of negative sanctions, and the relationship of "trust and deference" that the student-professor relationship entails within the collegiate environment. *Id.* at 11.

From this baseline, the *Doe #553* Court had little trouble analogizing to the even more intimate relationship between a child in residential custody, forced to live under the supervision of a state contractor, and the state's contractor. *Id.* at 12 ("a fiduciary relationship exists between the contractor defendants and the children placed in their care...this includes children placed in the contractors defendants' custody pursuant to RSA 169-B, RSA 169-C, and RSA 169-D."). The Court ruled that "in those situations, the contractor defendants have acquired influence over the children in custody."

The recognition of the fiduciary duty extinguishes arguments serially raised by the State and its contractors that it has no duty to care for children in these circumstances. See *C.M. v. DHHS*, No. 217-2019-CV-00677, slip. op. at 10 (Merr. Super. Ct. Aug. 27, 2021) (*Kissinger*, J.) (recognizing a duty of care to conduct a competent investigation once the state receives a report of suspected child abuse). The *Doe #553* Court therefore was able to make quick work of the state contractors' reliance on

Marquay v. Eno, 139 N.H. 708, 717 (1995) (citation omitted), which defendants rely upon as the principle source of law regarding state-contractor liability.

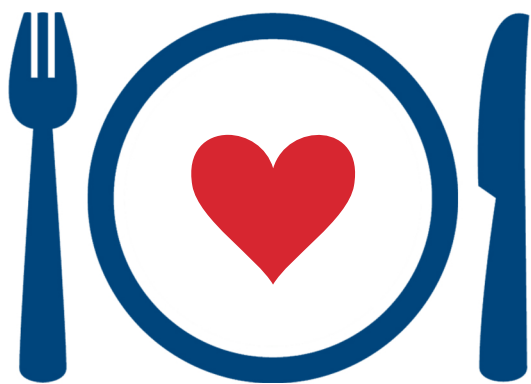
Marquay predated *Schneider*. It examined liability arising from duties primary level schools owed to students. Its analysis was grounded in a discussion of theories of negligence. It recognized duties flowing from negligence arise against a baseline that "a person has no affirmative duty to aid or protect another." *Id.* Cf. *Walls v. Oxford Management, Co., Inc.*, 137 N.H. 652, 657-660 (1993) (landlords do not have a general duty to protect tenants but may accrue a special relationship if it creates the circumstances that increase the risk of harm).

Schneider's recognition of a breach of fiduciary duty cuts through the complexities arising from the negligence in *Marquay* because the recognition of a fiduciary duty raises the baseline obligations flowing between the parties. A fiduciary's duty includes affirmative duties to act selflessly in order to protect the party to whom the duty is owed in the protected party's interests and that duty includes the duty to create and maintain a safe environment. 144 N.H. at 105-06.

These decisions suggest that courts are losing patience with efforts by responsible parties to have it both ways. The *Doe #553* Court's decision, in particular, suggests that the same fiduciary duty may apply to other circumstances in which the state takes custody of a child, and then places that child in a dangerous environment with dangerous private actors. These include circumstances where the state places children with abusive foster settings.

The next court confronted with the next permutation of litigation flowing from New Hampshire's unresolved child abuse and neglect crisis thus may have to consider whether there is any meaningful distinction between a foster family subject to vetting, selection and oversight by the state, and state contractors who provide congregate care giving rise to a fiduciary duty. Cf. RSA 170-E:24, et. seq. (statutory provisions governing placement with foster families); Rev. Part He-C 6446, et. seq. (regulatory rules governing foster family care licensing and oversight requirements). Parties seeking to have it both ways will surely press such distinctions. ♦

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