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Reexamining School Liability and the Viability of a Special Relationship Claim in the Aftermath of Deshaney v. Winnebago County Department of Social Services

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NOTES

REEXAMINING SCHOOL LIABILITY AND THE VIABILITY OF A SPECIAL RELATIONSHIP CLAIM IN THE AFTERMATH OF *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*

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> You would think it obvious that sexual molestation, when visited upon one of our schoolchildren . . . would undoubtedly violate [the student's] constitutional right to be free from intrusions into bodily integrity.[1]

INTRODUCTION

A high school athletic coach sexually harassed, abused, and raped a fourteen-year-old freshman girl, Jane Doe.[2] The same coach had previously been accused of abusing nine different girls at a different school.[3] An investigation found four of the nine allegations of sexual abuse to be potentially "founded."[4] Subsequently, the school was notified, yet following a "pre-trial agreement," no criminal proceedings were pursued against the coach.[5] Despite knowledge of evidence that the teacher potentially abused at least four different students, the school

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[1] Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 138 (5th Cir. 1992), *vacated*, 15 F.3d 443 (5th Cir. 1994).

[2] Doe v. Claiborne Cnty., 103 F.3d 495, 500 (6th Cir. 1996).

[3] *Id.* at 502.

[4] *Id.*

[5] *Id.*

board rehired the coach the succeeding year.[6] Following his previous pattern, the coach sexually abused Jane on at least six different occasions.[7] As a scorekeeper for the boys' baseball team, Jane was required to travel by bus to the games with the team and the coach.[8] It was during these bus trips that the coach began to systematically harass Jane for more than one year.[9] The coach began reaching into Jane's blouse and fondling her breasts.[10] Jane brought a civil rights action under 42 U.S.C. § 1983 ("section 1983") against Claiborne County, Tennessee, the Claiborne County Board of Education, and several school board members and school administrators in both their individual and official capacities.[11] Jane claimed she suffered damages from being sexually harassed, abused, and ultimately raped by the coach.[12] Shockingly, the Sixth Circuit dismissed Jane's section 1983 claim against the school officials and the school district, because it found no "special relationship" existed between the student and the school.[13]

A mentally-handicapped high school student sexually assaulted another fellow mentally handicapped student, Brian B., in the school shower.[14] Both students were enrolled in the school district's Community-Based Instruction Program, a program designed to teach life and social skills to mentally handicapped children.[15] Although the school defendants allegedly were aware that Brian's attacker had a history of violent and sexually assaultive behavior, they never took any action to prevent him from attacking Brian.[16] Brian's mother filed a suit for damages under section 1983 against the school officials and the school district, alleging a deprivation of Brian's constitutional right to bodily integrity and security under the Fourteenth Amendment.[17] The Eighth Circuit, like the Sixth,

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[6] *Id.* at 503.
[7] *Id.* at 501.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 500.
[12] *Id.*
[13] *Id.* at 510.
[14] Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 731 (8th Cir. 1993).
[15] *Id.*
[16] *Id.*
[17] *Id.*

dismissed the student's action, because it declined to find a "special relationship," which would have imposed an affirmative duty on the school officials.[18]

In each of the two foregoing cases, the Eighth and Sixth Circuits refused to recognize the existence of a "special relationship" between the injured student and the school. A "special relationship" is an exception to the general rule that state officials have no constitutional duty to protect individuals from private harms.[19] In *DeShaney v. Winnebago County Department of Social Services*, however, the Supreme Court recognized an exception to that general rule when a state creates or assumes a special relationship with an individual.[20]

This special relationship arises when a state affirmatively by its exercise of powers "so restrains an individual's liberty"—either through imprisonment, institutionalization, or other similar restraint of personal liberty.[21] Although the Supreme Court recognized a state duty in the case of prisoners, mental patients, and foster children, the limited scope of its holding called into question the applicability of this exception in other settings like schools.[22]

Post-*DeShaney* circuits have addressed the issue of school liability under a wide variety of circumstances—the claims have involved children as young as eleven years old, children with developmental disabilities, and children left alone without supervision.[23] Yet, invariably, the majority of circuits have held that public schools simply do not have a special relationship with its students—no matter who inflicted the particular harm, be it the student himself, a fellow student, or even a school employee.[24]

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[18] *Id.* at 734.

[19] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197–99 (1989).

[20] *Id.* at 198–200.

[21] *Id.* at 200.

[22] Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After* DeShaney, 90 COLUM. L. REV. 1940, 1941 (1990); *see also* Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools After* DeShaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101, 1122 (1994); Robert C. Slim, Comment, *The Special Relationship Doctrine and a School Official's Duty To Protect Students from Harm*, 46 BAYLOR L. REV. 215, 216 (1994).

[23] *Dorothy J.*, 7 F.3d at 731; Kim, *supra* note 22, at 1125 & n.123.

[24] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 857–58 (5th Cir. 2012) (en banc).

In refusing to find a special relationship, courts are essentially saying that a school has no constitutional duty to protect its students from harm.

Recently, the Fifth Circuit, in *Doe ex rel. Magee v. Covington County School District*, similarly held that no special relationship existed in a school context.[25] *Covington* involved a little girl who, on numerous occasions, was released by the school into the custody of a stranger, who sexually abused her. The parents brought a section 1983 claim against the school.[26] Although, the Fifth Circuit initially held for the plaintiff,[27] on rehearing en banc, the court vacated its decision and refused to conclude that a special relationship existed and held that the school did not have a constitutional duty to protect its students from private actors.[28] In reaching its decision that no special relationship existed, however, the Fifth Circuit, like the Sixth and Eighth Circuits, lacked a clear objective test by which they could determine whether a particular set of facts could fall within this exception.

The holdings by the Fifth, Sixth and Eighth Circuits demonstrate the uncertainty courts face in determining liability for schools.[29] Courts lack the clear guidance needed to effectively determine what circumstances are sufficient to create a special relationship. This uncertainty is mainly over how to categorize the relationship between a school and its students. Limited by the bounds of *DeShaney*, but faced with a unique set of facts not foreseen by the Supreme Court, the Fifth Circuit in *Covington* failed to distinguish this case from previous cases. In fact, egregious cases, such as *Covington*, underscore the need courts have for an objective, analytical framework that they can apply to any future, unforeseen facts to assist them in determining the existence of a special relationship in a school environment.

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[25] *Id.* at 852.

[26] *Id.* at 853.

[27] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 353–54 (5th Cir. 2011), *aff'd in part, rev'd in part*, 675 F.3d 849 (5th Cir. 2012) (en banc).

[28] Doe *ex rel.* Magee, 675 F.3d at 852.

[29] *See infra* Part II; *see also* Huefner, *supra* note 22, at 1942 (describing how the Supreme Court's decision in *DeShaney* has left an uncertainty about "whether public schools have an affirmative duty under section 1983 to protect the liberty rights of their students").

This Note focuses on whether a school deprives a student of a constitutional due process right to bodily integrity and security—and thus violates section 1983—when the school fails to adequately protect the student from harm. At the center of this discussion is the special relationship exception that *DeShaney* carved out.[30] Part I briefly discusses the Fourteenth Amendment, due process, and section 1983 claims. It then examines the facts and holding of *DeShaney*, which have shaped the boundaries of school system liability.[31] Part II discusses the majority approach taken by circuit courts in determining the proper duty of public schools under post-*DeShaney* section 1983 challenges. This Part concludes with the recent *Covington* decision, which is aligned with the majority view. Finally, Part III discusses the need for a clear and objective test. Specifically, it proposes a three-prong factor test that courts should apply to determine whether a special relationship arises between a school and its students. This Part then applies this test to several cases to show an objective and analytical framework that would provide courts with a test that allows recovery in the most egregious of cases, such as *Covington*, while denying it in lesser instances.

I. BACKGROUND: SECTION 1983 AND *DESHANEY*

Section 1983 permits students to file a damage suit against school officials and school districts, claiming that the students have been deprived of their Fourteenth Amendment liberty interests.[32] This Section first briefly discusses the requirements of section 1983, and then discusses the Supreme Court's holding in *DeShaney*.

