

NOTES

THE LESSONS OF *DeSHANEY*: SPECIAL RELATIONSHIPS, SCHOOLS & THE FIFTH CIRCUIT

INTRODUCTION

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents, who placed him in a dangerous predicament, and who knew or learned what was going on and yet did essentially nothing.¹

The Court can well imagine all manner of constitutional mischief which might result from adoption of theories such as urged by the plaintiff here. The Constitution of the United States is, and must be, a document of grandeur and wisdom that secures and protects the most fundamental and sacrosanct rights of our people. To extend the protections of the Constitution to the most mundane fracas of everyday life cheapens and trivializes not only the Constitution itself, but those rights and privileges which are protected under it, as well.²

These two opposing views highlight the disagreement over when, if at all, a state, under the Constitution, owes one of its citizens an affirmative duty to provide that citizen with protection from harm, and when the failure to provide that protection is a basis for liability.³ In recent years, as this nation's school campuses have become increasingly dangerous, students who have been injured while at school, have invoked due process to attempt to hold their school district liable for

¹ *DeShaney v. Winnebago County Dept. of Social Serv.*, 109 S. Ct. 998, 1012-13 (1989) (Blackmun, J., dissenting).

² *Reeves by Jones v. Besonen*, 754 F. Supp. 1135, 1140-41 n.2 (E.D. Mich. 1991).

³ See *DeShaney*, 109 S. Ct. at 1006.

failure to protect them from harm.⁴ The plaintiff students have filed damage suits under 42 U.S.C. § 1983 against the school officials and school districts involved, claiming that they have deprived the students of their Fourteenth Amendment liberty interests.⁵

Until very recently, the federal circuit courts of appeals have almost universally held that school officials do not owe students, compelled by state law to attend school and entrusted to their care, an affirmative obligation to protect them from harm while in school.⁶ These courts have reached this conclusion based upon the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, which held that a state owes its citizens an affirmative duty to protect them from harm only where the state has affirmatively acted to place limitations on an individual's ability to act on his or her behalf, through incarceration, institutionalization or other similar means of restraint.⁷ In October 1992, however, the United States Court of Appeals for the Fifth Circuit broke with the other circuits and created a conflict that, to date, the Supreme Court has declined to address.⁸

⁴ See *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 141 (5th Cir. 1992), *cert. denied*, *Caplinger, Lankford v. Doe*, 113 S.Ct. 1066, 1066 (1993), *reh'g denied*, *Caplinger, Mike, et. al. v. Doe*, 113 S.Ct. 1436 (1993) (student brought action alleging that school officials did nothing while teacher sexually molested her); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3d Cir. 1992) (student brought action alleging that school officials were negligent in failing to prevent sexual molestation of one student by another).

⁵ 42 U.S.C. § 1983 (1988) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured

Personal security and freedom from physical restraint and sexual abuse are well established liberty interests. See *infra* notes 171-74 and accompanying text.

⁶ See, e.g., *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992); *Middle Bucks*, 972 F.2d at 1373; *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990). The theory of an affirmative obligation to protect is to be contrasted with that of supervisory liability. See *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989) [hereinafter *Stoneking II*]. Under such a theory, the school district can be held liable where it is shown that the school district is deliberately indifferent to the constitutional misbehavior of one of the school's employees. *Id.* Thus, although the school district is under no affirmative obligation to protect, it can be held liable where one of its own, another state actor, has committed constitutional wrongs. *Id.* at 724-25. Supervisory liability, however, may not be invoked where the plaintiff alleges that he or she was constitutionally violated by another student, who is not a state actor. *Id.* at 724. Were a court to find that an affirmative obligation to protect did exist, the school would be under a duty to protect the child from harm at the hands of both public and private actors. *DeShaney*, 109 S. Ct. at 1005-06. See *infra* notes 83-91 and accompanying text for a discussion of the *DeShaney* opinion.

⁷ 109 S. Ct. at 1006.

⁸ *Taylor*, 975 F.2d at 147.

This Note argues that although public schools exercise substantial authority over their students, this is not enough under *DeShaney* to create an affirmative obligation to protect them, as exists in the contexts of prisons and mental hospitals. Section I discusses the background and development of the § 1983 lawsuit.⁹ Section II explores the concept of a "special relationship" existing between the state and a citizen, the obligations created by such a relationship, and the applicability, if any, to public schools before 1989.¹⁰ Section II also discusses the constitutional changes in public schools wrought by Supreme Court decisions beginning in the late 1960s.¹¹ Section III analyzes the *DeShaney* decision and its impact on the special relationship analysis.¹² Section IV explores the impact of *DeShaney* on public schools and how lower courts responded to the *DeShaney* holding.¹³ Section V discusses, *Doe v. Taylor School District*, the 1992 Fifth Circuit decision that created a conflict in the courts of appeals as to the applicability of special relationships to schools.¹⁴ Finally, Section VI argues that special relationships are inapplicable to schools, when read in light of *DeShaney*, past Supreme Court decisions, and the nature of the modern school environment.¹⁵

I. SECTION 1983 LIABILITY

Congress enacted section 1983 of the United States Code as part of the Civil Rights Act of 1871, along with the adoption of the Fourteenth Amendment.¹⁶ This statute represented a congressional attempt to provide a remedy for constitutional violations propagated by state

⁹ See *infra* notes 16-38 and accompanying text.

¹⁰ See *infra* notes 39-61 and accompanying text.

¹¹ See *infra* notes 62-82 and accompanying text.

¹² See *infra* notes 83-96 and accompanying text.

¹³ See *infra* notes 97-140 and accompanying text.

¹⁴ See *infra* notes 141-198 and accompanying text.

¹⁵ See *infra* notes 199-273 and accompanying text.

¹⁶ See Laura S. Harper, *Battered Women Suing Police For Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1395 (1990).

An important motive for the passage of § 1983 was to provide a federal forum for civil rights claims, thus enabling plaintiffs to bypass state courts.

One reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.

Id. at 1395 (quoting *Monroe v. Pape*, 365 U.S. 167, 180 (1961)).

officials acting pursuant to their governmental authority.¹⁷ Before 1961, suits under section 1983 were sustained only where the conduct in question was authorized by federal or state law, as, where the official acted in compliance with an unconstitutional or illegal statute.¹⁸

In the 1961 decision of *Monroe v. Pape*, the United States Supreme Court dramatically increased the applicability of section 1983 by extending section 1983 liability to those situations where the individual official, who allegedly violated a constitutional right of the plaintiff, acted in an official capacity, but in a manner not authorized by state law.¹⁹ In *Monroe*, the plaintiff brought a section 1983 suit against police officers who broke into his house in the middle of the night and conducted an illegal search.²⁰ The *Monroe* Court reasoned that although the challenged conduct, an illegal search, might be unlawful under state law, it nonetheless was to be considered "under color of law" for the purpose of section 1983 if it was undertaken by a state official acting in an official capacity.²¹

Additionally, section 1983 has been invoked to hold liable not only the "offending" individuals, who directly violated the plaintiff's constitutionally-protected rights, but also to hold liable those government agencies or supervisory personnel of the individual.²² In the 1978 case

¹⁷ See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 381, 389-90 (1989) (permitting suit under section 1983 where municipality failed to train police officers to provide medical care to detained individuals); *Monroe*, 365 U.S. at 169, 172 (permitting suit under section 1983 where police officers entered home in middle of night and forced plaintiff to stand naked while illegal search took place).

¹⁸ See, e.g., *Boynton v. Virginia*, 364 U.S. 454, 455, 458-59 (1960) (Court overturned conviction of a black bus passenger, arrested for violating a Virginia statute making it a misdemeanor for any person "without authority of law" to remain upon the premises of another after having been forbidden to do so, as a violation of Due Process and Commerce Clauses); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 154-55, 160-61 (1939) (Court invalidated a municipal ordinance prohibiting solicitation and distribution of circulars unless licensed by police, including censorship, as an abridgement of the freedom of speech secured against state invasion by the Fourteenth Amendment); *Hague v. C.I.O.*, 307 U.S. 496, 500, 514 (1939) (Court held ordinance void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate places). For a case after 1961, see *Adickes v. S.H. Kress Co. & Co.*, in which the plaintiff, a white woman, had been denied service in defendant's restaurant because she was in the company of black children, and could make out a claim under section 1983 by showing the existence of state-enforced custom of segregating races in public eating places, 398 U.S. 144, 147, 167-68 (1970).

¹⁹ 365 U.S. at 172. See also Steven F. Huefner, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940, 1943-44, 1944 n.19 (1990) (noting that section 1983 was "relatively unimportant prior to *Monroe*").

²⁰ *Monroe*, 365 U.S. at 169.

²¹ *Id.* at 172.

²² See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 389-90 (1989); *Pembauer v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978).

of *Monell v. New York City DSS*, the United States Supreme Court held that local government bodies were directly suable for damages as a result of constitutional violations committed by subordinates.²³ In *Monell*, the plaintiffs brought a section 1983 action against the school board alleging that the Board had, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before medically necessary.²⁴ According to the Court, local government liability under section 1983 may not be based on a respondeat superior theory, but only upon the direct actions of the supervisors.²⁵

To prevail in a suit against a government entity, the plaintiff must show that the supervisory personnel "implement a policy so deficient that the policy 'itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.'"²⁶ In the 1989 case of *City of Canton v. Harris*, the United States Supreme Court held that liability may be imposed where supervisors are "deliberately indifferent" to the rights of persons with whom their subordinates come into contact, such that their own conduct may be seen as an implicit condonation of their subordinate's abuse of authority.²⁷ In *Canton*, the Court imposed liability on the city for its failure to train its police officers to provide medical care to injured persons detained by the police.²⁸ In order for liability to attach based on this theory, with one notable exception, the supervisory officials must have been deliberately indifferent to the misconduct of other state actors.²⁹ Through the United States Constitution,

²³ *Monell*, 436 U.S. at 690. The Court held that municipalities and other public entities could be liable as "persons" under § 1983. *Id.* On this point, the Court specifically overruled *Monroe*, which had held that municipalities were immune from section 1983 liability. *See id.* at 696-701.

²⁴ *Id.* at 660-61.

²⁵ *Id.* at 694-95; *See also Pembaur*, 475 U.S. at 478 (municipal bodies cannot be liable under section 1983 for the tortious acts of employees which do not represent official policy).

²⁶ *See* *Thompson v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987); *see also Pembaur*, 475 U.S. at 483 ("liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.").

²⁷ 489 U.S. at 381, 389-90 (municipality can be held liable for the failure to provide medical care to individuals detained by police officers where the "failure to train those officers amounts to deliberate indifference to the rights of persons with whom the police come into contact"); *Jane Doe "A" v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990) (when school officials are on "notice of a pattern of unconstitutional acts committed by subordinates, the Constitution will not tolerate a practice of deliberate or conscious indifference to the potentiality of harm that is likely to follow"); *Stoneking II*, 882 F.2d 720, 724-25 (3d Cir. 1989) (school official can be held liable if he "maintains a practice of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct").

²⁸ *Harris*, 489 U.S. at 381, 389-90.

²⁹ *See id.* at 389-90; *Daniels v. Williams*, 474 U.S. 327, 333 (1986) (where court held that government could not be held liable under § 1983 for conduct that is "merely negligent"). The

individuals may derive two distinct protections from government conduct, the violation of which triggers a § 1983 remedy.³⁰ First, the Constitution imposes on the government a duty to refrain from action which interferes with a citizen's protected interests.³¹ Most § 1983 suits challenge that the government has taken some affirmative act which contravenes the Constitution's protections of the individual interest to be free from government interference.³² Section 1983 is designed to protect all citizens from government interference.³³

Alternatively, the government may also be held liable under section 1983 where it in fact had an affirmative obligation to act to protect the safety of one of its citizens from harm at the hands of others.³⁴ Although the Constitution has been called a "charter of negative liberties," an obligation to act may exist in two situations.³⁵ First, the government has an affirmative obligation to police the conduct of its subordinates and protect against potential constitutional misbehavior.³⁶ Thus, a court may impose liability under section 1983 where the government has been deliberately indifferent to the misconduct of other state actors under its employ.³⁷ The second situation may occur where the government has entered into a "special relationship" with

one notable exception referred to constitutes the main subject of this note. Where the state has entered into a "special relationship" with an individual, it owes that individual an affirmative duty to protect that individual and may not maintain a policy of deliberate indifference even where the alleged harm comes at the hands of a private third party. *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1006 (1989). See *infra* notes 34-46 and accompanying text for a discussion of the origins of the special relationship obligations.

³⁰ See *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1006 (1989); *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

³¹ See, e.g., *Monroe*, 365 U.S. at 172 (permitting suit under § 1983 where police unlawfully search plaintiffs apartment, in violation of Fourth Amendment).

³² *Huefner*, *supra* note 19, at 1943.

³³ *Id.* at 1945. This is in contrast to the affirmative obligation to protect which arises only where the government has entered into a special relationship with the injured individual. *DeShaney*, 109 S. Ct. at 1006. See *infra* notes 83-96 and accompanying text for a discussion of the *DeShaney* decision.

³⁴ See, e.g., *Smith v. Wade*, 461 U.S. 30, 32 (1983) (holding prison liable for failure to protect inmate from dangerous comrade); *Stoneking II*, 882 F.2d at 724-25 (holding school district liable for failure to protect student from sexual abuse by teacher). In this situation, a § 1983 plaintiff may allege governmental inaction, claiming that the inaction has worked a deprivation of a constitutionally protected interest. *Wade*, 461 U.S. at 32.

³⁵ *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

³⁶ *Stoneking II*, 882 F.2d at 725.

