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Civil Rights - Third Circuit Narrows Scope of Public School District 1983 Liability for the Sexual Abuse of Students

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Third Circuit Review

CIVIL RIGHTS — THIRD CIRCUIT NARROWS SCOPE OF PUBLIC SCHOOL DISTRICT § 1983 LIABILITY FOR THE SEXUAL ABUSE OF STUDENTS

D.R. v. Middle Bucks Area Vocational Technical School (1992)

I. INTRODUCTION

In recent years, student reports of sexual abuse in public schools have increased dramatically.[1] Nonetheless, state laws compel parents to send their children to school,[2] with little assurance of their safety. Therefore, it is critical that public schools, as the institutions entrusted with the custody of our children, be held accountable for their safety.[3]

In an effort to hold schools accountable, students seeking redress for sexual abuse suffered at public schools have invoked section 1983 of the Civil Rights Act of 1871.[4] Section 1983 creates a civil action for

1. *See* Gail P. Sorenson, *School District Liability for Federal Civil Rights Violations Under Section 1983*, 76 W. EDUC. L. REP. 313, 321 (1992) (noting that reports of sexual abuse of students at schools are increasing); William D. Valente, *Liability for Teacher's Sexual Misconduct with Students—Closing and Opening Vistas*, 74 W. EDUC. L. REP. 1021, 1021 (1992) (recognizing "alarming" increase in reports of sexual molestation at schools).

2. *See, e.g.*, 24 PA. CONS. STAT. ANN. § 13-1327 (1992). Pennsylvania's compulsory school attendance law provides, in pertinent part, that "every child of compulsory school age having a legal residence in this Commonwealth . . . is required to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." *Id.* Pennsylvania law penalizes parents who do not comply with this compulsory education law. *See id.* § 13-1333. This provision establishes fines for parents and guardians who fail to send their children to school. *Id.*

3. *See* Sorenson, *supra* note 1, at 321 (arguing that public school boards should not escape liability in situations where proper school personnel training or school procedures would have prevented flagrant violations of students' civil rights, and concluding that school boards must adopt procedures to prevent such abuses in public schools); Valente, *supra* note 1, at 1027 (asserting that alarming incidence of sexual abuse of students in public schools mandates creation of "compromise standards" to hold schools liable for such abuse in "exceptional circumstances"); Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940, 1941 (1990) (arguing that "the pervasive role that schools play in shaping the lives of their students, and the discretion extended to schools to control student behavior and the educational environment, require that public schools offer some protection of their students' liberty interests or face liability under section 1983").

4. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)). Section 1983 provides:

> 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

citizens who have been deprived of their constitutional rights by state actors.[5] The United States Supreme Court has recognized that the Fourteenth Amendment includes the constitutional right to be free from "unjustified intrusions on personal security."[6] Consequently, students have sued public schools under section 1983 based upon claims that their schools deprived them of this constitutional right by failing to protect them from intrusions into their personal security.[7]

A special problem arises in this type of section 1983 case when a court attempts to determine whether a school has an affirmative duty to protect its students from harm caused by private actors, as opposed to state actors. The Supreme Court has determined that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."[8] The Court, however, has never clearly defined the circumstances that give rise to this duty. As a result, our nation's judiciary has struggled to determine exactly when a public school's affirmative duty to its students arises, and great debate has emerged among courts and commentators, leaving the law in this area in considerable disarray.[9]

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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 proceeding for redress.

Id. In recent years, public school students have raised numerous section 1983 claims based on sexual abuse at school. *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 139-41 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1066 (1993) (public high school student allegedly sexually molested by teacher brought § 1983 action against teacher and school district); Maldonado v. Josey, 975 F.2d 727, 728-29 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1266 (1993) (section 1983 action brought on behalf of elementary school student who died of strangulation in a school classroom); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 722 (3d Cir. 1989), *cert. denied sub nom.* Smith v. Stoneking, 493 U.S. 1044 (1990) (student allegedly sexually assaulted by public high school's band director bringing § 1983 action against school district, principals, and superintendent); Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405, 1407-08 (E.D. Ark. 1992) (mentally handicapped public school student sexually assaulted by another student bringing § 1983 action against school district); Pagano v. Massapequa Public Schs., 714 F. Supp. 641, 642 (E.D.N.Y. 1989) (public elementary school student allegedly physically and mentally abused by other students bringing § 1983 action against school district).

5. *See* 42 U.S.C. § 1983 (1988); *see also* Lisa E. Heinzerling, Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048, 1048 (1986) (arguing that "special relationship" concept is not appropriate test for determining whether constitutional rights have been deprived). For a further discussion of § 1983, see *infra* notes 17-25 and accompanying text.

6. Ingraham v. Wright, 430 U.S. 651, 673 (1977); *see* Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (noting that Fourteenth Amendment Due Process Clause has historically protected constitutional right to personal security).

