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Peer Abuse in Public Schools: Should Schools Be Liable for Student to Student Injuries Under Section 1983?

In recent years, the scope of civil rights claims under 42 U.S.C. § 1983 has been expanded.[1] This expansion has significantly affected public schools. Schools have become a place where the civil rights of students and employees have limited school officials' authority and augmented their responsibilities. For example, in a recent Texas case, the Fifth Circuit Court of Appeals held that a school principal could be held supervisorily liable when a teacher had sexual relations with a fifteen-year-old student.[2] In New York, a federal district court allowed a student to bring a claim against his school for verbal and physical abuse from other students.[3] In Utah, a teacher was fired after the school found out that the police arrested and charged him with selling drugs.[4] Later, the Salt Lake police department dismissed the charges when the teacher agreed to become

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1. 42 U.S.C. § 1983 (1988).

2. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 70 (1994). In *Doe*, the principal's motion for summary judgment was denied and the case was remanded to the trial court to see if the principal's failure to take corrective action against a teacher rose to the level of deliberate indifference.

3. Pagano v. Massapequa Pub. Sch., 714 F. Supp. 641 (E.D.N.Y. 1989). This case may be an aberration. Currently, six circuit courts have reached the opposite result based on the Supreme Court's holding in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). *See infra* note 116 and accompanying text.

However, there are exceptions to the *DeShaney* holding. These exceptions arise when the state creates a special relationship with individuals that are within the custody of the state. *DeShaney*, 489 U.S. at 198. According to the *DeShaney* Court, a special duty is created when the state takes individuals into custody, such as criminals and mental patients. *Id.* at 198-99.

In *Doe v. New York City Department of Social Services*, the Second Circuit Court of Appeals expanded the special relationship doctrine by holding that such a relationship was created when a child was put into a foster home. 649 F.2d 134 (2d Cir. 1981). The *Pagano* court stated that *Pagano* was more akin to *Doe* than *DeShaney*. *Pagano*, 714 F. Supp. at 643. Thus, the state owed a duty under the doctrine of parens patriae to the school children under its care at the time the incidents took place. *Id. See generally* Gail P. Sorenson, *School District Liability for Federal Civil Rights Violations Under Section 1983*, 76 EDUC. LAW REP. 313, 323-28 (1992) (discussing alternative justifications for allowing a special relationship in the public school context).

4. Ambus v. Granite Bd. of Educ., 975 F.2d 1555, 1558 (10th Cir. 1992).

an informant.[5] The teacher then filed a suit against the school district for wrongful dismissal and was awarded over $200,000.[6]

With such high stakes, school officials need to be aware of the liability that section 1983 creates for their schools. Of course, this is more easily said than done. Section 1983 jurisprudence is so complex that essential elements of a section 1983 claim are easily overlooked.[7] Because section 1983 is so complex, this Comment cannot discuss all aspects of section 1983 claims in the public school arena. Therefore, this Comment will focus on the section 1983 liability of school officials and districts when students injure other students (peer abuse). However, in order to understand the peer abuse issue, it is essential to know the background of section 1983 and the prima facie elements necessary to establish a section 1983 case in the educational arena.

Thus, part I will give a brief history of section 1983. Part II will outline the elements needed to bring a cause of action under section 1983. Part III will analyze whether school officials are or should be liable for deprivation of rights caused by peer abuse under section 1983. Part IV draws some conclusions from the analysis.

I. HISTORY OF SECTION 1983

A. *The Early History of Section 1983*

Section 1983 was originally passed as section 1 of the Civil Rights Act of 1871.[8] This Act was passed primarily in response to the "growing terrorism of [the] Ku Klux Klan."[9]

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5. *Id.*

6. Interview with Byron Fischer, attorney for the defendant Board of Education in *Ambus*, in Provo, Utah (Sept. 19, 1994). The amount of damages is not listed in the reported case.

7. *See, e.g.*, Seamons v. Snow, 864 F. Supp. 1111, 1119-22 (D. Utah 1994). *Seamons* involved a group of students hazing another student in a northern Utah school. *Id.* The court dismissed the § 1983 claim because the plaintiff failed to show a constitutional interest that was deprived. *Id.* at 1122. For a discussion of the prima facie elements of a § 1983 claim, see *infra* part II.

8. Monell v. Dep't of Social Servs., 436 U.S. 658, 692 n.57 (1978); Leon Friedman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions*, C902 A.L.I.-A.B.A. 129, 131 (1994).

9. *See* Friedman, *supra* note 8, at 131.

The Act was passed essentially as introduced by Congressman Samuel Shellabarger.[10] The part now codified as section 1983 was passed without amendment and with very little debate.[11] Thus, legislative history is scarce for interpreting section 1983. In spite of the lack of legislative history, the Supreme Court has reasoned that Congress passed the Ku Klux Klan Act in order to provide federal relief and remedies to individuals who were being deprived of their federal rights because local officials were unwilling or unable to enforce the federal laws.[12]

Although this Act was passed in 1871, it was essentially disregarded for the first seventy years after its passage.[13] It was not until 1939 that the Court held that the rights to assemble and to distribute literature were within the protection of section 1983.[14] This holding was the first modern holding by which citizens were protected from the states under the Fourteenth Amendment.[15] However, the real power of section 1983 was not recognized until *Monroe v. Pape*.[16]

B. Monroe's *Impact on Section 1983*

In 1961, the Court expanded the scope and power of section 1983 in *Monroe v. Pape*.[17] In *Monroe*, thirteen Chicago police officers broke into James Monroe's apartment without a search warrant in the early morning.[18] They routed the Monroe household from bed, "made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[19] Mr. Monroe was also taken to the police station, held in custody for ten hours, and interrogated

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10. *Id.*
11. *Id.*
12. *See* Monroe v. Pape, 365 U.S. 167, 171-76 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978); Steven S. Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. REV. 693, 694-95 (1993).
13. Friedman, *supra* note 8, at 135.
14. Hague v. CIO, 307 U.S. 496 (1939); *see* Friedman, *supra* note 8, at 135.
15. Friedman, *supra* note 8, at 135.
16. 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).
17. 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).
18. *Id.* at 169.
19. *Id.*

about a two-day-old murder.[20] He never saw a judge, no charges were filed against him, and he was not allowed to call his family or an attorney.[21] The Monroes brought a suit claiming among other things, that their civil rights had been violated under section 1983.[22] The City of Chicago and the officers moved to dismiss, claiming that section 1983 did not provide a cause of action.[23] The U.S. Supreme Court held that there was a cause of action for damages against the police officers, but not against the city.[24]

Monroe affected the law in two significant ways. First, section 1983 was expanded so plaintiffs could bring "damage suits against state officers."[25] Previously, such suits had been limited to prospective injunctive relief.[26]

Second, damages were available only against individuals. In *Monroe*, a municipality did not qualify as a "person" under section 1983.[27] Thus, Chicago was not liable for the acts of the police officers.[28] This second holding essentially exempted municipalities from liability for damages under section 1983.[29] The Court justified this holding based on the failed Sherman Amendment to the Civil Rights Act of 1871.[30] The Sherman Amendment would have made a municipality liable for any acts of violence committed by riotous persons assembled within its boundaries.[31] This would have placed a tremendous burden on the municipality to keep the peace. Although section 1983 is much narrower than the Sherman Amendment, the Court used

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 170.
24. *Id.* at 172, 187.
25. Friedman, *supra* note 8, at 135. Such suits extend to state officers in their individual capacity, not their official capacity. If state officers were liable in their official capacity, it would be the same as the state being directly liable for the harm caused by its official. The court in *Monroe* specifically exempted the municipality from liability for the acts of its officials. *Monroe*, 365 U.S. 167, 187 (1961), *overruled in part by* Monell v. Dep't of Social Servs. of New York, 436 U.S. 658 (1978).
26. *See* Kentucky v. Graham, 473 U.S. 159, 167 n.14, 169 nn.17-18 (1985).
27. *Monroe*, 365 U.S. at 191.
28. *Id.* at 187.
29. Although states and municipalities were not liable for damages under § 1983, both could be sued for prospective injunctive relief by suing their officers in their official capacity. *See* Kentucky v. Graham, 473 U.S. at 167 n.14, 169 nn.17-18.
30. *Monroe*, 365 U.S. at 188-91; Cushman, *supra* note 12, at 699.
31. *Monroe*, 365 U.S. at 188-91.

