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Cover Page Footnote
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THE FOURTH R—RESPECT: COMBATTING PEER SEXUAL HARASSMENT IN THE PUBLIC SCHOOLS

*HELENA K. DOLAN**

INTRODUCTION

"[O]ffensive touching of [two females'] breasts and genitalia, sodomization and forced acts of fellatio" allegedly continued for a period of approximately five months.[1] Reported attempts to touch a female's breasts and vaginal area accompanied by sexually suggestive comments spanned a similar time frame.[2] Bra snapping, breast grabbing, shoving and name calling topped the list of alleged sexual misbehavior that another female regularly endured for close to seven months.[3]

As lurid accounts of sexual harassment continue to unfold with startling frequency,[4] the scenarios remain largely the same with one striking variation. The above detailed instances of sexual harassment reflect the experiences of America's school children.[5] Females continue to be the most frequent targets of harassment,[6] and males persist

* I am grateful to Professor Tracy E. Higgins for reading an initial draft of this Note.

1. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

2. Davis v. Monroe County Bd. of Educ., No. C.A.94-140-4MAC(WDO), 1994 WL 477195, at *1 (M.D. Ga. Aug. 29, 1994).

3. Tamar Lewin, *Students Seeking Damages for Sex Bias: School Officials Around Nation View Lawsuits With Trepidation*, N.Y. Times, July 15, 1994, at B7.

4. *See infra* notes 36-63 and accompanying text.

5. *See D.R.*, 972 F.2d at 1366; *Davis*, No. C.A.94-140-4MAC(WDO), 1994 WL 477195, at *1; Lewin, *supra* note 3, at B7; *see also* Nan Stein, *Sexual Harassment: 'It Breaks Your Soul and Brings You Down'*, N.Y. Teacher, Oct. 18, 1993, at 23 (quoting several female teenagers who described sexual harassment by other students).

The National Advisory Council on Women's Educational Programs defined academic sexual harassment as "the use of authority to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs that student's full enjoyment of education benefits, climate, or opportunities." Monica L. Sherer, Note, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. Pa. L. Rev. 2119, 2127 (1993) (quoting Massachusetts Board of Education, Who's Hurt and Who's Liable: Sexual Harassment in Massachusetts Schools 9 (1986)). School sexual harassment occurs at both a teacher-to-student level and a student-to-student (peer) level. *Id.* The subject of this Note is peer sexual harassment.

6. As is the case in workplace harassment, females are the most frequent victims of harassment in school. Studies indicate that, in both employment and school harassment cases, females are harassed more often than males. In a 1980 federal employee study conducted by the U.S. Merit Protection Service Board, 15% of males and 42% of females revealed that they were harassed on the job. Ellen Bravo & Ellen Cassedy, 9 to 5 Guide to Combatting Sexual Harassment: Candid Advice from 9 to 5, The National Association of Working Women 4-5 (1992). A follow-up survey in 1987 yielded nearly identical results. *Id.* In a 1990 study polling 20,000 military employees by the Department of Defense, 64% of females and 17% of males said that they had

as the aggressors.[7] But school sexual harassment poses a unique threat. Secondary, intermediate and elementary school students are the victims and, even more disturbingly, the perpetrators.[8]

While instances of teacher-to-student sexual harassment are an important concern,[9] peer sexual harassment takes place with far greater frequency,[10] and its consequences are more severe.[11] Sexual harassment at the student-to-student level directly impacts the emotional and behavioral development of children,[12] and sets the stage for how they will treat each other as adults.[13] The danger is not only that students are subjected to sexual harassment in school,[14] but that conditioned acceptance of this behavior also encourages workplace harassment and domestic violence.[15] Following the lead of women in the workplace, female students are challenging the "normalcy" of this behavior.[16]

The present and future welfare of America's students depends upon prompt corrective action. Continued adult inattention to instances of peer sexual harassment[17] and dismissal of sexual misconduct as harmless adolescent flirtation[18] perpetuate the problem. Recognition of a special relationship between school officials and school children would impose an affirmative duty of protection on school officials in cases of

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been victims of harassment. *Id.* For a discussion of the frequency of female harassment in school, see *infra* notes 64-66 and accompanying text.

7. In the workplace setting females are subjected to harassment most frequently by male fellow employees. Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale Univ. Press 1979). Similarly, the sexual harassment that female students suffer is most often at the hands of male peers. For further discussion of female student harassment by male aggressors, see *infra* notes 42-46, 49-63, 67 and accompanying text.

8. *See* discussion *infra* part I.

9. *See* John Hildebrand, *Sex Abuse in Schools LI Study: Reports Often Doubted When Accused Is Well-Liked*, Newsday, Nov. 7, 1993, at 6 (discussing the dangers posed by teacher-to-student sexual harassment).

10. American Association of University Women Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools 11 (1993) [hereinafter AAUW Survey].

11. *See infra* notes 64-113 and accompanying text.

12. AAUW Survey, *supra* note 10, at 16-18.

13. Stein, *supra* note 5, at 23 (noting that "schools may be the training grounds for domestic violence").

14. *See infra* notes 27-63 and accompanying text.

15. Stein, *supra* note 5, at 23; *see also* Richard Fossey, *Law, Trauma, and Sexual Abuse in the Schools: Why Can't Children Protect Themselves?*, 91 Educ. L. Rep. 443, 443 (Aug. 1994) (quoting Raymond Flannery, Jr., *From Victim to Survivor: Stress Management Approach in the Treatment of Learned Helplessness*, *in* Psychological Trauma 217 (B.A. van der Kolk ed., 1987)) (stating that a victim's tendency to recreate traumatic situations has been described as "learned helplessness").

16. Jane Gross, *Schools Are Newest Arenas for Sex-Harassment Issues*, N.Y. Times, Mar. 11, 1992, at B8.

17. *See infra* notes 85-86 and accompanying text.

18. *See infra* notes 91-102 and accompanying text.

peer sexual harassment.[19] Under 42 U.S.C. § 1983, liability would be imposed on school officials for the harm suffered based on a breach of that official's affirmative constitutionally-based duty to protect school children.[20]

Courts have given a good deal of consideration to whether a special relationship exists between public school officials and school children in the realm of student sexual harassment cases.[21] The debate centers around the "special relationship" doctrine articulated in *DeShaney v. Winnebago County Department of Social Services.*[22] The Supreme Court in *DeShaney* explained that when the state, by an affirmative exercise of its powers, so restrains an individual that he is unable to care for himself, a "special relationship" exists between the state and individual.[23] The state assumes an affirmative duty to provide for the individual's basic needs.[24] In the school sexual harassment context, the question is whether the state, by compelling children to attend school through compulsory attendance statutes, has cultivated a special relationship with the students, and thus assumed an affirmative duty of protection.[25] Courts have reached differing conclusions as to the applicability of the special relationship doctrine in school sexual harassment cases.[26]

This Note argues that a special relationship exists between school officials and school children, and school officials thus have an affirmative duty to protect students against peer sexual harassment. Part I discusses the problem of peer sexual harassment, its pervasiveness in America's schools, and its impact on female students in particular. Part II analyzes the special relationship doctrine enunciated in

19. For a discussion of the mechanics of the special relationship doctrine, see *infra* notes 116-31 and accompanying text.

20. 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 or Territory . . . 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 . . . .

Id.

21. *See infra* notes 136-64 and accompanying text.

22. 489 U.S. 189 (1989).

23. *Id.* at 199-200.

24. *Id.* at 200.

25. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1370 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

26. While the Third and Seventh Circuits have held that no special relationship exists between school officials and school children, *D.R.*, 972 F.2d at 1373; J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990), the Fifth Circuit has not gone this far. *See* Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 529 (5th Cir. 1994). After an interesting line of cases, the Fifth Circuit refused to conclude "that no special relationship can ever exist between an ordinary public school district and its students." *Id.* For an in depth discussion, see *infra* notes 146-64 and accompanying text.

DeShaney. Part III examines the *DeShaney* Court's rationale and focuses on the special relationship doctrine's applicability in the public school setting. Part IV proposes a "reasonable foreseeability" standard of review in determining school official liability under the special relationship doctrine in cases of peer sexual harassment. This Note concludes that students have a constitutional right to affirmative state protection in public schools under the *DeShaney* special relationship doctrine, and that a determination of school official liability under a standard of "reasonable foreseeability" would ensure prompt preventive action against peer sexual harassment.

I. STUDENT-TO-STUDENT SEXUAL HARASSMENT: THE PROBLEM, ITS PERVASIVENESS AND ITS IMPACT

A. *The Problem*

Sexual harassment is typically thought of "in terms of employers or faculty who say: 'You sleep with me and you'll get a better job or a better grade.' "[27] But sexual harassment in a different context is reaching an epidemic level.[28] Students of all ages are subjected to unwanted taunting and touching by fellow classmates everyday at school.[29] Secondary, intermediate and elementary school children are equally vulnerable to attack, and increasingly likely to be guilty of such misbehavior themselves.[30] While such instances of peer sexual harassment occur with startling regularity,[31] students, for the most part, face the problem alone.[32] Female victims simply avoid particular hallways "rather than risk a Tailhook-like gauntlet,"[33] and targeted males attempt to dodge harassers.[34] Inevitably, however, both sexes are forced to endure the misconduct to a large extent.[35]

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27. Jacquelynn Boyle, *U.S. Says Indecent Taunting Is Illegal*, Detroit Free Press, May 19, 1994, at A1.

28. AAUW Survey, *supra* note 10, at 7.

29. *See infra* notes 36-63 and accompanying text.

30. Judy Mann, *Making Schools Safe for Girls*, Wash. Post, May 7, 1993, at E3.

31. Judy Mann, *What's Harassment? Ask a Girl*, Wash. Post, June 23, 1993, at D26 (noting that a study performed by the Wellesley College Center on Women and the NOW Legal Defense and Education Fund revealed that 39% of 4200 girls surveyed reported suffering sexual harassment every school day).

32. *See infra* notes 85-102 and accompanying text.