³⁷ See *Harris*, 489 U.S. at 389-90 (municipality held liable where its failure to train police officers amounted to deliberate indifference of detained individual's constitutional rights); *Stoneking II*, 882 F.2d at 724-25 (school district held liable where its failure to protect student from sexual abuse by teacher amounted to deliberate indifference of student's rights).

the individual.³⁸ The issues surrounding special relationships are explored in the next section.

II. SPECIAL RELATIONSHIPS

A. *Before DeShaney*

Where a court finds that an individual has entered into a special relationship with the state, the state owes that individual a duty to provide for and ensure his or her safety and freedom from bodily restraint.³⁹ Before 1989, courts had found that such a duty did exist when the state has incarcerated or institutionalized an individual, so as to deprive the individual of the ability to protect himself or herself, or where the state may have taken the individual into custody, assured the individual's safety, or exposed the individual to unusual risk.⁴⁰ Significantly, where a special relationship exists, the state owes the individual a duty to provide for his or her safety and to protect him or her from harm at the hands of both state actors and possibly even private individuals.⁴¹

In the 1980 case of *Martinez v. California*, the United States Supreme Court raised the possibility that the state might, in certain

³⁸ See *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). The concept of "special relationships" is usually traced this case. *DeShaney*, 109 S. Ct. at 1006. In *Estelle*, the court held that when a state incarcerates someone it must then provide medical care to that person. 429 U.S. at 99, 105.

³⁹ See, e.g., *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244-45 (1983) (duty to provide medical care to arrestees); *Wade*, 461 U.S. at 32 (prison has duty to protect inmate from dangerous comrade); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (duty of care for institutionalized mental patients); *Estelle*, 429 U.S. at 103-04 (state has duty to protect and provide services to convicted prisoners).

⁴⁰ See, e.g., *Youngberg*, 457 U.S. at 320 (mental patients); *Martinez v. California*, 444 U.S. 277, 285 (1980) (special relationship may exist between prison officials and victim murdered by paroled prisoner); *Estelle*, 429 U.S. at 105-06 (prisoners); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987) (special relationship may exist between school official and children compelled by law to attend public school); *Estate of Bailey v. County of York*, 768 F.2d 503, 508-11 (3d Cir. 1985) (special relationship may exist when youth services department knows child is being abused and has taken steps to protect her); *Bowers*, 686 F.2d at 618 (special relationship may exist between the government and an individual whom the state has put in a position of danger); *Doe v. New York City DSS*, 649 F.2d 134, 141 (2d Cir. 1981) (special relationship may exist between state and children placed by state in foster care); *White v. Rochford*, 592 F.2d 381, 383-85 (7th Cir. 1979) (special relationship found to exist between police and child passengers of vehicle when police detained driver).

⁴¹ See *Martinez*, 444 U.S. at 279, 285 (where the plaintiff's decedent had been murdered by a paroled prisoner, released despite warning to the parole board of danger); *Bowers*, 686 F.2d at 618 (Where "the state puts a person in position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit").

circumstances, be held liable for the failure to protect an individual from harm by a third party.⁴² In *Martinez*, the plaintiff attempted to hold the state liable where a paroled prisoner, released despite warnings of danger, murdered the plaintiff's decedent.⁴³ The Court rejected the section 1983 claim as too attenuated from the challenged state conduct, but did not foreclose the possibility that a parole officer could be held liable for action taken in connection with the release of a prisoner on parole.⁴⁴

In sum, until 1989, when the Supreme Court decided to hear a Seventh Circuit case involving a young boy beaten by his father,⁴⁵ the Court had not addressed the full scope of when an affirmative duty to protect existed.⁴⁶

B. *Special Relationships & Schools Before 1989*

One of the principal questions confronting circuit courts of appeals regarding the notion of the government's affirmative duties to protect was whether the required special relationship existed in the nation's public schools.⁴⁷ Under the common law *in loco parentis* doctrine, it was thought that school officials were to act on behalf of students' welfare, as a reasonable parent would, when harm was reasonably foreseeable, and that this carried with it an obligation to protect the students from danger, regardless of the source.⁴⁸ Two circuits, the Third and the Fifth, found that because of compulsory school attendance laws and the nature and immaturity of schoolchildren, such a special relationship existed.⁴⁹

In the 1982 case of *Horton v. Goose Creek Independent School District*, the United States Court of Appeals for the Fifth Circuit found that because "schoolchildren are too young to be considered capable of mature restraint, public school assumes a duty to protect schoolchil-

⁴² 444 U.S. 277, 285 (1980).

⁴³ *Id.* at 279.

⁴⁴ *Id.* at 285 (declaring: "[w]e need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole.").

⁴⁵ *DeShaney v. Winnebago County DSS*, 812 F.2d 298 (7th Cir. 1987).

⁴⁶ *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1002 (1989) ("[b]ecause of the inconsistent approaches taken by the lower courts . . . and the importance of the issue to the administration of state and local governments, we granted certiorari").

⁴⁷ See *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 601 (3d Cir. 1988) [hereinafter *Stoneking I*].

⁴⁸ See Huefner, *supra* note 19, at 1967.

⁴⁹ See *Stoneking I*, 856 F.2d at 601; *Lopez*, 817 F.2d at 356; *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982).

dren from the dangers posed by anti-social activities-their own and *those of other students*.⁵⁰ In *Horton*, the court was confronted with the constitutionality of dog sniff searches of students in schools.⁵¹ In holding the searches unconstitutional, the Fifth Circuit established that although students had Fourth Amendment rights, the special relationship between school officials and students, and the corresponding duties assumed by the state mandated a less than probable cause standard.⁵² Thus, although the Fifth Circuit expanded the constitutional rights of students in school, the court still expressed the belief that the students and school officials were in a special relationship.⁵³

Further, in 1987, in *Lopez v. Houston Independent School District*, the Fifth Circuit held that a school district could be held liable for injuries sustained by a student, even though the harm was caused by a private actor, such as another student.⁵⁴ In *Lopez*, the plaintiff student brought a section 1983 action against the school district where a school employee, a bus driver, failed to break up a fight between the plaintiff and another student.⁵⁵ The Fifth Circuit found that the school district could be held liable for the bus driver's failure to break up a fight between schoolchildren if his failure to protect the injured child rose to the level of callous indifference to the student's right to be free from bodily harm.⁵⁶

⁵⁰ 690 F.2d at 480 (emphasis added). The court specifically rejected grounding this duty on the doctrine of *in loco parentis*. *Id.*

⁵¹ *Id.* at 474.

⁵² *Id.* at 480-81. The Supreme Court eventually adopted the Fifth Circuit's position in regard to searches conducted by school officials of students entrusted to their care. *New Jersey v. TLO*, 469 U.S. 325, 336-37, 341 (1984). In *TLO*, the Supreme Court held that school officials were subject to the confines of the Fourth Amendment in conducting searches of students. *Id.* at 336-37. Although the Court held that the Fourth Amendment required less suspicion to search students in school than is required in the adult world, *TLO* extended the trend begun in the late 1960's of extending constitutional protections to school students and constitutional limitations to school officials. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969). Thus, while the 5th Circuit recognized that school officials have "special duties with associated powers," it also recognized that those powers did have constitutional limits. *Horton*, 690 F.2d at 480 n.18. See *infra* notes 62-82 and accompanying text for a discussion of the Supreme Court's jurisprudence in the public schools and its affect on the special relationship analysis.

⁵³ *Horton*, 690 F.2d at 480-81.

⁵⁴ 817 F.2d 351, 356 (5th Cir. 1987).

⁵⁵ *Id.* at 352-53.

⁵⁶ *Id.* at 356. Various circuit courts of appeals had held that a student, while in school, has a constitutionally protected interest in being free from bodily restraint and sexual assault and molestation, and that such acts of bodily intrusion violate substantive due process and may be remedied by section 1983 under certain circumstances. See *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) ("[c]onstitution forbids schoolteachers from assaulting our schoolchildren absent some legitimate punitive or disciplinary purpose"); *Stoneking II*, 882 F.2d

Also, in 1987, in *Stoneking v. Bradford Area School District (Stoneking I)*, the United States Court of Appeals for the Third Circuit found that a special relationship exists between school officials and students entrusted to their care such that an affirmative obligation to protect applied to the school.⁵⁷ In *Stoneking I*, the student plaintiff brought a section 1983 action against her school district after she was sexually molested and harassed by one of her teachers.⁵⁸ The school officials knew the teacher had a history of such sexual misconduct, yet failed to take any action.⁵⁹ The Third Circuit reasoned that because the plaintiff spent a large part of her day in an environment where the defendant school officials had ultimate control over her actions, a special relationship did in fact exist.⁶⁰ At least as far as the Fifth Circuit was concerned, a school district could be held liable if it was deliberately indifferent to the threat of harm posed by either a school employee or by a fellow student.⁶¹

C. Changing Nature of Schools Before 1989

While the courts of appeals' decisions reflected the view that schools and students were in a relationship that might be classified as a "special" one for purposes of the state's obligations, the United States Supreme Court's jurisprudence reflected a different trend.⁶² Balanced against decisions finding special relationships in schools was an increasing pattern in Supreme Court decisions to limit the authority of school officials in the conduct of school order and discipline.⁶³ This

720, 726 (3d Cir. 1989) (schoolchild has a constitutional liberty interest to be free from sexual molestation).

⁵⁷ 856 F.2d 594, 601-02 (3d Cir. 1987).

⁵⁸ *Id.* at 595-96.

⁵⁹ *Id.*

⁶⁰ *Id.* at 601-02. Besides finding that a special relationship exists between school officials and students entrusted to their care such that an affirmative obligation to protect applied, the Third Circuit denied the defendants' motions for summary judgment because the court found evidence that the school officials knew or recklessly failed to discover the sexual assault. *Id.* at 603. However, the Supreme Court later directed the Third Circuit to reconsider the *Stoneking* decision in light of the *DeShaney* decision. *Smith v. Stoneking*, 109 S. Ct. 1333, 1333-34 (1989). See *infra* notes 103-110 and accompanying text for a discussion of the subsequent history of the *Stoneking I* decision.

⁶¹ See *Lopez*, 817 F.2d at 356. The court held that the bus driver's failure to protect the schoolchild from the assault by a fellow student or to render emergency aid would amount to an abuse of state power and support a section 1983 action if it rose to the level of callous indifference and was a cause of the injury. *Id.* The *Lopez* case was cited with approval by the case that is the chief subject of this note. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 145 (5th Cir. 1992).

⁶² See *Stoneking I*, 856 F.2d at 601-02; *Lopez*, 817 F.2d at 355-56; *Horton*, 690 F.2d at 480-81.

⁶³ See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1984); *Ingraham v. Wright*, 430 U.S. 651, 669-70

was accomplished through two means.⁶⁴ First, the Supreme Court granted specific constitutional rights to students while in public school, rights that were to be protected from infringement absent a legitimate school disciplinary purpose.⁶⁵ Second, the Supreme Court altered the role of the school officials themselves.⁶⁶

Beginning with the 1969 decision of *Tinker v. Des Moines Independent School District*, the United States Supreme Court recognized that students in school are "persons" under the Constitution, and that the state, in its dealings with students, must respect the liberties contained in the Bill of Rights.⁶⁷ In *Tinker*, the Court struck down a school regulation prohibiting students from wearing armbands to protest government policy in Vietnam.⁶⁸ The Court stated that "[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."⁶⁹ The *Tinker* decision was the first in a subsequent line of Court cases that empowered students with new constitutional rights.⁷⁰

(1977); *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

⁶⁴ See *TLO*, 469 U.S. at 336.

⁶⁵ See, e.g., *id.* at 336 (students have Fourth Amendment rights while in school); *Goss*, 419 U.S. at 573–74 (students have Due Process rights while in school); *Tinker*, 393 U.S. at 505–06 (students have First Amendment rights while in school).

⁶⁶ See *TLO*, 469 U.S. at 336.

⁶⁷ 393 U.S. at 507, 511. Previously, the Court's position was that, under the common law, the nature of the state-child relationship was "custodial" and thus, the school official could not "deprive the child of any rights, because he had none." *Id.* at 511.

⁶⁸ *Id.* at 504–05.

⁶⁹ *Id.* at 507 (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)).

⁷⁰ See *TLO*, 469 U.S. at 336 (students have Fourth Amendment reasonable expectation of privacy rights while in school); *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (removal of books from school libraries because school board disapproved of ideas contained in the books violated students' First Amendment rights); *Goss*, 419 U.S. at 573 (when granted by state statute, the right to an education is irrevocable unless proceeded by "fundamentally fair procedures" which consist of a minimum of notice to the student of charges against him and of the opportunity to be heard, anything less violates Due Process); *Tinker*, 393 U.S. at 505–06 (students have First Amendment rights in school). One commentator has also written that the Court may have determined that students are also entitled to Fifth Amendment rights, specifically the right against self-incrimination in school disciplinary hearings. See Robert J. Goodwin, *The Fifth Amendment in Schools: A Rationale For Its Application In Investigation and Disciplinary Proceedings*, 28 WM. & MARY L. REV., 683, 689–90 (1987) (citing *In re Gault*, 387 U.S. 1, 47–48 (1967) ("[t]he privilege against self-incrimination can be claimed in any proceeding, be it criminal or civil administrative or judicial, investigatory or adjudicatory . . ."). *Id.* Several lower courts have held that students are entitled to at least some measure of Fifth Amendment protection. See *Picozzi v. Sandalow*, 623 F. Supp. 1571, 1575–76 (E.D. Mich. 1986); *Pollnow v. Glennon*, 594 F. Supp. 220, 223 (S.D.N.Y. 1984); *Gonzales v. McEwen*, 435 F. Supp. 460, 470–71 (C.D. Cal. 1977).