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[30] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989). The focus of this Note will not be on the State-Created Danger theory, which "subjects the state to liability for failing to protect a person after it takes an affirmative step to place that person in danger, regardless of whether or not there is a custodial or custodial-like relationship." Kim, *supra* note 22, at 1120 n.92.

[31] Monica L. Hof, Comment, *Roadblock: The Fifth Circuit Further Insulates Public School Systems from § 1983 Liability*, 43 LOY. L. REV. 649, 650 (1998).

[32] Huefner, *supra* note 22, at 1940.

A. *The Fourteenth Amendment and 42 U.S.C. § 1983*

The Fourteenth Amendment of the United States Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of law."[33] The intent of the Due Process Clause was to prevent states from using their coercive powers in an arbitrary or irrational manner to deny individuals of rights secured under the Constitution.[34] A deprivation of these rights is protected by the federal civil rights statute, 42 U.S.C. § 1983, which provides a plaintiff with monetary relief.[35] This section was originally enacted by Congress as section one of the Civil Rights Act of 1871.[36] Under section 1983, a claim "must satisfy two requirements: (1) the conduct must be committed by a person acting under color of state law; and (2) the conduct must deprive the individual of a constitutional [or federal civil] right."[37] Thus, in order for parents or students to successfully bring an action against a school, they would need to satisfy the above two elements—namely the school authority, acting under color of state law, must have deprived the student victim of a constitutional or federal civil right.[38] In *Ingraham v. Wright*, the Supreme Court held that one constitutional right is a student's right to his or her bodily integrity under a liberty interest.[39] Consequently, a method a student could use to establish liability under section 1983 is to prove that the school created a special relationship

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[33] U.S. CONST. amend. XIV, § 1.

[34] Slim, *supra* note 22, at 219.

[35] Lori DeMond, Note, DeShaney's *Effect on Future "Poor Joshuas"—Whether a State Should Be Liable Under the Fourteenth Amendment for Harm Inflicted by a Private Individual*, 1990 BYU L. REV. 685, 685. This statute provides that:

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

42 U.S.C. § 1983 (2006).

[36] Robert L. Phillips, *Peer Abuse in Public Schools: Should Schools Be Liable for Student to Student Injuries Under Section 1983?*, 1995 BYU L. REV. 237, 238.

[37] DeMond, *supra* note 35, at 685–86.

[38] *See, e.g.*, Robert C. Cloud, *Federal, State, and Local Responses to Public School Violence*, 120 W. EDUC. L. REP. 877, 885–86 (1997).

[39] 430 U.S. 651, 673–74 (1977).

with the particular student when it affirmatively restrained the student's liberty.[40] This method, however, is a difficult task given the Supreme Court's holding in *DeShaney*.

B. DeShaney v. Winnebago County Department of Social Services

1. Facts

The facts in *DeShaney* reveal a tragic tale of constant child abuse performed under the watchful eyes of the state. After Randy and Melody DeShaney were granted a divorce in 1980, a Wyoming court placed their one-year-old son, Joshua, in the custody of his father, Randy DeShaney.[41] Shortly thereafter, Randy and Joshua moved to a city located in Winnebago County, Wisconsin, where Randy entered into a second marriage that also ended in a divorce.[42] No more than two years later, in January of 1982, the defendant, Winnebago County Department of Social Services ("DSS"), was first notified that Joshua might be a victim of child abuse.[43] At the time of their divorce, Randy's second wife had complained to the police that he had previously " 'hit the boy causing marks and [how she thought this] [was] a prime case for child abuse.' "[44] Yet, except for interviewing the father, who denied the accusations, DSS took no action until a year later, in January 1983, when hospital officials reported to them that Joshua was admitted with "multiple bruises and abrasions."[45]

Upon notification, DSS instantly received an order from a Wisconsin juvenile court that directed Joshua to be placed in temporary custody.[46] Three days later, the county organized a "Child Protection Team" in order to assess Joshua's situation.[47]

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[40] Laura Beresh-Taylor, *Preventing Violence in Ohio's Schools*, 33 AKRON L. REV. 311, 318–19 (2000).

[41] 489 U.S. 189, 191 (1989).

[42] *Id.*

[43] *Id.* at 192.

[44] *Id.* (second alteration in original).

[45] *Id.*

[46] *Id.*

[47] *Id.* (internal quotation marks omitted). The team consisted of "a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel." *Id.*

After determining that there was a lack of evidence of child abuse to keep Joshua in the custody of the court, Joshua's father received custody of his son again.[48]

Within a month, the DSS caseworker handling Joshua's case received a phone call from emergency room personnel reporting that Joshua had once again been treated for "suspicious injuries."[49] Although it was concluded that no basis for action existed, the caseworker, during monthly visits, observed further signs of suspicious injures.[50] Except for recording all these incidents in her file, the caseworker did nothing more.[51] The caseworker was once again notified by the emergency room in November of 1983 that Joshua had been treated for injuries, believed to be caused by child abuse.[52] Still DSS took no action, even after the caseworker on the two subsequent visits was denied access to see Joshua.[53]

Early in 1984, at the age of four, Joshua fell into a life-threatening coma after his father severely beat him. Although he did not die that day, Joshua suffered such severe brain damage that he became profoundly retarded and was expected to be institutionalized for the rest of his life.[54] Emergency brain surgery revealed numerous hemorrhages inflicted by traumatic injuries to Joshua's head, caused over an extended period of time.[55]

Joshua's mother sought justice by bringing an action against DSS on behalf of Joshua under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Wisconsin.[56] The plaintiffs alleged deprivation of Joshua's constitutional right to "liberty without due process of law" under the Fourteenth Amendment because DSS should have intervened to protect Joshua "against a risk of violence at his father's hands of which they knew or should have known."[57]

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 192–93. The caseworker noticed injuries on Joshua's head and observed that Joshua had not been enrolled in school. The girlfriend also had not moved out as agreed. *Id.*

[51] *Id.* at 193.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* Randy DeShaney was convicted of child abuse. *Id.*

[57] *Id.*

2. Holdings

The lower courts denied the plaintiffs' claim.[58] On summary judgment, Judge John W. Reynolds dismissed the civil rights action against DSS, and the Court of Appeals for the Seventh Circuit affirmed.[59] The Court of Appeals held that the plaintiffs had not proven an actionable section 1983 claim for two alternative reasons: (1) a state or local government entity is not required under the Due Process Clause of the Fourteenth Amendment to protect its "people from private violence, or other mishaps not attributable to the conduct of its employees,"[60] and (2) under section 1983, the plaintiffs could not establish a deprivation of constitutional rights because the causal connection between DSS's action and Joshua's injuries was too attenuated.[61] Thus, the Seventh Circuit rejected the plaintiffs' argument that a special relationship arises between the state and the particular child once the state has knowledge of the danger that the child may be abused.[62]

Similarly, the Supreme Court affirmed.[63] Writing for the Court, Justice Rehnquist found that the State had no constitutional duty to protect Joshua.[64] Justice Rehnquist's analysis began with an explanation of the limiting language of the Due Process Clause.[65] The failure of a state to protect an individual against private violence was deemed not to be a violation of the Due Process Clause.[66] The Due Process Clause was held by the Court to be "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[67] Additionally, particularly when the harm was not

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[58] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 303–04 (7th Cir. 1987), *aff'd*, 498 U.S. 189 (1989).

[59] *Id.*

[60] *Id.* at 301.

[61] *Id.* at 302–03.

[62] *Id.* at 303.

[63] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 498 U.S. 189, 203 (1989).

[64] *Id.* at 201. Chief Justice Rehnquist wrote the opinion on behalf of a six-member majority. *Id.* at 190. Justices White, Stevens, O'Connor, Scalia, and Kennedy joined Justice Rehnquist. Justice Brennan filed a dissenting opinion, in which Marshall and Blackmun joined. *Id.*

[65] *Id.* at 195–96.

[66] *Id.* at 197.