33. Gary Peller, *For Girls, High School Sometimes Seems Like a Tailhook*, Wash. Post, July 25, 1993, at C3; *see also* AAUW Survey, *supra* note 10, at 17-18 (stating that 69% of girls who have been harassed said they avoided the person or persons who harassed them, and 34% of girls stayed away from particular places in their schools).

34. AAUW Survey, *supra* note 10, at 17-18 (noting that 27% of harassed boys respond by avoiding the perpetrator); Mark Jennings & LaShawn Howell, *Blackboard Jungle '93: Coping With Groping, and Worse Uh, Girls Aren't the Only Ones Getting Hassled*, Wash. Post, July 25, 1993, at C3 (quoting one male high school student who stated, "I try and ignore it").

35. *See infra* notes 36-63, 85-102 and accompanying text.

B. *Peer Sexual Harassment's Pervasiveness*

In the Spring of 1993, the American Association of University Women Educational Foundation (AAUW) conducted the first national survey of adolescent sexual harassment in school.[36] The sample consisted of 1632 students, grades eight through eleven in seventy-nine public schools.[37] The AAUW revealed that eighty-five percent of girls and seventy-six percent of boys reported that they were subjected to "unwanted and unwelcome sexual behavior that interfere[d] with their lives."[38] A fair percentage of students reported sexual harassment by adults,[39] but this figure was dwarfed by the number of school children claiming student-to-student harassment.[40] Of the nearly eighty percent of students who revealed that they experienced harassment, eighty-six percent of girls and seventy-one percent of boys stated that they were targeted by a current or former student from school.[41] While the statistics are daunting, the detailed accounts given by harassment victims paint the clearest picture.

At Duluth Central High School in Minnesota, a female student, rumored to be a promiscuous teen, endured harassing remarks daily.[42] Over an eighteen month period, she was repeatedly tormented: "Are you as good as everyone says?" and "What are you going to do it with this weekend?"[43] High school girls are commonly subjected to a "steady stream of such verbal harassment, often accompanied by lewd gestures and other sexual remarks"[44] as they travel school hallways. The same students describe how "their breasts, genitals and buttocks [are] grabbed by unseen boys as they pass in the stairwells, and boys

36. AAUW Survey, *supra* note 10, at 2.

37. *Id.* at 5. Students were asked if teachers, students or other school employees had done any of the following: 1) made sexual comments, jokes, gestures, or looks; 2) shown, given, or left the student sexual messages or pictures; 3) written sexual graffiti on bathroom or locker room walls about the student; 4) spread sexual rumors about the student's sexual activity or orientation; 5) spied on the student while dressing or showering; 6) flashed or mooned the student; 7) touched, grabbed or pinched the student; 8) intentionally brushed against the student in a sexual way; 9) pulled the student's clothing in a sexual way; 10) blocked or cornered the student in a sexual way; or 11) forced the student to engage in kissing or something sexual, other than kissing. *Id.*

38. *Id.* at 7.

39. *Id.* at 10 (noting that of the students who reported sexual harassment, 18% claimed that they were harassed by a school employee).

40. *Id.* at 11.

41. *Id.*

42. Gross, *supra* note 16, at B8; *Harassment in the Halls*, Seventeen, Sept. 1992, at 186 (noting that a female high school student was verbally harassed and the subject of sexual graffiti); Katherine Lanpher, *Reading, 'Riting, and 'Rassment*, Ms., May-June 1992, at 90.

43. *Harassment in the Halls*, *supra* note 42, at 186.

44. Peller, *supra* note 33, at C3; *see also* Mann, *supra* note 31, at D26 (noting that sexual harassment in junior high and high school includes sexual comments and gestures).

press[ed] up against them at the water fountains or the lockers."[45] One female student from a Boston-area high school reported that a fellow male track team member "grabbed her breasts by way of saying hello."[46] High school boys similarly report "sexual comments, jokes, gestures or looks"[47] and girls "rubbing up" against them or "touching [their] butts."[48]

Instances of peer sexual harassment, however, are not peculiar to high schools. Rather, students are "most likely" to have their first experience with sexual harassment at the middle school level of grades six through nine.[49] The pervasiveness of peer sexual harassment in middle schools is confirmed by the results of the AAUW Survey which revealed that forty-seven percent of harassed students explained that they were first harassed at the middle school level.[50] One female intermediate school student reported being "tripped, spit on, [and] subjected to hurtful, lewd remarks about her anatomy by five male sixth-graders."[51] Other female middle school students in Michigan suffered similar experiences.[52] One schoolgirl complained that a male classmate told her that he wanted to touch her breasts, and another was teased by a male peer that she had "tiny tits."[53] Females at this age level are taunted about being flat-chested or large breasted, propositioned to engage in various sexual acts, and, in some instances, physically restrained so that they must listen to such lewd remarks.[54]

Even more startling is that peer sexual harassment is frequently encountered by students in elementary schools. At Cedar Ridge Elementary School in Eden Prairie, Minnesota, a first grade boy reportedly chased a six-year-old girl off a school bus, shouting a "derogatory sex-related name" after her.[55] The bus harassment, including repeated crude references to the student's genitalia and sexually sug-

45. Peller, *supra* note 33, at C3; *see also* Carlos V. Lozano, *Sex Harassment Law Applies to Students*, L.A. Times, Jan. 18, 1993, at 3A (quoting one student who described how when she walked in a crowded school hallway, male students grabbed her); Mann, *supra* note 31, at D26 (stating that sexual harassment in school includes touching, grabbing and pinching).

46. Elizabeth Mehren, *Sexual Harassment Shows Up at School*, L.A. Times, Mar. 25, 1993, at E5.

47. AAUW Survey, *supra* note 10, at 8.

48. Jennings & Howell, *supra* note 34, at C3 (quoting several male high school boys discussing sexual harassment).

49. AAUW Survey, *supra* note 10, at 7.

50. *Id.* at 7 (noting that of the students who reported harassment, 40% of boys and 54% of girls claimed that they were subjected to the sexual misbehavior in middle school).

51. Mann, *supra* note 30, at E3.

52. Karen Schneider, *Taunts Costly to Sued Schools*, Detroit Free Press, June 2, 1993, at 1A.

53. *Id.*

54. Mann, *supra* note 30, at E3.

55. *Id.*

gestive remarks by male classmates, continued over the course of a school year.[56] Another six-year-old student at Cooper Elementary School in Detroit complained to "school officials that four first-grade boys picked her up, dropped her on a mat and fondled her after gym class."[57] In yet another instance, a five-year-old girl reported that she was led into an art resource room by a male five-year-old, and, once inside, the boy forcibly pulled down her pants and then his own.[58] He then "jumped on top of her" and "began simulating sexual intercourse."[59] Harassment at the elementary school level still takes the form of shoving, touching, sexually derogatory name calling and teasing victims about their sex organs,[60] but the "incidents are happening to girls at earlier and earlier ages."[61]

Regardless of how old students are or the level of their schooling, peer sexual harassment is a constant threat. As one commentator noted, "a Tailhook [is] happening in every school."[62] An even greater problem, however, is presented by the damaging effects that female victims suffer after the actual harassment ends.[63]

C. *The Impact of Peer Sexual Harassment on Female Students*

While detailed accounts of victims reveal that school sexual harassment is a problem facing all students, females remain the most frequent targets of harassment, and males are the habitual aggressors.[64] The AAUW Survey estimated that eighty-five percent of girls and seventy-six percent of boys were subjected to school sexual harassment, but the gap between instances of male and female harassment wid-

56. Jerry Adler & Debra Rosenberg, *Must Boys Always Be Boys? In the Wake of the Clarence Thomas Hearings, Girls Are Suing to Fight Sexual Harassment at School*, Newsweek, Oct. 19, 1992, at 77; Elizabeth Gleick & Margaret Nelson, *The Boys on the Bus: When Teasing Turned Obscene, Cheltzie Hentz and Her Mother Took Action*, People, Jan. 30, 1992, at 125; Rhonda Hillbery, *Taunts on the School Bus Spark Girl's Sexual Harassment Complaint*, L.A. Times, Dec. 1, 1992, at A5.

57. Debra Adams, *Girl's Dilemma Shows Harassment Problems: McGriff to Propose Student Rules Against Sexual Misconduct*, Detroit Free Press, Feb. 25, 1993, at 1B.

58. Ruth Shalit, *Romper Room: Sexual Harassment—by Tots*, New Republic, Mar. 29, 1993, at 13.

59. *Id.*

60. Mann, *supra* note 30, at E3; *see also* Kristina Sauerwein, *A New Lesson in Schools: Sexual Harassment Is Unacceptable*, L.A. Times, Aug. 1, 1994, at E1 (quoting one ten-year-old elementary school female who described how she dodged but often endured "boys who consistently spit on girls, touched their genitals, screamed obscenities, locked them in chokeholds, kissed them, pinched their behinds and pinned them to the ground").

61. Mann, *supra* note 30, at E3 (citing Bernice R. Sandler of the Center for Women Policies Studies who pioneered research into student sexual harassment).

62. Margaret Lillard, *Sexual Harassment Spreads to First Grade; 6-Year-Old Says Stop*, L.A. Times, Oct. 3, 1993, at B4.

63. *See infra* notes 64-113 and accompanying text.

64. *See infra* notes 65-67 and accompanying text.

ened when frequency was considered.[65] While sixty-six percent of girls and forty-nine percent of boys reported harassment occasionally, only eighteen percent of males as opposed to thirty-one percent of females claimed to have been harassed often.[66] Further, while fifty-seven percent of the male peer sexual harassment victims reported the misbehavior by a female acting alone, and thirty-five percent by a group of females, eighty-one percent of female victims revealed that they were harassed by a male acting alone and fifty-seven percent by a group of males.[67]

The emotional, educational and behavioral impact of peer sexual harassment is significant for all student victims, but females suffer the most devastating effects.[68] Research indicates that males and females disagree not only over what types of behavior rise to the level of sexual harassment, but also over the misconduct's impact on the targeted individual's self-esteem and productivity.[69] The same sexual remarks that females describe as "intimidating,"[70] males characterize as "titillating."[71] While female harassment victims report feeling embarrassed, self-conscious, less confident and afraid,[72] "males [tend to] perceive sexual harassment as flattery, even if it is unwanted."[73]

These contrasting viewpoints stem from the social construction of male and female sex roles.[74] As one commentator noted, society defines distinct behaviors, attitudes and pursuits for each sex.[75] While males are socially conditioned to be aggressive, strong and dominant, females are encouraged to be passive, gentle and submissive.[76] Soci-

65. AAUW Survey, *supra* note 10, at 7.

66. *Id.* A study conducted by the Massachusetts Department of Education confirmed that female students are much more likely to be the victims of sexual harassment than male students. Sherer, *supra* note 5, at 2128 (citing Massachusetts Board of Education, Who's Hurt and Who's Liable: Sexual Harassment in Massachusetts Schools 2 (1986)).