Not only were students gaining fundamental rights, but the Court was also changing the authority of school officials.⁷¹ In the 1984 decision of *New Jersey v. TLO*, the United States Supreme Court held that school officials must abide by the commands of the Fourth Amendment and were prohibited from conducting illegal searches and seizures of students pursuant to school disciplinary policies.⁷² In *TLO*, the Court held that a search of a student's pocketbook, suspected of containing marijuana, was to be judged by the standards of the Fourth Amendment.⁷³ The Court reasoned that students have a reasonable expectation of privacy while in school and extended the constitutional rights of students to include those under the Fourth Amendment, joining these new rights with those already granted in the Court's past decisions.⁷⁴

In terms of the special relationship analysis, what is most significant about the Court's decision in *TLO*, is its characterization of school officials.⁷⁵ Previously, it was thought that school officials and teachers act *in loco parentis* in their dealings with students.⁷⁶ Their authority was that of the parent, not the State, and therefore, it was thought that school officials, like parents, were not subject to the restrictions contained in the Constitution.⁷⁷ Under such a common law theory, schools were to act on behalf of students' welfare and like the children's parents were free from constitutional restraints in pursuit of that welfare.⁷⁸ In *TLO*, the Court rejected this theory, recognizing that the concept of parental delegation as a source of school authority was not "entirely consonant" with modern school policy.⁷⁹ Instead, the Court stated that today's public school officials do not merely exercise authority voluntarily conferred on them by parents, but act in furtherance of publicly mandated educational and disciplinary policies.⁸⁰ Thus, school officials act as representatives of the state, and cannot claim immunity from the strictures of the Constitution.⁸¹ In sum, while

⁷¹ See *TLO*, 469 U.S. at 336.

⁷² *Id.*

⁷³ *Id.* at 328-29, 337.

⁷⁴ See *id.* at 336 (Fourth Amendment); *Goss*, 419 U.S. at 573 (Due Process); *Tinker*, 393 U.S. at 505-06 (First Amendment).

⁷⁵ See *TLO*, 469 U.S. at 336.

⁷⁶ *Id.*

⁷⁷ *Id.* at 332 n.2 (citing cases).

⁷⁸ *Id.*

⁷⁹ *Id.* at 336 (citing *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)).

⁸⁰ *TLO*, 469 U.S. at 336.

⁸¹ *Id.* at 336-37. One commentator has suggested that *TLO*'s rejection of the *in loco parentis* doctrine is the Court's denial of the existence of a special relationship between school officials and students. Goodwin, *supra* note 70, at 686 n.14 (writing two years before *DeShaney*).

the courts of appeals for the Third and Fifth Circuits were reaffirming the common law obligations on school officials, the Supreme Court, by granting more constitutional rights to students, was imposing new constitutional limits on the authority of those same school officials.⁸²

III. *DESHANEY V. WINNEBAGO DEPARTMENT OF SOCIAL SERVICES*

A. *The Court's Opinion*

In 1989, because of what it called "inconsistent approaches taken by lower courts" in confronting the special relationship dilemma, the Supreme Court granted certiorari to a case that would have a profound impact on the public schools.⁸³ For constitutional scholars, the facts of *DeShaney* are well-known: a four-year-old boy was beaten into a life-threatening coma by his father, after being returned to his father's custody by the county department of social services.⁸⁴ Joshua DeShaney's mother brought a section 1983 action against the department, alleging that the department's failure to protect her son from his father violated his rights and liberty interest in bodily integrity in violation of the Due Process Clause of the Fourteenth Amendment.⁸⁵

The *DeShaney* Court, despite what it called "tragic facts," refused to impose liability on the department on the grounds that the Constitution imposes no duty on the state to provide protective services against the deprivation of life, liberty and property interests by other means besides the state itself.⁸⁶ Thus, the department was under no

⁸² See *TLO*, 469 U.S. at 336; but see *Stoneking I*, 856 F.2d 594, 601-02 (3d Cir. 1988); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480-81 (5th Cir. 1982).

⁸³ *DeShaney*, 109 S. Ct. 998, 1002 (1989).

⁸⁴ *Id.* at 1001-02. The county became familiar with Joshua in January 1983, when he was hospitalized for injuries suspected to be the result of abuse. *Id.* The county social services department released him to his father, who had had custody of Joshua since divorcing his mother in 1980. *Id.* Monthly visits to the home by a caseworker revealed ongoing abuse, and Joshua was twice subsequently hospitalized. *Id.* Despite evidence of mounting serious abuse, neither the caseworker nor the department took any further attempts to try to protect the child. *Id.*

⁸⁵ *Id.* at 1002. U.S. CONST. amend. XIV states in pertinent part: "... nor shall any State deprive any person of life, liberty or property without due process of law."

⁸⁶ *DeShaney*, 109 S.Ct. at 1001, 1003.

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. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty or property without 'due process of law', but its language cannot be fairly extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.

Id.

constitutional obligation to protect Joshua from the violence of his father, a private actor.⁸⁷ It was what followed in the Court's opinion that is significant in the context of public schools.

In dicta, the Court then chose to severely limit those instances where the state owes an affirmative duty, by reason of its special relationship with its citizens, to protect them from harm from others.⁸⁸ The Court held that the "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it imposed on his freedom to act on his own behalf."⁸⁹ Therefore, a special relationship exists only where the state has taken a person into custody and by its "affirmative act of restraining the individual's freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint of personal liberty-does the state then owe the individual an affirmative obligation to protect from harm by others."⁹⁰ Although leaving the question of the complete list of those in special relationships with the state unanswered, the Court did indicate that only those individuals who have been rendered unable to care for their own welfare, like those in prisons and mental hospitals, are owed corresponding duties to be protected by the state from third parties.⁹¹

B. *Post-DeShaney Problem*

Despite the Supreme Court's attempts to end the ambiguity that had existed, the *DeShaney* opinion, especially when read in the context of schools, has spawned much litigation. The goal of this litigation has been to determine the applicability, if any, of the Court's analysis to public schools.⁹² The insertion of the phrase ". . . or other similar

⁸⁷ *Id.* at 1006.

⁸⁸ *Id.* at 1005-06. Petitioners contended that a special relationship existed between the State and Joshua because the State knew that the boy faced a danger of abuse at his father's hands, and "specifically proclaimed, by word and by deed, its intention to protect him against that danger." *Id.* at 1004.

⁸⁹ *Id.* at 1006.

⁹⁰ *Id.*

⁹¹ *DeShaney*, 109 S.Ct. at 1006. The Court did indicate, in an oft-cited footnote, that an affirmative duty to protect might arise where the state, by the affirmative exercise of its power, removes a child from free society and places him in a foster home operated by its agents. *Id.* at n.9. However, the Court refused to express a view on the validity of this argument. *Id.* Several courts of appeals have seized on this footnote to hold that a special relationship exists and an affirmative obligation to protect arises in the foster home situation. *See, e.g., Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d 883, 891 (10th Cir. 1992); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990); *Griffith v. Johnston*, 899 F.2d 1427, 1438-39 (5th Cir. 1990).

⁹² *See Huefner, supra* note 19, at 1951 n.69 (citing the federal cases both before and after

restraint of personal liberty" has been interpreted by some courts to indicate that a special relationship may exist between school officials and students, who may in effect be in custody of the state because of compulsory attendance laws.⁹³ Where a court finds that a special relationship does exist, an affirmative obligation to provide protective services may be imposed on the school even to the extent of providing protection from private actors, such as a fellow student.⁹⁴ Additionally, *DeShaney* raised the specter that where a special relationship exists, the court owes the individual an affirmative obligation to provide "undefined" protective services.⁹⁵ Conversely, where a court finds that no

DeShaney). In the eighteen subsequent months following *DeShaney*, at least five new suits were reported, already exceeding the number of reported decisions in this field in the ten years prior to *DeShaney*. *Id.* In addition to the cases cited by the *Huefner* note, several other cases were reported in the two years after publication and have been cited by this note. *See* *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707 (3d Cir. 1993); *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992); *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992); *Robbins v. Maine Sch. Admin. Dist. No. 56*, 807 F. Supp. 11 (D.Me. 1992); *Elliot v. New Miami Bd. of Educ.*, 799 F. Supp. 818 (S.D. Ohio 1992); *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405 (E.D. Ark. 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992); *Waechter v. School Dist. No. 14-030 of Casopolis, Mich.*, 773 F. Supp. 1005 (W.D. Mich. 1991); *Doe v. Douglas County Sch. Dist.*, 770 F. Supp. 591 (D.Colo. 1991); *Arroyo v. PLA*, 748 F. Supp. 56 (D. P.R. 1990).

⁹³ *DeShaney*, 109 S. Ct. at 1006. *See also* *Stoneking I*, 856 F.2d 594, 601 (3d Cir. 1988) ("[b]ecause students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional custody of the school authorities . . ."); *Waechter*, 773 F. Supp. at 1009 (finding that a custodial relationship exists in schools); *Arroyo*, 748 F. Supp. at 59 (finding that students were in custody of state while in school but refusing to impose affirmative obligation to protect on schools).

⁹⁴ *See* *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987) (school liable where bus driver deliberately indifferent to assault of student by another student); *Pagano v. Massapequa Pub. Sch.*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (school district might be liable where student was physically and verbally abused by other students).

⁹⁵ *DeShaney*, 109 S. Ct. at 1006 (" . . . when the State by the affirmative exercise of its power so restrains an individual's liberty 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, it transgresses the substantive limits of the Fourteenth Amendment"); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that when the state institutionalizes an individual it is obligated to provide that individual with adequate food, shelter, clothing, and medical care); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (duty to provide prisoners with medical care). These cases indicate the most basic needs the State must provide to those within its "custody", under the *DeShaney* holding. However, other courts had previously and subsequently indicated other kinds of affirmative obligations the State must satisfy under its undertaking of a special relationship. *See* *Bounds v. Smith*, 430 U.S. 817, 824 (1977) (prison officials have affirmative duty to assist prisoners in exercise of their rights to access of courts); *Lipscomb v. Simmons*, 884 F.2d 1242, 1245-49 (9th Cir. 1989) (state has affirmative obligation to assist children in state custody in exercising their fundamental constitutional rights, such as the right to family integrity and association); *Monmouth County Correctional Inst. Inmates v. Lanzero*, 834 F.2d 326, 337-38 (3d Cir. 1987) (prison officials have affirmative obligation to assist prisoners in exercise of their right to abortions); *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987) (prison officials have affirmative duty to assist prisoners in exercise of their right of observance of religious dietary and

special relationship exists, school officials are under an obligation only to refrain from acting "deliberately indifferent" to the misconduct of their employees.⁹⁶

IV. COURTS' RESPONSES TO *DESHANEY*

After *DeShaney*, the federal courts were confronted with two kinds of section 1983 suits brought by students against school officials, alleging constitutional violations.⁹⁷ The first involved instances where a school employee was accused of sexually assaulting or injuring a student.⁹⁸ The second dealt with the issue of liability when a student alleges sexual assault or injury by a fellow student.⁹⁹

A. Supervisory Liability

In cases where a school official allegedly sexually assaulted a student, the circuit courts ruled that *DeShaney* did not affect liability where the offending actor was a state actor.¹⁰⁰ Regardless of whether the court considered students to be in a special relationship with the school district, the circuit courts ruled that nothing in the Supreme Court's opinion altered the fact that school officials could be held liable for their deliberate indifference to actions taken by subordinates.¹⁰¹ Although *DeShaney* may have foreclosed the possibility of imposing liability where the offending actor was a private citizen, where

other laws); *B.H. v. Johnson*, 715 F. Supp. 1387, 1392-93 (N.D. Ill. 1989) (child in state custody has substantive due process right, which the state must protect, to be free from unreasonable and unnecessary intrusions on both physical and emotional well-being).

⁹⁶ See *Black*, 985 F.2d at 707 (finding no liability against school officials where private actor committed sexual assault); *Middle Bucks*, 972 F.2d at 1372 (no liability against school officials, because of no special relationship, where student was sexually assaulted by other students); *Stoneking II*, 882 F.2d 720, 724-25 (3d Cir. 1989) (liability against school district not because of special relationship but because student sexually assaulted by teacher, a state actor).

⁹⁷ See *Middle Bucks*, 972 F.2d at 1365 (student sexually assaulted by other students); *Stoneking II*, 882 F.2d at 721 (student sexually assaulted by teacher).

⁹⁸ See *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992); *J.O. v. Alton Community Unit School Dist.*, 909 F.2d 267, 272 (7th Cir. 1990); *D.T. v. Indep. Sch. Dist.*, 894 F.2d 1176, 1184 (10th Cir. 1990); *Stoneking II*, 882 F.2d at 720; *Waechter*, 773 F. Supp. at 1009; *Douglas County*, 770 F. Supp. at 592; *Robert G. v. Newburgh Sch. Dist.*, 1990 WL 3210, at * 1-2 (S.D.N.Y. Jan. 8, 1990); *Tilson v. School Dist. of Philadelphia*, 1990 WL 98932, *8-9 (E.D. Pa. July 13, 1990).

⁹⁹ See *Middle Bucks*, 972 F.2d at 1367; *Robbins*, 807 F. Supp. at 13; *Elliot v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 819 (S.D. Ohio 1992); *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405, 1414 (E.D. Ark. 1992); *Russell*, 784 F. Supp. at 1578; *Arroyo*, 748 F. Supp. at 60; *Pagano*, 714 F. Supp. at 641.

¹⁰⁰ See *Stoneking II*, 882 F.2d at 724-25.