7. For a description of these § 1983 actions brought by students, see *supra* note 4.

8. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 198 (1989).

9. *See* D.R. v. Middle Bucks Area Vo. Tech. Sch., Civ. A. Nos. 90-3018, 90-3060, 1991 WL 14082, at *10 (E.D. Pa. Feb. 1, 1991) (recognizing that "law in

In *D.R. v. Middle Bucks Area Vocational Technical School*,[10] two students brought a civil rights action against a public school district under section 1983, claiming that the school district was liable to the students for sexual molestation by their classmates.[11] The United States Court of Appeals for the Third Circuit, sitting *en banc*, held seven to five that the school district could not be held accountable for the molestation of the students.[12] In reaching this conclusion, the Third Circuit rejected the district court's finding that a special custodial relationship existed between the public school and the students, which gave rise to an affirmative duty to protect the students from harm by third parties.[13]

In order to provide a backdrop for examining the Third Circuit's decision in *D.R. v. Middle Bucks Area Vocational Technical School*, this Casebrief first surveys United States Supreme Court and Third Circuit authority on the issue of school district liability under section 1983.[14]

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this area is not fully developed" and therefore it is unclear whether public school is liable for acts of private third party); *see also* Karen M. Blum, *Local Government Liability under Section 1983*, 449 PRAC. L. INST./LIT. 9 (1992) (explaining that while courts generally agree that state has no constitutional duty to protect its citizens from misconduct, lower federal courts disagree as to when duty to protect may arise from "special relationship"); Valente, *supra* note 1, at 1021-22 (describing federal case law developing under § 1983 as "clouded" and "nascent"). For a further discussion of the history of school district liability under § 1983 and the current state of disarray of case law in this area, see *infra* notes 26-57 and accompanying text.

10. 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

11. *Id.* at 1366. The public school defendants in *Middle Bucks* included Middle Bucks Area Vocational Technical School, Penn Ridge School District and Bucks County Intermediate Unit No. 22, as well as various school officials and teachers. *Id.* at 1365. One of the student plaintiffs, D.R., was a minor; therefore, her parent, L.R., filed suit on her behalf. *Id.* The other student plaintiff filed suit on her own behalf. *Id.* The student plaintiffs also asserted claims under 42 U.S.C. § 1985(3) and Pennsylvania law. *Id.* at 1366. The focus of this Casebrief, however, is their claim brought under § 1983. For a further discussion of the facts and procedural history of *Middle Bucks*, see *infra* notes 58-76 and accompanying text.

12. *Middle Bucks*, 972 F.2d at 1377. Judge Seitz wrote the opinion of the court and was joined by six other judges. *See id.* at 1365-77. Chief Judge Sloviter wrote a dissenting opinion which was joined by Judges Mansmann, Scirica and Nygaard. *See id.* at 1377-84 (Sloviter, C.J., dissenting). Judge Becker wrote a brief second dissenting opinion. *See id.* at 1384 (Becker, J., dissenting). For a discussion of these various opinions, see *infra* notes 77-111 and accompanying text.

13. *Middle Bucks*, 972 F.2d at 1373. The district court had found that because state law requires students to attend school and because a public school is legally permitted to assert control over its students, the public school owes the students an affirmative duty to protect them. D.R. v. Middle Bucks Area Vo. Tech. Sch., Civ. A. Nos. 90-3018, 90-3060, 1991 WL 14082, at *6 (E.D. Pa. Feb. 1, 1991). Nonetheless, the district court dismissed the students' complaints because it did not find sufficient facts to show that the school had "recklessly abandoned" this duty. *Id.* at *6-9. For a further discussion of the district court's opinion, see *infra* notes 70-75 and accompanying text.

14. For a further discussion of the law in this area, see *infra* notes 17-57 and accompanying text.

Next, this Casebrief traces the facts and procedural history of *Middle Bucks*, and analyzes the Third Circuit's reasoning in both the majority and dissenting opinions.[15] Finally, this Casebrief concludes that while public schools should not be held accountable for all instances of misconduct by private actors, under the facts presented in *Middle Bucks*, the Third Circuit should have imposed liability under section 1983.[16]

II. BACKGROUND

A. *Section 1983 Claims*

Congress enacted section 1983[17] to facilitate enforcement of the Due Process Clause of the Fourteenth Amendment.[18] Section 1983 is often referred to as having created a "constitutional tort" claim because it incorporates both constitutional and tort law principles.[19] Section 1983, however, offers a plaintiff several advantages that are often not available in conventional state law tort actions.[20] These advantages include the potential recovery of attorneys' fees, a wider range of rights that may be litigated, an increased number of potential defendants, generous federal law standards for assessing damages and the circumvention of state law immunity.[21] Due to these advantages it offers to plaintiffs, section 1983 has been described as transforming the Fourteenth Amendment from a shield into a sword.[22]

15. For a discussion of the facts and procedural history of *Middle Bucks* and an analysis of the Third Circuit's opinion, see *infra* notes 58-111 and accompanying text.