67. AAUW Survey, *supra* note 10, at 11.

68. *Id.* at 15-18; *Free for All—Hostile Hallways*, Wash. Post, Oct. 16, 1993, at A19.

69. Sherer, *supra* note 5, at 2132 (citing Massachusetts Board of Education, Who's Hurt and Who's Liable: Sexual Harassment in Massachusetts Schools 12 (1986)).

70. *Id.*

71. *Id.* (quoting *The Price of Saying No*, People, Oct. 28, 1991, at 49); *see also* Jennings & Howell, *supra* note 34, at C3 (quoting one male student who "sort of like[d]" advances from a female supervisor and tried to respond to them).

72. AAUW Survey, *supra* note 10, at 16-17; Patricia Edmonds, *'H' Is for Harassment / Schools Forming Policies*, USA Today, Oct. 11, 1993, at 3A (noting verbal and physical assaults make a young woman feel insecure and ill-prepared to learn).

73. Sherer, *supra* note 5, at 2132; Jennings & Howell, *supra* note 34, at C3 (quoting one male high school student who stated: "I do like certain comments. You know certain comments are flattering to me. It boosts my ego to have somebody want you like that . . . ."); Marjorie Williams, *From Women, An Outpouring of Anger; Rhetoric Underscores Deep Divisions in How the Sexes View Harassment*, Wash. Post, Oct. 9, 1991, at A1 (noting that while harassment results in great intimidation for females, males largely escape this negative impact).

74. MacKinnon, *supra* note 7, at 156-57.

75. *Id.*

76. *Id.*

ety enforces these "dimorphic" sex roles, which privilege men and subordinate women, as the norms.[77] Sexual harassment is a direct manifestation of these sex roles in action.[78] The male perpetrator, a socialized aggressor, engages in sexual misbehavior unwelcomed by a female who passively accepts it.[79] This "dominance eroticized" relegates females to a position of inferiority.[80]

The sexually harassed female is twice-victimized. First, she suffers the emotional distress of the actual encounter.[81] Second, the sexual harassment has a devastating impact on the female's sense of self-worth.[82] Female targets of continued harassment begin to accept that they are "second-class citizens, only valued for their physical attributes."[83] Societal mistreatment of complaints, however, reinforces the misbehavior's acceptability.[84]

Tragically, female students are frequently but erroneously blamed for instigating the harassment.[85] The victim is made to feel that the "incident is [her] fault, that [she] must have done something, individually, to elicit or encourage the behavior, that it is '[her] problem.' "[86] Peer sexual harassment often is accompanied by threats of retaliation if complaints are ever made[87] as well as total alienation by other classmates.[88] Consequently, victims are often too intimidated by the possi-

77. *Id.*
78. *Id.* at 162.
79. *Id.*
80. *Id.*
81. AAUW Survey, *supra* note 10, at 16-17.
82. Gross, *supra* note 16, at B8.
83. *Id.*
84. *See infra* notes 85-102 and accompanying text.
85. *Sexual Harassment Widespread in High Schools, Study Finds*, L.A. Times, Jan. 4, 1987, at 26.
86. MacKinnon, *supra* note 7, at 47 (discussing the impact of sexual harassment on females in the employment context); *see also* Gross, *supra* note 16, at B8 (noting that one high school girl disliked boys lifting up her cheerleading skirt, yet wondered whether she had "asked for it" by wearing revealing clothes); Peller, *supra* note 33, at C3 (describing how one female student who complained to an assistant principal about peer sexual harassment was told that she "hadn't said 'no' forcefully enough").
87. Elaine Whiteley, *Nightmare in Our Classrooms*, Ladies Home J., Oct. 1992, at 80; *see also* DeNeen L. Brown, *Schools Get Tough on Unwanted Touching: 'Boys Will Be Boys' Is No Defense as Girls Become Aware of Rights*, Wash. Post, June 28, 1992, at A1 (quoting one student as saying that many school children do not complain because they know the harasser would be mad); Gross, *supra* note 16, at B8 (noting female students failed to report harassment by male students because the taunting only increased if the females called attention to it).
88. Whiteley, *supra* note 87, at 83. A young and impressionable student subjected to harassment by a member of the "in crowd" often becomes lost in the emphasis placed on peer acceptance. In an effort to maintain popularity, the harassed student responds to the unwelcome behavior by laughing or dismissing it without complaint. Jane Gross, *Where 'Boys Will Be Boys,' and Adults Are Befuddled*, N.Y. Times, Mar. 29, 1993, at A1. Students interviewed at Lakewood High School admitted that they were troubled by the behavior of members of a group called the Spur Posse who were accused of molesting and raping girls as young as age 10. The school children, however, only agreed to discuss their feelings anonymously because they feared retalia-

ble repercussions to reject advances, regardless of how offensive they are. The result is that males who are not challenged by their victims regarding the appropriateness of their behavior perceive the behavior as acceptable.[89] The female seems to " 'go along' with sexual harassment, [so the assumption is that she] must like it, and it is not really harassment at all."[90]

The "lack of legitimation of these injuries *as injuries*" is another reason why females fail to complain.[91] Male and female students agree that, in the face of peer sexual harassment, school personnel rarely take action.[92] As one commentator noted, "[t]he nearly universal feature of all incidents and complaints of sexual harassment in schools is that they occur in public."[93] But negative experiences of many students are seldom confirmed by school personnel because most of the adults "do not name [the behavior] as 'sexual harassment' and do nothing to stop it."[94] Instances of harassment are often characterized as "harmless adolescent exploration," and dismissed as "flirting."[95] Just as this "boys will be boys" attitude sends a message to girls that they are inferior, it sends a message to harassing boys that they are privileged.[96] Male students equate adult silence with tacit permission that they may continue to intimidate, harass or assault

tion or the possibility of falling out of favor with the "in crowd." *Id.* Far more students defended the Spurs and said that their accusers were promiscuous girls who wanted to gain popularity and "got what they asked for." *Id.*

89. Sherer, *supra* note 5, at 2135; *see also* Brown, *supra* note 87, at A1 (noting that schoolgirls "said sometimes the problem starts when girls fail to speak out against remarks or touching and boys take the silence as a sign of acceptance"); *Harassment in the Halls*, *supra* note 42, at 186 (noting that an eighth grade boy who pulled down a female student's pants concluded that she didn't mind because she smiled rather than protested).

90. MacKinnon, *supra* note 7, at 48 (describing male perceptions in workplace harassment).

91. *Id.*

92. Gross, *supra* note 16, at B8.

93. Stein, *supra* note 5, at 23.

94. *Id.*; *see also* MacKinnon, *supra* note 7, at 52 ("Trivialization of sexual harassment has been a major means through which its invisibility has been enforced.").

95. Sherer, *supra* note 5, at 2130 (citing Gross, *supra* note 16, at B8; Nan D. Stein, *It Happens Here, Too: Sexual Harassment in the Schools*, Educ. Wk., Nov. 27, 1991, at 32); *see also* Edmonds, *supra* note 72, at 3A (noting peer sexual harassment is often dismissed as "schoolkid banter"); Peller, *supra* note 33, at C3 (noting that one principal admitted that he received "numerous complaints about hallway harassment but described it as a 'cultural thing'—just the way that hispanic boys let a girl know they like her"); *Putting a Stop to Sexual Harassment*, L.A. Times, June 13, 1993, at 23 (noting that school officials and teachers think that harassment "is something little boys just do, and because they are not considered sexually functional[,] it is harmless"); Sauerwein, *supra* note 60, at E1 (quoting one elementary school teacher who stated: "Boys always tease cute girls and call them names. That's not sexual harassment. It's called growing up. (Students) are too young to (sexually harass).").

96. Gross, *supra* note 16, at B8.

girls.[97] Boys who do not harass, but nonetheless witness the tacit permission to harass, may be tempted to harass girls themselves.[98]

The psychological impact of sexual harassment on a female's socialized sense of self-worth, coupled with general adult non-response, ensures that few complaints are ever made.[99] Girls begin to accept that speaking out will not result in their being heard or believed, so they learn to endure the harassment privately.[100] They silently attempt to adjust to this "normal" behavior[101] and begin to distrust the adults who do not intervene to safeguard their educational environment.[102]

The result is grave for schoolgirls. As a female student's self-confidence and motivation declines,[103] she becomes unable "to reach her full academic potential."[104] Harassment victims often switch classes

97. Stein, *supra* note 5, at 23.

98. *Id.*

99. Peller, *supra* note 33, at C3 ("[S]tudents who complain [of sexual harassment] are re-victimized: They are denounced in letters to the editor for bringing the school, administration and teachers into disrepute, or they are accused of being publicity hounds who are somehow enjoying themselves."); *see also* MacKinnon, *supra* note 7, at 48 (noting that when no corrective action is taken, "complaint becomes an integral part of the social pathology of the problem, a further aggravation of the injury of the incident itself, instead of a potential solution to it").

100. Peller, *supra* note 33, at C3 (noting that female students have become "so accustomed to harassment and so convinced of their powerlessness to stop it that, until recently, they didn't even think to mention it to anyone—it was just part of going to school"). Students generally do not report sexual harassment to adults. If they tell anyone, it is a friend. AAUW Survey, *supra* note 10, at 14. Only seven percent of the sexually harassed students surveyed said they told a teacher about the experience, and a mere 23% approached parents with the problem. *Id.* An additional 23% reported that they told no one. *Id.*

101. Peller, *supra* note 33, at C3 ("Most high school girls have, unfortunately, learned simply to stay silent and take it.").