[67] *Id.* at 195.

exacted by a state actor, the absence of positive rights was found by the Court to preclude liability based on a state's failure to act.[68]

While not generally recognizing a state duty, the Court did recognize an exception for special relationships. Justice Rehnquist discussed the types of special relationships that are sufficient to enforce a constitutional duty[69] and found that the Court does recognize an exception when it comes to state custody.[70] Relying on its past cases,[71] such as *Estelle v. Gamble*[72] and *Youngberg v. Romeo*,[73] Justice Rehnquist discussed two situations where such duty under state custody arises: in the case of (1) prisoners[74] and (2) mental patients.[75] The Court used the *Estelle-Youngberg* analysis to demonstrate that the state has a " 'duty to assume some responsibility for . . . [the] safety and general well-being' of prisoners and the involuntarily committed."[76] Thus, the Court found that the Constitution only imposes a corresponding duty on the state to assume some responsibility when "the State takes a person into its custody and holds him there against his will."[77]

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[68] DeMond, *supra* note 35, at 695.

[69] *DeShaney*, 489 U.S. at 198–99.

[70] *Id.* at 198 ("It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.").

[71] *Id.* at 198–99 (citing Youngberg v. Romeo, 457 U.S. 307, 314–24 (1982); Estelle v. Gamble, 429 U.S. 97, 103–04 (1976); Robinson v. California, 370 U.S. 660, 667 (1962)).

[72] 429 U.S. 97 (1976).

[73] 457 U.S. 307 (1982).

[74] *Estelle*, 429 U.S. at 103–04 (holding that because the prisoner is unable " 'by reason of the deprivation of his liberty [to] care for himself,' " it is only "just" that the state be required to care for him (quoting Spicer v. Williamson, 132 S.E. 291, 293 (1926))).

[75] *Youngberg*, 457 U.S. at 314–25 (holding that under the Fourteenth Amendment's Due Process Clause, the state is required to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others).

[76] Michael Gilbert, Comment, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471, 479 (1993) (alterations in original).

[77] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

The Court, however, also left open the possibility that a custodial relationship with the state may also exist under a third circumstance—the foster care footnote.[78] Specifically, in footnote nine, Justice Rehnquist commented on how a foster care placement by the state might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."[79] Thus, according to Justice Rehnquist, the state's obligation is created by the "[s]tate's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty."[80]

Applying this analysis to the case of Joshua, the Court concluded that the State could not be found liable as there was no constitutional duty to protect Joshua.[81] The Court found that the *Estelle-Youngberg* analysis did not apply in Joshua's case because Joshua had never been in state custody when the harms inflicted on him occurred, but rather, he was in his father's custody—who was by no means a "state actor."[82] Contrasting Joshua's case with a foster care situation, the Court, under the foster care footnote, wrote that the State could have been found

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[78] *Id.* at 201 n.9 ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."); *see* Gilbert, *supra* note 76, at 480 n.41 (explaining how "[t]his footnote is conventionally recognized as the foster care footnote").

[79] *DeShaney*, 489 U.S. at 201 n.9.

[80] *Id.* at 200. Under the similar restraint of personal liberty, lower courts, finding that this footnote leaves open the possibility that *DeShaney* does not only limit affirmative duties to the strict custodial settings of prisoners or institution, have held that a special relationship does exist between the state and children in foster care placements. *See* Gilbert, *supra* note 76, at 480 ("Thus, the foster care footnote arguably vitiates any contention that *DeShaney* limits affirmative duties only to the strict 'custodial' settings of prisons or institutions."); Mary Kate Kearney, DeShaney's *Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 283 (2002) (discussing how several courts have accepted this foster care footnote, such as Nicini v. Morra, 212 F.3d 798, 809 (3d Cir. 2000), Lintz v. Skipski, 25 F.3d 304, 305 (6th Cir. 1994); Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289, 292–93 (8th Cir. 1993); Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883, 891–92 (10th Cir. 1992); Meador v. Cabinet for Human Res., 902 F.2d 474, 476–77 (6th Cir. 1990); K.H. v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990)); *see also* Laura Oren, DeShaney's *Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV., 113, 130–47 (1990) (discussing foster care abuse cases after *DeShaney*).

[81] *DeShaney*, 489 U.S. at 203.

[82] *Id.* at 201.

liable if it had by any "affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents."[83] Thus, although the State might have had knowledge of the dangers that Joshua faced, the Court found that the State had neither played any role in their creation nor had it done anything to place him in a position any more vulnerable to them.[84] The Court found that the most that could be said about the State was that "[it] stood by and did nothing when suspicious circumstances dictated a more *active* role for them."[85] Similarly, the State was not found liable for taking temporary custody of Joshua, because after returning him to his father's custody, the State had never placed him in any worse position than if it had refused to act at all.[86]

Finally, although the Court denied the plaintiffs' federal claim under the Due Process Clause of the Fourteenth Amendment, it noted that the plaintiffs may have had state law claims.[87] The Court disclosed how a state, through its courts and legislatures, could impose affirmative duties of care and protection upon its agents as it wishes.[88]

II. THE CHALLENGES FACED BY COURTS POST-*DESHANEY*

This Part demonstrates the difficulties courts have faced post-*DeShaney* when it comes to determining school liability under a section 1983 suit filed by a student against the officials and the school district, claiming a violation of the student's Fourteenth Amendment liberty interest. Specifically this Part first discusses the approach taken by the majority of the circuits after *DeShaney* when deciding whether the special relationship exception applies to schools, thus creating a duty to protect their

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[83] *Id.* at 201 n.9.

[84] *Id.* at 201. Since the *DeShaney* decision, this language by the Supreme Court has given rise to a State-Created Danger theory. *See, e.g.*, Uhlrig v. Harder, 64 F.3d 567, 572 n.7 (10th Cir. 1995); Dwares v. City of New York, 985 F.2d 94, 99 (2d Cir. 1993); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990); Cornelius v. Town of Highland Lake, 880 F.2d 348, 354 (11th Cir. 1989); Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989); Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 3 (2007).

[85] *DeShaney*, 489 U.S. at 203 (emphasis added).

[86] *Id.* at 201.

[87] *Id.* at 201–02.

[88] *Id.* at 202.

students from harm. Next, it discusses the majority courts' rationales for limiting liability. Finally, this section addresses the recent Fifth Circuit decision in *Covington*.

A. *Post*-DeShaney *School Liability Cases*

1. Majority Circuit View—No Special Relationship

The majority of circuit courts have denied a special relationship between public schools and their students, namely because they have found that schools do not place the same restraints on students' liberty as do prisons and state mental health institutions.[89] The First and Tenth Circuits have refused to find a special relationship in the school context even in cases where children have been left alone without supervision.[90] In *Hasenfus v. LaJeunesse*, the parents of a fourteen-year-old student who attempted suicide by hanging herself in the school locker room sued the school claiming a violation of section 1983.[91] The student's gym teacher had reprimanded the student for misconduct and the student was told to return to the locker room, where she was unsupervised.[92] Despite allegations that the teacher knew or should reasonably have known that the student, a rape-victim, was distressed, the First Circuit refused to find a special relationship between the school and the student.[93] It did not matter to the court that three months before the student's suicide attempt, several other students had attempted suicide at school or at school events.[94] In *Maldonado v. Josey*, an eleven-

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[89] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 358–59 (5th Cir. 2011) (King, J., dissenting), *aff'd in part, rev'd in part*, 675 F.3d 849 (5th Cir. 2012) (en banc).

> Conspicuously absent from the majority's opinion is a discussion of the decisions from other circuits. Like our court, each circuit to address the issue has concluded that compulsory attendance laws do not create a 'special relationship' between public schools and their students because even though school attendance is compulsory, public schools do not place the same restraints on students' liberty as do prisons and state mental health institutions.

Id.

[90] *See supra* notes 81–88 and accompanying text.

[91] 175 F.3d 68, 69–70 (1st Cir. 1999).

[92] *Id.*

[93] *Id.* at 70–71.