16. For a discussion of the conclusion that the *Middle Bucks* court should have imposed section 1983 liability, see *infra* notes 112-13 and accompanying text.

17. For the text of section 1983, see *supra* note 4.

18. *See* Sorenson, *supra* note 1, at 313.

19. *See* Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719, 1719-20 (1989) (explaining that Supreme Court is increasingly using tort language in § 1983 cases, and arguing that use of tort language results in corresponding use of tort principles and is attempt to minimize protection that § 1983 confers on Fourteenth Amendment rights); *see also* Sorenson, *supra* note 1, at 313-14. Sorenson refuses to refer to § 1983 claims as "constitutional torts" because § 1983 "is a federal statute and not part of the Constitution" and this terminology disregards the significant part that § 1983 plays in protecting federal statutory rights. *Id.* at 314. According to Sorenson, reference to "[s]ection 1983 violations/actions/claims" or "[s]ection 1983 torts" is more accurate. *Id.*

20. *See* Valente, *supra* note 1, at 1022 (claiming that section 1983 advantages may further increase litigation against school authorities in future); *see also* Jeffrey J. Horner, *The Anatomy of a Constitutional Tort*, 47 W. EDUC. L. REP. 1 (1988). Horner notes that while § 1983 may avoid governmental immunity problems implicated in state tort law actions, § 1983 contains demanding standards that a plaintiff must meet in order to recover. *Id.* at 2. For example, under § 1983 mere negligence is insufficient to create state liability. *Id.* at 13. Rather, the state must act in a "callously indifferent manner." *Id.*

21. *See* Valente, *supra* note 1, at 1022 n.4.

22. *See* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers*

In order to set forth a claim under section 1983, a plaintiff must first allege that there has been a violation of one of his or her constitutional or statutory rights.[23] Second, the plaintiff must allege that the violation occurred "under color of state law."[24] The Supreme Court has held that section 1983 should be interpreted broadly in order to provide a liberal remedy for violations of the rights of citizens.[25]

B. *United States Supreme Court Decisions on State Liability Under Section 1983*

The issue of school district liability under section 1983 is a recent problem, first emerging in the Supreme Court case of *Monell v. Department of Social Services*[26] in 1978.[27] In *Monell*, the Court held that local governments are not entitled to absolute immunity from suit under section 1983.[28] The Court explained that recent congressional authorizations made it apparent that Congress did not intend to grant school boards absolute immunity from section 1983 suits.[29] The *Monell* Court did not, however, offer much guidance as to what circumstances would give rise to governmental liability under section 1983.[30]

Beyond, 60 NW. U. L. REV. 277, 322 (1965) (arguing that "even given the broad language of [section 1983], it seems questionable that a breach of this constitutional shield must in all cases call forth the response of this statutory sword"); *see also* Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1441 (1989) (recognizing "sword and shield" metaphor and arguing that § 1983, as "procedural vehicle of constitutional enforcement[,] has . . . changed the substance of constitutional law itself").

23. *See* Sorenson, *supra* note 1, at 313. In the Third Circuit, a plaintiff's complaint under § 1983 must meet a heightened specificity requirement so that state officials have sufficient notice of the claims and do not drown in frivolous claims. Colburn v. Upper Darby Twp., 838 F.2d 663, 666 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

24. *See* Sorenson, *supra* note 1, at 313.

25. Monell v. Department of Social Servs., 436 U.S. 658, 700-01 (1978).

26. 436 U.S. 658 (1978).

27. For an excellent discussion of the history of school district liability under § 1983 and the *Monell* decision, see Sorenson, *supra* note 1, at 314-15.

28. *Monell*, 436 U.S. at 663, 701. *Monell* involved a claim brought by employees of the Department of Social Services and the Board of Education of New York City against their employers. *Id.* at 660. The employees filed suit under § 1983, asserting that the defendant employers had violated their constitutional rights by forcing pregnant women to take unpaid maternity leave before it was medically necessary to do so. *Id.* at 660-61.

29. *Id.* at 696-99. The Court noted, for example, that Congress had recently authorized grants to assist school boards in obeying federal court decrees, had permitted the award of attorneys' fees against government bodies, and had rejected bills designed to eliminate federal jurisdiction over school boards. *Id.* at 696 & n.62, 697-98.