Congress' antagonistic reaction to the Sherman Amendment to justify not classifying a municipality as a person.[32]

C. *From* Monroe *to* Monell

The *Monroe* rule, which limited the liability of a municipality, was overturned seventeen years later in *Monell v. Department of Social Services of New York City*.[33] In 1978, the Court in *Monell* held that a municipality could be classified as a person under section 1983.[34] However, the Court limited the scope of this liability to official municipality policies that "cause" an employee to violate another's constitutional rights.[35] In other words, a municipality is not liable for the tortious acts of its employees under the theory of respondeat superior[36] unless there is a final decision made by an official

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32. *Id.* at 191.

33. 436 U.S. 658 (1978).

34. *Id.* In *Monell*, female employees of the Department of Social Services and the Board of Education of New York City brought a class action suit. *Id.* at 660-61. These women had been forced to take unpaid leaves of absence before such leaves were medically necessary. *Id.*

35. *Id.* at 691-92. The Court in *Monell* clearly limited municipal liability to acts by its employees that were directed by official policy:

> [A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.
>
> We begin with the language of § 1983 as originally passed: "*[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." (emphasis added).
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> The italicized language plainly imposes liability on a government that, under color of *some official policy, "causes" an employee to violate another's constitutional rights.*

Id. (emphasis added) (citations omitted). Many commentators have discussed *Monnell*'s impact and scope on public schools. *See* Cushman, *supra* note 12; Jeff Horner, *When Is a School District Liable Under 42 U.S.C. 1983?—The Evolution of the "Policy or Custom" Requirement*, 64 EDUC. L. REP. 339, 340 (1991); Sorenson, *supra* note 3, at 314-16.

36. *Monell*, 436 U.S. at 691-92. The Court justified this limitation based on Congress' treatment of the Sherman Amendment, which indicates that Congress did not desire to impose vicarious liability on the municipality based on the actions of a few private citizens. *Id.* at 691 n.57. However, municipal liability for acts of its own employees is distinguishable from liability for acts of all private citizens within a specified jurisdiction. *Id.* The Court was persuaded that the Sherman Amendment evidenced an opposition by Congress to vicarious responsibility and a lack of

policymaker that causes a municipal employee to violate the constitutional rights of another.[37]

After *Monell* opened the door for section 1983 suits against local municipalities, the question arose whether the state or its agencies could be held liable under section 1983 as well. The Supreme Court put that question to rest in *Will v. Michigan Department of State Police*.[38] The Court held that neither the State nor any of its officials acting in their official capacities are persons under section 1983.[39] Thus, if a school district is classified as an arm of the state, it is not liable for damages under section 1983.[40] Conversely, if the school district is not considered an arm of the state, it is subject to liability under section 1983 if the other prima facie elements of a section 1983 claim are met.[41] The question of whether the school is an arm

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intent to bind the municipality through its employees. *Id.* The Court combined these two factors to reject the argument that a municipality could be liable under § 1983 based on the doctrine of respondeat superior. *Id.*

37. *Id.* at 690-91. *See generally* Horner, *supra* note 35 (discussing the role of the policy and policymaker to create liability for public schools under § 1983).

38. 491 U.S. 58 (1989). In *Will*, the plaintiff filed a suit in state court against the Department of State Police when he was denied a promotion. *Id.* at 60. The plaintiff alleged that he was denied the promotion because his brother had been a student activist about whom the department had maintained a "red squad" file. *Id.*

39. *Id.* at 70-71. *Will* is difficult to understand without the background of the Eleventh Amendment. This amendment reserves rights to the states, but Congress can abrogate the Eleventh Amendment under § five of the Fourteenth Amendment. *Id.* at 66; Dellmuth v. Muth, 491 U.S. 223, 227 (1989). Congress can also abrogate the Eleventh Amendment under the Commerce Clause. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989) (Brennan, J., joined by Marshall, Blackmun, Stevens and Scalia, JJ., concurring in that part of the opinion). However, to abrogate Eleventh Amendment state rights, "Congress must make its intention [to abrogate] unmistakably clear." Hoffman v. Connecticut Dep't of Income Main., 492 U.S. 96, 101 (1989); Dellmuth v. Muth, 491 U.S. 223, 228 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). The Court has held that Congress did not intend to abrogate the states' Eleventh Amendment rights when it passed § 1983 because Congress' intention to abrogate the Eleventh Amendment was not clear. Quern v. Jordan, 440 U.S. 332, 338-45 (1979). Thus, the only way to make a state liable is a congressional amendment to § 1983.

40. *See, e.g.*, Martinez v. Board of Educ., 748 F.2d 1393 (10th Cir. 1984) (holding that school districts within the state of New Mexico are an arm of the state and therefore not subject to § 1983); Martinez v. Board of Educ., 724 F. Supp. 857 (D. Utah 1989) (holding school board is an arm of the state), *overruled by* Ambus v. Granite Bd. of Educ., 975 F.2d 1555 (10th Cir. 1992) (holding school board is not an arm of the state).

41. *Ambus*, 975 F.2d 1555 (holding that school districts within the state of Utah are not an arm of the state, and therefore are subject to § 1983). The Tenth Circuit has decided cases both ways depending upon its interpretation of state laws. *Compare Ambus*, 975 F.2d at 1555 (holding that a school district is not an arm of the state, thus subject to § 1983 claims) *with Martinez*, 748 F.2d at 1393

of the state, and thus a person under section 1983 is discussed below.[42]

II. LEGAL ELEMENTS REQUIRED TO ESTABLISH A PRIMA FACIE CASE UNDER SECTION 1983

The elements of section 1983 are set forth in title 42 of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[43]

Aside from this sentence, Congress has given little guidance for section 1983 civil rights claims.[44] Thus, the meaning of section 1983 elements have been promulgated by the courts. This promulgation has created a complex body of judicial law, which augments the importance of understanding each essential element as applied in the educational context. The following four elements, extracted from 42 U.S.C. § 1983, have been the subject of most of the litigation in the educational arena:

(1) A *person* who
(2) *under color of* any statute, ordinance, regulation, custom, or usage of any State
(3) who subjects, or *causes* to be subjected, any citizen or other person,
(4) a *deprivation of any rights*, privileges, or immunities secured by the Constitution and laws shall be liable to the injured party.[45]

Each of these elements is necessary to establishing a prima facie case. If the defendant can show that any one of these elements is missing, the section 1983 claim will fail.

(holding that a school district is an arm fo the state, thus not subject to § 1983 claims) For the elements of a § 1983 claim, see *infra* part II.

42. *See infra* part II.A.
43. 42 U.S.C. § 1983 (1988).
44. *See supra* part I.A.
45. *Cf.* 42 U.S.C. § 1983 (1988).

A. Who or What Is a Person?

Three broad classes of persons can be sued under section 1983: a person in an individual capacity,[46] a person in an official capacity,[47] and entities, such as a school district.[48] In reality these three classifications are really two, because anytime a person is sued in an official capacity, the plaintiff is actually suing the entity that person represents. However, the courts use all three classifications, so they will be considered separately.

First, any individual sued in an individual capacity is classified as a "person" under section 1983, regardless of whether that individual is a state or local official.[49] There is no complex formula for finding that an individual is a "person" under section 1983.

Second, if a person is sued in an official capacity, the classification as a "person" depends upon whether the official is a state official. A state official cannot be sued for damages in an official capacity because it would be the same as suing the state. Under *Will v. Michigan Department of State Police*,[50] the state is not a "person" and cannot be sued for damages under section 1983. An injured party is limited to seeking prospective injunctive relief from the state and monetary relief ancillary to injunctive relief.[51] Conversely, if a municipal (not state) employee is sued in an official capacity, it is the municipality that is actually being sued and is liable for general damages under *Monell*.[52] This is because a municipality does not receive protection under the Eleventh Amendment.[53]

Third, municipal liability and state non-liability under section 1983 is particularly important to entities like schools and school districts. Schools can be arms either of the state or

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46. This could be a teacher, a principal, a school employee, or a school board member.

47. Suing a person in his official capacity is the same as suing the government agency that he represents. Thus, if a principal is sued in his or her official capacity, it is the same as naming the school district as a defendant.

48. *See, e.g.*, Ambus v. Granite Bd. of Educ., 975 F.2d 1555 (10th Cir. 1992).

49. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). This person is rarely the focus of a § 1983 claim because usually she does not have deep pockets.

50. 491 U.S. 58, 68-69 (1989).

51. *See* Kentucky v. Graham, 473 U.S. 159, 167 n.14, 169 nn.17-18 (1985).

52. Monell v. Dept. of Social Servs., 436 U.S. 658, 690 (1978); *see also Will*, 491 U.S. at 68-69.

53. *See Monell*, 436 U.S. at 690 n.54.

of municipalities depending upon the court's interpretation of the specific state law.[54] If the school is held to be an arm of the state, the analysis stops there, and the school is protected from section 1983 liability under the Eleventh Amendment.[55] However, most schools are not classified as arms of the state and are therefore subject to damages under section 1983 as persons.[56]

B. How Extensive is the Term "Under Color of Law?"

The term "under color of law" had a limited reach in the early section 1983 cases.[57] Traditionally, only acts committed by state officers in performance of their official duties came

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54. *Compare* Ambus v. Granite Bd. of Educ., 975 F.2d 1555 (10th Cir. 1992) (finding that a school is not an arm of the state) *with* Martinez v. Board of Educ., 748 F.2d 1393 (10th Cir. 1984) (finding that a school is an arm of the state). Most cases have found that school districts are persons. To reach this conclusion, a court focuses on how much control the state has over the school districts. For example, New Mexico's Constitution provides the state with significant management control over schools. *See Ambus*, 975 F.2d at 1561-62. In contrast, Utah's local school districts have more control—at least according to the court—so they are ostensibly not an arm of the state.

Most jurisdictions have held that a school district is not an arm of the state. In such jurisdictions, the schools are potentially liable under § 1983. This liability was derived from the analysis in *Mt. Healthy City School District Board of Education v. Doyle*, which denied a school district Eleventh Amendment immunity since it was not an arm of the state. 429 U.S. 274 (1977). Although *Mt. Healthy* was an Eleventh Amendment immunity case—not a § 1983 case—its analysis has been applied to school districts in the post-*Monell* era. Most courts have found that school districts are not arms of the state and thus potentially liable under § 1983. *See, e.g.*, *Ambus*, 975 F.2d 1555 (holding a school district was not an arm of the state in Utah); Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989) (holding that a school district was not an arm of the state in Connecticut), *cert. denied*, 496 U.S. 941 (1990); Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986) (holding a school district was not an arm of the state in New York); Minton v. Saint Bernard Parish Sch. Bd., 803 F.2d 129 (5th Cir. 1986) (holding that a school district was not an arm of the state in Louisiana); Travelers Indem. Co. v. School Bd. of Dade County, 666 F.2d 505 (11th Cir. 1982) (holding a school district was not an arm of the state in Florida), *cert. denied*, 459 U.S. 834 (1982). *But see* Martinez v. Board of Educ. of Taos Mun. Sch. Dist., 748 F.2d 1393 (10th Cir. 1984) (holding that the New Mexico schools are an arm of the state).

55. The idea of the Eleventh Amendment is that citizens cannot bring suit against their own state in federal court unless Congress specifically disallowed Eleventh Amendment protection, which it did not do for § 1983. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 67 (1989).

Whether a particular entity is a municipality or an arm of the state is a question infrequently discussed in § 1983 literature because it rarely arises outside the school district context.

56. *See supra* note 54 and accompanying text.

57. Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 499-500 (1985).

within the scope of section 1983.[58] However, *Monroe v. Pape* rejected this narrow construction of "under color of law."[59] *Monroe* expanded the interpretation to include not only acts under legitimate law, but also the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[60]

Although scholars currently debate the expanded view held in *Monroe*,[61] the expanded view is the current status of the law. Thus, individuals and entities such as school districts, which are not arms of the state, can be held liable for misuse of power. For example, in *Doe v. Taylor Independent School District*,[62] a school teacher had consensual sexual relations with a minor. Such conduct was not sanctioned by the school and contravened the state's statutory rape law. However, the teacher took full advantage of his position as teacher and coach to seduce the student, and thus he acted under color of law.[63]

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58. *Monroe v. Pape*, 365 U.S. 167, 184-85 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).

59. *Id.*

60. *Id.* (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); *see also* Susan B. Shoemaker, D.T. v. Independent School District*: Limiting Liability Under 42 U.S.C. § 1983*, 24 URB. L. 393, 393-94 (1992) (discussing "under color of law" as developed in various supreme court cases including *United States v. Classic*).

61. *Compare* Zagrans, *supra* note 57 *with* Steven L. Winter, *The Meaning of "Under Color Of" Law*, 91 MICH. L. REV. 323 (1992).

Zagrans argues that § 1983 should be limited to state-authorized deprivation. Zagrans, *supra* note 57, at 589. Such a limitation more accurately reflects the "intent and understanding of the enacting Congress." *Id.* Further, this approach would be simpler and eliminate the need for judicially created makeshift rules to fill in gaps. *Id.* Finally, the limitation should relieve the Court's impulse to "pare away substantive constitutional rights as a means of limiting the statute's broad scope." *Id.*

Winter rejects the Zagrans model and interpretation both historically and as a matter of statutory construction. Winter, *supra* at 325-27. Winter claims that when an actor is clothed with the appearance of official authority, the actor carries more weight and can consequently do more harm. *Id.* at 417-18. For example, if a police officer accuses a person of shoplifting, the accusation carries more weight than a similar accusation by a private citizen. *Id.* Winter's approach is best characterized by the following quote from William Penn: "Every Oppression against Law, by Colour of any usurped Authority, is a Kind of Destruction, and it is the worst Oppression that is done by Colour of Justice." *Id.* at 418 (quoting 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 27 (1726)).

62. 15 F.3d 443, 447-48 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 70 (1994).

63. *Id.* at 452 n.4. The court listed some of the factors that showed the teacher acted "under color of" state law. He required Doe to do little or no homework. *Id.* He spoke to another teacher about raising Doe's grades. The teacher was also Doe's basketball coach. *Id.* His first inappropriate physical contact commenced after a basketball game. *Id.* The teacher used his access to school facilities such as

Thus, the "under color of law" requirement was met when a teacher acted by virtue of his position and not his actual authority.

However, not all acts by teachers are under color of state law. In *D.T. v. Independent School District No. 16*,[64] a fifth-grade teacher and boys' basketball coach sexually molested some of his players while they were raising money to attend a summer basketball camp. The court held that the camp and fundraising were not school programs, but voluntary community activities.[65] Since the teacher was apparently acting outside his official role as teacher and coach in running the summer activity, he did not act "under color of law."

Although the court in *Doe* focused on the differences between *Doe* and *D.T.*,[66] analyzing the similarity of the courts' approaches helps to better understand the phrase "under color of law" in the school context. Both courts focused on whether the teacher/coach was able to take advantage of these children because of his teacher status.[67] The question of teacher status in the "under color of law" context is fact specific. For example, *D.T.* would likely have come out the other way if the teacher had molested the students on the school grounds or after a school-sponsored activity.

Although the teacher-student relationship discussed above is a commonly litigated area for the phrase "under color of law," there are many other areas in which school districts, administrators, or teachers may be held liable under section 1983. Other commonly litigated areas under section 1983 include wrongful dismissals[68] (conflicts between employees and

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a lab room adjoining his classroom and the fieldhouse to engage in inappropriate sexual contact with Doe. *Id.* These factors illustrate how the teacher/coach took advantage of his position to seduce Doe.

64. 894 F.2d 1176, 1182-85 (10th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990). Three players and the coach traveled to Sands Springs and Tulsa, Oklahoma, to sell candy in order to raise money for summer camp. *Id.* at 1183. The coach had the parents' permission to travel to these locations and spend one night. *Id.* at 1184. During this trip, the coach sexually abused each of the players. *Id.*

65. *Id.* at 1186-92; *see also Doe*, 15 F.3d at 452 n.4 (noting factual differences between *Doe* and *D.T.*).

66. *Doe*, 15 F.3d at 452 n.4 (noting factual differences between *Doe* and *D.T.*).

67. *See* D.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176, 1186-92 (10th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990); Doe v. Taylor Indep. Sch. Dist., 15 F.3d at 451-54, *cert. denied*, 115 S. Ct. 70 (1994).