102. Stein, *supra* note 5, at 23; *see also* Sherer, *supra* note 5, at 2133 (noting that when sexual harassment is not stopped, school children grow less trusting of people in general). Schoolgirls responding to surveys have complained that school supervisory personnel make no attempt to stop harassment or punish the aggressor. Rather, "harassment is condoned and the girls who are targets of unwanted attention are left feeling that they are powerless and unworthy of adult protection." Mann, *supra* note 31, at D26.

Sexual harassment must be of chief concern to the "academic community in which the students and faculty are related by strong bonds of intellectual dependence and trust." Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. Rev. 525, 552 (1987) (quoting Yale University, Report of the Dean's Advisory Committee on Grievance Procedure 1 (Mar. 1979, rev. May 1980) (unpublished report, on file with author)). The faculty-student relationship is analogous to the fiduciary-beneficiary relationship. *Id.* A beneficiary places trust and confidence in the fiduciary, and the fiduciary must act in "scrupulous good faith." *Id.* (quoting B. Dziech & L. Weiner, The Lecherous Professor 93 (1984)). The student, like the beneficiary, is in a vulnerable position because she puts her trust and confidence in teachers and relies upon them to maximize her education. *Id.*

103. AAUW Survey, *supra* note 10, at 15-17; *see also* Boyle, *supra* note 27, at A1 (noting that one peer harassment victim had nightmares, developed an ulcer and her grades dropped).

104. Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) ("A nondiscriminatory environment is essential to maximum intellectual

or majors[105] and increasingly miss school altogether to avoid the behavior.[106] A resulting poor grade in a particular class may prevent a female student from enrolling in specific courses or programs, effectively foreclosing certain career paths.[107] This snowballing effect "plays an instrumental role in keeping females out of nontraditional fields of study or employment, such as skilled trades, science, and engineering."[108] Ultimately, school sexual harassment deprives female students of deprives female students of their ability "to partake in the rights, benefits, services and privileges of schooling that are part of the promise of our democracy."[109] Female sexual harassment victims[110] are effectively denied a learning experience free of hostility that male students, for the most part, continue to enjoy.[111]

Unless effective steps are taken to address peer sexual harassment, neither boys nor girls will learn equal relationships,[112] and girls will continue to be deprived of valuable educational opportunities.[113] As courts begin to address cases of student-to-student harassment with greater frequency, an important question is whether school officials have an affirmative, constitutionally-based duty to protect school children against this egregious behavior.[114] The focus of this analysis is on the special relationship doctrine enunciated in *DeShaney v. Winnebago County Department of Social Services*.[115]

II. THE SPECIAL RELATIONSHIP DOCTRINE

At age four, Joshua DeShaney suffered a series of hemorrhages caused by traumatic injuries to his head inflicted by his father.[116] As a result, he was severely brain damaged.[117] Joshua's mother brought a

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growth and is therefore an integral part of the educational benefits that a student receives."); *see also* AAUW Survey, *supra* note 10, at 15-16 (noting that harassment victims often do not want to go to school and have trouble paying attention in class).

105. *Harassment in the Halls*, *supra* note 42, at 186.

106. AAUW Survey, *supra* note 10, at 15.

107. Sherer, *supra* note 5, at 2153.

108. *Id.* A Maryland school board equal opportunity official stated, "[s]tudents are now coming forward with charges [of sexual harassment], mostly in classes such as shop and auto mechanics where there are very few of one sex." Kevin Chappell, *Taking Aim At Sexual Harassment: School Board Considers Policy*, Md. Wkly., Jan. 30, 1992, at M1.

109. Stein, *supra* note 5, at 23; *see also* Schneider, *supra* note 102, at 551 (noting that a sexually abusive environment prevents school children from receiving the most that they can from their academic program).

110. *See supra* notes 64-84 and accompanying text.

111. *Harassment in the Halls*, *supra* note 42, at 186; Lanpher, *supra* note 42, at 90-91; Peller, *supra* note 33, at C3.

112. Gross, *supra* note 16, at B8.

113. *See supra* notes 103-11 and accompanying text.

114. *See infra* notes 136-76 and accompanying text.

115. 489 U.S. 189 (1989).

116. *Id.* at 193.

117. *Id.*

civil rights action under 42 U.S.C. § 1983 against social workers and local officials for their failure to remove Joshua from his father's custody despite their receipt of complaints that he was abused by his father.[118] The Supreme Court held that the state had no constitutional duty to protect Joshua.[119]

The *DeShaney* Court concluded that the Due Process Clause of the Fourteenth Amendment acts as a "limitation on the [s]tate's power to act, not as a guarantee of certain minimal levels of safety and security."[120] Its language disallows the state itself from depriving individuals of "life, liberty or property without 'due process of law,' "[121] but imposes no "affirmative obligation on the [s]tate to ensure that those interests do not come to harm through other means."[122]

Under certain limited circumstances, however, the Court recognized that the Constitution imposes upon the state an affirmative duty to protect particular individuals.[123] Under the "special relationship" doctrine,[124] the Court held that when a state affirmatively acts to restrain an "individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty"—the state assumes a corresponding duty to provide for the individual's "basic needs—e.g., food, clothing, shelter, medical care, and reasonable safety."[125] The state's affirmative restraint of an individual is a " 'deprivation of liberty' triggering the protections of the Due Process Clause."[126]

Although *DeShaney* provided "clear demarcations" for when an affirmative constitutionally-based duty of protection exists between a state and individual and when it does not, the Court did not offer de-

118. *Id.*
119. *Id.* at 201.
120. *Id.* at 195.
121. *Id.*
122. *Id.*
123. In Estelle v. Gamble, 429 U.S. 97 (1976), the Eighth Amendment's prohibition against cruel and unusual punishment, which applies to the states through the Fourteenth Amendment's Due Process Clause, requires states to provide adequate medical care to incarcerated prisoners. The Court reasoned that if a "prisoner is unable 'by reason of the deprivation of his liberty [to] care for himself,' it is only 'just' that the [s]tate be required to care for him." DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199 (1989) (quoting *Estelle*, 429 U.S. at 103-04 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (1926))).

Youngberg v. Romeo, 457 U.S. 307 (1982), extended this duty beyond the Eighth Amendment. The state also must provide involuntarily committed mental patients the services necessary to ensure their "reasonable safety" from themselves and others. *Id.* at 314-25. The Court noted that "[w]hen a person is institutionalized—and wholly dependent on the [s]tate—a duty to provide certain care and services does exist." *Id.* at 317. Relying on *Estelle* and *Youngberg* in its analysis, the Supreme Court articulated the special relationship doctrine in *DeShaney*, 489 U.S. at 198-200.
124. *DeShaney*, 489 U.S. at 198.
125. *Id.* at 200.
126. *Id.*

finitive guidance for cases which fall between the two extremes.[127] Under the special relationship doctrine, the focus is on the involuntariness of a custodial relationship between a state and an individual.[128] While the *DeShaney* Court specifically recognized a state's affirmative duty of protection in cases of imprisonment and institutionalization, it "acknowledge[d] that other similar state-imposed restraints of personal liberty will trigger a state duty to prevent harm."[129] Thus, the question remains whether, in cases which fall short of "involuntary, round-the-clock, legal custody,"[130] a state, by its affirmative restraint of an individual rendering him unable to provide for his own basic needs, still owes that individual an affirmative duty of protection.[131]

III. The Special Relationship and Peer Sexual Harassment

A. *Case History*

The special relationship doctrine's applicability in the public school context is an example of a situation left unanswered by *DeShaney*. Student custody, although involuntary,[132] cannot be said to be "full time"[133] and "continuous."[134] Several courts, however, have considered whether a special relationship exists between school officials and school children.[135]

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127. B.M.H. by C.B. v. School Bd., 833 F. Supp. 560, 567 (E.D. Va. 1993); *see also* Spivey v. Elliott, 1994 WL 419485, No. 93-8269, at *5 (11th Cir. Aug. 26, 1994) (explaining that circumstances exist "beyond those in *Estelle* and *Youngberg* where restraint by the [s]tate can create a relationship engendering constitutional protection"); Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 994 (10th Cir. 1994) (noting that *DeShaney* left unclear the "precise measure of state restraint that engenders an individual's right to claim a corresponding duty").

128. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989).

129. *Id.* at 200; *see also* D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1379 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (noting that cases beyond incarceration and institutionalization will trigger a state duty of affirmative protection), *cert. denied*, 113 S. Ct. 1045 (1993).

130. *D.R.*, 972 F.2d at 1379.

131. *Id.* at 1370; Walton v. Alexander, 20 F.3d 1350, 1354 (5th Cir. 1994), *reh'g en banc granted*, July 1, 1994.

132. *See infra* note 204.

133. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

134. *Id.*

135. For a discussion of case law, see *infra* notes 136-64 and accompanying text. *See also* Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992) (explaining that "compulsory school attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school"), *cert. denied*, 113 S. Ct. 1266 (1993); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) (concluding that in a case of teacher-to-student sexual harassment the state does not enter into a special relationship with students by requiring them to attend school).

In *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*,[136] the Third Circuit Court of Appeals addressed the issue of whether a special relationship exists in the public school context in a case involving peer sexual harassment.[137] Two female students in a graphic arts class alleged continued harassment by male classmates, including "offensive touching of their breasts and genitalia, sodomization and forced acts of fellatio."[138] The violent sexual assaults further included the forced masturbation of the male students two to four times weekly.[139] The repeated instances of sexual misconduct, extending over a period of approximately five months, were allegedly brought to the attention of a school official, but no corrective action was taken.[140]

Admitting that the case was "certainly a tragedy,"[141] the Third Circuit Court of Appeals concluded that school officials' authority over students during the school day does not "create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*, particularly when . . . channels for outside communication [are] not totally closed."[142] The court reasoned that students do not depend upon a school to provide for their basic human needs.[143] Rather, parents remain the primary caretakers.[144] School children carry with them the "support of family and friends and [are] rarely

136. 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

137. *Id.* at 1369.

138. *Id.* at 1366.