30. *Id.* at 695 (refusing to address "what the full contours of municipal liability under § 1983 may be"); *see* Karen M. Blum, *Monell, DeShaney, and Zinermon: Official Policy, Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983*, 24 CREIGHTON L. REV. 1, 1-4 (1990) (arguing that although *Monell* Court expanded § 1983 liability of local government units, "the

After *Monell*, the Supreme Court made additional attempts to define the scope of governmental liability under section 1983.[31] Most recently, the Supreme Court addressed this issue in *DeShaney v. Winnebago County Department of Social Services*.[32] In *DeShaney*, county officials and social workers received reports that a three-year-old boy was being physically abused by his father.[33] The county investigated and recommended protective measures, but did not remove the boy from his father's custody.[34] Thereafter, the boy's father abused him again, rendering him comatose and severely brain damaged.[35]

The boy and his mother filed suit under section 1983, alleging that the county violated the boy's Fourteenth Amendment rights by failing to protect him from his father's physical abuse, of which the county knew or had reason to know.[36] The Supreme Court held that the state's mere knowledge of abuse by a private party does not give rise to an affirmative duty to protect the victim from the abuse.[37] Nonetheless, the Court recognized that an affirmative duty to protect a person from private harm may arise when the state holds the person in custody against his will.[38]

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parameters of that liability have yet to be firmly established" and "lower federal courts are still engaged in unraveling the considerable confusion that has sprouted from Supreme Court attempts to address the 'full contours of municipal liability under section 1983' ").

31. For an excellent discussion of *Monell* and its progeny, see Jeff Horner, *When Is a School District Liable Under 42 U.S.C. 1983?—The Evolution of the "Policy or Custom" Requirement*, 64 W. EDUC. L. REP. 339 (1991).

32. 489 U.S. 189 (1989).

33. *DeShaney*, 489 U.S. at 191. The first report was from the defendant's second wife, who declared that the defendant had physically abused the boy. *Id.* at 192. The second report was made by a physician who examined the boy when he was admitted to the hospital with abrasions. *Id.*

34. *Id.* at 192. The county assembled a team to investigate and consider the boy's condition. *Id.* The team found the evidence insufficient to justify keeping the boy in the court's custody. *Id.* The protective measures they recommended included counseling services for the defendant, placing the boy in preschool, and recommending that the defendant's girlfriend leave the home. *Id.*

35. *Id.* at 193. The boy was four years old at the time. *Id.* His physician concluded that his condition was the result of head injuries inflicted over time, and they expected that he would live his life mentally retarded. *Id.*

36. *Id.*

37. *Id.* at 200.

38. *Id.* at 199-200. The Court explained that this duty may arise, for instance, when the state restrains a person's liberty to the extent that the person can no longer care for himself, or herself, and the state fails to provide the person with basic human needs. *Id.* at 200. The court described basic human needs as "food, clothing, shelter, medical care, and reasonable safety." *Id.* The Court also explained that examples of "restraining the individual's freedom to act on his own behalf [include] incarceration, institutionalization, or other similar restraints of personal liberty." *Id.* The Court further recognized in a footnote that if the boy's abuse had occurred at a state-operated foster home, an alternative duty may have arisen on the part of the state to protect him, because such circumstances would be closely analogous to incarceration or institutionalization. *Id.* at 201 n.9.

This principle was inapplicable in the *DeShaney* case, however, because the boy was in his father's custody at the time of the abuse.[39]

C. *Third Circuit Decisions on State Liability Under Section 1983 in the Public School Context*

The Third Circuit first confronted the issue of section 1983 governmental liability in the public school context in *Stoneking v. Bradford Area School District* (*Stoneking I*).[40] In *Stoneking I*, a student alleged that she was sexually molested by the band director at her public school.[41] She filed suit against the school district under section 1983, claiming that the school had violated her Fourteenth Amendment right to bodily integrity by failing to affirmatively protect her.[42]

In *Stoneking I*, the Third Circuit concluded that the public school had an affirmative duty to protect its students.[43] The court concluded that this duty arose from state compulsory education laws, *in loco parentis* statutes, and a broad common-law duty, which the court believed created a special custodial relationship between the students and the school.[44] After *Stoneking I* was decided, however, the United States

39. *Id.* at 201. The Court emphasized that the father was not a state actor and that the state did not create the danger of abuse or "do anything to render [the boy] any more vulnerable to [the abuse]." *Id.* The Court found it irrelevant that the state had taken temporary custody of the boy, because in returning him to his home, the state did not put him in a worse position than he would have been in had the state never taken any action at all. *Id.*

40. 856 F.2d 594 (3d Cir. 1988), *vacated sub nom.* Smith v. Stoneking, 489 U.S. 1062 (1989) (*Stoneking I*); 882 F.2d 720 (3d Cir. 1989), *cert. denied sub nom.* Smith v. Stoneking, 493 U.S. 1044 (1990) (*Stoneking II*).