68. *See, e.g.*, Maestas v. Board of Educ. of Mora Indep. Sch. Dist., 749 F.2d 591 (10th Cir. 1984) (former assistant superintendent and former district bookkeeper brought suit under § 1983 for failure to rehire when they did not make contri-

the administration or school board), limitations on free expression (conflicts between students or employees and the administration or school board),[69] and student discipline (conflicts between students and the administration).[70]

In the peer abuse context, "under color of law" is a much more difficult issue. The actual deprivation is caused by a peer—a private third party—not the school or one of its employees. The injured party must argue that the school created the hostile environment and refused to try to stop the abuse after it was reported. This indirect link to the school causes one to wonder where the threshold for causation lies.

C. *What is the Threshold for Causation under Section 1983?*

In *City of Canton v. Harris*,[71] the Court reiterated the importance of causation in section 1983 claims. The Court held that the "first inquiry in any case alleging municipal liability under [section] 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."[72] In the case of peer violence at school, this may be difficult to show since the deprivation is caused by a party other than the school or one of its officials. To compound this causation problem, the Supreme Court has

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butions to the school board chairman's campaign); Martinez v. Board of Educ. of Taos Mun. Sch. Dist., 748 F.2d 1393, 1394 (10th Cir. 1984) (former superintendent brought suit for wrongful termination under § 1983 claiming he was terminated "because of his 'real or imagined' activities in [a] school board election"); Blackburn v. Floyd County Bd. of Educ., 749 F. Supp. 159 (E.D. Ky. 1990) (teacher brought § 1983 action claiming wrongful dismissal when she exercised her First Amendment rights); Martinez v. Board of Educ., 724 F. Supp. 857 (D. Utah 1989) (former high school coach brought a § 1983 action claiming she was wrongfully terminated as an assistant basketball and volleyball coach).

69. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (student claimed under § 1983 that his right to free expression was denied when the student was disciplined for using a sexual metaphor during an assembly); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (students claimed under § 1983 that their right to free expression was denied when the school district would not permit them to wear black arm bands protesting the Vietnam war).

70. *See, e.g.*, *Bethel*, 478 U.S. 675 (1986) (student claimed right to free expression was denied under § 1983 when the student was disciplined for using a sexual metaphor during an assembly); Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5th Cir. 1987) (student claimed teacher violated his rights under § 1983 when the teacher lashed the second-grade student to a chair for the better part of two days).

71. 489 U.S. 378, 385-92 (1989).

72. *Id.* at 385.

held that the government has no affirmative duty to protect its citizens from private actors.[73]

While these obstacles are difficult, they are not insurmountable. Such obstacles may be overcome by showing a special relationship and deliberate indifference.[74] Some commentators argue that the vulnerability of the student and mandatory attendance laws create a special relationship between the school and its students.[75] Possible bases for special relationships will be further discussed in part III.

In addition to having a special relationship with a student, the school must also act with deliberate indifference that deprives a student of some federal right.[76] For example, inadequately training teachers could be a policy of deliberate indifference if the inadequacy was so obvious that it would likely lead to constitutional deprivations in the classroom.[77] Thus, the school's action or inaction ultimately leads to a student's deprivation, and not just any deprivation, but a deprivation of a federal or constitutional right.

D. What Constitutes a Deprivation of a Constitutional Right?

Section 1983 cannot be claimed for a general injury; section 1983 is limited to deprivations of federal or constitutional rights. For example, in the teacher disciplinary context, a right would probably arise under the Fourteenth Amendment as a deprivation of either a liberty interest[78] or a property interest.[79] In the case of physical injuries caused by another student, a student would probably claim a violation of bodily integrity.[80] It is important for the claimant to distinguish be-

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73. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 191 (1989).

74. Adam M. Greenfield, Note, *Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 615-18 (1993) (citing Leslie Ansely, *Many Teens Feel Unsafe in School*, USA TODAY, Aug. 13, 1993, at 1A).

75. *Id.* at 601-14.

76. *See City of Canton*, 489 U.S. at 388.

77. *See id.* For an example of conduct that constitutes deliberate indifference, see *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (remanding to see if the principal's failure to take corrective action against a teacher rose to the level of deliberate indifference), *cert. denied*, 115 S. Ct. 70 (1994).

78. The liberty interest can take the form of a violation of the teacher's First Amendment rights to speech or harm to the teacher's reputation.

79. If the dismissed teacher had an expectation of continued employment, the dismissal deprives the teacher of a property interest. *See, e.g.*, Ambus v. Granite Bd. of Educ., 975 F.2d 1555 (10th Cir. 1992).

80. *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 450-52 (5th Cir.

tween claiming tortious conduct and constitutional or federal deprivation;[81] if the claimant fails to structure the claim as a federal or constitutional deprivation, the case will be dismissed.[82]

III. A SCHOOL'S LIABILITY FOR PEER ABUSE UNDER SECTION 1983

Public schools have become a place where violence and sexual harassment are commonplace.[83] In a recent poll, one third of the students polled felt unsafe at school.[84] Most students knew someone who had brought a weapon to school.[85] Fifty percent said they knew someone who had switched schools to feel safer.[86] Sexual harassment is commonplace. Eighty-five percent of girls and seventy-six percent of boys in a AAUW survey reported "unwanted and unwelcome sexual behavior [at school] that interferes with their lives."[87] With all

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1994) (although it was a teacher, not a student, that violated *Doe*'s bodily integrity, the court's analysis substantiates bodily integrity claims under § 1983), *cert. denied*, 115 S. Ct. 70 (1994). In a recent Supreme Court opinion regarding § 1983, the Court in dicta recognized bodily integrity as a substantive due process right. *See* Albright v. Oliver, 114 S. Ct. 807, 812 (1994) (Rehnquist, J., joined by O'Connor, Scalia and Ginsburg, JJ.).

81. Both torts and constitutional deprivations can arise from the same set of facts.

82. *See, e.g.*, Seamons v. Snow, 864 F. Supp. 1111, 1119-22 (D. Utah 1994).

83. Graham v. Independent Sch. Dist. No. I-89, 22 F.3d 991, 992-93 (10th Cir. 1994).

84. Greenfield, *supra* note 74, at 589.

85. *Id.*

86. *Id.*

87. Karen M. Davis, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1124 (citing THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (June 1993)).

Sexual harassment may not be actionable under § 1983. Section 1983 requires a deprivation of a constitutional or federal right. Verbal sexual harassment, though offensive, may not qualify under § 1983. Scholars are calling for sexual harassment claims in schools to be actionable under Title IX, which "was intended to discourage discrimination on the basis of sex in educational programs." Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2123 (1993); *cf.* Gail Sorenson, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 ED. LAW REP. 1, 1-5 (1994). "Because judicial actions under section 1983 are extremely complex and because the Supreme Court has been reluctant to extend liability under Section 1983, students have had remarkably little success with such claims." *Id.* at 8 (citing as examples DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (imposing no affirmative constitutional duty to protect individuals from

these problems, some people have sought relief under section 1983. However, the courts have been reluctant to use section 1983 as a means for remedying the problems in our public schools.[88] One reason for this reluctance comes from the Supreme Court, which held in *DeShaney* that the state has no affirmative duty to protect individuals from private actors.

A. The Court's Analysis in DeShaney

Writing for the majority, Chief Justice Rehnquist conceded that "[t]he facts of [*DeShaney v. Winnebago*] are undeniably tragic."[89] Joshua DeShaney was living with his father, whose second marriage had just recently ended in divorce.[90] The second wife of Joshua's father complained to police at the time of their divorce that Joshua was being abused.[91] The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the accusations.[92] Later, Joshua was admitted to a local hospital with multiple bruises and abrasions.[93] The examining physician suspected child abuse and notified DSS. A "Child Protection Team" reviewed Joshua's case but found there was insufficient evidence to remove Joshua from his father's custody.[94] The team did, however, take several other actions to protect Joshua. His father had to attend counseling and Joshua had to attend a preschool program.[95] In November 1983, a month later, Joshua was again treated for suspicious injuries.[96] For the next few months a

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private actors) and Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) (finding "no constitutional duty to protect mentally retarded boy from assault and rape by peer with history of assaultive behavior; school attendance does not create special custodial relationship")). However, if the sexual harassment includes physical touching, the student may be able to bring an action under § 1983. *See, e.g.*, Spivey v. Elliott, 29 F.3d 1522 (11th Cir. 1994) (holding that a "special relationship existing between student and state imposed duty on state to protect [the] student from sexual assault by [a] classmate").