¹⁰¹ *Id.*

it is the state, through one of its subordinates, which has deprived a citizen of life, liberty or property, the Due Process Clause of the Constitution has clearly been implicated.¹⁰² The first federal court to address the dilemma after the *DeShaney* decision was the United States Court of Appeals for the Third Circuit, which had been directed to re-consider its decision in *Stoneking I*, in light of *DeShaney*.¹⁰³ In *Stoneking I*, the court had held that a special relationship did exist in the school context.¹⁰⁴ The *Stoneking II* court, hearing the appeal again on direction of the Supreme Court, changed its holding.¹⁰⁵ The court noted that the primary difference between *DeShaney* and the case before it, was that in *Stoneking II*, a state actor, the teacher, was accused of the sexual assault, while in *DeShaney*, a private actor had committed the violence.¹⁰⁶ This difference allowed the Third Circuit to hold that the school district could be liable upon sufficient proof that its deliberate indifference to the actions of one of its subordinates represented a custom, policy or practice in violation of the student's constitutional rights, regardless of whether a special relationship did in fact exist.¹⁰⁷ Even though the court rested its decision on supervisory liability, it also addressed the special relationship question in post-*DeShaney* schools.¹⁰⁸ Despite the statement that in light of *DeShaney* it could no longer rely on a theory imposing the affirmative obligation to protect students established in *Stoneking I*, the court, in dicta, stated that "[a]rguably, our earlier discussion noting that 'students are in what may be viewed as functional custody of the school authorities during their presence at school' . . . is not inconsistent with the *DeShaney* opinion."¹⁰⁹ Other courts, confronted by the special relationship issue, have cited this statement.¹¹⁰

¹⁰² *DeShaney*, 109 S. Ct. at 1006.

¹⁰³ See *Stoneking II*, 882 F.2d at 723.

¹⁰⁴ *Stoneking I*, 856 F.2d 594, 601 (3d Cir. 1988).

¹⁰⁵ *Stoneking II*, 882 F.2d at 724-25.

¹⁰⁶ *Id.* at 724.

¹⁰⁷ *Id.* at 724-25.

¹⁰⁸ *Id.* at 722-23. The Court did not reach a conclusion as to the breadth of the special relationships existing between the state and individuals. *Id.* "We prefer not to rest our decision again on an affirmative duty to protect such students in this situation because the uncertainty of the law in this respect may cause further delay." *Id.*

¹⁰⁹ *Id.* at 723.

¹¹⁰ See *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 147 (5th Cir. 1992). What is ironic is that the Third Circuit, in *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, appeared to end any validity to this statement, yet it continues to be cited. 972 F.2d at 1372. See *infra* notes 114-19 and accompanying text for a discussion of the Third Circuit's change of position.

B. Student Versus Student

When a student alleges that he or she was sexually assaulted by another student, the plaintiff may not plead supervisory liability since no state actor is involved.¹¹¹ In this situation, courts are directly forced to address whether the special relationship exists in schools such that an affirmative duty to protect the students from harm arises.¹¹² With very few exceptions, courts have, since *DeShaney* and *Stoneking II*, rejected the contention that students are in a special relationship with the state.¹¹³

1. No Special Relationship

In 1992, the United States Court of Appeals for the Third Circuit, in *D.R. v. Middle Bucks Area Vocational Technical School*, settled the unanswered issue raised by its earlier decision in *Stoneking II*, and held that students compelled by law to attend school are not in a special relationship with the state.¹¹⁴ In *Middle Bucks*, the plaintiff alleged that she was sexually assaulted by other students, and argued that a special relationship existed between herself and the school during the school day because compulsory attendance laws so restrained her liberty interests that she should be deemed to be in state custody.¹¹⁵ As a result, she claimed that the state owed her an affirmative duty to protect her from the harm posed by her fellow classmates.¹¹⁶ The *Middle Bucks* court rejected these arguments and held that students are not subject to the same severe and continuous state restrictions that render individuals wholly dependent on the state to meet their basic needs, as are prisoners and mental patients.¹¹⁷ Unlike individuals whom the state has

¹¹¹ See *Middle Bucks*, 972 F.2d at 1364; see also *supra* note 99 for other cases.

¹¹² *Middle Bucks*, 972 F.2d at 1364.

¹¹³ See *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992) (school district not liable where child caught on his bandanna in cloakroom and choked to death because no affirmative duty to protect against harm not inflicted by the state); *Middle Bucks*, 972 F.2d at 1372 (school not liable for sexual assault of student by other students); *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990) (school district not liable for sexual assault of student by teacher under theory of affirmative obligation). But see *Pagano v. Massapequa Pub. Sch.*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (holding that school did owe some duty to protect in refusing to dismiss section 1983 suit brought against school for alleged physical abuse by fellow students).

¹¹⁴ 972 F.2d at 1372. The court considered this question an open one after its opinion in *Stoneking II. Id.*

¹¹⁵ *Id.* at 1370-71.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

incarcerated or institutionalized, public schoolchildren remain residents in their home, under the care and supervision of their parents, who are responsible for providing for their basic needs and who may turn to persons unrelated to the state for help.¹¹⁸ Based upon these assertions, the court refused to extend the special relationship affirmative obligation to include schoolchildren compelled to attend school.¹¹⁹

The reasoning used by the *Middle Bucks* court has been invoked by other courts in the First, Third, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits to reject the special relationship argument contemplated by the *Stoneking II* decision.¹²⁰ Although some of these courts conceded that schoolchildren, while in school, were in the custody of the state, they refused to equate that custody with the total deprivation

¹¹⁸ *Id.* at 1372. The Court based its reasoning on several Pennsylvania statutes which restrict the authority exercised by school officials and affirm the authority and decision-making power of parents, even while the child is in school. *Id.*

¹¹⁹ *Middle Bucks*, 972 F.2d at 1372. A petition to the United States Supreme Court for a writ of certiorari was filed in late 1992 and denied on January 19, 1993. 113 S. Ct. 1045 (1993).

¹²⁰ See *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707 (3d Cir. 1993) (no special relationship exists between students and school such that school had affirmative obligation to protect students from sexual abuse by bus driver employed by private contractor of the school district); *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992) (no special relationship and no affirmative obligation to protect student who choked on bandanna while in cloakroom where not inflicted by state); *Middle Bucks*, 972 F.2d at 1377 (no special relationship and no liability where school failed to protect student from sexual assaults of fellow students); *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990) (no special relationship and no affirmative obligation to protect where plaintiff was sexually assaulted by a teacher and failed to plead supervisory liability); *Jane Doe "A" v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990) (no special relationship analysis implicated where school bus driver sexually assaulted students); *Robbins v. Maine Sch. Admin. Dist. No. 56*, 807 F. Supp. 11, 13 (D. Me. 1992) (where court in the First Circuit held that no special relationship exists in schools such that school had an affirmative duty to protect student from physical and emotional assaults from other students); *Elliot v. New Miami Bd. Educ.*, 799 F. Supp. 818, 823 (S.D. Ohio 1992) (where court in the Sixth Circuit refused to hold school district liable under theory of special relationship or affirmative obligation to protect where student was harassed by other students); *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405, 1414 (E.D. Ark. 1992) (where court in the Eighth Circuit held that no special relationship and no affirmative obligation in dismissing suit brought by student allegedly sexually assaulted by another student); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1580 (N.D. Ga. 1992) (where court in the Eleventh Circuit held that no affirmative duty to protect student assaulted by other students); *Doe v. Douglas County Sch. Dist.*, 770 F. Supp. 591, 593-94 (D. Colo. 1991) (where court in the Tenth Circuit held that no special relationship between student sexually assaulted by school psychologist and school, although supervisory liability could be imposed); *Reeves by Jones v. Besonen*, 754 F. Supp. 1135, 1141 (E.D. Mich. 1991) (where court in the Sixth Circuit refused to find special relationship and affirmative obligation where student injured by another student during extracurricular activity); *Arroyo v. PLA*, 748 F. Supp. 56, 60 (D.P.R. 1990) (where court in the First Circuit refused to impose affirmative obligation to protect students, where plaintiff brought suit after being shot by another student); *Stouffer v. Orangeville Sch. Dist.*, 1990 WL 304250, *4-5 (N.D. Ill. May 17, 1990) (where court in the Seventh Circuit held that no affirmative obligation to protect where student sexually assaulted by other students).

of liberty rights that exists in the prison and mental hospital contexts.¹²¹ Still, other courts were unwilling to find that compulsory attendance laws placed students in the custody of the state at all, as *DeShaney* mandated.¹²² The commonality existing in these opinions is that in contrast to mental patients and prisoners, the state has not so restrained the student from exercising basic liberty rights nor has the State deprived the students' parents from providing for their children's food, shelter, clothing, medical care, and reasonable safety, such that a special relationship should exist.¹²³

One district court went beyond the arguments used in the *Middle Bucks* opinion and other court decisions that the special relationship analysis was legally inapplicable to schools, and raised questions as to the feasibility of imposing further constitutional duties on school officials.¹²⁴ In *Dorothy J. v. Little Rock School District*, the United States District Court for the Eastern District of Arkansas confronted the issue of whether school officials owed an affirmative obligation to protect a student, assaulted by other students.¹²⁵ The *Dorothy J.* court found that imposing such constitutional duties on schools, already inflicted with the epidemic of deadly violence on school campuses, would force school officials to assume the roles of police officers or prison guards rather than teachers.¹²⁶ Additionally, it would impose liability anytime children skinned their knee on the playground or were beaten up by the school bully.¹²⁷ Thus, although the *Dorothy J.* court ultimately rejected the special relationship applicability to schools on the similar basis of other courts, the court raised substantial concerns regarding the feasibility of such an analysis, concerns that no other court had identified.¹²⁸

¹²¹ See *Stoneking II*, 882 F.2d at 723 ("[a]rguably our earlier discussion that 'students are in what may be viewed as functional custody of the school authorities' . . . is not inconsistent with *DeShaney*," however, "we prefer not to rest our decision again on an affirmative duty to protect such students . . ."); *Arroyo*, 748 F. Supp. at 60 ("It may be said that children are under the custody of the State while they attend classes" The court however declined to impose liability because private actor committed wrong in question).

¹²² See *Maldonado*, 975 F.2d at 732; *Middle Bucks*, 972 F.2d at 1371; *J.O.*, 909 F.2d at 272.

¹²³ See *supra* note 120 for a listing of the cases.

¹²⁴ *Dorothy J.*, 794 F. Supp. at 1414.

¹²⁵ *Id.* at 1405-06.

¹²⁶ *Id.* at 1414.

¹²⁷ *Id.*

¹²⁸ See *id.* The *Dorothy J.* decision was affirmed on appeal, where the Eighth Circuit Court of Appeals denied the existence of a special relationship in the schools. *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993).

2. The Other Side

There has not been complete unanimity in rejecting the special relationship theory proposed by plaintiffs abused by private actors.¹²⁹ In 1989, in *Pagano v. Massapequa Public Schools*, the United States District Court for the Eastern District of New York, held that students, while in school, were owed a limited duty from school officials to protect them from harm.¹³⁰ In *Pagano*, the plaintiff alleged that the school failed to protect him from the verbal and physical abuse of fellow students.¹³¹ In denying the defendant's motion to dismiss, the *Pagano* court held that although the duty to protect is not necessarily equivalent to that existing in prisons and mental hospitals, there exists a duty sufficient to survive a motion to dismiss.¹³²

The *Pagano* court analogized the student's plight to that of children in foster homes, a category specifically referred to but not elaborated on by the *DeShaney* court.¹³³ Because a pre-*DeShaney* court in the *Pagano* circuit had held that such a duty existed in the foster care situation, the *Pagano* court allowed the suit to continue.¹³⁴ The court determined that school officials, as representatives of the state, are to assume the role of guardian of the children, who, much like foster children are incapable of providing for themselves.¹³⁵

In two other cases, courts specifically discussed the special relationship argument, agreeing with the *Stoneking II* decision that such a relationship might exist but deciding their cases instead on supervisory liability, because the offending party was a state actor.¹³⁶ Despite these

¹²⁹ See *Pagano v. Massapequa Pub. Sch.*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989); *Robert G. v. Newburgh Sch. Dist.*, 1990 WL 3210, *1-2 (S.D.N.Y. Jan. 8, 1990); *Tilson v. School Dist. of Philadelphia*, 1990 WL 98932, *8-9 (E.D. Pa. July 13, 1990). It would appear likely that after the *Middle Bucks* decision, the reasoning used by the *Tilson* court is not valid in the Third Circuit. See *Middle Bucks*, 972 F.2d at 1377. Both the *Pagano* and *Robert G.* courts are in the Second Circuit.

¹³⁰ 714 F. Supp. at 643.

¹³¹ *Id.* at 642.

¹³² *Id.* at 643.

¹³³ *Id.*; see also *DeShaney v. Winnebago DSS*, 109 S. Ct. 998, 1006 n.9 (1989).

¹³⁴ *Pagano*, 714 F. Supp. at 643. The Second Circuit had previously held that a special relationship existed and thus, an affirmative obligation to protect arose in the foster home situation. *Doe v. New York City*, 649 F.2d 134 (2d Cir. 1981).

¹³⁵ *Pagano*, 714 F. Supp. at 643.