[94] *Id.* at 70.

year-old boy died of accidental strangulation in an unsupervised cloakroom adjacent to his classroom.[95] Like the First Circuit, the Tenth Circuit denied the existence of a special relationship.[96]

Additionally, several courts have denied special relationship claims in cases where students were harmed by their fellow peers.[97] In *D.R. v. Middle Bucks Area Vocational Technical School*, the Third Circuit refused to hold the school liable for physical, verbal, and sexual assault of two female students by several male students primarily occurring in a unisex bathroom and a darkroom.[98] Both locations, however, were part of a classroom. It was alleged that a teacher was present in this classroom during the attacks.[99] Although these acts allegedly took place during the school day, the court denied the plaintiffs' prison analogy as students "could, and did, leave the school building every day."[100] Thus, a school could not be found to restrict students' liberty as it did not deny students "meaningful access to sources of help."[101]

Following the lead of its sister circuits, the Fourth Circuit in *Stevenson ex rel. Stevenson v. Martin County Board of Education*, denied a ten-year-old student's claim of a special relationship between him and the school.[102] The boy was assaulted by his classmates.[103] The court held that "[a]ttending school is not the equivalent of incarceration or institutionalization," and thus school officials are not "constitutionally liable for failing to prevent all student-on-student violence."[104] In *Dorothy J. v. Little Rock School District*, a mentally retarded high school boy was sexually assaulted and raped by another mentally retarded student.[105] The Eighth Circuit denied the plaintiff's special relationship claim.[106] Similarly, in *Patel v. Kent School District*, the Ninth Circuit refused to find a special relationship between

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[95] 975 F.2d 727, 728 (10th Cir. 1992).

[96] *Id.* at 732–33.

[97] *See supra* notes 90–96 and accompanying text; *infra* notes 98–101 and accompanying text.

[98] 972 F.2d 1364, 1366, 1371 (3d Cir. 1992).

[99] *Id.* at 1366.

[100] *Id.* at 1372.

[101] *Id.*

[102] 3 F. App'x 25, 27, 31 (4th Cir. 2001).

[103] *Id.* at 27.

[104] *Id.* at 31.

[105] 7 F.3d 729, 731 (8th Cir. 1993).

[106] *Id.* at 734.

the school and the student victim in a case involving sexual assault by a developmentally disabled high school student on another fellow peer.[107] Specifically, the court found that a "tailored educational program for a disabled student" cannot reach to the level of state custody.[108]

Likewise, both the Sixth and Seventh Circuits have refused to find a special relationship between the school and the harmed student even in cases where the harm was inflicted by school employees.[109] In *Doe v. Claiborne County*, a fourteen-year-old student was sexually harassed, abused, and raped by an athletic coach off school grounds.[110] Despite previous sexual abuse allegations, the Sixth Circuit ruled in the defendants' favor. Although the Sixth Circuit found the facts of this case were "tragic," and it was "deeply disturbed by [the coach's] sexual abuse of Doe," under the limits of *DeShaney*, the Court refused to find a special relationship.[111] In *J.O. v. Alton Community Unit School District 11*, a teacher sexually molested three "school-age children."[112] Similarly, the Seventh Circuit refused to find a special relationship, basing its conclusion on the fact that school children, unlike prisoners and mental patients, are able to provide for their "basic human needs," and "parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child."[113]

2. Main Rationales for Limiting School Liability

As the preceding cases demonstrate, most courts post-*DeShaney* have refused to find a special relationship between the harmed student and the school.[114]

Numerous rationales have been given for refusing to find such a relationship. Mainly, courts are fearful of exposing a state actor to unlimited liability under a section 1983 claim.[115] Schools

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[107] 648 F.3d 965, 968, 973 (9th Cir. 2011).

[108] *Id.* at 974.

[109] *See supra* notes 102–06 and accompanying text.

[110] 103 F.3d 495, 500 (6th Cir. 1996).

[111] *Id.* at 510.

[112] 909 F.2d 267, 268 (7th Cir.1990).

[113] *Id.* at 272.

[114] See *supra* Part II.A.1 for a discussion of these cases.

[115] *See, e.g.*, DeMond, *supra* note 35, at 690 ("Because of the threat of unlimited liability, courts are reluctant to find every tort committed by a state actor actionable under section 1983.").

are viewed as a "sanctuary of safety and nurturance"[116] and as fulfilling a central role of state and local government.[117] As schools are seen to shape the whole form of society, great importance is already attached to safety in schools.[118] Courts and commentators have expressed concern that permitting liability in such instances would overburden schools.[119]

There are competing interests in determining liability between the teachers—who believe they should not be exposed to this extra burden—and parents—who wish to trust that the school will take care of their children.[120] Advocates of the current method fear that because schools are "already terribly overburdened, imposing more constitutional duties and liability for failure to fulfill impossible obligations will exacerbate an already desperate situation."[121] In analyzing a plaintiff's constitutional claims, courts have frequently stressed that rather than conferring affirmative rights to governmental assistance, the Bill of Rights is a charter of negative liberties.[122] In fact, Judge Posner wrote, "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."[123] In her opinion in *Dorothy J.*, District Court Judge Wright wrote of her concern for expanding constitutional duties of care and protection to schools.[124] Focusing on the consequences of expanding liability,

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[116] Gilbert, *supra* note 76, at 471.

[117] Huefner, *supra* note 22, at 1969.

[118] *Id.*

[119] *See* Stephen Faberman, Note, *The Lessons of* DeShaney*: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97, 138 (1993); *see also* Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993); Gilbert, *supra* note 76, at 493 ("Clearly, courts need to draw some lines when imposing affirmative duties on the state. Holding the state liable for its inaction poses very serious difficulties." (internal quotation marks omitted)); John W. Walters, Note, *The Constitutional Duty of Teachers To Protect Students: Employing the "Sufficient Custody" Test*, 83 KY. L.J. 229, 262 (1995).

[120] Walters, *supra* note 119, at 253–54.

> On one hand, parents expect a certain degree of protection for their children when they are at school. Although they cannot reasonably expect teachers to insure the safety of their children, they do expect teachers to act responsibly to prevent dangerous situations when they have the power and opportunity to do so.

Id. at 230.

[121] Faberman, *supra* note 119, at 137–38.

[122] Gilbert, *supra* note 76, at 493.

[123] *Id.* (alteration in original).

[124] 794 F. Supp. 1405, 1414 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993).

Judge Wright wrote this might lead school officials to "be subject to section 1983 liability anytime a child skinned his knee on the playground or was beat-up by the school bully, so long as the requisite 'state of mind' was shown."[125] Additionally, there is also a fear of overburdening federal courts with what many believe are state tort claims.[126]

B. The Recent Fifth Circuit Decision: Doe ex rel. Magee v. Covington County School District

1. Facts

Plaintiff, Jane Doe ("Jane"), was a nine-year-old elementary school student at Covington County Elementary School.[127] On at least six different occasions, the school released Jane to a complete stranger, Tommy Keyes ("Keyes").[128] Keyes checked Jane out of the school each time and subsequently raped, sodomized, and molested her before returning her to the school, where the school's employees would check Jane back on the school grounds.[129]

Despite its check-out policy, the school permitted Keyes, an unauthorized person who bore no relation to Jane, to check Jane out of the school.[130] The school had formally adopted and implemented a check-out policy, which expressly contained a "Permission to Check-Out Form" (the "Form") for each student.[131] Specifically, this Form contained only the names of individuals allowed to check a particular student out of the school.[132] There was, however, no condition or directive in this check-out policy that required school employees to verify that any individual seeking to check out a student was an actually authorized adult

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[125] *Id.* Judge Wright also wrote how today with the epidemic of deadly violence on many school campuses, "teachers would be constitutionally obliged to assume roles similar to policemen or even prison guards in protecting students from other students." *Id.*

[126] *Id.* at 1422.

[127] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 637 F. Supp. 2d 392, 395 (S.D. Miss. 2009), *aff'd*, 675 F.3d 849 (5th Cir. 2012) (en banc).

[128] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 340 (5th Cir. 2011), *aff'd in part, rev'd in part*, 675 F.3d 849 (5th Cir. 2012) (en banc).

[129] *Id.*

[130] *Covington*, 637 F. Supp. 2d at 395.

[131] *Covington*, 649 F.3d at 340.