41. *Stoneking I*, 856 F.2d at 595-96. Prior to these incidents, the principal had allegedly received a report from another female band member that the band director had tried to rape her. *Id.* at 595. The principal allegedly did not investigate the situation or notify authorities. *Id.* Instead, he allegedly instructed the student to make a public apology to the band director and told the band director to stay away from the female band members. *Id.* Finally, the plaintiff alleged that after she and a psychologist accused the band director of additional sexual abuse, he was eventually criminally prosecuted for sex-related crimes. *Id.* at 596.

42. *Id.* at 595-96. The basis of the student plaintiff's complaint was that the school had a "special relationship" with her, had knowledge of the sexual abuse or recklessly failed to discover it, and had failed to adopt a policy by which the school could investigate and convey student reports of abuse to the proper authorities. *Id.* at 596.

43. *Id.* at 603-04. Both *Stoneking I* and *Stoneking II* were heard before Third Circuit Judges Sloviter, Stapleton and Mansmann. *See id.* at 595; *Stoneking II*, 882 F.2d at 721. It is interesting to note that Judge Sloviter, author of the opinion of the court in *Stoneking I* and *Stoneking II*, wrote the dissenting opinion in *Middle Bucks*. *See* D.R. v. Middle Bucks Area Vo. Tech. Sch., 972 F.2d 1364, 1377 (3d Cir. 1992) (Sloviter, C.J., dissenting). Similarly, Judge Stapleton, who dissented in *Stoneking I* and *Stoneking II*, joined in the opinion of the court in *Middle Bucks*. *See id.* at 1365.

44. *Stoneking I*, 856 F.2d at 601-03. The Third Circuit explained that "[b]ecause students are placed in school at the command of the state and are not free to decline to attend, students are in what may be viewed as functional cus-

Supreme Court issued its opinion in *DeShaney*.[45] Consequently, the Supreme Court vacated the Third Circuit's decision in *Stoneking I* and remanded the case for "further consideration in light of *DeShaney*."[46]

On remand in *Smith v. Stoneking* (*Stoneking II*),[47] the Third Circuit explained that in light of *DeShaney* it could not base a duty to protect students from private actors upon the state statutory and common law duties relied upon in *Stoneking I*.[48] The Third Circuit recognized that the holding in *Stoneking I*, based upon a "special custodial relationship" between the public school and its students, was arguably not inconsistent with *DeShaney*.[49] Nonetheless, the Third Circuit refused to decide *Stoneking II* on special relationship grounds.[50] Instead, the court chose to determine whether the student's claim "would withstand summary judgment even if [it] could not rely on the special relationship which the Supreme Court's footnote in *DeShaney* may still leave as a viable basis for

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tody of the school authorities, at least at the time they are present." *Id.* at 601. According to the court, such circumstances give rise to a broad common law affirmative duty on the part of a public school to protect its students. *Id.* at 601-03. The court found further support for this special relationship in Pennsylvania's *in loco parentis* statutes, which grant a public school substantial authority over its students. *Id.* Pennsylvania's *in loco parentis* statute provides:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 PA. CONS. STAT. ANN. § 13-1317 (1992). For a discussion of Pennsylvania's compulsory education law, upon which the Third Circuit also relied in formulating its special relationship theory, see *supra* note 2.

45. For a discussion of the facts and holding in *DeShaney*, see *supra* notes 32-39 and accompanying text.

46. *Stoneking II*, 882 F.2d at 721.

47. 493 U.S. 1044 (1990).

48. *Stoneking II*, 882 F.2d at 723. The court concluded that *DeShaney* distinguished "affirmative duties of care and protection imposed by a state on its agents [from] constitutional duties to protect." *Id.* Therefore, the court decided that it could not rely on Pennsylvania law as a foundation for the conclusion that public schools have an affirmative duty to protect their students from harm by third parties. *Id.*

49. *Id.* In making this statement, the *Stoneking II* court relied on footnote 9 in *DeShaney*, which recognized that if the abuse had occurred at a state-operated foster home, an affirmative duty to protect may have arisen because this situation would be "sufficiently analogous to incarceration or institutionalization." *Id.* (citing *DeShaney*, 489 U.S. at 201 n.9). For the text of *DeShaney* footnote 9, see *supra* note 38. The Third Circuit also noted that the *DeShaney* Court had recognized several Courts of Appeals decisions in which such analogies were drawn. *Stoneking II*, 882 F.2d at 723-24.