88. *See, e.g.*, cases cited *infra* note 116. *But see* Pagano v. Massapequa Pub. Sch., 714 F. Supp. 641 (E.D.N.Y. 1989).

89. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 191 (1989).

90. *Id.*

91. The second wife was not Joshua's natural mother. *Id.* at 192.

92. *Id.*

93. *Id.*

94. The "Child Protection Team" consisted of a pediatrician, a child psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel. *Id.*

95. *Id.*

96. *Id.*

caseworker visited Joshua monthly; she carefully recorded that Joshua was not in preschool and had suspicious physical injuries.[97] On two occasions, the caseworker was not allowed to see Joshua because he was "too ill."[98] Sadly, in March 1984, Joshua's father beat him so severely that he suffered permanent brain damage and will likely live the rest of his life institutionalized.[99] Joshua's father was convicted of child abuse.[100]

Joshua's natural mother brought a section 1983 claim against DSS and various individual employees for depriving Joshua of his liberty interest under the Fourteenth Amendment.[101] Joshua's mother claimed his liberty interest was deprived because DSS failed to intervene and protect him when they knew of the danger he was in.[102] The district court granted DSS's motion for summary judgment, which the Court of Appeals for the Seventh Circuit and the Supreme Court affirmed.[103]

The Supreme Court found "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[104] The purpose of the Fourteenth Amendment was to protect individuals from the state, not from each other.[105] The Amendment was phrased as a limitation on the state's power to act, "not as a guarantee of certain minimal levels of safety and security."[106]

The Court's underlying policy consideration was twofold. First, the Court recognized that if DSS had acted too soon, it would likely have been attacked by Joshua's father under the Due Process Clause.[107] Second, the state, through its legislative process, should decide which system of liability is best to place upon the state and its officers.[108] If the state wants DSS to be liable, the state can create such a system under tort

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97. *Id.* at 192-93.
98. *Id.* at 193.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 193-94.
104. *Id.* at 196.
105. *Id.*
106. *Id.* at 195.
107. *Id.* at 203.
108. *Id.*

law through its normal legislative process.[109] "They should not have [such liability] thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment."[110]

However, the Court did recognize two exceptions to its holding of no affirmative duty. First, the state creates a special relationship for itself when a person is incarcerated or institutionalized.[111] Such individuals have been committed involuntarily and—by reason of their liberty deprivation—are unable to care for themselves.[112] Second, the court implied in footnote nine that an affirmative duty to protect may arise in "a situation sufficiently analogous to incarceration or institutionalization."[113] For example, if the state puts a child "in a foster home operated by the state's agent," the state might be liable if the foster home is worse than the home from which the child was removed.[114] However, since these facts were not before the Court, this exception is dicta only.[115]

B. Applying DeShaney *to the Public School Context*

Although *DeShaney* was a child welfare case, the opinion's rules and exceptions have become the source of controversy in the public school context. Courts have been reluctant to extend the special relationship doctrine to public schools. The six circuits that have addressed the issue have held that schools have no special relationship with their students.[116] However, many

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109. *Id.*

110. *Id.*

111. *Id.* at 198-199 (citing Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble, 492 U.S. 97 (1976)).

112. *Id.*

113. *Id.* at 201 n.9.

114. *Id.* This situation is often referred to as the "snake-pit" exception because the state action created a worse environment for the child. *See* Karen M. Blum, DeShaney*: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435 (1994); Julie Shapiro, *Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm*, 62 CIN. L. REV. 883 (1994).

115. *DeShaney*, 489 U.S. at 201 n.9.

116. *See, e.g.*, Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 528-29 (5th Cir. 1994) (holding the school had no affirmative duty under § 1983 to protect a student injured by another student in the school parking lot after a nonmandatory school dance); Graham v. Indep. Sch. Dist. No. I-89, 22 F.3d 991, 992-93 (10th Cir. 1994) (holding no custodial relationship exists between school and student; thus, the school district did not have an affirmative duty to protect students from another student even if school employees had received warnings that the other student had threatened violence); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (no custodial relationship); Black v. Indiana Area Sch. Dist., 985 F.2d

commentators are persuaded that the special relationship doctrine should extend to public schools.[117] Both sides have valid arguments to support their position on the special relationship issue.

1. *The case for finding a special relationship in public schools*

a. Arguments from the courts in favor of a special relationship. Less than four months after *DeShaney* was decided, *Pagano v. Massapequa* extended the special relationship doctrine to public schools.[118] The analysis in *Pagano* is very limited. The court based its opinion on the frequency of the abuse.[119] According to the court, a single act of negligence does not form a basis for a civil rights action.[120] However, the

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707, 713-14 (3rd Cir. 1993) (no custodial relationship); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990); Russell v. Fannin County Sch. Dist., 784 F. Supp. 1576, 1581-83 (N.D. Ga. 1992), *aff'd without opinion*, 981 F.2d 1263 (11th Cir. 1992); *cf.* Michael Gilbert, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471, 481 n.45 (1993) (listing other cases holding no custodial relationship). *But see* Pagano v. Massapequa Pub. Sch., 714 F. Supp. 641 (E.D.N.Y. 1989); *cf.* Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992) (custodial relationship undecided), *cert. denied*, 113 S. Ct. 1066, *reh'g granted*, 987 F.2d 231 (5th Cir. 1993), *aff'd in part, rev'd in part, and remanded*, 15 F.3d 443 (5th Cir. 1994) (this final decision never discussed the special or custodial relationship theory, but decided the issue on the basis of the principal's "deliberate indifference" to the conduct of the teacher, a state actor, who caused the deprivation), *cert. denied*, 115 S. Ct. 70 (1994); Walton v. Alexander, 20 F.3d 1350 (5th Cir. 1994) (holding a special relationship existed between a deaf student and the superintendent); Spivey v. Elliott, 29 F.3d 1522 (11th Cir. 1994) (the court distinguishes this case from *Russell v. Fannin County School District* and many of the other cases above because the student was a residential student and could not go home at the end of the day).

117. *See, e.g.*, Greenfield, *supra* note 74, at 623-24; Steven F. Huefner, *Affirmative Duties in the Public Schools After* DeShaney, 90 COLUM. L. REV. 1940, 1972 (1990); Blum, *supra* note 114, at 479; *see also* Gilbert, *supra* note 116, at 509 (arguing for the proposition that an affirmative duty should be applied in some contexts but not all). *But see* Stephen Faberman, Note, *The Lessons of* DeShaney*: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. REV. 97 (1993) (arguing against affirmative obligation to protect students in public schools).

118. Pagano v. Massapequa Pub. Sch., 714 F. Supp. 641 (E.D.N.Y. 1989). Like most other § 1983 claims in the public school cases, the issue arises in the context of a summary judgment motion or a motion to dismiss. *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1066, *reh'g granted*, 987 F.2d 231 (5th Cir. 1993), *aff'd in part, rev'd in part, and remanded*, 15 F.3d 443, 458 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 70 (1994); Seamons v. Snow, 864 F. Supp. 1111, 1114 (D. Utah 1994) (motion to dismiss).

119. *Pagano*, 714 F. Supp. at 642-43.

120. *Id.* at 643. This is not exactly accurate. A single act of negligence may rise to the level of deliberate indifference if the plaintiff can show that the single

student in this case alleged seventeen separate incidents of verbal and physical abuse.[121] The court held that allowing seventeen acts could amount to deliberate indifference on the part of the school.[122]

Pagano and cases decided by other district courts in the Second Circuit are the only cases to find a special relationship between public schools and their students. The Court of Appeals for the Second Circuit has not yet opined on the issue. Although it was thought that the Fifth Circuit had split with the other circuit courts by finding a special relationship between schools and students, that assumption was subsequently denied by the Fifth Circuit.[123] To date, no circuit court has

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act was a policy made by either a legislative body (school board) or a person with final decision-making authority (principal or superintendent). This would probably be a rare event requiring, for example, a school board to pass a motion allowing guns at show and tell.

121. *Id.* at 643.