139. *Id.* at 1378 (Sloviter, C.J., dissenting).

140. *Id.* at 1366. The two female students at Middle Bucks Area Vocational Technical School were enrolled in the same graphic arts class as the alleged harassers. *Id.* The sexual misconduct primarily took place in a unisex bathroom and darkroom, both of which were attached to the classroom. *Id.*

141. *Id.* at 1374.

142. *Id.* at 1372. Plaintiffs also asserted a claim based on a "state-created danger" theory. The theory's foundation lies in *DeShaney's* language that no basis for a constitutional claim exists when the state "had" or "has" played no part in the creation of harm to an individual, nor did it do anything to render him more vulnerable to harm. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989). The Third Circuit stated that "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger." D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993). But the court explained that the school defendants' inattention to the misbehavior neither created the danger in question nor rendered the alleged victims more vulnerable to it. *See id.* at 1376. While recognizing that the line was "certainly blurred," the court was "not prepared to say that the conduct charged to the school . . . crossed the line." *Id.* at 1377. Courts, however, have been more receptive to the state-created danger theory in cases of teacher-student sexual harassment. *See, e.g.*, C.M. v. Southeast Delco Sch. Dist., 828 F. Supp. 1179, 1189 (E.D. Pa. 1993) (concluding that states have an affirmative duty to protect school children from teacher-to-student sexual harassment); K.L. v. Southeast Delco Sch. Dist., 828 F. Supp. 1192, 1195-96 (E.D. Pa. 1993) (noting that states must affirmatively protect students from abusive conduct by teachers).

143. *D.R.*, 972 F.2d at 1372.

144. *Id.*

apart from teachers and other pupils who may witness and protest any instances of mistreatment."[145]

Less than two months later, a panel of judges from the Fifth Circuit Court of Appeals, in *Jane Doe v. Taylor Independent School District*,[146] considered the same question of whether a special relationship exists between school officials and school children, this time in a teacher-to-student sexual harassment case.[147] The court agreed that children are ordinarily incapable of providing for their own basic needs and rely on parents or guardians as primary care givers,[148] but reached a different conclusion than did the *D.R.* court as to the state's duty of protection.[149] The court stated that "by compelling a child to attend public school, the state cultivates a special relationship with that child and thus owes him an affirmative duty of protection."[150] Children who are separated from their parents during the school day by force of law are "entrusted" to school officials to provide for their "safety and well-being."[151] The resulting "functional custody" is enough to satisfy the *DeShaney* standard.[152]

The Fifth Circuit later granted *en banc* consideration.[153] *Taylor II*, however, failed to address the question of whether a special relationship exists in the public school setting.[154] The court refused even to consider whether a *DeShaney* special relationship arises in the public school context because the issue was wholly irrelevant in a case of teacher-to-student sexual harassment.[155]

Since *Taylor II*, the Fifth Circuit considered the special relationship doctrine in the public school setting in *Leffall v. Dallas Independent School District*.[156] The plaintiffs brought suit when their child was killed by random gunfire in a school parking lot after a dance, claiming that a special relationship existed between the school district and their child.[157] The court first noted that *Taylor II* "neither adopted or rejected the argument that a *DeShaney* special relationship arises in the ordinary public school context."[158] The court explained that a special relationship only arises in "cases involving harms inflicted by

145. *Id.* at 1373.
146. 975 F.2d 137 (5th Cir. 1992), *vacated*, 15 F.3d 443 (5th Cir. 1994) (en banc).
147. *Taylor I*, 975 F.2d at 138.
148. *Id.* at 146.
149. *Id.* at 146-47.
150. *Id.* at 147 (citations omitted).
151. *Id.*
152. *Id.*
153. Jane Doe v. Taylor Indep. Sch. Dist., 987 F.2d 231 (5th Cir. 1993).
154. *See* Jane Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 n.3 (5th Cir. 1994) (en banc).
155. *Id.*
156. 28 F.3d 521 (5th Cir. 1994).
157. *Id.* at 523.
158. *Id.* at 529 (elaborating on its reason not to address the special relationship doctrine in the public school context in *Taylor II*).

third parties, and it is not applicable when it is the conduct of a state actor that has allegedly infringed a person's constitutional rights."[159]

Leffall clearly involved a harm inflicted by a third party rather than a state actor. The child victim was accidentally shot and killed with a handgun by a sixteen-year-old student after a high school dance.[160] Under the specific facts of the case, however, the Fifth Circuit concluded that no special relationship existed between the school officials and student victim because the student was in no way compelled to attend the dance.[161] The court reasoned that "even though [the student] may have been compelled to attend school during the day, any special relationship that may have existed lapsed when compulsory attendance ended."[162] The Fifth Circuit Court of Appeals did not "conclude that no special relationship can ever exist between an ordinary public school district and its students."[163] Rather, the court determined "only that no such relationship exists during a school-sponsored dance held outside of the time during which students are required to attend school for non-voluntary activities."[164]

While the special relationship doctrine's applicability in the public school context remains an open question, a recent trend indicates that an affirmative duty of protection exists in the residential school setting. In *Walton v. Alexander*,[165] the Fifth Circuit considered the *DeShaney* special relationship doctrine in a residential special education setting,[166] and concluded that a special relationship does exist between school officials and school children.[167] The court concluded that a student victim of peer sexual assaults who resided at a school for the deaf in Mississippi was in a special relationship with the superintendent.[168] The court emphasized that the child was in the twenty-four hour custody of the school, the child lacked normal communication skills, and the "economic realities" of most Mississippi families dictated that deaf children's attendance at the school in question was the only viable option.[169] Therefore, the deaf school child fell within *DeShaney's* category of individuals in custody by means of "similar restraints of personal liberty."[170]

The Eleventh Circuit addressed a similar case in *Spivey v. Elliott*,[171] involving an eight-year-old student who resided at the Georgia School

159. *Id.*
160. *Id.* at 523.
161. *Id.* at 529.
162. *Id.*
163. *Id.*
164. *Id.*
165. 20 F.3d 1350 (5th Cir. 1994), *reh'g en banc granted*, July 1, 1994.
166. *Id.* at 1353-54.
167. *Id.* at 1355.
168. *Id.*
169. *Id.*
170. *Id.*
171. No. 93-8269, 1994 WL 419485 (11th Cir. Aug. 26, 1994).

of the Deaf.[172] The school child brought a civil rights action against school officials for their failure to protect the student from continued sexual assaults by a thirteen-year-old classmate.[173] The court explained that the student who lived at the deaf school Sunday through Thursday and spent the remainder of the week at home with his mother,[174] spent the majority of his week at the school and was thus committed to the "full-time custody of the state."[175] The court concluded that a special relationship existed, triggering an affirmative duty of protection similar to the duty recognized in the *Estelle-Youngberg* exceptions.[176]

B. *An Analysis of the Special Relationship Doctrine in the Public School Context*

The "logical" extension of the special relationship doctrine's affirmative duty of protection to the residential school context[177] provides a proper foundation on which to build. Careful consideration of the relevant factors set out in *DeShaney* reveals that students who are compelled to attend public school under state law also are entitled to the full protection of the special relationship doctrine.[178]

The *DeShaney* Court's rationale is "simple enough."[179] When a state so restrains an individual's liberty such that he is unable to care for himself, the state assumes an affirmative duty to protect him.[180] Nowhere does the Court state that such a duty only arises in cases of formal custody.[181] Rather, the Court conceded that the duty may arise in cases of "other similar restraint[s] of personal liberty."[182] Thus, as one commentator noted, the focus of the analysis should be on the "implications" of state control, rather than the control itself, "because it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian."[183] The most important considerations then are the individual's increased vulnerability and exposure to risk as a result of state restraint, rather than the existence of a formal custodial relationship.[184] Furthermore, the de-

172. *Id.* at *1.
173. *Id.*
174. *Id.*
175. *Id.* at *5.
176. *Id.*
177. *Id.* at *6.
178. *See infra* notes 179-243 and accompanying text.
179. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989).
180. *Id.*
181. *See id.* at 198-201.
182. *Id.* at 200.
183. Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 Colum. L. Rev. 1940, 1957 (1990).
184. *Id.*

gree of state control is a relevant inquiry, but only as a measure of the restrained individual's increased dependency.[185]

DeShaney's specific reference to incarceration and institutionalization[186] is significant because it provides examples where restrained individuals are rendered incapable of caring for themselves and thus depend on the state to provide for their basic needs.[187] Formal custody is the clearest case warranting affirmative protection as a result of a restrained individual's increased dependency on the state, but it is by no means a threshold standard.[188] Public schooling arrangements may not rise to a level of formal custody, but they nevertheless involve enough of the factors typically present in such custodial relationships to qualify as a "similar restraint of personal liberty."[189]

The focus of the analysis in cases of incarceration and institutionalization is on the formal nature of the custodial relationship[190] because it is this factor which gives rise to the restrained individual's increased vulnerability and dependency on the state.[191] In *D.R.*, the Third Circuit Court of Appeals reasoned that "the full time severe and continuous" state control over prisoners or committed mental patients leaves them "wholly dependent" upon the state.[192] The restrained individuals do not have "it within their power to provide for themselves, nor are they given the opportunity to seek outside help to meet their basic needs."[193] The state thus assumes a corresponding duty to protect the individuals.[194] In cases arising in the public school context, several courts have emphasized that unlike prisoners or committed mental patients, school children who return to their homes on a daily basis are not so restricted that they are effectively denied "meaningful access to sources of help."[195]

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185. *Id.*

186. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198-200 (1989).

187. *Id.* at 200 (noting that the state must provide for an involuntarily restrained individual's reasonable safety).

188. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1379 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (explaining that if the *DeShaney* Court intended to limit protection to incarceration or institutionalization, it easily could have done so by using language that read "other similar types of custody" rather than "other similar restraint of personal liberty"), *cert. denied*, 113 S. Ct. 1045 (1993).

189. *See* Huefner, *supra* note 183, at 1950; *see also infra* notes 190-243 and accompanying text.

190. *See, e.g.*, *D.R.*, 972 F.2d at 1371 (discussing cases of incarceration and institutionalization).