50. *Stoneking II*, 882 F.2d at 724. Although the Third Circuit noted that the state foster home situation described in footnote 9 of *DeShaney* may be analogous to state custody in the school context, the court chose not to resolve the case on special relationship and affirmative duty grounds because "the uncertainty of the law in this respect may cause further delay." *Id.*

liability."[51] The Third Circuit then determined that the student's claim could withstand summary judgment on the grounds that the public school "maintained a practice, policy or custom" with deliberate indifference to the constitutional harm it caused.[52] The court concluded that this theory constituted grounds for public school liability that is independent and unrelated to the special relationship issue discussed in *DeShaney*.[53]

Consequently, the question of whether a special relationship exists in the public school context remained unresolved in the Third Circuit after *Stoneking II*. The majority of lower federal courts that have addressed the issue have held that public schools do not have a special relationship with their students that gives rise to an affirmative duty to protect them.[54] Other federal courts, however, have recognized that a public school has a custodial relationship with its students that gives rise to an affirmative duty to protect them.[55] These divergent outcomes are illustrative of the unsettled posture of the law in this area.[56] The decisions in these cases essentially turn on a matter of "constitutional line drawing," depending upon the level of restriction on liberty that a court

51. *Id.*

52. *Id.* at 725. The student plaintiff asserted that the public school's policy was to discourage and conceal student reports of sexual abuse and that this policy was responsible for the sexual abuse she experienced from the band director. *Id.* at 724-25. The court concluded that the existence of such a policy was properly a jury question. *Id.* at 725.

53. *Id.* at 725. The court found authority for this theory of liability in the Supreme Court case of City of Canton v. Harris, 489 U.S. 378 (1989). In *Canton*, the plaintiff was arrested and taken into custody by the police department. *Canton*, 489 U.S. at 381. She brought suit under § 1983 claiming that the police department had violated her constitutional rights by failing to provide her with medical treatment while she was in police custody. *Id.* The Court held that the state's failure to train police officers properly may be the basis for state liability under § 1983 if it "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388.

54. *See, e.g.*, Maldonado v. Josey, 975 F.2d 727, 731 (10th Cir. 1992) (holding that compulsory education laws do not restrain child's liberty to extent that Fourteenth Amendment is violated); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990) (holding that compulsory education laws do not restrain child's liberty so as to give rise to affirmative duty to protect child); Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405, 1415 (E.D. Ark. 1992) (holding that school district was not liable for sexual molestation of mentally handicapped student by another student because no special relationship existed).

55. *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 147 (5th Cir. 1992) (finding that school owes child duty of protection because child is in " 'functional custody' of school officials"); Waechter v. School Dist. No. 14-030, 773 F. Supp. 1005, 1009 (W.D. Mich. 1991) (finding special custodial relationship between student and teacher because teacher took control of student's liberty); Pagano v. Massapequa Public Schs., 714 F. Supp. 641, 643-44 (E.D.N.Y. 1989) (holding that students who alleged physical and verbal abuse by other students while in state's custody stated § 1983 claim).

56. For a list of cases exemplifying these divergent views, see *supra* notes 54-55.

determines to constitute custody for special relationship purposes.[57]

III. FACTS/PROCEDURAL HISTORY

D.R. and L.H. were two female students enrolled in a graphic arts class at Middle Bucks Area Vocational Technical School for the 1989-90 school year.[58] D.R. and L.H. maintained that, while attending this class, male students molested them sexually, physically and verbally.[59]

L.H. contended that her molestations began in December 1989, and D.R. contended that she was molested beginning in January 1990.[60] Both D.R. and L.H. alleged that the molestations lasted until May of 1990 and occurred approximately two to four times per week.[61] These sexual assaults allegedly took place in the darkroom and unisex bathroom of the graphic arts classroom.[62]

In December 1988, L.H. allegedly complained to James Bazzel, the Assistant Director of Middle Bucks Area Vocational Technical School, that a male student in the class had attempted to sexually molest her.[63] L.H. alleged the school did not respond to her complaint or take steps to rectify the situation in any way.[64] The student plaintiffs further asserted that other school officials were aware of the misconduct occurring in the classroom.[65]

D.R. and L.H. did not inform their teacher, Susan Peters, that these assaults occurred.[66] However, they contended that Ms. Peters heard or should have heard the episodes transpiring, either because Ms. Peters

57. *See Middle Bucks*, 972 F.2d at 1365 (noting that problem before court was "a classic case of constitutional line drawing in a most excruciating factual context").

58. *Id.* at 1366. D.R. was sixteen years old and L.H. was seventeen years old at the time. *Id.* at 1370. Under Pennsylvania state law, D.R. was considered an "exceptional" student because she was hearing impaired and had difficulty communicating effectively due to related speech problems. *Id.* at 1366 n.5. Although D.R. was a student in the Penn Ridge School District, the two districts agreed to let her attend the graphic arts class at Middle Bucks Area Vo-Tech due to her status as "exceptional." *Id.*

59. *Id.* at 1366. D.R. and L.H. alleged that male students forced them to perform acts of fellatio, touched their breasts and genitalia, sodomized them, forced them to watch the molestation of other students, forced them to touch the genitalia of the male students and also forced them to watch the male students offensively touch their teacher. *Id.*

60. *Id.* By contrast, the district court opinion stated that the assaults on D.R. occurred between January and April or May of 1989 and the assaults on L.H. occurred between December of 1988 and March or May of 1989. D.R. v. Middle Bucks Area Vo. Tech. Sch., Civ. A. Nos. 90-3018, 90-3060, 1991 WL 14082, at *2 (E.D. Pa. Feb. 1, 1991).