122. *Id.*

123. *Compare* Gilbert, *supra* note 116, at 489-93 *with* Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 528-29 (5th Cir. 1994). The thought at the time of the Gilbert comment was that the Fifth Circuit Court of Appeals had adopted the *Pagano* approach in *Doe v. Taylor Independent School District*. Gilbert, *supra* note 116, at 489 n.90 (citing Doe v. Taylor Ind. Sch. Dist., 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1066, *reh'g granted*, (5th Cir. 1993)). Subsequent to the Gilbert comment, the Fifth Circuit opined on the rehearing of *Doe v. Taylor Independent School District*. *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 70 (1994). The court avoided the special relationship issue and denied the principal's motion for summary judgment under the deliberate indifference standard. *Id.* at 458; *cf. Leffall*, 28 F.3d at 528-29 ("We did not address the question of whether a special relationship exists in an ordinary public school setting in our en banc decision in *Doe v. Taylor Indep. Sch. Dist.*").

Leffall clarified that *Doe v. Taylor Independent School District* did not address the special relationship issue. However, *Leffall* did not conclusively establish the Fifth Circuit's position on special relationships. The court held that there was no special relationship with a student who was killed by random gunfire in a parking lot after a school dance. *Id.* at 526-29. The court buttressed its holding by citing that its "sister circuits" had concluded that no special relationship existed between a school and a student. *Id.* at 528 (citing the Third, Seventh, Eighth, and Tenth Circuits). However, the court left the door open for the possibility of a special relationship being established in the future. The court focused its finding of no special relationship on the student's attendance at a voluntary after-school dance as opposed to the regular school day attendance. *Id.* at 529. Because the student was not compelled to go to the dance, the court stated:

> [W]e need not go so far as have some of our sister circuits and conclude that no special relationship can ever exist between an ordinary public school district and its students; we conclude 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.

Id. Thus, the position of the Fifth Circuit is simply uncertain at this time.

found a special relationship in public schools.[124]

b. Arguments from commentators in favor of a special relationship. Most commentators argue that students should be able to bring section 1983 actions for deprivations caused by other students.[125] Although the general rule is that the government has no affirmative duty to protect students from their peers, commentators argue that schools should fall into the special relationship exception under *DeShaney*.[126] This argument is based on three theories: legal custody theory, functional custody theory, and the snake-pit theory.

Under the legal custody theory, the government has a duty to protect students under the doctrine of in loco parentis. This authority is not voluntarily given by parents but is mandated by state statute.[127] States mandate this authority through compulsory education laws and punitive actions against both parents and students for truancy.[128] Thus, the laws mandate that a school take custody of a student during the regular school day. Because a school effectively has legal custody during the regular school day, it should also assume the responsibility associated with its custody.

Even if a school does not have legal custody, commentators argue that a school has functional custody of a student, which is an indicia of a special relationship.[129] Rather than looking at the school's legal authority, the functional custody theory looks at the particular set of circumstances to find a special relationship, creating an affirmative duty.[130] The focus is on factors such as control, dependency, and vulnerability.[131] "Schools may be said to have functional custody of students because they restrict students' ability to protect themselves as well as their parents' ability to intercede on their behalf."[132]

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124. Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994); *see* cases cited *supra* note 116 and accompanying text.

125. *See* commentators cited *supra* note 117.

126. *Id.*

127. *See, e.g.*, UTAH CODE ANN. § 53A-11-101 (1994) (requiring students to attend school); *see also* Greenfield, *supra* note 74, at 604-05.

128. *See, e.g.*, UTAH CODE ANN. § 53A-11-103 (1994) (empowering local board's to issue truancy citations and enforce school attendance).

129. *See* Blum, *supra* note 114, at 445-57; Greenfield, *supra* note 74, at 609-14; Huefner, *supra* note 117, at 1966-69.

130. *Compare* Blum, *supra* note 114, at 445-57 *with* Greenfield, *supra* note 74, at 609-14 *and* Huefner, *supra* note 117, at 1966-69.

131. Greenfield, *supra* note 74, at 609; Huefner, *supra* note 117, at 1957.

132. Greenfield, *supra* note 74, at 609.

In finding a special relationship under functional custody, courts should look to the nature of the student-state relationship.[133] Liability should arise in the school context because the state, by limiting a victim's freedom or taking some responsibility for his or her care, has increased the victim's dependence on the state's protection.[134] This increased dependence creates an affirmative duty for the school.

The snake-pit theory, which stems from *DeShaney*'s footnote nine,[135] is another theory used to create a special relationship. Under this theory, if a student is placed in a more dangerous situation by the state, the state assumes an affirmative duty and should be liable for any increase in harm.[136] The affirmative duty arises because the state creates and controls the environment where the student is harmed.[137] However, this theory leaves many policy questions unanswered. For example, was the child worse off at school than he or she would have been playing in the neighborhood at home? A child who is shot at school may have been less likely to be shot at school than in the neighborhood playground. How do we gauge whether a child is worse off? If a student in Burlington, Wyoming, is less likely to be shot at home, while a student in East Los Angeles is more likely to be shot at home, does an equal protection problem arise if one student can recover damages while the other cannot?

c. Underlying policy reasons in favor of a special relationship. The policy reasons for creating a special relationship between students and schools are apparent in both academic discussion and the cases. Students who are physically or sexually assaulted at school have no recourse against the establishment that may have permitted or even fostered the environment that gave rise to the deprivation. Granted, the injured party has a right against the tortfeasor, but this does little to remedy an environment that threatens future deprivations.

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133. Huefner, *supra* note 117, at 1957.

134. *Id.*

135. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 n.9 (1989).

136. *Id.*

137. Huefner, *supra* note 117, at 1968. In *DeShaney*, the abusive environment was created by Joshua's father, not the government agency. However, if the agency had taken Joshua out of his father's home and put him in a foster home that was an even worse environment, the agency would be liable for the increased risk of harm. *See DeShaney*, 489 U.S. at 201 n.9.

Additionally, it is unlikely that the state will provide a cause of action for the injured party under state tort law.[138] Public perception, whether accurate or not, is that expanding school liability will increase the cost of schools. Schools will either have to raise revenues or cut programs. Either move will likely be controversial and unpopular.

Furthermore, historically this is precisely the type of harm that section 1983 was intended to prevent—a deprivation of federal rights due to local officials' reluctance or inability to enforce the law.[139] If the state is reluctant or unable, it is the federal government's duty to step in and protect such constitutional and federal rights.

Finally, in contrast to public perception, creating a special relationship will not produce a myriad of large civil awards against the schools.[140] A special relationship simply helps the injured party satisfy the "under color of law" prong. Causation still must be established by proving that the school official or district was deliberately indifferent.[141] This standard is higher than simple negligence and places a heavy burden on the injured student.[142] Such a standard would limit successful section 1983 claims to only the most egregious cases.

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138. In Utah, for example, the Governmental Immunity Act prevents an injured party from suing the school district for any injury arising out of an assault or battery. UTAH CODE ANN. § 63-30-10 (1993). The exception to this is if the school district or its officers acted with fraud or malice. UTAH CODE ANN. § 63-30-4 (1993). However, this is no help for two reasons. First, it is unlikely that a school official or board will have acted with malice towards a student injured by another student. Their conduct will likely be categorized as negligent or grossly negligent, which does not rise to the level of malice. Second, even if a teacher intentionally injured or caused a student to be injured, the school district still may not be liable. Such conduct by a teacher would likely be outside the scope of employment and, thus, the school district may not be liable.

139. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). But, there may be a difference between the constitutional right sought to be upheld—most likely violation of bodily integrity—and assault and battery, which is covered under traditional state tort law. A question arises as to whether the courts want to effectively override state governmental immunity statutes or whether such decisions should be left to legislative bodies. *See DeShaney*, 489 U.S. at 203.

140. Huefner, *supra* note 117, at 1961-62; Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools After* Deshaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101, 1136 (1994).

141. City of Canton v. Harris, 489 U.S. 378, 388 (1989); Greenfield, *supra* note 74, at 614-23.

142. It would be interesting to compare the malice standard under the governmental immunity laws with the deliberate indifference standard under § 1983.

In summary, there are strong public policy reasons to support finding a special relationship in public schools. However, these policy reasons must be weighed against and compared to other policy reasons that support finding no special relationship as discussed below.[143]

2. The case against finding a special relationship in public schools

a. The circuit courts have unanimously held no special relationship in public schools. Presently, six circuit courts of appeal have faced the special relationship issue and all six have found that no special relationship exists in the public school context.[144] The facts of each case are different and each holding varies. To understand why no special relationship has been found, it will be useful to compare the extreme opinions and the commonalities of these cases.