[132] *Id.*

listed on the Form.[133] Consequently, school officials never consulted the Form to determine whether Keyes had authority to check out Jane or verified that Keyes was who he claimed to be.[134] Accordingly, Keyes was able to take custody of Jane on multiple occasions by representing himself to be different persons—on several occasions, Keyes signed as Jane's father and, on least one occasion, he signed as Jane's mother.[135]

Jane and her parents filed suit in the United States District Court for the Southern District of Mississippi.[136] The plaintiffs brought claims against the school district and several school officials under 42 U.S.C. §§ 1983 and 1985 and under Mississippi tort law.[137] Under the constitutional claims, the plaintiffs alleged that the defendants implemented a policy that violated Jane's Fourteenth Amendment substantive due-process rights.[138] Specifically, the plaintiffs alleged that the school had a special relationship with Jane, and thus, it had a duty to protect her because of the school's "total limitation on Jane's freedom to act on her own behalf."[139] The plaintiffs argued that even if the school could not be deemed to already have a duty to protect *very young students*, such as nine-year-old Jane, while on school property during the school day, "it certainly *did* assume a duty to protect her when it affirmatively delivered her from the School's exclusive custody into the sole custody of Keyes, further depriving her of her liberty by isolating her from the people she trusted and the surroundings she knew."[140] The defendants moved to dismiss the action pursuant to Rule 12(b)(6) for failure to state a claim.[141]

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[133] *Id.*

[134] *Id.* at 340–41.

[135] *Id.* at 341.

[136] *Id.* at 337.

[137] *Id.*

[138] *See id.* at 337–38.

[139] *Id.* at 339.

[140] *Id.*

[141] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 637 F. Supp. 2d 392, 396 (S.D. Miss. 2009), *aff'd*, 675 F.3d 849 (5th Cir. 2012) (en banc).

2. Holdings

a. District Court

The district court granted the defendants' motion to dismiss.[142] In reaching his conclusion, District Court Judge Keith Starrett considered the applicability of the two scenarios in which a right to governmental protection might arise: (1) the State-Created-Danger exception[143] and (2) the special relationship exception.[144] Specifically, Judge Starrett concluded that the defendants could not be found to owe any duty to protect Jane for the following reasons: (1) The Fifth Circuit had never recognized the State-Created-Danger exception, and even if it did, the facts in this case did not meet the elements of this theory; and (2) A public school could not be found to be in a special relationship with its students purely due to the young age of the students in the school's custody.[145] Judge Starrett also held that the defendants were entitled to qualified immunity from this suit.[146]

b. The Initial Fifth Circuit Opinion

In a two-to-one split, the United States Court of Appeals for the Fifth Circuit partly affirmed and partly reversed the lower court's decision and remanded the case to the lower court.[147] The district court's grant of qualified immunity was affirmed by the majority. The court noted, however, that the district court "inadvertently" extended immunity to all the defendants, when it only applied to defendants sued in their *individual* capacities.[148] While the court found that Jane's constitutional right had been violated, the court found that these individuals were entitled to qualified immunity because the constitutional right at issue was not clearly established at the time the violation occurred.[149] As to

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[142] *Id.* at 405.

[143] As previously stated, this Note's focus will solely be on the special relationship exception so this State-Created-Danger exception will not be discussed.

[144] *Covington*, 637 F. Supp. 2d at 398–99, 405.

[145] *Id.*

[146] *Id.* at 405.

[147] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 353–354 (5th Cir. 2011), *aff'd in part, rev'd in part*, 675 F.3d 849 (5th Cir. 2012) (en banc).

[148] *Id.* at 341 n.10, 353.

[149] *Id.* at 353.

the district court's dismissal of Jane's action, based on that court's refusal to find a special relationship, the Fifth Circuit reversed.[150]

The Fifth Circuit held that the school had a special relationship with Jane.[151] The court asked whether there "[a]re . . . circumstances under which a compulsory-attendance, elementary public school has a 'special relationship' with its nine-year-old students such that it has a constitutional 'duty to protect' their personal security?"[152] The court began its analysis with a discussion of *DeShaney*.[153] The court found that the facts were "significantly distinct" from *DeShaney*[154]—unlike *DeShaney*, in which the injury to the child could be considered to be the result of *inaction*,[155] here, the school's conduct could be looked upon as *affirmative* acts.[156]

The court was convinced that the school's repeated, deliberate acts of isolating Jane from her classmates and her teachers, and then helplessly forcing her into the custody of an adult stranger, could "constitute precisely the kind of 'affirmative exercise of [s]tate power' contemplated in *DeShaney*."[157] Explicitly, the school's expressly adopted check-out policy had forced Jane into an "even *more* restrictive and unfettered custody of Keyes, not at the end but during the school day, when the School was otherwise obligated to care for Jane."[158] Thus, by virtue of its own policy and acts, the school could be found to have a *DeShaney* "special relationship" with Jane.[159]

c. Fifth Circuit's Rehearing En Banc

After granting a rehearing en banc, the Fifth Circuit vacated its prior decision and held that Jane did not have a *DeShaney* special relationship with her school. [160] In affirming the

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[150] *See id.* at 340.
[151] *Id.* at 350.
[152] *Id.* at 338.
[153] *See id.* at 342–43.
[154] *Id.* at 342.
[155] *See id.* at 342–43.
[156] *Id.* at 347–48.
[157] *Id.* at 347.
[158] *Id.* at 348 (emphasis added).
[159] *Id.* at 350.
[160] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 852 (5th Cir. 2012) (en banc). Although plaintiff made several different claims, this Note will only focus on the special relationship claim.

judgment of the district court, the court held that because no special relationship existed, the school did not have a constitutional duty to protect Jane from harm inflicted by a private actor.[161] In making this determination, the court rejected the plaintiff's argument that "compulsory school attendance laws, combined with Jane's young age and the affirmative act of placing Jane into Keyes's custody . . . created a special relationship in this case."[162]

As to the argument made about Jane's young age, the court emphasized how a constitutional duty to protect a student from harm does not depend on the maturity of the student.[163] Rather, the court noted that since parents "remain the primary source for the basic needs of their children," schools do not have a special relationship with students.[164] Jane was attending the school because her parents voluntarily chose to send her there, and thus, the court found that her parents remained responsible for her basic needs.[165]

Similarly, the court rejected the plaintiff's compulsory school attendance claim.[166] Although the court recognized that Jane's attendance at school was mandated by compulsory attendance laws, the court noted how "compulsory school attendance laws do not alone create a special relationship."[167] The court emphasized how Jane's parents had been free at any time to remove her from the school if they felt that her safety was being compromised.[168]

Finally, the court rejected the plaintiff's argument that a special relationship formed from the school's indifferent conduct in releasing Jane to Keyes.[169] As to this claim, the court emphasized that the school officials "did not *knowingly* transfer that custody to an unauthorized individual."[170] This particular fact was important to the court, as it noted that this requirement that state actors *know* that they are restricting an individual's liberty is inherent in the Supreme Court's holding that a state

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[161] *Id.* at 852, 858.
[162] *Id.* at 858.
[163] *Id.* at 859–60.
[164] *Id.* at 859 (internal quotation marks omitted).
[165] *Id.* at 861.
[166] *Id.*
[167] *Id.* (internal quotation marks omitted).
[168] *Id.*
[169] *Id.* at 861–62.
[170] *Id.* at 862.

official may create a special relationship through an *affirmative* exercise of its power.[171] "When a school employee carelessly fails to ensure that an adult is authorized to take an elementary student from the school, no state actor has knowledge that the school has thereby restricted the student's liberty, because the adult taking the student from school may or may not be authorized."[172]

III. THE NEED FOR A NEW OBJECTIVE FRAMEWORK: THE THREE-PRONG FACTOR TEST

Despite the *DeShaney* special relationship exception, the majority of courts have refused to find that such a relationship exists in the school context. However, the current analysis used by courts in determining whether a special relationship exists is impractical, opaque, and overly subjective. Courts, and more importantly, victimized children, are in need of a clear and objective test to determine school liability. This Part proposes a three-prong factor test that courts should apply to determine whether a *DeShaney* special relationship exists. This test creates an objective framework that balances the competing concerns of both schools and parents and would provide courts with much-needed guidance in deciding such section 1983 claims. Finally, this Part concludes by applying this test to several earlier circuit court cases: first, to the Fifth Circuit's recent decision in *Covington*,[173] and second, to two earlier circuit court cases—*Dorothy J. v. Little Rock School District*[174] and *Doe ex rel. Magee v. Claiborne County*.[175]