61. *Middle Bucks*, 972 F.2d at 1366.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* Ms. Peters was a student teacher. *Id.* D.R. and L.H. alleged that Ms.

was, or should have been, in the classroom at the time.[67] They further asserted that Ms. Peters personally observed misconduct in the main classroom.[68] Ms. Peters admitted that managing the students was difficult.[69]

In February, 1991 the student plaintiffs brought a section 1983 federal civil rights action in the United States District Court for the Eastern District of Pennsylvania.[70] They claimed that the school had violated their Fourteenth Amendment liberty interests in personal security by failing to affirmatively protect them from the sexual assaults.[71] The defendants filed a motion to dismiss for failure to state a claim upon which relief may be granted.[72]

The district court preliminarily opined that the school district had an affirmative duty to protect the students during school hours.[73] The

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Peters was not capable of teaching and protecting the students because she had not been sufficiently trained. *Middle Bucks*, 1991 WL 14082, at *2.

67. *Middle Bucks*, 972 F.2d at 1366.

68. *Id.* D.R. and L.H. alleged that Ms. Peters was offensively touched by male students in the class, observed other females in the classroom being offensively touched, and was exposed to obscene language and gestures by the male students. *Id.*

69. *Id.*

70. *Middle Bucks*, 1991 WL 14082, at *1. For a discussion of liability under § 1983, see *supra* notes 17-25 and accompanying text. The student plaintiffs also brought claims under § 1985(3) and Pennsylvania state law. *Middle Bucks*, 1991 WL 14082, at *1. Section 1985 of the U.S. Code creates a civil action for "[c]onspiracy to interfere with civil rights." 42 U.S.C. § 1985 (1988). Section 1985(3) provides, in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

71. *Middle Bucks*, 1991 WL 14082, at *1-2.

72. *Id.* at *1. The district court noted that the heightened specificity requirements that pleadings must meet under § 1983 do not change the requirements for a 12(b)(6) motion to dismiss. *Id.* at *3. The district court then stated that the proper question to be answered was whether the pleadings were sufficient to show that the student plaintiffs' complaint was not frivolous, and that the defendants had sufficient notice to respond. *Id.*

73. *Id.* at *6. Specifically, the district court stated that "[b]ecause school districts do have a duty to protect students from each other while on school property, during school hours, [it] must [be] determine[d] whether the school districts in question recklessly abandoned this duty." *Id.* However, in a footnote to this statement, the court explained that because the law in this area is unsettled, the defendant school districts arguably could not have recklessly "abandoned a known duty." *Id.* at *6 n.2. Nonetheless, the court explained that it would be unnecessary to address this argument because the facts of the case, as

court derived this duty from the custodial relationship it found to exist between a public school and its students as a result of compulsory education, *in loco parentis* and truancy laws.[74] Notwithstanding this conclusion, the district court dismissed the student plaintiffs' complaints because it concluded that they had failed to plead sufficient facts to establish that the defendant school districts had breached this duty with reckless indifference.[75] Thereafter, the student plaintiffs appealed to the United States Court of Appeals for the Third Circuit.[76]

IV. THE THIRD CIRCUIT'S ANALYSIS

A. *The Middle Bucks Majority*

In *Middle Bucks*, the Third Circuit majority commenced its analysis by recognizing that students have a constitutional liberty interest in bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment.[77] The Third Circuit then addressed each of the four theories asserted by the student plaintiffs to establish that the defendant school districts deprived them of this constitutional right.[78] These theories were: 1) that a special relationship existed between the student plaintiffs and the school district defendants, thus creating a duty on the part of the school to protect the students from danger; 2) that the violation of the student plaintiffs' Fourteenth Amendment constitutional rights resulted from a danger created by the public schools; 3) that the public school's policy, custom or practice permitted harm to the student plaintiffs, thus violating their constitutional rights; and 4) that the school district defendants conspired to deprive the student plaintiffs of their constitutional rights.[79]

First, the Third Circuit addressed the issue of whether a special re-

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pled, were not sufficient to support a § 1983 action. *Id.* The Third Circuit interpreted the district court's opinion as holding that "a special custodial relationship between plaintiffs and the school defendants was established by virtue of the state's compulsory attendance and truancy laws." *Middle Bucks*, 972 F.2d at 1367.