¹³⁶ See *Robert G.*, 1990 WL 3210 at *1-2 (where the court held that a student, who was sexually assaulted by a substitute teacher, was in functional custody of the State, in denying a motion to dismiss the suit, even though supervisory liability existed as well); *Tilson*, 1990 WL 98932 at *8-9 (where the court held that preschool children, sexually abused by school employee, may be in a

decisions raising the possibility of a special relationship in schools, by September of 1992, a majority of the circuits refused to impose liability on the school where a plaintiff alleged harm perpetrated by another student or non-state actor.¹³⁷ The special relationship affirmative obligation only extended to, at least as far as the Supreme Court had decided, those individuals whom the state had imprisoned or institutionalized.¹³⁸ Lower courts had extended the special relationship analysis to include those individuals removed from their natural home and placed in foster care, or state supervision, or possibly those whom the state had placed in a position of danger where otherwise they would not have been, although limiting such relationships to situations where the individual was in the functional custody of the state.¹³⁹ Just as the circuits were beginning to agree, the United States Court of Appeals for the Fifth Circuit broke ranks with a decision announced on October 21, 1992.¹⁴⁰

special relationship with the school imposing an affirmative obligation to protect but dismissing the suit because there was no evidence of deliberate indifference by the school officials).

¹³⁷ See *supra* notes 120–22 and accompanying text for a listing of cases.

¹³⁸ See *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (special relationship exists between the state and individuals confined to state mental health facility); *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (special relationship exists between prisoners and state such that state owes duty to provide necessary services and protection from harm).

¹³⁹ See *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 990–91 (1st Cir. 1992) (voluntary mental patient not in state custody so no special relationship); *Yvonne L. v. New Mexico Dept. Human Serv.*, 959 F.2d 883, 890 (10th Cir. 1992) (special relationship exists between state and children placed by state in foster care); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1067 (3d Cir. 1991) (pre-trial detainee in state custody owed duty to protect from harm); *Harris v. District of Columbia*, 932 F.2d 10, 13–14 (D.C. Cir. 1991) (no special relationship because no state custody where officers shackled victim's ankles, handcuffed him, and locked him in police van); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (same); *Griffith v. Johnston*, 899 F.2d 1427, 1438–39 (5th Cir. 1990) (state owes affirmative obligation to protect children under full-time state supervision); *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989) (finding that police officer's instructing burglary suspect to remain in private club where there was reason to believe suspect's safety was threatened by club owner who was interrogating him was sufficient to constitute custody); *Milburn v. Anne Arundel County DSS*, 871 F.2d 474, 476 (4th Cir. 1989) (denying relief under § 1983 special relationship to child voluntarily released from custody of state and then placed in abusive home); *Was v. Young*, 796 F. Supp. 1041, 1045–47 (E.D. Mich. 1992) (rejecting special relationship and affirmative obligation to protect where plaintiffs were spectators beaten by other attendees at fireworks display, while not in state custody); *G-69 v. Degnan*, 745 F. Supp. 254, 265 (D.N.J. 1990) (court held that a special relationship existed where the state had acted affirmatively to place plaintiff in position of danger, as a government informant, where otherwise the individual would not have been but for the state's promise to protect and provide new identity); *Hynson v. City of Chester*, 731 F. Supp. 1236, 1239 (E.D. Pa. 1990) (no special relationship and no duty to protect woman from her husband during lapse period of police protection).

¹⁴⁰ *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 147 (5th Cir. 1992), *cert. denied*, *Caplinger*,

V. THE *DOE* V. *TAYLOR* DECISION

A. *Background*

Before the United States Court of Appeals for the Fifth Circuit heard the appeal that is the subject of this note, the Circuit had not specifically spoken on the issue of special relationships in the schools since the Supreme Court's *DeShaney* decision.¹⁴¹ Previously, the Fifth Circuit had held that a special relationship did exist between the school and students entrusted to their care under compulsory attendance laws.¹⁴² In that case, the court used this theory of liability to hold the school district liable where a bus driver failed to break up a fight between students.¹⁴³

In one post-*DeShaney* case, the 1990 case of *Griffith v. Johnston*, the United States Court of Appeals for the Fifth Circuit held that a special relationship only exists with regard to particular individuals, such as prisoners, mental patients, pretrial detainees and possibly children in state adoption agencies.¹⁴⁴ In *Griffith*, the plaintiffs, adoptive parents of troubled children, alleged that the state adoption agency, which previously had custody of the children, had violated the due process rights of the children by failing to provide post-adoption services.¹⁴⁵ The *Griffith* court rejected the notion that a special relationship existed between the state and the children, reasoning that when the children were placed in their permanent homes, the state ceased to act as guardian of the children.¹⁴⁶ The court quoted the *DeShaney* case in holding that a special relationship exists between the state and individuals only where the state has acted to curtail the individuals' ability, against their will, to protect themselves.¹⁴⁷

Lankford v. Doe, 113 S. Ct. 1066, 1066, *reh'g denied*, Caplinger, Mike, et. al. v. Doe, Jane, 113 S. Ct. 1436 (1993).

¹⁴¹ *Taylor*, 975 F.2d at 145. In its analysis, the *Taylor* court referred back to circuit precedent of ten years before, citing only one Fifth Circuit case involving special relationships that was decided after *DeShaney*, and the case did not concern schools. *Id.* at 146 (citing *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990)).

¹⁴² See *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987).

¹⁴³ *Id.*

¹⁴⁴ 899 F.2d at 1439.

¹⁴⁵ *Id.* at 1433.

¹⁴⁶ *Id.* at 1439.

¹⁴⁷ *Id.* (citing *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1006 (1989); *Romeo*, 457 U.S. at 320; *Estelle*, 429 U.S. at 105-06).

B. *Facts & Procedural History*

In October 1987, after a year of sexual involvement and molestation by a school gym teacher with Jane Doe, a fourteen-year old freshman at Taylor High School, school district officials finally took action against the teacher, Lynn Stroud, employed at the high school from 1981-87.¹⁴⁸ Before Jane Doe ever entered the picture, it was no secret within the school community that Coach Stroud had developed romantic affections for a number of young female students at the high school.¹⁴⁹ As early as 1985, complaints about his behavior had reached the offices of both the superintendent and the principal.¹⁵⁰

When Jane Doe became a freshman at Taylor High in 1986, she immediately became the "point of Coach Stroud's obsession."¹⁵¹ He began by writing suggestive comments on test papers, giving her high grades without requiring that she do any work, and taking her and other female students out to lunch during the school day and buying them alcoholic beverages.¹⁵² By early January 1987, Coach Stroud began to pressure Jane Doe into having sexual intercourse and after several requests, she finally agreed.¹⁵³

Taylor High School Principal Eddy Lankford first officially became aware of possible misconduct when another student informed him of the situation.¹⁵⁴ In response, the principal acknowledged that he was aware of the rumors, transferred the informing student out of Stroud's class, and took no further action.¹⁵⁵ Superintendent Caplinger was also informed of the situation, although from a separate source.¹⁵⁶

Over the next several months, Jane Doe and Coach Stroud had repeated sexual contact both on and off school grounds.¹⁵⁷ Their

¹⁴⁸ *Taylor*, 975 F.2d at 141. After receiving the complaints of both Jane Doe and another student, the school district suspended Coach Stroud without pay. *Id.* Coach Stroud later resigned and pled guilty to criminal charges in connection with the matter. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 139. Coach Stroud reportedly made little effort to conceal his fancy for young female students, writing explicit love notes to them, letting them drive his truck, exhibiting explicit favoritism in class toward them and physically touching them in a "manner not becoming a schoolteacher." *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Taylor*, 975 F.2d at 139.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* Superintendent Caplinger was informed of Coach Stroud's "unprofessional conduct" with Jane Doe at a school basketball game by another school official. *Id.*

¹⁵⁷ *Id.* Jane Doe insisted that she "gave into" Stroud and continued having sexual relations

romantic relationship was common knowledge within the Taylor High community, not only among students but also among teachers and parents.¹⁵⁸ The school officials met with both Jane Doe and Coach Stroud, who each denied any wrongdoing.¹⁵⁹ Based solely on the adamant denials of Jane Doe and Stroud, the school officials were apparently satisfied that the matter should be closed.¹⁶⁰

Despite a summer relapse, the sexual contact resumed when classes began again in the fall of Jane Doe's sophomore year.¹⁶¹ Finally, after becoming concerned with their daughter's relationship with Stroud, Doe's parents contacted their attorney, who met with Jane Doe and then with the school officials.¹⁶² Stroud was then suspended without pay and later resigned.¹⁶³ Jane Doe then brought a civil rights suit, in the United States District Court for the Western District of Texas, against her teacher, the school district, the superintendent and the principal, alleging violations of due process and equal protection arising from the sexual molestation by her teacher.¹⁶⁴ The defendants filed a motion for summary judgment on grounds of qualified immunity.¹⁶⁵ When the district court denied the motion, the school officials appealed.¹⁶⁶

with him because she was "just tired of the pressure" and was fearful of losing her relationship with him. *Id.*

¹⁵⁸ *Taylor*, 975 F.2d at 140. Several parents called to request that their children not be assigned to Stroud's class. *Id.*

¹⁵⁹ *Id.* The school officials until this time had never called Jane Doe's parents to inform them of their concerns. *Id.* When Jane Doe's parents were finally called, they were assured that a meeting of all the concerned parties was to be held. *Id.* No such meeting ever took place. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 141.

¹⁶³ *Taylor*, 975 F.2d at 141.

¹⁶⁴ *Id.* at 137.

¹⁶⁵ *Id.* at 141. Even where the plaintiff in a § 1983 suit brought against supervisory officials, states a legitimate constitutional violation, the supervisory officials themselves may escape liability if they successfully plead that they are entitled to qualified immunity. *Id.* The officials "must show that their conduct did 'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The school officials must demonstrate that "reasonable officials in their position at the relevant time could have believed, in light of clearly established law, that their conduct comported with established legal standards." *Id.* The *Taylor* court concluded that no reasonable school official would have believed that he could act with deliberate indifference towards instances of sexual molestation by a school teacher, and, rejecting the qualified immunity defense, the court remanded the case to determine whether the school officials acted with the requisite deliberate indifference. *Id.* at 148. The subject of qualified immunity is beyond the scope of this note.

¹⁶⁶ *Id.* at 141. The denial of qualified immunity is an immediately appealable order. *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

C. *The Taylor Opinion*

The Fifth Circuit's opinion, written by Judge Goldberg, began by stating that the court "thought it was 'patently obvious' that the Constitution would not tolerate the school officials looking the other way or only taking meager measures to protect a fourteen-year-old girl from being sexually abused by one of their subordinates." From this initial premise, the court recognized that there were two major issues they confronted in determining whether Superintendent Caplinger, Principal Lankford and the Taylor School District were liable for the sexual assault of Jane Doe by one of their subordinates.¹⁶⁷ The first issue was whether sexual molestation of a schoolchild rises to the level of a constitutional violation, as a section 1983 suit requires.¹⁶⁸ The second issue was whether the school officials owed Jane Doe some affirmative duty to protect her from "such an assault on her constitutional rights."¹⁶⁹

As to the first issue, no previous Fifth Circuit decision had held that the sexual molestation of a child violated the Due Process Clause of the Fourteenth Amendment, although other circuits had addressed the question.¹⁷⁰ The *Taylor* court referred to its own precedent in extending the due process prohibition to include the sexual molestation of a schoolchild by a teacher.¹⁷¹ The Fifth Circuit had previously held that a public school teacher violated the constitutional rights of a schoolchild by lashing the child to a chair for a protracted period of time without any justification.¹⁷² As the *Taylor* court reasoned, if it was unconstitutional for a teacher to tie a child to a chair, then it clearly

¹⁶⁷ *Taylor*, 975 F.2d at 141.

¹⁶⁸ *Id.* See also *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3d Cir. 1992) ("[g]enerally, the first issue in a section 1983 case is whether a plaintiff sufficiently alleges a deprivation of any right secured by the constitution").

¹⁶⁹ *Taylor*, 975 F.2d at 141.

¹⁷⁰ *Id.* at 143 ("We explicitly express this opinion for the first time in this circuit . . ."). See also *K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (sexual abuse of a child removed by the state from natural home and placed in abusing home implicates due process); *Stoneking II*, 882 F.2d 720, 727 (3d Cir. 1989) (due process clause protects student's right to be free from sexual assault by teacher).

¹⁷¹ *Taylor*, 975 F.2d at 142. "We take no great leap in coming to this conclusion." *Id.*

¹⁷² See *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987). The Supreme Court had previously held that a state actor cannot use means, in the name of the public good, which "shock the conscience." *Rochin v. California*, 342 U.S. 165, 173 (1952) (where police pumped suspect's stomach to retrieve evidence). Such conduct and methods implicate the due process clause because they intrude upon an individual's liberty interest to be free from bodily abuse. *Id.*

had to be unconstitutional for a teacher to sexually molest a school-child.¹⁷³

The *Taylor* court then turned to the more controversial aspect of the case, whether the school officials involved owed Jane Doe an affirmative obligation to protect her from the sexual molestation of her teacher, their employee.¹⁷⁴ The court concluded that the school officials did owe Jane Doe an affirmative obligation to protect her under two separate and distinctive theories.¹⁷⁵ The court concluded that from either theory, a duty did exist.¹⁷⁶

1. Supervisory Liability

The court first invoked the theory of supervisory liability to impose a duty on the school officials to protect Jane Doe.¹⁷⁷ Superintendent Caplinger and Principal Lankford could be held liable if, by their direct actions, they were deliberately indifferent to the misconduct of their subordinate.¹⁷⁸ As the *Stoneking II* court had held, "school officials can find themselves liable for the malfeasance of their subordinates if they know or should be aware of the transgressions, yet consciously choose not to put an end to them."¹⁷⁹ Such conduct by the school officials can only be viewed, so the court stated, as an implicit condonation of the subordinate's constitutional indiscretion.¹⁸⁰ Most courts believed that supervisory liability had survived the *DeShaney* cutback on due process coverage.¹⁸¹ Thus, because supervisory liability had formed the basis for liability in other cases involving the sexual molestation of a schoolchild by a public school teacher or other state actor, the *Taylor* court imposed liability on that basis.¹⁸²

¹⁷³ *Taylor*, 975 F.2d at 142-43. "Obviously, there is never any justification for sexually molesting a child, and thus, no state interest which might support it." *Id.*

¹⁷⁴ *Id.* at 144.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 144-45.