A. *The Schools' Need for a Clear, Objective Test To Determine the Existence of a Special Relationship*

The Circuits' divergent approaches to determining the viability of a special relationship claim underscore the need to formulate a clear test. Although the majority of circuits have simply refused to find a special relationship between the harmed student and the school, there has been no clear guidance given to courts as to what circumstances might suffice to create a special

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[171] *Id.*
[172] *Id.*
[173] 675 F.3d 849 (5th Cir. 2012).
[174] 7 F.3d 729 (8th Cir. 1993).
[175] 103 F.3d 495 (6th Cir. 1996).

relationship. Consequently, this Part sets forth a three-prong factor test that courts should apply in determining whether a school fits within a *DeShaney* special relationship exception. The three factors are as follows: (1) potential gravity of the harm; (2) foreseeability; and (3) age and maturity of the student. By forcing courts to analyze all three factors, this test strikes a balance between the competing interests of teachers—who believe they should not be exposed to this burden—and parents—who seek safety in schools. By applying this test, courts would have an objective and analytical framework by which they would be able to permit recovery in the most egregious of cases, such as *Covington*, while denying it in lesser instances. Unlike state tort law remedies, a finding of school liability under a section 1983 claim will impose a federal constitutional requirement on every school, in every state, and thus create a safer environment for all students.[176]

This test is consistent with *DeShaney*. The Supreme Court, in *DeShaney*, recognized that a state creates or assumes a special relationship with an individual when it affirmatively restrains an individual's liberty—either through imprisonment, institutionalization, or other similar restraint of personal liberty.[177] Limited by the case at hand, the Court did not give details as to what such "other similar restraint of personal liberty"[178] might be. These three above factors would be illustrative in determining whether the state has affirmatively restrained a student's liberty.

Additionally, various courts have separately considered some of these factors.[179] Under this test, however, a court would balance all these factors in determining whether a school official's act or omission has so affirmatively restrained a student's "personal liberty" and thus "imposed on [the student's] freedom to act on his [or her] own behalf" so as to create a special relationship between the school and the student.[180] Such a test is needed because alternative remedies like the State-Created

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[176] Alison Bethel, Note, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty To Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 199 (2004).

[177] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

[178] *Id.*

[179] *See supra* Part II.

[180] *DeShaney*, 489 U.S. at 200.

Danger theory are insufficient.[181] For instance, this test is broader because it is not limited only to circumstances where the school *actively* placed a student in harm's way. This test is also more fact sensitive and thus allows flexibility to accommodate different settings—both in-school and out-of-school sponsored volunteer events—where unique and complex fact patterns demand a special balancing of individual and governmental interests.

Finally, this test proposes that the courts should apply a "totality of the circumstances" approach when deciding whether a special relationship exception applies to the case at hand. The Supreme Court has recognized a "totality of circumstance" approach in other areas of constitutional law.[182] Consequently, each case will be examined individually in light of the surrounding circumstances—no one factor will be dispositive. Thus, the mere fact that a child is young or suffered a particularly egregious harm would not be enough to permit the court to find the existence of a special relationship. This case-by-case approach will allow courts to recognize that the strengths of competing interests may vary by context.

B. Determining Whether Schools Fit Within DeShaney*'s Special Relationship Exception—The Application of a Three-Prong Factor Test*

1. Potential Gravity of the Harm

Certain school policies or practices, whether formal or informal, might impose such a grave potential gravity of harm on a student that it thus affirmatively creates a duty upon the school to protect the student. In evaluating this factor, courts

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[181] Under this State-Created Danger theory, a state actor may be liable under section 1983 if the state actor created or knew of a dangerous situation and affirmatively placed the plaintiff in that situation. *See, e.g.*, Carlton v. Cleburne Cnty., 93 F.3d 505, 508 (8th Cir. 1996) ("In [the State-Created Danger theory] cases the courts have uniformly held that state actors may be liable if they affirmatively created the plaintiffs' peril or acted to render them more vulnerable to danger. In other words, the individuals would not have been in harm's way but for the government's affirmative actions." (citation omitted)).

[182] *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977) (holding that before the plaintiff establishes a prima facie case of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment, it first applies a "totality of circumstances" approach to prove whether there was intent of discrimination).

would find an affirmative duty arises when the school, through its procedure, places students in a situation in which the existence of a potential harm is grave.

Additionally, this factor will remove an enormous burden on students and instead place this burden properly on the school. In many cultures, children generally do not challenge authority.[183] Thus, in situations where schools create a potentially dangerous and harmful situation for students, not all students will be able to raise reasonable objections to a school official's authority. Accordingly, schools place a tremendous burden on their students to make any reasoned objections when they are faced with a potentially harmful situation. Under this factor, however, this burden will be shifted away from students who might not be able to voice their opinions, and instead it will be placed on a party that is partly responsible for this harm.

Furthermore, in evaluating this factor, school liability may attach regardless of whether the harm occurred during school or during an out-of-school activity, such as a school-sponsored camp or recreational event occurring outside the boundaries of school. Rather than focusing on *where* the harm occurred, courts should instead look at the potential gravity of harm that the school's act created. Hence, this test allows schools to potentially be liable when they implement a policy or create an environment where the probability of harm is grave.

2. Foreseeability

Contrary to the Fifth Circuit's majority opinion in *Covington*,[184] in determining whether a special relationship exists between the school and a student, foreseeability *should* also be one factor that courts consider. Under this factor, the student victim needs to demonstrate that, in connection with a particular school policy or practice, the school official failed to protect the particular student from a known or reasonably foreseeable harm.

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[183] *See, e.g.*, PATRICIA BILL, PACER CTR. INC., PARENTS FROM VARIED CULTURES CAN COMMUNICATE WITH SCHOOLS 1 (2000), *available at* http://www.pacer.org/mpc/pdf/MPC19.pdf ("Southeast Asian parents, for example, teach their children not to challenge authority in most instances."); KATHLEEN MALLEY-MORRISON & DENISE A. HINES, FAMILY VIOLENCE IN A CULTURAL PERSPECTIVE: DEFINING, UNDERSTANDING, AND COMBATING ABUSE 229 (2004) (discussing how "[i]n the Hispanic cultures, children are taught not to question authority").

[184] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 862–63 (5th Cir. 2012) (en banc).

Thus, the potential existence of a school duty would arise from the school's ignorance of a known or reasonably foreseeable harm and the strength of the student's evidence in showing this particular harm. Subsequently, the school official would then have a chance to respond and demonstrate that the harm done to the student victim was not known or reasonably foreseeable.[185]

This foreseeability factor would strike the appropriate balance between the interests of schools and students.[186] While students will benefit from a school's incentive to prevent foreseeable harm, a diligent school official will be protected from an unforeseeable or an isolated case of harm. For instance, under this foreseeability prong, a school would not be held liable for its failure to take adequate precautions to protect a student from an attack by another violent student, if this harm occurred years after the attacker's last outburst, or if these prior outbursts had been directed at the violent student himself, rather than others.[187]

3. Age and Maturity of the Student

To determine whether the school is in a special relationship with a student, the age and maturity of a student should also be considered. Contrary to the majority's suggestion in *Covington*,[188] this factor would not be inconsistent with Supreme Court precedent. The Supreme Court has previously discussed its concern over children's inability to make mature choices.[189] In fact, the Supreme Court has recognized that "[m]ost children, even in adolescence, simply are not able to make sound

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[185] Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 240 (1994) (proposing that foreseeability should be a factor in considering peer sexual harassment cases).

[186] *Id.* at 242.