The two cases that sit at opposite extremes are *Graham v. Independent School District No. I-89*[145] and *Leffall v. Dallas Independent School District.*[146] In *Graham*, two students were killed by peers on the school premises.[147] The decedents' mothers each brought section 1983 claims, arguing that the school knew of the violent propensities of the aggressor student.[148] Furthermore, the school's knowledge combined with the quasi-custodial nature of school attendance satisfied the *DeShaney* requirements.[149] However, the court held that "foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship."[150] The court went on to explain that "[i]naction by the state in the face of a known danger is not enough to trigger the obligation; according to *DeShaney* the state must have limited in some way the liberty of a citizen to act on his own be-

143. Most commentators have taken the position that a special relationship should be found. *See, e.g.*, Greenfield, *supra* note 74; Huefner, *supra* note 117. In taking such a position, very little attention has been given to the policy reasons supporting those decisions not finding special relationships.

144. *See* cases cited *supra* note 116.

145. 22 F.3d 991 (10th Cir. 1994).

146. 28 F.3d 521 (5th Cir. 1994).

147. *Graham*, 22 F.3d at 993 (one student was shot and another was stabbed—each mother brought suit). Both cases were dismissed when the court granted the school's federal rule 12(b)(6) motions. *Id.*

148. *Id.* at 994.

149. *Id.*

150. *Id.*

half."[151] This holding is the strongest position taken by any circuit court against finding an affirmative duty.[152]

On the other end of the spectrum, the most lenient circuit on the peer abuse issue was the Fifth Circuit in *Leffall v. Dallas Independent School District*.[153] This case is factually distinguishable from *Graham* because the student's death took place after a school dance where attendance was not required.[154] Although factually distinguishable from *Graham*, the *Leffall* opinion indicates that the court was unwilling to go as far as the Tenth Circuit in *Graham*.[155] *Leffall* went on to say that the special relationship decision in "ordinary public school" was left open for another day.[156] The court hinted that under the right factual circumstances, it might find a special relationship. This somewhat indecisive Fifth Circuit opinion represents the weakest stand against finding a special relationship.

In addition to the extreme positions of the circuits, it is important to focus on the commonalities that have lead the courts to their holdings. For example, in opining on the special relationship exception to a lack of an affirmative duty, the circuits have distinguished schools from the classic incarceration or institutionalization scenarios of the *DeShaney* exception. First, the school's custody does not deprive guardians of their responsibility over the children.[157] Guardians are still the primary care providers for children.[158] Children are only at

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151. *Id.* at 995 (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 389 (1993)).

152. However, even the Tenth Circuit seems to recognize the snake-pit exception. *See Graham*, 22 F.3d at 995 ("[P]laintiffs cannot point to any affirmative actions by the defendants that *created or increased the danger* to the victims.") (emphasis added).

153. 28 F.3d 521 (5th Cir. 1994).

154. *Id.* at 529. If a special relationship exists because students are legally compelled to attend school, the legal custody argument may fail if attendance is voluntary. *See supra* part III.B.1.b.

155. After noting that the Tenth Circuit *"has gone so far* as to hold that a school district cannot be liable for a tort inflicted on a student by a private actor during school hours even if its employees knew that the private actor had threatened the student and was present on school grounds," the *Leffall* court stated that they "need *not go so far as have some of our sister circuits* and conclude that no special relationship can ever exist between an ordinary public school district and its students." *Id.* at 528-29 (emphasis added).

156. *Id.* at 528-29.

157. *E.g.*, Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990).

158. *Dorothy J.*, 7 F.3d at 732; *J.O. v. Alton*, 909 F.2d at 272-73.

school for part of the day; the greater part of the day, they are not in the custody of the school. Additionally, the courts have narrowly read the special relationship exception:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[159]

Since the guardians of a public school student are still the primary providers of food, clothing, and shelter, no affirmative duty is assumed by the school.[160]

Second, students are not as severely restricted as involuntarily committed mental patients or prisoners.[161] Although there are some school restrictions and a mandatory attendance policy, students are not so controlled that they are denied access to help.[162] Furthermore, parents may choose whether a child's education will take place in public schools rather than in the home, vocational-technical schools, or private schools.[163] Even if guardians are limited financially, they still retain discretion to withdraw their children.[164]

Besides the limited restrictions on the students and the parents being the primary care providers, little else is used to justify the courts' position. Although there is some fluctuation in the stricture of holdings of no special relationship, the unan-

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159. Black v. Indiana Area Sch. Dist., 985 F.2d 707, 713 (3rd Cir. 1993) (quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989)).

160. *J.O. v. Alton*, 909 F.2d at 272.

161. *Id.* ("The analogy of a school yard to a prison may be a popular one for school-age children, but we cannot recognize constitutional duties on a child's lament.").

162. *Black*, 985 F.2d at 713; Russell v. Fannin County Sch. Dist., 784 F. Supp. 1576, 1582 (N.D. Ga. 1992), *aff'd without opinion*, 981 F.2d 1263 (11th Cir. 1992). In *Russell*, the court stated: "The *key concept* is the *exercise of dominion or restraint* by the state. The state must somehow significantly limit an individual's freedom or impair his ability to act on his own before it can be constitutionally required to care and provide for that person." *Id.* at 1582 (quoting Wideman v. Shallowford Community Hosp., Inc., 826 F.2d 1030, 1035 (11th Cir. 1987)) (emphasis added).

163. *Black*, 985 F.2d at 713.

164. *Id.* at 713-14. *But see* Greenfield, *supra* note 74, at 607-08 (exercising this right may be limited because of the economic restraints).

swered question is whether courts have denied finding a special relationship in public schools because it is a simple bright-line test, which makes their job easy in a difficult area of the law, or because of valid policy reasons.

b. Underlying policy reasons against a special relationship. Several policy reasons support the case against finding a special relationship. First, legislative bodies should decide whether liability should be imposed through the regular law-making process.[165] If the state does not already have a tort system that creates liability in public schools, the people of that state can change the system.[166] However, such a system should not be forced upon them by the "Court's expansion of the Due Process Clause of the Fourteenth Amendment."[167] A constitutional wrong is significantly different than a tort.[168] Second, few people will be helped by creating liability through finding a special relationship. Commentators argue for the need for section 1983 claims.[169] However, to buffer the concern over large liabilities, they argue that the high threshold of the deliberate indifference standard will allow only egregious cases to go to trial. However, this reasoning is flawed. If deliberate indifference is such a high standard,[170] very few plaintiffs will find relief under section 1983. Conversely, because section 1983 also includes awards for attorneys' fees, lawyers have a greater incentive to sue under section 1983. Opening the door a little more will encourage many unnecessary suits to burden the already overcrowded federal system.

Third, damage awards under section 1983 take money away from our educational system. Blaming the school rather than the student tortfeasors is no solution to violent behavior in our schools. Damages simply reduce the already limited funds available for public education.[171]

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165. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 203 (1989).

166. *Id.*

167. *Id.*

168. Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 532 (5th Cir. 1994) (citing De Jesus Benavides v. Santos, 883 F.2d 385, 388 (5th Cir. 1989)).

169. Greenfield, *supra* note 74, at 609; Huefner, *supra* note 117, at 1957.

170. Huefner, *supra* note 117, at 1957.

171. The state created the educational process to satisfy the needs of the community. The state through the normal legislative process should also decide what level of risk is appropriate in public schools. If corrective action is needed, the state can take a variety of creative approaches to resolve the crisis in our schools. The court has just one approach—damages, which takes funds away from our pub-

Fourth, a court's action may force state legislative bodies to react in ways that may not be beneficial for education. Although commentators argue that section 1983 claims will be limited, state officials may believe that Pandora's box has been opened and overreact. As discussed in part II.A. above, the state cannot be sued under section 1983. The perceived threat—not necessarily the realistic threat—of section 1983 liability may encourage a more centralized public educational system.[172] This does nothing to help the injured parties and reduces the flexibility of states to explore helpful alternative educational policies.[173]

Fifth, allowing students to sue the school district for injuries caused by other students goes beyond Congress's intent in enacting section 1983. Congress specifically rejected the Sherman Amendment to the Civil Rights Act of 1871.[174] The Sherman Amendment, which would have made municipalities liable for any act committed within their boundaries, was rejected because of the tremendous burden that it would place on municipalities.[175] Although *Monell* allowed municipal liability, it limited that liability to situations where an official policy causes an employee to violate another's constitutional rights.[176] Constitutional deprivations caused *by other students*

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lic schools.