191. *See id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*; *see also* Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992) (explaining that school custody does not amount to a restraint that prohibits children's parents from caring for their basic needs), *cert. denied*, 113 S. Ct. 1266 (1993); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) (concluding that

In the public school setting, however, the restrained individual's increased vulnerability and dependency on the state do not turn exclusively on the nature of the custodial relationship involved.[196] While students are clearly not held in school "under shackles,"[197] several other relevant factors figure into the equation.[198] State mandatory attendance laws, the immaturity of the student involved, and the broad discretion extended by the state to schools in controlling students "combine to create the type of special relationship which imposes a constitutional duty on [a school] to protect the liberty interests of students while they are in the state's functional custody."[199]

Like incarcerated and institutionalized persons, school children are put in a position where they lack the power to protect themselves.[200]

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compulsory school attendance does not render school children so helpless that an affirmative duty to protect arises).

196. *See infra* notes 197-233 and accompanying text.

197. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1379 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting), *cert. denied*, 113 S. Ct. 1045 (1993).

198. Fossey, *supra* note 15, at 443 (citing Judith Herman, Trauma and Recovery 74 (1992)) (noting that "sexually abused [students] are quite like prisoners, 'made captive by the condition of their dependency,' and shackled by confusion, shame, isolation, and fear").

199. *D.R.*, 972 F.2d at 1377.

The concept of "functional" custody originated in Stoneking v. Bradford Area Sch. Dist. (*Stoneking I*), 856 F.2d 594, 601 (3d Cir. 1988), *vacated*, 489 U.S. 1062 (1989). On remand from the Supreme Court, the Third Circuit decided against basing its decision on a "functional" custody analysis given the "uncertainty" of the special relationship doctrine after *DeShaney*. Stoneking v. Bradford Area Sch. Dist. (*Stoneking II*), 882 F.2d 720, 723-24 (3d Cir. 1989), *cert. denied*, 113 S. Ct. 1044 (1990). The court concluded that it would be more "expedient" to make its decision without reliance on the doctrine. *Id.* at 724. The court instead held school officials accountable by relying on a theory that they, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [an individual] constitutional harm." *Id.* at 725. Nevertheless, the court stated explicitly that its earlier discussion noting that " 'students are in what may be viewed as functional custody of the school authorities' during their presence at school . . . [was] not inconsistent with the *DeShaney* opinion." *Id.* at 723. But in *D.R.*, 972 F.2d at 1372, the Third Circuit concluded that no special relationship exists between school officials and school children in a case of peer sexual harassment. The court stated that state authority over individual students does not create the type of physical custody contemplated in *DeShaney's* special relationship doctrine. *Id.*

Although the case may be closed in the Third Circuit, the concept of "functional" custody is not dead. In Jane Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992), *vacated*, 15 F.3d 443 (5th Cir. 1994) (en banc), a case of teacher-to-student sexual harassment, the Fifth Circuit concluded that a school child is in the "functional" custody of school officials, and a special relationship thus exists between the two. *Id.* After the case was reheard *en banc*, however, the court failed to address whether a special relationship exists in the public school context because the doctrine is not applicable in cases of teacher-to-student sexual harassment. *Taylor II*, 15 F.3d at 452 n.3. Thus it still remains unclear whether the Fifth Circuit would support the conclusion that students are in the "functional" custody of school officials. *See supra* notes 146-64 and accompanying text.

200. *D.R.*, 972 F.2d at 1371 (noting that incarcerated and institutionalized persons are incapable of protecting themselves).

It is well established that children are generally incapable of providing for their own basic needs,[201] and the law recognizes that their ability to exercise mature judgment often is not fully developed.[202] Parents or guardians are expected to accept primary caretaking responsibilities.[203] But compulsory school attendance laws effectively prevent parents or guardians from fulfilling their role as protectors during school hours.[204] A child may be exposed to a multitude of dangerous situations,[205] yet lack the mature judgment to address them alone.

Public school children are "not restricted to the same degree as arrestees, convicts and patients committed to state mental hospitals," but they "are similarly involved in an environment where the state

201. *Id.* at 1371; Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982) (noting that school children are "too young to be considered capable of mature restraint"), *cert. denied*, 463 U.S. 1207 (1983).

202. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1380 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (noting that children are recognized under the law as being incapable of mature judgment), *cert. denied*, 113 S. Ct. 1045 (1993).

203. *Id.* at 1371; Maldonado v. Josey, 975 F.2d 727, 735 (10th Cir. 1992) (Seymour, J., concurring), *cert. denied*, 113 S. Ct. 1266 (1993).

204. The majority of students are mandated to attend school under state law. *See* Cal. Educ. Code § 58556 (West 1989); Haw. Rev. Stat. § 298-9 (1985 & Supp. 1992); Ill. Ann. Stat. ch. 105, para. 5/26-1 (Smith-Hurd 1993); Iowa Code Ann. § 299.1A (West Supp. 1994); Kan. Stat. Ann. § 72-1111 (1992); Ky. Rev. Stat. Ann. § 159.010 (Michie 1992); La. Rev. Stat. Ann. § 17:221 (West 1982 & Supp. 1994); Me. Rev. Stat. Ann. tit. 20-A, § 5001-A (West 1993); Mass. Ann. Laws ch. 71, § 22 (Law. Co-op. 1991); Miss. Code Ann. § 37-13-91 (1972); N.J. Stat. Ann. § 18A:38-25 (West 1989); N.M. Stat. Ann. § 22-12-2 (Michie 1994); N.Y. Educ. Law § 3205 (McKinney 1981); Pa. Stat. Ann. tit. 24, § 13-1327 (West 1992); W. Va. Code § 18-8-1 (Michie 1994 & Supp. 1994).

Public school attendance is no less compulsory because some students may decide to attend private school or receive home education. Many families do not have the financial options to send children to private school or provide home education. *D.R.*, 972 F.2d at 1380 (Sloviter, C.J., dissenting) (noting that the mandatory nature of school attendance "is not lessened by the fact that a few fortunate students have the option to attend private school or be educated at home. For the vast majority of children of school age, this is no choice at all."). An estimated 12% of students attending elementary and secondary schools are enrolled in private institutions. *Id.* at 1380 n.4 (citing Muriel Cohen, *A Schooling Tradition Turns 350 Today*, Boston Globe, Apr. 14, 1992, at 24); *see also* Walton v. Alexander, 20 F.3d 1350, 1355 (5th Cir. 1994) (recognizing that the "economic realities" of some families leave only one schooling option).

Even the minority of students who have reached the age where they are no longer compelled to attend school still have little choice. Most school children realize that a proper education directly impacts their prospects for success in the future. *See* Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992) (noting that high school graduation motivates students throughout their schooling and promises a graduate "the right and duty to assume [a role] in the community and all of its diverse parts"). To say that a student can simply choose not to attend school is unrealistic. *Cf. id.* (explaining that the conclusion that every student has a real choice not to attend their high school graduation, one of life's most important occasions, "ignores reality" and is "formalistic in the extreme").

205. For examples of the sexual harassment that children suffer at school, see *supra* notes 27-63 and accompanying text.

[exercises] some lawful control over their liberty."[206] During school hours, students are subject to the "broad supervisory and disciplinary powers"[207] of teachers and school officials. School children are required to attend scheduled classes and assigned to specific lunch periods. Like incarcerated or institutionalized persons, students must abide by specific policies, rules and regulations with respect to behavior and discipline.[208] School supervisory personnel are authorized to separate pupils or even isolate a particular student as a disciplinary measure.[209]

Elementary, intermediate and secondary school children alike are often not "sufficiently independent" of school authorities to bring complaints promptly to their parents.[210] Students cannot "simply walk[ ] out of school without permission during school hours without calling into play the truancy laws."[211] This broad exercise of state control effectively prevents school children from "voluntarily withdrawing from situations posing [a] risk of personal injury."[212]

Courts have distinguished the public school setting from foster care situations where special relationships have been found to exist between a state and child.[213] In *D.R.*, the Third Circuit explained that the foster care relationship arises out of a state's affirmative act in placing a child with a "state-approved" family.[214] "By so doing," the

206. *Maldonado*, 975 F.2d at 731 (quoting Hilliard v. City of Denver, 930 F.2d 1516, 1520 (10th Cir.), *cert. denied*, 112 S. Ct. 656 (1991)).

207. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982).

208. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1380 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting), *cert. denied*, 113 S. Ct. 1045 (1993).

209. *See, e.g.*, Ala. Code § 16-1-14 (1975) (noting that school children may be isolated or separated from each other as a disciplinary measure).

210. *D.R.*, 972 F.2d at 1380 (Sloviter, C.J., dissenting).

211. *Id.* at 1380-81.

212. Maldonado v. Josey, 975 F.2d 727, 731 (10th Cir. 1992) (quoting Hilliard v. City of Denver, 930 F.2d 1516, 1520 (10th Cir.), *cert. denied*, 112 S. Ct. 656 (1991)), *cert. denied*, 113 S. Ct. 1266 (1993).

213. Several circuit courts have recognized that a special relationship exists between a state and a child in foster care. *See, e.g.*, Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 883, 893 (10th Cir. 1992) (noting that children in state custody have "a constitutional right to be reasonably safe from harm," and state actors must protect foster care children from situations they "know or suspect to be dangerous"); K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 853 (7th Cir. 1990) (recognizing a child's constitutional right not to be placed with a foster care parent "who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child"); Taylor ex. rel Walker v. Ledbetter, 818 F.2d 791, 794-97 (11th Cir. 1987) (en banc) (explaining that a foster child is in a situation so analogous to that of incarcerated and institutionalized persons that he is similarly entitled to affirmative state protection), *cert. denied*, 489 U.S. 1065 (1989); Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 141-42 (2d Cir. 1981) (concluding that a child has a constitutional right to be placed in a foster care setting known to be safe), *cert. denied*, 464 U.S. 864 (1983).

214. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993).

court reasoned, "the state assumes an important continuing, if not immediate, responsibility for the child's well-being."[215] But by mandating school attendance, a state similarly places a far greater number of children in "state-approved" schools.[216] It is well recognized that foster care children are "dependent on the state, through their foster families, to provide their basic needs including food, clothing, shelter and medical care."[217] But students during the school day likewise depend on the state to provide for a fifth basic need recognized in *DeShaney*, their reasonable safety.[218]

Furthermore, while a child is "invariably free to return home" at the end of the school day,[219] it cannot be assumed that help is always readily available.[220] For the few hours that a student is home from school in the evening, a parent or guardian may be unavailable to discuss the problems that a child encountered at school.[221] The American family is no longer comprised of "the breadwinning father, the housewife mother, and the children."[222] Over the past thirty years, the number of children with divorced parents has increased from one

215. *Id.*

216. *See supra* note 204 and accompanying text.

217. *D.R.*, 972 F.2d at 1372.

218. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (recognizing food, clothing, shelter, medical care and reasonable safety as basic human needs).

219. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc) (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)), *cert. denied*, 113 S. Ct. 1045 (1993).

220. In concluding that a special relationship does not exist between school officials and school children, the Third and Seventh Circuits stressed that the degree of parental involvement in children's lives is great, and that this control dictates that the state does not become the primary caretaker when a child is compelled to attend school. *Id.* at 1371; J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

221. Even in the fortunate instances where parent caretakers address the sexual harassment of a child, harm is already done, and still difficult to remedy. The school child faces initial instances of harassment alone. The conclusion that a student is adequately protected through her capacity to seek help outside of school rests on the assumption that instances of sexual misconduct will occur at least once, and that they can be remedied only after damage has been done. *See* JoAnn Strauss, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and An Affirmative Duty Imposed on Educational Institutions*, 10 Minn. J. Law & Inequality 163 (1992) (noting that steps must be taken to prevent student sexual harassment, "not just to react once an incident has happened").

222. Sally Wendkosolds, The Working Parents Survival Guide 3 (1983). Over the past twenty years, the percentage of children that live with only one parent doubled. Bureau of the Census, Statistical Abstract of the United States: 1992, at 55 (112th ed. 1992) (citing U.S. Bureau of the Census, Current Population Reports, series P-20, No. 461) (reporting that among all races, the number of children that live with one parent rose from 12% in 1970 to 25% in 1991). In 1991, it was estimated that approximately one-fifth of all white children and one-third of all Hispanic children live with only one parent, while more than half of all African-American children come from single parent homes. *Id.*

in nine to almost one in two.[223] Children born out-of-wedlock from 1983 to 1993 "soared by more than 70 percent" to a staggering 6.3 million.[224] In the resulting single parent homes, financial constraints often dictate that the parent work extremely long hours.[225] When a child returns home from school, the single parent is often inattentive to the child's problems or absent entirely.[226] More and more two parent households experience similar problems. Over the last thirty years, the percentage of employed married women with children between the ages of six and seventeen has more than doubled.[227] Before long, an expected three out of four married women will work full-time outside the home.[228] On the basis of these statistics, it is evident that a vast number of school children do not have access to help simply because they are free to return home at the end of the school day.

The question remains then how the home environment of public school children is so clearly different from that of residential school students who spend weekends with a parent or guardian, but nonetheless receive affirmative state protection under the special relationship doctrine. In *Spivey*, the Eleventh Circuit concluded that a special relationship exists between state school officials and a residential school child.[229] But the school child in question spent as much time with his parent caretaker as innumerable public school children do. The student lived away from home for five days of the week and spent the remaining two with his mother.[230] Public school children similarly spend time with parents or guardians over weekends, but often not with much greater frequency during the week.[231] The Eleventh Circuit distinguished the case from those arising in the normal public school context, placing great emphasis on the child's status as a "residential student."[232] But in either the residential or public school setting, the basic problem is the same. Separated from parent caretakers,

223. Neil Kalter, Growing Up With Divorce: Helping Your Child Avoid Immediate and Later Emotional Problems 1 (1990); Susan Chira, *Study Confirms Some Fears on U.S. Children: Carnegie Panel Sounds Alarm with a Bleak Portrait of Future*, N.Y. Times, Apr. 12, 1994, at A1. Instances of divorce increased dramatically from 708,000 in 1970 to 1,167,000 in 1988. Bureau of the Census, *supra* note 222, at 90 (citing U.S. National Center for Health Statistics, Vital Statistics of the United States; Monthly Vital Statistics Report; and unpublished data).

224. Steven A. Holmes, *Out-of-Wedlock Births Up Since '83, Report Indicates*, N.Y. Times, July 20, 1994, at A1.

225. Chira, *supra* note 223, at A1.

226. *Id.* (noting that children are deprived "loving supervision and intellectual stimulation" in many cases as a result of divorce and parents' work).

227. Bureau of the Census, *supra* note 222, at 413 (citing U.S. Bureau of Labor Statistics, Bulletin 2307; Employment and Earnings, monthly).

228. Wendkosolds, *supra* note 222, at 3.

229. Spivey v. Elliott, No. 93-8269, 1994 WL 419485, at *5 (11th Cir. Aug. 26, 1994).

230. *Id.* at *1.

231. *See supra* notes 219-28 and accompanying text.

232. *Spivey*, No. 93-8269, 1994 WL 419485, at *4.

school children are placed in positions of increased vulnerability, and, when exposed to risk, they often are unable to secure help.[233]

Public schools must ensure that students are protected "from dangers posed by antisocial activities—their own and those of other students—[in order] to provide . . . an environment in which education is possible."[234] A student's inability to address situations of risk during school hours is magnified when the danger posed is sexual harassment.[235] Victims of peer sexual misconduct are generally reluctant to disclose the abuse.[236] Many sexually harassed students fear the repercussions of a complaint.[237] Others observe general adult non-response to instances of harassment and silently attempt to adjust to the "normal" behavior.[238] Countless victims are unaware that what they are suffering even has a name.[239] When there are "no words to articulate discontent . . . it is sometimes held not to exist."[240]

By placing children in positions of increased vulnerability in mandating school attendance, the state must undertake the corresponding responsibility to protect them.[241] Children are inherently dependent

233. *See supra* notes 200-28 and accompanying text.

234. Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992) (quoting D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993)), *cert. denied*, 113 S. Ct. 1266 (1993); *see also* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982) (noting that the state assumes an affirmative duty to protect school children, who are considered too young to be capable of mature restraint, from dangers posed by other students), *cert. denied*, 463 U.S. 1207 (1983); Strauss, *supra* note 221, at 163 (quoting Kimberly A. Mango, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 Conn. L. Rev. 355, 358-59 n.9 (1991)) ("[A school] serves as the parent and the student's 'home away from home' for seven or more hours of the day . . . .").

235. *D.R.*, 972 F.2d at 1381 (noting that school children facing continued instances of peer harassment are often themselves incapable of addressing the misbehavior with mature judgment).

236. Myers v. Morris, 810 F.2d 1437, 1459-60 (8th Cir.) (noting that sexually abused children possess a "unique reluctance" to disclose the misconduct), *cert. denied*, 484 U.S. 828 (1987); Fossey, *supra* note 15, at 443 (noting that an "abundance of research [indicates] that child abuse victims are often isolated from parents or peers"). *See also supra* notes 91-102 and accompanying text. Ironically, a prisoner, who is probably more likely to disclose abuses than a child suffering sexual harassment, is protected by the state, while the child is not. *D.R.*, 972 F.2d at 1381 (Sloviter, C.J., dissenting).

237. *See supra* note 87 and accompanying text.

238. *See supra* notes 91-102 and accompanying text.

239. *Harassment in the Halls*, *supra* note 42, at 186 (noting that a student victim of continued peer sexual harassment only learned that she could pursue a cause of action through the help of her parents).

240. MacKinnon, *supra* note 7, at 28 (quoting Sheila Rowbotham, Women's Consciousness, Man's World 29-30 (1973)) (describing the position of women when faced with employment harassment two decades ago).

241. This concept is to be distinguished from the "state-created danger" theory explained *supra* note 142. In the public school context, not only has the state exposed the student to increased risk, but it has also "involuntarily restrained" the student by virtue of state compulsory school attendance laws. *See supra* note 204.

on adults to guard them against the dangers of the world.[242] As one commentator noted, these caretakers are often parents, guardians or relatives, but "in a complex society they must sometimes be teachers and educational institutions as well."[243] Recognition of a special relationship between school officials and school children would provide public school students with the affirmative protection that they deserve.

IV. A Proposed Model for Peer Sexual Harassment Cases

In determining school official liability under 42 U.S.C. § 1983 for a breach of the officials' affirmative duty of protection, victims of peer sexual harassment would be required to demonstrate by a preponderance of the evidence that school officials failed to protect them from "known or reasonably foreseeable harms occurring during or in connection with school activities."[244] The harmed school child would present evidence to establish the nature and frequency of the alleged harassment, whether the sexual misconduct occurred in the presence of school personnel, and whether the student victim brought the abuse to the attention of teachers or other school supervisory employees.[245]

The school officials would then have the opportunity to demonstrate that the harm done to the student victim was not "known or reasonably foreseeable."[246] An isolated instance of peer sexual harassment, for example, would indicate that school officials could not have reasonably foreseen the misbehavior. A school's preventive measures, such as implemented sexual harassment policies and educational workshops, and the student victim's accessibility to counseling and grievance procedures would also suggest that the sexual misconduct was, in fact, unforeseeable.[247] Further important considerations,

242. Huefner, *supra* note 183, at 1966.

243. *Id.*

244. The "protection from known or reasonably foreseeable harm" standard was enunciated by the Fifth Circuit in *Taylor* before it was withdrawn for *en banc* consideration. Jane Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 144 (5th Cir. 1992), *vacated*, 15 F.3d 443 (5th Cir. 1994) (en banc).

245. In D.R. by L.R. v. Middle Bucks Area Technical Vocational Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993), for example, the frequency of the two female victims' alleged molestation in addition to the fact that the misbehavior occurred in the presence of a student teacher would tend to show that instances of harassment were foreseeable. *Id.* at 1366, 1378. The complaint to a school official by one of the female victim's would be an even stronger indication of the harassment's foreseeability. *Id.* at 1366.

246. The *D.R.* school officials would have an opportunity to demonstrate that other relevant factors revealed that the alleged instances of sexual misbehavior were not known or reasonably foreseeable.