[187] Jackson v. Indian Prairie Sch. Dist. 204, 653 F.3d 647, 649, 655 (7th Cir. 2011) (discussing how the school district's failure to transfer an autistic student from the general education classroom did not " 'shock the conscience' " under the State-Created Danger theory because the record had shown that "many of [the student's] acts of violence were not against other people, but were against himself," and evaluation reports did not indicate that the school staff feared harm from the student).

[188] *Covington*, 675 F.3d at 859–61.

[189] *See* Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) ("I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice.").

judgments concerning many decisions."[190] Despite being a completely different factual scenario, in *Roper v. Simmons*—a case involving a juvenile offender who committed murder at age seventeen—the Supreme Court recognized how age and maturity are factors that bear on the analysis of whether the Constitution bars capital punishment for juvenile offenders.[191] The Court noted how sociological studies have shown that a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults."[192] Consequently, heavily taking into account the factors of age and maturity, the Court ultimately struck down the death penalty on juvenile offenders under age eighteen.[193] Similarly, in *Miller v. Alabama*, the Supreme Court noted how precedent and individualized sentencing decisions make clear that a "sentencer [must] have the ability to consider the mitigating qualities of youth. . . . [Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness[,] and recklessness."[194] The Court further noted how science and social science have made the Court's conclusion in *Roper* even stronger.[195]

Further, as both courts and commentators have recognized, a student's mental capacity and age can influence directly the level of custody that a school holds.[196] Many students are minors whose judgments may not be fully mature and developed.[197] In fact, society has recognized this as laws have been created that

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[190] Parham v. J.R., 442 U.S. 584, 603 (1979).

[191] Roper v. Simmons, 543 U.S. 551, 555 (2005).

[192] *Id.* at 569.

[193] *Id.* at 578.

[194] 132 S.Ct. 2455, 2467 (2012) (alteration in original) (citations omitted) (internal quotation marks omitted).

[195] *Id.* at 2464 n.5.

[196] *See, e.g.*, D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1381 (3d Cir. 1992) (Sloviter, C.J., dissenting) ("[T]he duty of state entities to protect those already within their charge should be broad enough to extend at least to young children and those who, because of disability or other impairment, are not likely to seek assistance promptly."); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982) (addressing this issue after observing that school children are "too young to be considered capable of mature restraint," and thus asserted that a public school "assumes a duty to protect [its students] from dangers posed by anti-social activities—their own and those of other students—and to provide them with an environment in which education is possible"); Kim, *supra* note 22, at 1132–34; Walters, *supra* note 119, at 257.

[197] *D.R.*, 972 F.2d at 1380; Kim, *supra* note 22, at 1132–33.

prohibit children from voting,[198] drinking,[199] smoking,[200] or serving in the armed forces.[201] As the Tenth Circuit noted in *Maldonado v. Josey*, "younger children are incapable of providing for their own basic needs; they depend on parents or other caretakers to provide for them."[202] Similarly, students who suffer from disabilities or other impairments may also, "[m]uch more so than any other children . . . completely lack the skills to . . . otherwise defend themselves from those who would do them harm."[203]

Thus, in determining the possibility of a special relationship, courts should, contrary to the majority opinion in *Covington*, consider the age and competency of students—that is, their mental, psychological, and physical abilities to recognize and defend themselves against threats to their safety. Although courts should consider each student's age and maturity under this factor, it can certainly be argued that as age increases, the vulnerability of a student decreases.[204] In comparison to teenagers or adults, younger children are much more dependent on their custodians. Hence, especially when it comes to *younger* students, this factor might weigh more heavily towards finding a special relationship as younger students have limited psychological and physical abilities to recognize and defend themselves. In *Covington*, however, the majority suggested that the distinction between very young children and older children is "essentially arbitrary."[205] The Fifth Circuit expressed how, if age was considered a factor in the analysis, some students could simply "age out" the constitutional protection over the course of one academic year.[206] This concern, however, as noted by Judge Wiener in his dissenting opinion in *Covington*, is not legitimate, as the distinction "between pre-pubescent and pubescent or post-pubescent children is not just natural and intuitive—it is

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[198] U.S. CONST. amend. XXVI.

[199] *See, e.g.*, N.Y. PENAL LAW § 260.20 (McKinney 2010).

[200] *See, e.g.*, N.Y. PUB. HEALTH LAW § 1399-cc (McKinney 2013).

[201] 10 U.S.C. § 505(a) (2012).

[202] 975 F.2d 727, 735 (10th Cir. 1992).

[203] Teague *ex rel.* C.R.T. v. Tex. City Indep. Sch. Dist., 348 F. Supp. 2d 785, 792–93 (S.D. Tex. 2004), *vacated in part*, 386 F. Supp. 2d 893 (S.D. Tex. 2005), *aff'd*, 185 F. App'x 355 (5th Cir. 2006).

[204] Gilbert, *supra* note 76, at 508 n.188.

[205] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849, 859 (5th Cir. 2012) (en banc).

[206] *Id.* at 860.

grounded in extensive science."[207] Judge Wiener further pointed out how Congress and state legislatures have on numerous occasions "treated pre-pubescent and post-pubescent children differently and have used age as a proxy for that distinction."[208]

C. Application of the Three-Prong Factor Test to Covington

In analyzing *Covington* under the three-prong factor test, the outcome of *Covington* would be completely opposite from the Fifth Circuit's holding. Applying each of the three prongs to the facts in *Covington*, a court would find that Jane's liberty was so restrained as to create a special relationship between her and the school.

As to the first prong of this test, the school's compulsory, express check-out policy created a grave potential for harm. This policy also placed an enormous burden on students, such as Jane, to challenge school authority. In this case, the existence of this policy not only signaled to Jane's parents that they could rely on the school that it would only entrust the custody of Jane to specific authorized individuals, but it also rendered students, such as Jane, unable to act on their own behalf, by placing them exclusively in the custody of a particular individual. This grave potential for harm thus arose from the fact that this school policy gave exclusive custody of a student to an individual by permitting that individual to isolate and take a student away from the school. This act also placed a tremendous burden on Jane to challenge and question the school that she had been taught to trust without question.

Additionally, the fact that this check-out policy did not include a requirement or directive to the school's employees that they verify that the adult seeking to check out a student was who he said he was—that is, an adult listed on the authorization form[209]—further demonstrates how this policy created substantial potential gravity of harm. In this case, the gravity of harm was apparent—Jane was released to an unauthorized individual, Tommy Keyes, during the school day on at least six different occasions, in which Keyes brutally raped, sodomized, and molested Jane before returning her to the school, where the

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[207] *Id.* at 879.
[208] *Id.* at 879–80.
[209] *Id.* at 853.

school's employees checked her back in on school grounds.[210] Thus, by creating a policy which left open the possibility for grave harm, the school in *Covington* voluntary assumed a duty to protect students such as Jane.

Second, the school in *Covington* could have reasonably foreseen the harm suffered by Jane. Not only had the school received complaints and inquiries about its express check-out policy, but it had also had internal safety meetings and discussions concerning access to students under the school's care and control by unauthorized individuals.[211] Additionally, the mere fact that the school had a "Permission to Check-out Form" clearly indicates that the school had actual knowledge that if a minor child was released to an unauthorized person, it would create a danger to the child.[212]

Thus, it could be argued that these complaints demonstrated the school's *actual knowledge* of the dangers created by the school's policies, customs, and regulations. Specifically, the school could be considered to have been *aware* that nine-year-old Jane's safety was threatened by this policy—regardless of whether the school was aware that Jane had already been sexually abused when it repeatedly checked her out to Keyes. The fact that "the potential sexual assault of pre-pubescent children in general and nine-year-old girls in particular is hardly an unknown threat" further demonstrates the foreseeability of this harm.[213] Thus, in this case, the awareness of the risk that this school policy carried was sufficient to put the school on notice of this kind of harm.

Finally, as to the last prong of the factor test, a court could find that Jane's very young age and maturity also weighs more heavily in finding a special relationship between her and the school. Unlike middle school students, pre-pubescent, elementary students could be considered incapable of protecting themselves. Specifically, nine-year-old children, such as Jane, lack the real ability to fend for themselves against threatening

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[210] Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 649 F.3d 335, 338, 340 (5th Cir. 2011), *aff'd in part, rev'd in part*, 675 F.3d 849 (5th Cir. 2012) (en banc).