¹⁷⁸ *Taylor*, 975 F.2d at 144-45. See *supra* notes 100-10 and accompanying text for a discussion of supervisory liability.

¹⁷⁹ *Stoneking II*, 882 F.2d 720, 727 (3d Cir. 1989).

¹⁸⁰ *Taylor*, 975 F.2d at 145. See also *Stoneking II*, 882 F.2d at 727.

¹⁸¹ See *Stoneking II*, 882 F.2d at 725. "Nothing in *DeShaney* suggests that school officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* The Supreme Court itself, in *City of Canton v. Harris*, affirmed this concept of supervisory liability, as long as the offending actor was a state actor. 489 U.S. 378, 389-90 (1989).

¹⁸² *Taylor*, 975 F.2d at 144-45. See *Jane Doe "A" v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990) (where bus driver sexually assaulted handicapped students); *Stoneking II*, 882 F.2d at 725 (where band teacher sexually molested student); *Waechter v. School Dist.*

2. Special Relationships

Despite the fact that the *Taylor* court was willing to decide the case on the basis of supervisory liability, the court's opinion did not stop there.¹⁸³ The court went on to hold that the school officials could be held liable for breaching their affirmative duty to protect Jane Doe based on their "special relationship" with her, which arose when Jane Doe entered the Taylor district school system.¹⁸⁴ By virtue of Texas statutory law, Jane Doe was compelled to attend public school and this placed her in the care of the Taylor school district.¹⁸⁵

The *Taylor* court began its discussion of special relationships in schools by invoking past circuit precedent.¹⁸⁶ The Court cited with approval its holdings in both *Horton v. Goose Creek Independent School District* and in *Lopez v. Houston Independent School District*, which held that because of compulsory attendance laws, the school officials had entered into a special relationship with the students entrusted to their care.¹⁸⁷ The fact that these decisions may have actually been overruled or at best altered, by the *DeShaney* decision was not mentioned.

The court then proceeded to discuss the *DeShaney* opinion, citing that portion of the opinion providing that the special relationship analysis is not applicable unless the state has affirmatively acted to restrain individuals' freedom to act on their own behalf.¹⁸⁸ The Fifth Circuit had itself expounded upon the principles of *DeShaney* in its *Griffith v. Johnston* decision, by adopting the rule that a duty to provide protective services does not arise without the special relationship created by the state's rendering individuals, against their will, helpless to protect themselves.¹⁸⁹ The *Taylor* court concluded that by removing the child from his or her parents, the state has assumed the obligation to

No. 14-030 of Casopolis, Mich., 773 F. Supp. 1005, 1009 (W.D. Mich. 1991) (where school employee ordered student with asthma condition to run as punishment for talking in line); *Robert G. v. Newburgh Sch. Dist.*, 1990 WL 3210, at 1-2 (S.D.N.Y. Jan. 8, 1990) (where student sexually assaulted by substitute teacher); *Tilson v. School Dist. of Philadelphia*, 1990 WL 98932, at 8-9 (E.D. Pa. July 13, 1990) (where school employee sexually abused preschool students).

¹⁸³ *Taylor*, 975 F.2d at 145.

¹⁸⁴ *Id.* at 144-45.

¹⁸⁵ *Id.* at 144 (citing TEX. EDUC. CODE ANN. § 21.032).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* at 145-46; *Lopez*, 817 F.2d 351, 356 (5th Cir. 1984); *Horton*, 690 F.2d 470, 480 (5th Cir. 1982). See *supra* notes 50-56 and accompanying text for a discussion of previous Fifth Circuit precedent concerning special relationships.

¹⁸⁸ *Taylor*, 975 F.2d at 145 (citing *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1006 (1989)).

¹⁸⁹ 899 F.2d 1427, 1439 (5th Cir. 1990).

shoulder the burden of protecting the child from trauma, because the child is "too young to be considered capable of mature restraint."¹⁹⁰

The *Taylor* court, after citing the instances where courts had found special relationships to exist, extended the concepts outlined in *DeShaney* and *Griffith*, by providing that the state acquires a duty to protect an individual not only when it renders that individual helpless, *but also*, when it renders the guardian of that individual powerless to act on his or her own behalf.¹⁹¹ Upon this premise, the *Taylor* court held that "when the state has in some significant way separated the child from the persons otherwise responsible for taking precautions to shield the child from the social milieu, the state assumes a corresponding duty to provide that protection"¹⁹² The *Taylor* court reasoned that by compelling schoolchildren to attend school, the state affirmatively acted to restrain the ability of both Jane Doe and her parents to provide for her welfare, and therefore, the state had entered into a special relationship with Jane Doe and owed her an affirmative duty to fill that void.¹⁹³

The *Taylor* court recognized that its finding of a special relationship conflicted with the majority of other circuits, citing in a footnote the various cases of the other circuits that disagreed with its position.¹⁹⁴ The court did find some case law to support its proposition, although all but one of the cases were decided before the *DeShaney* decision.¹⁹⁵

¹⁹⁰ *Taylor*, 975 F.2d at 145-46 (quoting *Horton*, 690 F.2d at 480).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 146-47. The *Taylor* court refused to define the precise contours of a school official's duty, as it pertains to injuries inflicted by someone other than a school teacher. *Id.* at 146 n.14. However, as will be discussed later, by holding as it did, the court had already partially answered this question. *DeShaney*, 109 S. Ct. at 1006. See *infra* notes 259-69 and accompanying text for a discussion of the scope of the duties created by special relationships.

¹⁹⁴ *Taylor*, 975 F.2d at 147 n.13. See also *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992) (compulsory school attendance law did not so restrain school child's liberty as to create special relationship and affirmative duty to protect); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (no special relationship because school officials do not exercise the kind of physical custody and control contemplated by *DeShaney*); *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 272-73 (7th Cir. 1990) (no affirmative duty to protect since school does not render a child unable to care for basic human needs); *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405, 1414 (E.D. Ark. 1992) (no special relationship in schools).

¹⁹⁵ *Taylor*, 975 F.2d at 147. See, e.g., *Stoneking I*, 856 F.2d 594, 601 (3d Cir. 1988) (students in functional custody of state during school day); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987) (affirmative duty to protect student from harm inflicted by other student because of special relationship); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982) (school officials have duty and special powers to protect children from anti-social activities—their own and those of other students); *Pagano v. Massapequa Pub. Sch.*, 714 F.Supp. 641, 643 (E.D.N.Y. 1989) (holding that elementary school students, who were required by law to attend school, were entitled to some affirmative protection from abuse by other students during

The court then concluded that there was too much evidence that the school officials knew of the wrongdoing of their subordinate and failed to take prompt remedial action, to take the case from the jury, and denied the motion for summary judgment.¹⁹⁶ The school officials filed a petition for a writ of certiorari to the United States Supreme Court, which on January 19, 1993, was denied.¹⁹⁷

VI. INTERPRETING THE *TAYLOR* DECISION

The Fifth Circuit, in *Doe v. Taylor Independent School District*, although concluding that an affirmative obligation to protect students existed in the schools because of the special relationship undertaken between school officials and students, stated that its decision *did not necessarily mean* that school officials could be liable for injuries inflicted by other students.¹⁹⁸ The court specifically declined to address this issue and because the offending individual in the case was a school employee, and a state actor, the court did not have to address this question.¹⁹⁹ However, because of what it did do, the *Taylor* court has created a schism in the judicial opinion among the federal courts.²⁰⁰ At the

the school day). The decisions from the Third and Fifth Circuits would seem to have been overruled. See *Middle Bucks*, 972 F.2d at 1377; *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990).

¹⁹⁶ *Taylor*, 975 F.2d at 148-49.

¹⁹⁷ *Caplinger, Lankford v. Doe*, 113 S. Ct. 1066 (Jan. 19, 1993) (No. 92-908). On the same day, the Supreme Court also denied the petition for writ of cert. in the *Middle Bucks* case. 972 F.2d 1364 (3d Cir. 1992), cert. denied, 1992 WL 347965 (Jan. 19, 1993) (No. 92-816).

¹⁹⁸ *Taylor*, 975 F.2d at 147.

¹⁹⁹ *Id.* at 144-45, 147 n.14 ("The precise contours of a school official's duty, as it pertains to injuries inflicted by someone other than a school teacher (or other state subordinate) is not before us."). See *supra* notes 100-10 and accompanying text for a discussion of supervisory liability. The *Stoneking II* court also confronted the special relationship issue but declined to issue a ruling relying instead on supervisory liability. 882 F.2d 720, 724-25 (3d Cir. 1989). Perhaps the *Taylor* court should have exercised the same caution.

²⁰⁰ See *Taylor*, 975 F.2d at 147 (finding special relationship in schools); but see *Maldonado*, 975 F.2d at 732 (finding no special relationship); *Middle Bucks*, 972 F.2d at 1377 (same); *Alton*, 909 F.2d at 272 (same). Since the *Taylor* decision, the Third Circuit has upheld its reasoning of the *Middle Bucks* case in a 1993 decision involving students sexually abused by their bus driver. *Black v. Indiana Area Sch. Dist.*, 1993 WL 17081 (3d Cir. 1993). In the *Black* case, supervisory liability was not available as a means of imposing liability on the school district because the court had determined that the bus driver was a private actor. *Id.* The bus driver worked for a private contractor used by the school district. *Id.* The court went on to hold that the school district was not liable for the injuries inflicted by private actors since no special relationship existed between the students and their school district, affirming its holding in *Middle Bucks*. *Id.* See *Middle Bucks*, 972 F.2d at 1372. The Supreme Court has, by denying certiorari to the *Taylor* and *Middle Bucks* cases, despite their contrary holdings, apparently left this dispute to be resolved at the appellate level.

Two district court cases within the Third Circuit, however, have taken the affirmative obliga-

very least, the decision will have profound consequences within the Fifth Circuit.²⁰¹

By declaring that schoolchildren are in a special relationship with the state, when read in light of *DeShaney* and its progeny, the Fifth Circuit has imposed similar obligations as are owed state institutionalized mental patients and prisoners.²⁰² Further, within the Fifth Circuit, as well as other circuits, a finding of a special relationship carries with it obligations to children in foster care or under state supervision, to those in the "functional custody" of the state, and possibly to those whom the state has placed in a position of danger.²⁰³ In each of these cases, the state becomes obligated to protect the individual against

tion to protect one step further than *Middle Bucks*. See *K.L. v. Southeast Delco Sch. Dist.*, 828 F. Supp. 1192, 1195-96 (E.D. Pa. 1993); *C.M. v. Southeast Delco Sch. Dist.*, 828 F. Supp. 1179, 1186 (E.D. Pa. 1993). In these decisions, the Eastern District of Pennsylvania has held that states have an affirmative obligation to protect students in public schools from abusive conduct by their teachers. *C.M.*, 828 F. Supp. at 1186. However, this affirmative duty does not extend to protecting students from other school employees and state actors. *K.L.*, 828 F. Supp. at 1196.

²⁰¹ The court's decision may in fact already conflict with previous Fifth Circuit precedent. In *Griffith v. Johnston*, the circuit had already held that a special relationship existed between the state and one of its citizens only where the state has acted to curtail the individual's ability, against his or her will, to protect his or her self. 899 F.2d at 1439. It seems unlikely that even the *Taylor* court would acknowledge that students are in school "against their will." See *Taylor*, 975 F.2d at 147 ("we too would not equate 'a schoolyard to a prison'"). The Fifth Circuit has since cited its holding in *Taylor* in a case involving a § 1983 suit brought by the estate of a hostage killed by a gunman during a confrontation where the local sheriff called off a city police team of hostage negotiators and replaced them with county personnel. *Salas v. Carpenter*, 980 F.2d 308, 311 (5th Cir. 1992). The *Salas* court held that due process violations sufficient to support a § 1983 action can be found if "uncommon circumstances" create a special relationship and duty for the state to provide protective services to a particular individual. *Id.* Although the *Taylor* court may have been unwilling to define the "precise contours" of the state's duty, the Fifth Circuit has seized on the *Taylor* decision and defined such a duty to mean that the state owes persons in "uncommon circumstances," a duty to protect them from harm from third persons (the gunman in *Salas*) and to provide certain services that they are unable to provide for themselves. *Id.*

²⁰² See *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) ("[w]hen a person is institutionalized and wholly dependent on the state, a duty to provide certain services and care does exist"); *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) (prison officials have affirmative duty to provide necessary services and to protect prisoners and detainees from injuries).

²⁰³ See *Yvonne L. v. New Mexico Dept. of Human Serv.*, 959 F.2d 883, 890 (10th Cir. 1992) (special relationship exists when a state social services agency removes a child from natural home and places him in a state-run foster care facility); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (same); *Griffith*, 899 F.2d at 1439 (children in state custody are in a special relationship with the state); *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989) (finding that state owed affirmative obligation to protect where police instruction to burglary suspect to remain in private club, despite danger from owner, constituted functional state custody); *Doe v. New York City DSS*, 649 F.2d 134, 141 (2d Cir. 1981) (special relationship exists in foster care situation); *G-69 v. Degnan*, 745 F. Supp. 254, 265 (D.N.J. 1990) (court held that a special relationship existed where the state had acted affirmatively to place plaintiff in position of danger, as government informant, where otherwise the individual would not have been).

harm from both state as well as private actors.²⁰⁴ Additionally, the state may be held liable for failing, under sufficiently culpable circumstances, to provide protective services and ensure the general welfare and safety of the students entrusted to its care.²⁰⁵ Equating special relationships and the necessary obligations attached to them to the nation's public schools has two flaws, one from a doctrinal legal perspective and another from a practical standpoint.