172. For example, the Utah legislature has considered the impact that § 1983 claims will have on the state's educational system. MINUTES OF THE EDUCATION INTERIM COMMITTEE OF THE UTAH LEGISLATURE 4-6 (April 27, 1994) (copy on file with author) (discussing whether the state wanted schools to be liable under § 1983 or whether state legislative actions should be taken to protect public schools); *see also* MINUTES OF THE EDUCATION INTERIM COMMITTEE OF THE UTAH LEGISLATURE 3-4 (May 18, 1994) (copy on file with author) (discussing § 1983 liability for public schools). Conversely, the fear of § 1983 claims may motivate state and local officials to legislate corrective action to help eliminate the problems in our public schools; *cf.* MINUTES OF THE EDUCATION INTERIM COMMITTEE OF THE UTAH LEGISLATURE 5 (April 27, 1994) (copy on file with author) (stating that school "districts need to be accountable and at the same time enjoy some aspects of immunity").

173. For example, Utah is currently experimenting with the Centennial School Program. Part of the theory of centennial schools is increasing site-based decision making, a move towards decentralization. Whether such policies are good or bad, effective or ineffective is irrelevant. An overreaction by the state legislature to a perceived threat may take away the opportunity to experiment and explore educational alternatives.

174. *See* Monroe v. Pape, 365 U.S. 167, 188-91 (1961), *overruled in part by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978).

175. *Monroe*, 365 U.S. at 188-91; *see supra* part I.B.

176. Monell v. Dep't of Social Servs. of New York, 436 U.S. 658, 691-92 (1978).

goes beyond the historical scope and intent of section 1983 as explained in *Monroe* and *Monell*.[177]

Sixth, ironically, broadly construing a special relationship may discourage socially beneficial programs. For example, a state may repeal the mandatory attendance statute in hopes of avoiding liability under section 1983. Such a move may put more children on the streets and lead to more injuries and death. Granted this is an extreme example and unlikely to happen, but the reality is that nobody knows how the states will react if they feel threatened or overburdened.[178] Since education and social service programs are self-imposed by the states, such programs may be limited because of increased liability or a perceived threat of increased liability. Judicial activism sometimes creates more harm than good. Section 1983 will provide little relief for victims and has the propensity for negative change in our educational system. Given the alternatives, the bright-line test used by the courts may not be so bad after all.

c. The resident school exception. In contrast to normal public school cases, resident schools have a special relationship with their students.[179] Only two circuit courts have addressed this question, and both held that a special relationship existed.[180] Residential schools were distinguished from normal public schools in four ways. First, the school has twenty-four hour custody of the student.[181] Second, the student in *Walton* was a disabled student who lacked "basic communications skills that a normal child would possess."[182] Third, the student was not free to leave when he was in the custody of the

177. *Monroe*, 365 U.S. at 188-91; *Monell*, 436 U.S. at 691-92.

178. For example, California is currently struggling with Proposition 187. This proposition denies illegal immigrants access to state social services and education. Although the Proposition may be held unconstitutional under Plyer v. Doe, 457 U.S. 202 (1982), the issue illustrates the frustration of individuals and their overreaction. People are willing to do extreme things to avoid financial burdens.

179. *See, e.g.*, Walton v. Alexander, 20 F.3d 1350 (5th. Cir. 1994) (residential student at school for the deaf had a special relationship with the school, but the superintendent was not liable under § 1983 for sexual assault by another student because the superintendent's conduct did not amount to deliberate indifference); Spivey v. Elliott, 29 F.3d 1522 (11th Cir. 1994) (a residential student at a school for the deaf had a special relationship with the school, but school officials were not liable under § 1983 for sexual assault by a classmate because their duty was not clearly established at the time of the assault).

180. *Walton*, 20 F.3d at 1355; *Spivey*, 29 F.3d at 1524.

181. *Walton*, 20 F.3d at 1355; *Spivey*, 29 F.3d at 1525.

182. *Walton*, 20 F.3d at 1355.

school.[183] Finally, the state assumed responsibility for the student's basic needs such as food, clothing, and shelter.[184]

These four factors clearly put the resident school cases within the *DeShaney* Court's special relationship exception. The school not only assumed the educational responsibilities, but also the primary custodial responsibilities.[185] The key factors seem to be twenty-four hour custody and control over basic needs.[186] Under such conditions, a special relationship was created.[187]

3. The middle ground to a special relationship in public schools: bifurcating state actors from other students

Section 1983 claims in which a teacher causes the deprivation are distinguishable from cases in which the deprivation is caused by other students.[188] The factual difference is twofold. First, students are in a more vulnerable position vis-a-vis school officials, since officials are looked upon as authority figures.[189] Second, school officials are state actors who act under color of law.[190] Although the vulnerability argument infers a special relationship,[191] the focus should be on the deprivation caused by a state actor. Under the state actor analysis, there is no need for a special relationship analysis to show

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183. *Id.*

184. *Spivey*, 29 F.3d at 1525.

185. *Id.* at 1524.

186. *Id.* at 1524-25.

187. It is worth noting that both of these cases occurred in circuits that have addressed special relationships in the non-residential school context. In *Spivey*, the court carefully distinguished the residential school cases from day school cases, stating that "it was still the children's parents who had ultimate control of their basic needs." *Spivey*, 29 F.3d at 1525. *Walton* was also distinguished from the nonresidential schools, but in a later Fifth Circuit case. Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 529 (5th Cir. 1994). *Leffall* distinguished itself from *Walton* for the following reasons: the school in question was "not a school for the disabled, nor is it a boarding school with twenty-four hour custody of its students." *Id.* at 529; *cf. Spivey*, 29 F.3d at 1524-25 (involving a deaf student under the twenty-four hour care of a residential school).

188. *See Leffall*, 28 F.3d at 528-29; Gilbert, *supra* note 116, at 502-09.

189. Gilbert, *supra* note 116, at 504.

190. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 452 n.4 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 70 (1994).

191. *Leffall*, 28 F.3d at 528-29 ("The special relationship doctrine is properly invoked in cases involving harms inflicted by 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.").

causation from the school because there is a state actor.[192] The state actor's supervisor and the school district could be held liable if they acted with deliberate indifference.[193] This approach allows section 1983 claims against school officials without invoking the special relationship analysis. This analysis allows the court to avoid the quagmire of student inflicted deprivations by using the bright-line test that there are no special relationships.

IV. CONCLUSION

Section 1983 is complex as walking through a mine field: one is uncertain where to step next. Although commentators do not like the bright-line approach, they seem to oversimplify the impact of exposing schools to more liability. Even though schools still have the deliberate indifference buffer, the expense of simply defending suits could be enormous. Contrary to the arguments of commentators, the circuits bright-line approach is grounded in firm public policy. Historically, it avoids the affirmative duty concerns implicitly rejected by Congress in the Sherman Amendments and expressly by the Court in *DeShaney*. Practically, given the complexity of section 1983, it is somewhat refreshing to see a bright-line test that facilitates the judicial process and puts everyone on notice as to what their rights are. Philosophically, states will be encouraged to structure the educational system based on what will be effective to remedy violence in schools rather than how to avoid potential liability.

As commentators admit, permitting a special relationship in public schools will only help the few who can overcome the deliberate indifference threshold. In an attempt to help the few, constitutional rights are turning into nothing more than common torts while not even trying to catch the actual tortfeasor.

To avoid this problem, courts should continue the practice of disallowing section 1983 claims against public schools for peer abuse. If a remedy is needed, the cause of action should be provided by state tort law through the legislative process. If the state fails to provide relief, a party could bring a federal action against the school for prospective injunctive relief or lobby the legislature to make desirable, constructive changes. Additional-

192. *Id.*
193. *See, e.g., Doe*, 15 F.3d at 456-58.

ly, an action could be brought against the tortfeasor student. But alas, the student does not have the deep pockets; and was it not the school's deep pockets that prompted the action against the school in the first place?

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