[211] *Id.* at 350, 352.

[212] Brief for Appellant, Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist., 675 F.3d 849 (5th Cir. 2012) (No. 09-60406), 2009 WL 7112029, at *24.

[213] *Covington*, 649 F.3d at 352 (describing how many schools across the country had endorsed a nationwide program designed with the express purpose of combating the threat posed by pedophiles to very young children like Jane).

adults. In fact, this is one reason why young children are never permitted in the first place to leave the school grounds by themselves. This is in contrast to older teenage students who can regularly come and go on their own—regardless of whether it is during, before, or after school hours—and who most likely would not allow themselves to be checked out from a school by a complete stranger.

D. Application of the Three-Prong Factor Test to Two Earlier Circuit Court Cases

1. *Dorothy J. v. Little Rock School District*[214]

Applying this three-prong factor test to the facts in *Dorothy J*—a case involving a mentally handicapped student who was sexually assaulted by a fellow student with a violent history[215]—a court would, similarly to the Eighth Circuit, find that no special relationship existed because only the last prong of this test is met.

Under the first prong of this test, the high-school's Community-Based Instruction ("CBI") Program did not create a grave potential harm for students. There is no indication that this program itself placed students in a situation in which the existence of a potential harm was grave. The school district's CBI Program simply taught life and social skills to mentally retarded students.[216] As mentally disabled students, both Brian B. and his attacker, Louis C., attended this program.[217] Additionally, as the court noted, there was no claim that the school had involuntarily placed Brian B. in the program.[218] In fact, the school was neither responsible for placing Brian B. nor Louis C. in the program.[219] Thus, by just placing two boys in close proximity to one another, the CBI Program cannot be considered to have caused a grave potential for harm.

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[214] 7 F.3d 729 (8th Cir. 1993).

[215] For a more detailed description of the facts in this case, see *supra* notes 14–18 and accompanying text.

[216] *Dorothy J.*, 7 F.3d at 731.

[217] *Id.*

[218] *Id.* at 732.

[219] Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405, 1422 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993).

Likewise, as to the second factor, the school could not have reasonably foreseen the harm suffered by Brian B. Bringing a section 1983 claim on behalf of her son, Brian B.'s mother claimed that the school failed to take any action to prevent the attack on her son even after being "aware that Louis had a history of violent and sexually assaultive behavior."[220] Despite the school's awareness of Louis C.'s propensity for violence, the specific attack on Brian B. could not have been reasonably foreseen because Louis C. was placed in the program "at least two years before the assault."[221] As the district court noted, the case would be different if the assault had occurred a few weeks or even months after the placement of Louis C. in the program.[222] The violent encounter in this case, however, could be considered too remote a consequence.

The facts of this case satisfy the last prong of this test. Although Brian B. was a high school student,[223] a court could find that Brian B.'s mental disability potentially weighs toward finding a special relationship between him and the school. As a mentally retarded student, Brian B. could be considered to have lacked the mental and physical abilities to otherwise defend himself from the assault.

Similar to the Eighth Circuit's holding, under the three-prong factor test, a court would find that there is no special relationship between the harmed student and the school. Although the last prong is satisfied, a court would probably find that the age and maturity of the student are not alone sufficient to elevate the duty of the school to that of a special relationship.

2. *Doe v. Claiborne County*

Contrary to the Sixth Circuit's holding in *Claiborne*—where a school athletic coach raped a fourteen-year-old freshman girl, Jane Doe[224]—under the three-prong factor test, a court would find that a special relationship existed between Jane and the school. Two of the three prongs of this test are satisfied.

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[220] *Dorothy J.*, 7 F.3d at 731.

[221] *Id.* at 733.

[222] *Dorothy J.*, 794 F. Supp. at 1421.

[223] *Dorothy J.*, 7 F.3d at 731.

[224] For a more detailed description of the facts in this case, see *supra* notes 2–13 and accompanying text.

Under the first prong of this test, a court would find that there existed a special relationship between Jane and the school. This relationship arose from the school board's act of rehiring the same high school athletic coach who had previously been accused of sexually abusing nine different girls.[225] Under this first prong, there is no doubt that this act by the school created a grave potential of harm for students. Although the school board suspended the coach after the first allegations,[226] the following year, the school rehired him. [227] In evaluating this factor, it should not matter that the Department of Human Services ("DHS") decided not to pursue criminal proceedings against the coach after investigating the first allegations.[228] The school board should never have considered this an exoneration and rehired the coach. Thus, the school's act of rehiring the coach could be considered to have placed students in a grave potential for harm.

Likewise, under the second prong, the sexual abuse suffered by Jane could have been considered reasonably foreseeable. The school board was aware of the previous sexual abuse allegations.[229] Additionally, the court found that four of the charges were potentially "founded."[230] Yet, the coach was rehired.[231] After this rehiring, the school continued to observe inappropriate behavior by the coach.[232] In fact, on one occasion, the principal himself witnessed such inappropriate behavior when he found the coach sitting on some gymnasium bleachers with two female eighth-grade students after a physical education class had ended.[233] The principal had begun to personally supervise the coach because of the DHS charge and a rumor he had heard "about [the coach's] 'possible inappropriate behavior with a female student.' "[234] On another occasion, the principal was informed by a guidance counselor that a girl had complained that the coach had suggested that they " 'get[ ] naked' while

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[225] *See* 103 F.3d 495, 502–03 (6th Cir. 1996).
[226] *Id.* at 502.
[227] *Id.* at 503.
[228] *Id.* at 502.
[229] *Id.*
[230] *Id.*
[231] *Id.* at 503.
[232] *See id.*
[233] *Id.*
[234] *Id.*

touching her on the ribs."[235] Thus, in light of all this observed behavior, the school could have been considered to have had sufficient notice of this kind of harm suffered by Jane.

Finally, a court could find that the last prong of this test is not met. During the time of the sexual abuse, Jane was a fourteen-year-old freshman in high school.[236] Jane was the coach's scorekeeper for the boys baseball team.[237] This position required Jane to travel by bus to the games with the team and the coach. It was during these bus trips that the coach began to abuse and harass Jane.[238] During the team's first trip, Jane sat next to the coach, "who reached inside her blouse and fondled her breasts."[239] Although, at that time, Jane did not say anything about the incident to anyone, she avoided the coach for the rest of the school year.[240] During the next year, the coach continued harassing her.[241] There is no doubt that these facts are very tragic. Yet, unlike elementary students, a fourteen-year-old high school student could be considered to have a much more mature and developed judgment. Thus, a court *could* find that Jane was old and mature enough to decide to not go on the bus again and sit with the coach.

In contrast to the Sixth Circuit's decision, a court would probably find that, under this test, there existed a special relationship between the school and Jane. A court would find that the gravity of the harm created by the school, along with the foreseeability of this injury, would be sufficient to create a special relationship.

CONCLUSION

In the seminal case of *DeShaney*, the Supreme Court limited the circumstances in which the state could be found to have an affirmative duty under the Due Process Clause to protect its citizens. The Court, however, did recognize that a special relationship might arise between an individual and a state when the state affirmatively, by its exercise of powers, "so restrains an

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[235] *Id.* (alteration in original).
[236] *Id.* at 500.
[237] *Id.* at 501.
[238] *See id.*
[239] *Id.*
[240] *See id.*
[241] *See id.*

individual's liberty."[242] Despite creating the special relationship exception, the majority of courts have been unwilling to find such a relationship exists between a school and a harmed student. In making this determination, however, there has been no clear guidance given to courts as to what circumstances might suffice to create a special relationship. In fact, courts need an objective, analytical framework that balances competing public policies to assist them in determining the existence of a special relationship. The factor test provides courts with this guidance. As demonstrated, it is malleable enough to find liability in the most egregious of cases, while precluding it in less severe instances. Adoption of this test would continue to provide schools with the limited liability needed to function, while not depriving parents and victimized students of their constitutionally-provided remedies.

[242] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).