A. *Special Relationships are Legally Inapplicable to Schools*

1. Schoolchildren Are Not Prisoners

The Supreme Court, in *DeShaney v. Winnebago County DSS*, attempted to create a bright-line test for determining when an affirmative obligation to protect arises through the state's undertaking of a special relationship with an individual.²⁰⁶ Only where the state has affirmatively acted to restrain an individual's freedom to act on his or her own behalf through incarceration, institutionalization or other similar restraint of personal liberty does the state enter into a special relationship with that individual.²⁰⁷ The "analogy of a schoolyard to a prison may be a popular one for school-age children," but school officials do not exercise the full severe and continuous restrictions of liberty as exist in prisons and state mental hospitals that *DeShaney* indicated was necessary for a special relationship to exist.²⁰⁸

In the contexts of prisons and mental hospitals, the state has taken custody of individuals and rendered them unable to provide for their basic human needs, like food, shelter, clothing, medical care and reasonable safety.²⁰⁹ It is this state custody that, for many courts, is the

²⁰⁴ See *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1005 (1989). "When the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.*

²⁰⁵ See *id.* at 1005-06.

When the State, by its affirmative exercise of its power, so restrains an individual's liberty 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—it transgresses the substantive limits on state action set by the Due Process Clause.

Id.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1006.

²⁰⁸ *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990). See also *DeShaney*, 109 S. Ct. at 1005-06; *Middle Bucks*, 972 F.2d at 1372.

²⁰⁹ See *DeShaney*, 109 S. Ct. at 1005-06.

deciding factor as to whether a special relationship exists.²¹⁰ Without the state's protective grip, the individual would be completely defenseless and incapable of protecting his or her own liberty interests.²¹¹ Because it is the state that has acted to create such a result, it is the state that must ensure their constitutional safety because nothing short satisfies Due Process and the Constitution.²¹²

Although public school students are compelled by law to attend school, it can hardly be said that this fact alone constitutes the kind of affirmative act by the state of taking an individual into custody that *DeShaney* contemplated.²¹³ Schoolchildren, by statute, are required to attend school for only 180, six-hour days per year.²¹⁴ Further, schoolchildren remain residents of their homes and are free to leave school after school hours.²¹⁵ Unlike the custodial relationships that exist in the contexts of prisons and mental hospitals, schoolchildren have not become wards of the state, subject to continuous and full-time severe state restriction of liberty.²¹⁶

²¹⁰ See *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 990-91 (1st Cir. 1992) (where court held that no special relationship existed where the state did not affirmatively act to take the individual into custody, where the individual was voluntarily on his way to a mental health facility); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1067 (3d Cir. 1991) (no duty to protect persons who are not in custody of the state from violent acts of persons who are not state officials); *Harris v. District of Columbia*, 932 F.2d 10, 13-4 (D.C. Cir. 1991) (no special relationship where individual not in custody of the State; no custody existed where officers shackled victim's ankles, handcuffed him, and locked him in police van); *Alton*, 909 F.2d at 272-73 ("the state's custody over the person is the most distinguishing characteristic" in special relationships, and school children are not like prisoners and mental patients); *Griffith*, 899 F.2d at 1439 (no special relationship exists where the state no longer had custody of children placed in adopted homes); *Was v. Young*, 796 F. Supp. 1041, 1045-47 (E.D. Mich. 1992) (spectators beaten by other attendees at fireworks display not in special relationship with State and no affirmative obligation to protect because not in State custody); *Hynson v. City of Chester*, 731 F. Supp. 1236, 1239 (E.D. Pa. 1990) (no special relationship existed between state and woman murdered by ex-boyfriend during lapse period of police protection). One commentator has suggested that the Supreme Court's decision in *DeShaney* rejected the positions that a non-custodial "special relationship" may give rise to a duty of the state to act, the breach of which would lead to § 1983 liability and that a "special relationship" did not depend upon custody. See Douthett, *The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in DeShaney v. Winnebago County DSS*, 52 OHIO ST. L.J. 643, 647 (1991).

²¹¹ *DeShaney*, 109 S. Ct. at 1006.

²¹² *Id.*

²¹³ See *id.* (special relationships created through incarceration, institutionalization, or other similar restraint of personal liberty) (emphasis added); *Middle Bucks*, 972 F.2d at 1371-72 (stating that *DeShaney* sets out a test of physical custody for special relationships and that such custody does not exist in schools); *Alton*, 909 F.2d at 272 (stating that the state's custody is the most distinguishing characteristic of mental patients and prisoners and that schoolchildren are not in custody).

²¹⁴ See *Middle Bucks*, 972 F.2d at 1372.

²¹⁵ *Id.*

²¹⁶ *Id.* at 1371-72.

One commentator has suggested that "[a] proper analysis should look to the implications of custodial control, rather than only to the control itself, because it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian."²¹⁷ Even if this is the proper interpretation to be given to the "legal" creation of special relationships under *DeShaney*, it seems equally clear that when examined closely, the state has not so restricted the liberty interests of students forced to attend public school as to completely deprive those students of the ability to provide for their own basic human needs.²¹⁸ Thus, even under a non-custodial analysis, the state has not become so intertwined with one of its citizens' lives, that it has assumed responsibility for ensuring that citizen's welfare and protection.²¹⁹

As has been noted in the past, schoolchildren and prisoners stand in wholly different circumstances, as incarceration deprives prisoners of, "the freedom to be with family and friends and to form the other enduring attachments of normal life."²²⁰ In contrast, this is not the case with regard to students compelled by law to attend public school.²²¹ The schoolchild is not left completely defenseless while at school, completely shut off from the outside world.²²² As the Supreme Court stated:

Though attendance may not always be voluntary, the public school remains an open institution The child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends, and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.²²³

²¹⁷ See Huefner, *supra* note 19, at 1957.

²¹⁸ Courts have disagreed on the necessity of having actual physical custody to invoke the special relationship affirmative protection analysis. See, e.g., *Middle Bucks*, 972 F.2d at 1371 (physical custody required). But see *Stoneking II*, 882 F.2d 720, 724 (3d Cir. 1989) (finding that custodial relationship possibly existed in schools but refusing to apply special relationship analysis because offending actor was state actor). See *supra* notes 210-13 for other cases.

²¹⁹ *Alton*, 909 F.2d at 272.

²²⁰ *Ingrahm v. Wright*, 430 U.S. 651, 670 (1977).

²²¹ See *Alton*, 909 F.2d at 272 ("the government, acting through local school administrators, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises").

²²² *Id.*

²²³ *Ingrahm*, 430 U.S. at 670 (Eighth Amendment protections against cruel and unusual treatment were inapplicable to schools and corporal punishment). This quote has been cited

Additionally, compulsory school attendance laws do not prevent students from seeking outside help.²²⁴ Further, the state has not assumed responsibility for the child's entire personal life, as it has when it imprisons or institutionalizes a citizen.²²⁵ In sum, while school officials have been judicially and statutorily granted much control over their students' lives, they do not exercise the kind or degree of control that *DeShaney* contemplated.²²⁶

2. Parents, Not the State, Owe the Child Primary Care Duties

The Fifth Circuit, in *Doe v. Taylor Independent School District*, extended the concept of state assumption of affirmative obligations, to include those instances where the state has also rendered the guardian of the individual powerless to act on his or her behalf.²²⁷ The *Taylor* court provided, without citing precedent, that when the state has in some significant way separated the child from the persons otherwise responsible for taking care of the child, the state assumes that very duty.²²⁸ Yet it seems inapposite to declare that by requiring children to attend public school, the state has so deprived the parents, the child's primary caretakers, from providing for the child's basic needs and protection, that the state is obligated to fill that vacuum. Under the laws of many states, it is the parents who decide whether to educate the child at home, in private or in public schools.²²⁹ Additionally, even when enrolled in public school, parents retain the discretion to remove a child from classes for religious instruction, non-school sponsored educational trips and tours, and for health care reasons.²³⁰ In the case of special education students, the parents must approve the educational programs and even while in school, parents remain the primary decision-makers for the child.²³¹

with approval by other courts, who have used it to reject the special relationship duty in the schools. See *Middle Bucks*, 972 F.2d at 1373 (calling their view of the public school function with respect to its students "in harmony" with the Supreme Court).

²²⁴ *Alton*, 909 F.2d at 272.

²²⁵ *Id.*

²²⁶ *Id.* See also *New Jersey v. TLO*, 469 U.S. 325, 339-40 (1984). In holding that school officials do not need a warrant or probable cause to conduct a search of a student, the Court recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures and closer supervision than would be allowed in the adult world. *Id.*

²²⁷ *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 146 (5th Cir. 1992).

²²⁸ *Id.*

²²⁹ *Middle Bucks*, 972 F.2d at 1371.

²³⁰ *Id.*

²³¹ *Id.*

Not only has the state not adversely affected the parents' ability to perform their primary caretaker responsibilities while their children are in school, but the state, by both statute and judicial precedent, lacks the power to fill that void.²³² By statute, state school officials are allowed to develop only those reasonable regulations necessary to governing student conduct.²³³ School officials are vested with only such control and authority as is reasonably necessary to prevent infractions of discipline and interference with the educational process.²³⁴ Finally, teachers are not among those persons responsible for a child's welfare under typical statutes designed to provide child protective services.²³⁵

3. The Legal Status of Children

The Supreme Court has, in a number of decisions since the late 1960s, altered the "legal status" of children under the Constitution.²³⁶ These decisions indicate that children possess significant rights under the Constitution and that when these children enter the "schoolhouse gate," they do not shed these constitutional rights.²³⁷ Furthermore, the Supreme Court has dramatically changed the status of those school officials charged with the duty of operating the nation's schools.²³⁸ These changes significantly deprive the special relationship argument in the school context of much of its force, because *DeShaney* indicates that what causes a special relationship to arise is a state-dominated environment where the individuals confined within have been totally deprived of their liberty interests.²³⁹ Under the Supreme Court's own jurisprudence, such an environment does not exist in modern schools.²⁴⁰

One of the justifications used for claiming that a special relationship exists in schools is that teachers and school officials act *in loco parentis* in their dealings with students: their authority is that of the parent and not of the state.²⁴¹ The Supreme Court has since rejected

²³² *Id.* at 1372.

²³³ *Id.*

²³⁴ *Middle Bucks*, 972 F.2d at 1372.

²³⁵ *Id.* at 1371-72.

²³⁶ See, e.g., *New Jersey v. TLO.*, 469 U.S. 326, 336 (1984); *Ingrahm v. Wright*, 430 U.S. 651, 662 (1977); *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969).

²³⁷ See *Tinker*, 393 U.S. at 505.

²³⁸ *Ingrahm*, 430 U.S. at 662; *TLO*, 469 U.S. at 336.

²³⁹ *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1006 (1989).

²⁴⁰ See, e.g., *Middle Bucks*, 972 F.2d at 1372; *J.O. v. Alton Community Unit Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990).

²⁴¹ See *Huefner*, *supra* note 19, at 1967.

this doctrine, arguing that today's public school officials do not merely exercise authority voluntarily conferred on them by parents, but rather, they act in furtherance of publicly-mandated educational and disciplinary policies.²⁴² As a result, the Supreme Court has held that school officials are subject to the commands and restrictions of the First and Fourth Amendments, the Due Process Clause of the Fourteenth Amendment, and possibly the Fifth Amendment.²⁴³

This rejection of the *in loco parentis* doctrine has a tremendous detrimental effect on the major tenet of the special relationship argument which provides that by removing the child from his or her home, the state has assumed the role and obligations of the parent in ensuring the safety and welfare of the child.²⁴⁴ The Supreme Court has recognized that school officials are ill-suited for the *in loco parentis* task because they are compelled to act in the best interests of the state, a goal often mutually exclusive and even at odds with the interests of individual students.²⁴⁵ As one commentator stated, "[w]hen the school official takes a child in hand, searches him, and turns him over to the police, the school official acts as a representative of government and not as a representative of the parent."²⁴⁶ Given the school official's continual responsibility and status as a state actor, school officials can

²⁴² *TLO*, 469 U.S. at 336.

²⁴³ *Id.* (school officials, in carrying out searches and seizures and other disciplinary functions, cannot claim parents' immunity from the provisions of the Fourth Amendment); *Goss*, 419 U.S. at 573 (prior to suspensions from school, students are entitled to some limited due process protection); *Tinker*, 393 U.S. at 505 (as school officials do not possess absolute authority over students they may not suppress freedom of expression if such expression does not interfere with school discipline); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("[t]he Fourteenth Amendment protects the citizen against the state itself and all of its creatures—Boards of Education not excepted; Boards of Education have important, delicate and highly discretionary functions, but none that they may not perform within the Bill of Rights"). See *supra* note 70 for a discussion of the applicability of the Fifth Amendment to schools.

²⁴⁴ *Taylor*, 975 F.2d at 146.

²⁴⁵ As one commentator has suggested:

[p]arents retain unrestrained authority . . . [over their children] because we assume that the natural love and concern for their offspring will provide its own limits. School officials, however, have less emotional ties to their students . . . and may be unable to exercise their disciplinary functions solely in the best interests of the individual child.

Stuart C. Berman, *Student Fourth Amendment Rights: Defining the Scope of the TLO School-Search Exception*, 66 N.Y.U. L. REV. 1077, 1116 (1991).