247. Proper consideration must be given to whether a student victim was aware of her rights and had access to help. Under such circumstances, a student's failure to report instances of peer sexual harassment could indicate that the misbehavior was not known or reasonably foreseeable to school officials. In a hypothetical analysis of *D.R.*, school officials would demonstrate that clear harassment policies were in place

however, would include the student victim's age level as an indication of maturity, and whether the school child is disabled or suffers an impairment that might make the child unable to seek help promptly or at all.[248]

School official liability under 42 U.S.C. § 1983 for a breach of the officials' affirmative constitutionally-based duty of protection would depend on the strength of the peer sexual harassment victim's evidentiary showing of known or reasonably foreseeable harm, and the school officials' production of opposing evidence. The nature and frequency of the harassment in addition to the school personnel's awareness of continued instances of misbehavior would be balanced against the extent of the school's preventive and protective measures and the school child's ability to understand established policies and pursue implemented procedures.[249]

This reasonable foreseeability standard of review[250] would provide school officials with a greater incentive to take preventive action.[251] Consideration of relevant factors including student education and the availability of help in the realm of peer sexual harassment would provide a strong incentive to schools that have not yet formulated strict

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at Middle Bucks Area Vocational Technical School, and counseling services and adequate grievance procedures were made available.

School policies and training activities provide strong evidence in support of a student's ability to seek help because they ensure that "students and staff understand when sexual harassment has occurred and understand how to appropriately deal with it." Strauss, *supra* note 221, at 183; *see also* Maia Davis, *Enforced Courtesy: Schools Say New State Law Has Cut Sexual Harassment On Campus*, L.A. Times, Jan. 5, 1994, at B1 (noting that school district policies against student sexual harassment encourage school children to "complain about offensive behavior or comments that they previously may have let pass").

248. *D.R.*, 972 F.2d at 1381 (noting that students who are especially young or suffer disabilities or other impairments deserve affirmative protection); *see also* Walton v. Alexander, 20 F.3d 1350, 1355 (5th Cir. 1994) (explaining that a handicapped child at a residential school who "lack[ed] the basic communication skills that a normal child would possess" deserved affirmative protection).

249. In examining the alleged facts of D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1045 (1993), the female victims would make a strong showing of reasonable foreseeability based on the nature and the frequency of the harassment and the school supervisory personnel's awareness of the sexual misconduct. *Id.* at 1366. Further, one of the victims in *D.R.* was "almost totally hearing impaired" and "[h]er powers of articulation [were] seriously limited." *Id.* at 1381. This student's demonstration that she could not have effectively made use of available counseling services or school grievance procedures due to her handicap would weigh in favor of school official liability.

250. *See supra* notes 244-49 and accompanying text.

251. "The key element of prevention is adoption and implementation of clear policies and procedures" setting out clearly what sorts of behavior constitute sexual harassment and will not be tolerated. Strauss, *supra* note 221, at 183 (citing Billie W. Dziech & Linda Weiner, The Lecherous Professor: Sexual Harassment on Campus 200 (1990)). Also essential to prevention are clear communication of all policies and procedures to staff and students, educational workshops designed to help staff and students to recognize harassing behavior and discourage it, and "an accessible grievance procedure." *Id.*

sexual harassment policies[252] or implemented educational[253] and counseling programs.[254] Further, with the increased likelihood of liability under the standard of reasonable foreseeability,[255] school officials could not continue dismissing reported instances of peer harassment as insignificant.[256] Adult witnesses to questionable behavior would no longer have the option to avert their eyes or simply conclude that the misconduct was harmless.[257] Instead, the standard of reasonable foreseeability would require school employees to ask themselves: "Does this behavior constitute sexual harassment, or is it reasonably foreseeable that it could escalate to that level?"[258]

The reasonable foreseeability standard used to determine school official liability would strike the appropriate balance between the interests of school officials and school children. Students would benefit

252. *Id.* at 182-83 (noting that sexual harassment policies and procedures are keys to prevention).

253. *Id.* at 183 (arguing that "commitment to a curriculum that specifically addresses sexual harassment" and "promotes sex equity" is the answer).

254. Wendy Melillo, *Calendar—Defusing Sexual Harassment*, Wash. Post, Jan. 13, 1987, at Z19 (noting that some schools have implemented policies against student sexual harassment and set up counseling services).

255. A "reasonable foreseeability" standard would provide greater protection and incentive for prevention than does, for example, a "deliberate indifference" standard. The latter is a popular theory of liability posed in cases of violations by state actors. Victims of teacher-to-student sexual harassment pursue this theory. *See, e.g.*, Jane Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir. 1994) (en banc) (applying the deliberate indifference standard in a case of teacher-to-student sexual harassment). Under the "deliberate indifference" approach a student victim must establish that: 1) a supervisory school official had notice of a pattern of inappropriate sexual behavior "pointing plainly" toward the conclusion that the student was suffering sexual abuse; 2) the school official demonstrated "deliberate indifference toward the constitutional rights of the student" by failing to take corrective action which was "obviously necessary"; and 3) the official's failure to take action caused constitutional injury to the student. *Id.* Clearly, a school is under less pressure to address instances of harassment if they have to be on notice of a pattern that points plainly to sexual abuse as opposed to a standard of reasonable foreseeability.

256. *See supra* notes 91-102 and accompanying text. Further, certain state laws make it easier for teachers and school supervisory officials to address peer sexual harassment. In California, a state law which took effect January 1, 1993 seeks "to end sexual harassment by children by allowing school administrators to discipline offenders with the harshest penalty allowable: expulsion from school." Shalit, *supra* note 58, at 14. Under the law, peer sexual harassment is defined as " 'unwelcome sexual advances, requests for sexual favors and other physical, visual or verbal actions of a sexual nature' that are severe enough 'to have a negative impact upon an individual's academic performance or create an intimidating, hostile or offensive educational environment.' " *Id.* The law affects students in grades four through twelve. *Id.* A similar law is in effect in Minnesota which became effective in September 1991, covering children down to the kindergarten level. *Id.*

257. *See supra* notes 91-95 and accompanying text.

258. Teachers and other school employees would undergo mandatory training to learn to readily identify instances of sexual harassment and respond appropriately. Strauss, *supra* note 221, at 183 (citing Billie W. Dziech & Linda Weiner, The Lecherous Professor: Sexual Harassment on Campus 200 (1990)).

from both the greater protection offered under the law[259] and their schools' increased commitment to prevention.[260] Additionally, the state's opportunity to demonstrate that alleged sexual misconduct was truly unforeseeable would safeguard the interests of diligent school officials.

Schools are slowly beginning to adopt clear policies against peer sexual harassment[261] and implementing informational workshops[262] and effective counseling services for school children.[263] Training programs for school personnel are better enabling teachers and other supervisory school officials to address peer sexual harassment and accept responsibility for witnessed acts of misbehavior.[264] By raising awareness of both students and teachers, school officials are taking affirmative steps to protect school children from peer sexual harassment, but the progress is slow.[265]

Unless school liability in cases of peer sexual harassment is expanded to include a cause of action based solely on an abuse of special relationships in the public school context, students only can hope that "effective investigative and supervisory measures to prevent sexual abuse" will be taken.[266] The pervasiveness and intensity of the problem,[267] however, warrant that schools take affirmative steps "to pre-

259. School officials would assume an affirmative duty to protect school children from reasonably foreseeable harms. *See supra* notes 244-49 and accompanying text.

260. *See supra* notes 250-58 and accompanying text. *See also* Strauss, *supra* note 221, at 185 ("Swift action sends a strong message.").

261. For an example of a school policy prohibiting student sexual harassment, see Stephen Buckley, *Schools Drawing Line on Sexual Harassment: Principals Attend Training Session on Policy*, Wash. Post, Feb. 25, 1993, at M1.

262. The AAUW has workshop materials to educate teachers and students about what sexual harassment is and how to address it. Mann, *supra* note 31, at D26. The focus of the materials is on the unwelcomeness and unwantedness of the misbehavior. Workshop participants review words and conduct associated with sexual harassment. Students are reminded that harassment degrades a person and makes her feel sad or angry, while flirting makes a person feel good and is welcome. *Id.*

263. Melillo, *supra* note 254, at Z19 (noting that schools are beginning to offer counseling services).

264. Brown, *supra* note 87, at A1 (noting that schoolgirls are "becom[ing] more aware of their rights and school officials [are becoming] more aware of their responsibilities").

265. According to a study conducted by the Wellesley College Center of Research on Women and the NOW Legal Defense and Education Fund, only eight percent of 4,200 girls surveyed revealed that their schools had a policy on sexual harassment. Mann, *supra* note 31, at D26.

266. Ralph D. Mawdsley, *Compensation for the Sexually Abused Student*, 84 Educ. L. Rep. 13, 13 (1993); *see also* D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1383 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (noting that to conclude that a special relationship does not exist in peer sexual harassment cases would make it unlikely that any "state-imposed restraint of personal liberty short of incarceration or [institutionalization] w[ould] trigger the duty to protect"), *cert. denied*, 113 S. Ct. 1045 (1993).

267. *See* discussion *supra* part I.

vent as well as to react to [student] sexual harassment."[268] Recognition of the existence of a special relationship warranting state affirmative protection in the public school context would provide the necessary incentive for prevention.

CONCLUSION

Schools play an instrumental role in our children's development. Through consciousness-raising and proper education, young Americans can be instilled with strong values of equality and mutual respect. Presently, however, peer sexual harassment is teaching its own lesson in schools: that perpetrators are free to engage in unwelcomed sexual behavior, and victims are powerless to prevent it. While sexual harassment poses a threat to all school children, female students suffer the gravest consequences. The regularity of harassing behavior and adult inattention to the problem have a scarring effect on female students' "educational, emotional and behavioral" development.[269] Until a special relationship is found to exist between school officials and school children, and schools are forced to take an active stance against student sexual harassment, complaints will continue to be made but not heard, and victims will struggle to accept the unacceptable.

268. Strauss, *supra* note 221, at 182.
269. AAUW Survey, *supra* note 10, at 21.