Another author has suggested that "[i]t is questionable whether the *in loco parentis* doctrine has any role to play today . . . [p]ublic school officials are agents of the government and frequently fail to display the protective concern for a child which is an expected characteristic of a parent." ARVAL A. MORRIS, *THE CONSTITUTION AND AMERICAN PUBLIC EDUCATION* 277 (1989).

²⁴⁶ *Id.*

hardly be deemed the equivalent of parents.²⁴⁷ As one commentator has written:

Parents possess certain privileges with regard to the treatment of their children, under the assumption that they will act with the love, emotional concern, and special interest implicit in the parent-child relationship. In so acting, parents engage in activities which further their children's welfare, not the least of which is an attempt to shelter their children from harm. This protective quality which is inherent in an *in loco parentis* relationship is nonexistent in the school environment. School administrators are not employed to serve the interest of individual children. Rather, their objective is the fulfillment of a duty to coordinate school operations and to maintain an educational environment—in short to promote the welfare of all students . . . the decisions parents make with regard to their children are plainly different from those made by school officials.²⁴⁸

In sum, although those advocating special relationship application to schools would continue to regard school officials as surrogate parents of students, the Supreme Court has destroyed any validity to this argument by rejecting it in the context of school disciplinary procedures.²⁴⁹ Conversely, what authority has been taken away from the school officials has been given, in the form of constitutional liberty rights, to students. To that effect, students are entitled to freedom of expression while in school.²⁵⁰ Further, students are to be protected

²⁴⁷ See Deborah A. Reperowitz, *Constitutional Law—Search and Seizure—School Officials May Conduct Student Searches Upon Satisfaction of Reasonableness Test In Order to Maintain Educational Environment*: In re TLO, 14 SETON HALL L. REV. 738, 756–57 (1984) (“[a] parental authority analogy as applied to schools is now obsolete Because the relationships which parents and administrators have with children under their care are manifestly different, administrators should not be granted the same privileges parents have with regard to their own children.”).

²⁴⁸ *Id.* at 757.

²⁴⁹ *TLO*, 469 U.S. at 336–37. “Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students . . . and is therefore not subject to the limits of the Fourth Amendment. Such reasoning is in tension with contemporary reality and the teachings of this Court.” *Id.* at 336. Even in denying students constitutional protections, the Supreme Court has recognized that the concept of parental delegation as a source of school authority is not in line with modern schools and thus is not to be used to justify school disciplinary procedures. *Ingrahm v. Wright*, 430 U.S. 651, 662 (1977). In *Ingrahm*, the Supreme Court determined that the Eighth Amendment’s prohibition of cruel and unusual treatment does not apply to corporal punishment to schools. *Id.* In so doing, the Court refused to base the exception on the concept of parental delegation but rather that the open environment of the classroom did not require such protection normally reserved for prisoners. *Id.*

²⁵⁰ *Tinker*, 393 U.S. at 505.

from unreasonable searches and seizures, and in some school circumstances may have the same Fourth Amendment rights as adults.²⁵¹ Finally, students are entitled to procedural safeguards that minimize the risk of wrongful punishment in the name of school discipline and may be entitled to the Fifth Amendment's protection against self-incrimination.²⁵² Even in denying Eighth Amendment applicability to corporal punishment in schools, the Supreme Court in effect emancipated students by contrasting them with prisoners and declaring that for the purposes of the Eighth Amendment, students need little protection because the school is an open institution where students are not to be considered in custody of the state.²⁵³

If students are not in the custody of the state while attending public school for purposes of the First, Fourth, Fifth and Eighth Amendments to the Constitution, it is inconceivable how they can be for another part of the Constitution.²⁵⁴ *DeShaney* stands for the proposition that when the state has affirmatively acted to deprive a citizen of his or her constitutionally-protected liberty interests, the Constitution demands that the state fill the void left by its own action.²⁵⁵ Because the Supreme Court has found that students have not been deprived of their basic constitutional liberty interests while in school, the first part of the special relationship analysis fails: the state has not affirmatively

²⁵¹ *TLO*, 469 U.S. at 339. Students, while in school, have a reasonable expectation of privacy in a variety of legitimate, non-contraband and thus before a search may take place, school officials must have a reasonable suspicion of a violation of state law or school rules. *Id.* One commentator has suggested that this *TLO* reasonable suspicion standard was intended to be limited only to searches conducted on school grounds and of personal belongings and effects. Berman, *supra* note 246, at 1096-97. Under this analysis, the standard for searching lockers and other items might be the identical standard to be used in the adult world, where a warrant and/or probable cause is required. *Id.* If it is asserted that students have the same Fourth Amendment rights as the adult population, this strengthens the argument that children are not in custody of the State. The Supreme Court has already determined that prisoners, obviously in the custody of the State, have no reasonable expectation of privacy. *TLO*, 469 U.S. at 338.

²⁵² *Ingraham*, 430 U.S. at 669 (punishment of schoolchildren that is excessive violates Constitution); *Goss v. Lopez*, 419 U.S. 565 (1975) (striking down Ohio law providing for suspensions of up to ten days without any written procedure applicable to suspensions). See *supra* note 70 for a discussion of the Fifth Amendment's applicability to schools.

²⁵³ *Ingraham*, 430 U.S. at 669 ("the prisoner and the schoolchild stand in wholly different circumstances, separated by harsh facts of criminal conviction and incarceration"); *TLO*, 469 U.S. at 338 (prisoners have no reasonable expectation of privacy in cells and court not yet ready to hold that schools and prisons need be equated for purposes of the Fourth Amendment).

²⁵⁴ See *TLO*, 469 U.S. at 336; *Ingraham*, 430 U.S. at 662; *Goss*, 419 U.S. at 573; *Tinker*, 393 U.S. at 505.

²⁵⁵ *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1006 (1989). "When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, it transgresses the Due Process Clause." *Id.* at 1005-06.

acted to suppress students' constitutional rights.²⁵⁶ *DeShaney* clearly dictates that, in this situation, the state has not assumed an obligation to fill a void that it has not created, and that, in fact, does not exist.²⁵⁷

B. *Impracticability of Special Relationships to Schools*

Not only is it difficult to justify the existence of special relationships because of the lack of coercion exercised by the state in schools on a "legal basis," but it is also difficult to justify imposing affirmative duties on school officials on a "practical basis." Must the state, through its school officials, ensure the safety of school-children from injuries inflicted by other students, from injuries as a result of typical childhood accidents, and from injuries as a result of extracurricular activities, such as school sports? Is the state required to protect the child after school hours and on off-school grounds? Perhaps more significantly, must the state provide the kind of necessary services that are required for others involved in special relationships with the state, like prisoners and mental patients, such as food, clothing, shelter and medical care, where the parents fail to provide these essentials?²⁵⁸ The *DeShaney* opinion may have already answered this final question in the affirmative.²⁵⁹ In *DeShaney*, the Court determined that where the State has deprived an individual of the ability to take care of himself or herself, the state must fill the void, otherwise the Constitution is not satisfied.²⁶⁰ If the state has rendered this result by requiring public school students to attend, then the state is required to fulfill its obligations.²⁶¹

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1003. "It (the Due Process Clause) forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law', but its language cannot be fairly extended to impose an affirmative obligation to ensure that those interests do not come to harm through other means." *Id.*

²⁵⁸ This is precisely the question asked by the court in a recent lower court decision which rejected the application of special relationships to schools. *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405, 1414 (E.D. Ark. 1992). One commentator has already answered the question affirmatively and raised the possibility that the State owes a child (that it has entered into a special relationship with) affirmative obligations to provide substantive rights beyond "mere" protection from physical harm. Amy Sinden, *In Search of Affirmative Duties Toward Children Under a Post-DeShaney Constitution*, 139 U. PENN. L. REV. 227, 263 (1990). These would include protection from emotional harm, duty to assist in exercise of fundamental constitutional rights, like family integrity and association, and duties to provide housing, daycare, and drug treatments. *Id.*

²⁵⁹ *DeShaney*, 109 S. Ct. at 1005.

²⁶⁰ *Id.* See also *Youngberg v. Romeo*, 457 U.S. 307 (1982) ("When a person is institutionalized and wholly dependent on the State, a duty to provide certain services and care does exist"); *Estelle v. Gamble*, 429 U.S. 97 (1976) (where the state has imprisoned an individual, it owes that individual a duty to provide adequate medical care and to ensure his safety).

²⁶¹ *DeShaney*, 109 S. Ct. at 1005.

Even the Fifth Circuit, in *Doe v. Taylor Independent School District*, refused to define what the scope of such an affirmative duty might be.²⁶² Enforcing affirmative obligations to protect students from harm and mischief, no matter what the source, would "expand constitutional duties of care to millions of schoolchildren."²⁶³ School officials would be subject to § 1983 liability anytime a child skinned his knee on the playground or was beat-up by the school bully, so long as the school officials were not constantly attentive to the needs of every student entrusted to their care.²⁶⁴ School officials would be constitutionally obligated to assume the roles of police-officers or even prison guards to ensure the safety of every student in today's more dangerous schools.²⁶⁵ In addition, "school officials who are too restrictive would likely be charged under the same Due Process Clause with violating student's [sic] rights not to be treated like incarcerated prisoners," rights that the Supreme Court has only within the last twenty-five years proclaimed.²⁶⁶ Further, much of the change in the legal status of children was rendered by the growing violence in today's schools, violence that altered the status of school officials to "quasi-police officers" rather than teachers.²⁶⁷ Finally, the change in the environment of schools themselves has made it unrealistic and nearly impossible to require and to expect that school officials can be responsive to all student needs and threats.²⁶⁸ With schools already terribly overburdened, imposing

²⁶² *Taylor*, 975 F.2d at 147.

²⁶³ *Dorothy J.*, 794 F. Supp. at 1414.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* This paradox was also identified by the Supreme Court in *DeShaney*, that if the State had acted too quickly and too aggressively in removing Joshua from his home, the same social services agency would be the target of the same Due Process liability, brought, this time, by the offended father. *DeShaney*, 109 S. Ct. at 1007.

²⁶⁷ See Jules Menacker, *Getting Tough on School-Connected Crime in Illinois*, 51 EDUC. L. REP. 347, 347 (1989).

The problems of school-related juvenile violence . . . has reached a national crisis level. For over two decades, the annual Gallup Poll of the public's attitudes toward public schools has ranked discipline and drug abuse as the major problems confronting schools. The National Crime Survey reported that in 1986 nearly three million incidents of assault, rape, robbery and theft took place in schools or on school property.

Id. See also *New Jersey v. TLO*, 469 U.S. 325, 338-39 (1984). In *TLO*, the Supreme Court recognized that violence in schools and the need to maintain a proper educational environment required lesser constitutional protections than granted to adults in the outside world. *Id.* However, previously, students barely had any rights at all, so that the Court's lower standard for student searches was actually accompanied by a large grant of constitutional rights to the same students. *Id.*

²⁶⁸ See Reperowitz, *supra* note 248, at 756.

Today, . . . teachers specialize in particular areas, mandatory school attendance has

more constitutional duties and liability for failure to fulfill impossible obligations will exacerbate an already desperate situation.

As the *DeShaney* Court declared, "[j]udges and lawyers, like other humans, are moved by a natural sympathy . . . to find a way for [plaintiffs] to receive adequate compensation for grievous harm inflicted upon them."²⁶⁹ Nevertheless, the Due Process Clause cannot be judicially expanded to provide a remedy for every injustice wrought by other human beings.²⁷⁰ Changing state tort law appears to be the more attractive alternative to court expansion of the Fourteenth Amendment.

Perhaps an alternative standard could be adopted, such as that identified by a dissenting opinion in *D.R. v. Middle Bucks Area Vocational Technical School*.²⁷¹ In this dissent, it was suggested that rather than adopt a bright-line standard, as with special relationships, courts should use a fact-specific analysis to determine whether an affirmative duty should exist with respect to particular individuals and particular circumstances.²⁷² Unfortunately, although this standard might provide a remedy in more grievous circumstances, like Joshua DeShaney's, the uncertainty and unpredictability of such a standard would leave school officials, as well as courts, grasping, without any guidelines to govern their conduct.

VII. CONCLUSION

Not every tort committed by a state actor can be remedied by the Constitution. To impose constitutional duties on school officials, the likes of which exist only in prisons and mental hospitals, would overburden, both legally and practicably, the special relationship analysis outlined by the *DeShaney* Supreme Court. School officials would be forced to ensure the protection of students from teachers, other employees, other students, and even from their own youthful antics. School officials, already overburdened, would be forced to provide the kind of services reserved for only those in full-time custody of the state

led to larger classes, and students may spend only a few hours per week with each teacher. Consequently, the school has become an impersonal environment wherein teachers rarely become acquainted with students on an individual basis It is therefore illogical to expect school officials to treat students with the same understanding and concern as the youngsters' parents.

Id.

²⁶⁹ *DeShaney*, 109 S. Ct. at 1007.

²⁷⁰ *Id.*

²⁷¹ 972 F.2d 1364, 1384 (3d Cir. 1992) (Becker, J., dissenting).

²⁷² *Id.* (Becker, J., dissenting).

to students who spend only half the year and one-quarter of the day in the classroom.

In its search for a bright-line standard to determine when, if ever, the state owes a citizen an affirmative duty to protect, the Supreme Court had created a conflict that, until recently, appeared to be resolving itself. The Fifth Circuit, however, has thrown new logs onto the fire, and it appears likely that the conflict will grow more heated. Additionally, by refusing to hear the *Doe* and *Middle Bucks* cases, the Supreme Court has apparently given its assurance that it intends to allow the fire to continue burning.

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