74. *Middle Bucks*, 1991 WL 14082, at *6. For a summary of Pennsylvania's compulsory attendance and truancy laws, see *supra* note 2.

75. *Middle Bucks*, 1991 WL 14082, at *7. The district court concluded that the school did not act with reckless indifference because it did not have sufficient knowledge of the occurrences of sexual molestation. *Id.* The district court further asserted that the school's conduct may have been negligent, but that mere negligence would not be enough to generate § 1983 liability. *See id.* at *3, 11.

76. For a full discussion of the Third Circuit's opinion, see *infra* notes 77-111 and accompanying text.

77. *Middle Bucks*, 972 F.2d at 1368. The Third Circuit began its analysis in this manner because it perceived the first question to be addressed in a § 1983 action to be "whether a plaintiff sufficiently alleges a deprivation of any right secured by the constitution." *Id.* at 1367.

78. *Id.* at 1368-77.

79. *Id.* at 1368. For a full discussion of each of the student plaintiffs' four theories in turn, see *infra* notes 80-99 and accompanying text.

lationship existed between the students and the public school, which would generate an affirmative duty on the part of the school to protect the students.[80] The court recognized that although the Due Process Clause does not generally impose a duty on the state to protect its citizens, such an affirmative duty may arise when a special relationship exists between the state and a particular citizen.[81] The court explained that "[t]his liability attaches under [section] 1983 when the state fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty."[82] To determine whether the requisite special relationship existed, the court looked to the United States Supreme Court's opinion in *DeShaney*.[83]

The Third Circuit recognized that while *DeShaney* rejected the idea that an affirmative duty to protect could arise when a person is not in state custody, *DeShaney* left open the possibility that a duty may be owed to "other categories of persons in custody by means of [incarceration, institutionalization, or] 'similar restraints of personal liberty.' "[84] The court thus framed the issue in *Middle Bucks* as whether the students' liberty was so restrained by the state as a result of compulsory attendance and *in loco parentis* authority that the students could not adequately protect themselves.[85]

The Third Circuit concluded that a special relationship based on restraint of liberty did not exist for section 1983 purposes based on the facts presented in *Middle Bucks*.[86] In reaching this conclusion, the court emphasized that the students were free to return home in the evening, that their parents remained their primary caretakers, and that the school "did not restrict [either plaintiff's] freedom to the extent that she was prevented from meeting her basic needs," as required by *DeShaney*.[87]

Second, the Third Circuit addressed the issue of whether the public school was responsible for creating the danger leading to the alleged violations of the student plaintiffs' constitutional rights.[88] The court recognized that the state-created danger theory could be used to impose an affirmative duty to protect under section 1983, even if no special custodial relationship existed.[89] However, as noted in *DeShaney*, the Third Circuit recognized that awareness of such danger on the part of the state

80. *Middle Bucks*, 972 F.2d at 1368-69.

81. *Id.* at 1369.

82. *Id.*

83. *Id.* For a discussion of the facts and holding of *DeShaney*, see *supra* notes 32-39 and accompanying text.

84. *Middle Bucks*, 972 F.2d at 1370 (quoting DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 200 (1989)).

85. *Id.* at 1370.

86. *Id.* at 1373.

87. *Id.* at 1372; *see DeShaney*, 489 U.S. at 199-200.

88. *Middle Bucks*, 972 F.2d at 1373.

89. *Id.*

alone is insufficient to create section 1983 liability.[90] Rather, in order to be liable under section 1983, the state must have played an active part in creating the danger, or in making the plaintiff more vulnerable to the danger.[91] The Third Circuit rejected the notion that the public school's acts of assigning Ms. Peters to manage the class, setting up the classroom and darkroom, and providing a unisex bathroom increased the danger to the student plaintiffs.[92] The Third Circuit also rejected the plaintiffs' contention that the school district increased the danger to the students by failing to notify the authorities.[93] The court additionally noted that a violation of state law is not sufficient to set forth a section 1983 federal civil rights violation claim.[94] Thus, the student plaintiffs' assertion that the defendants failed to report the abuse to the students' parents or the proper authorities, allegedly violating state reporting laws, did not establish a violation of section 1983.[95]

Next, the Third Circuit considered whether the defendant school districts were liable on a *Stoneking II* theory for "deliberately and recklessly establishing and maintaining a custom, practice or policy which caused harm to a student."[96] The court concluded that the school districts were not liable because the harm was caused by a private third party actor and was not a violation by state actors.[97]

Finally, the Third Circuit considered whether the defendant school districts had conspired to deprive the student plaintiffs of their civil rights.[98] The court concluded that no facts were alleged to support such a claim.[99]

B. *The Middle Bucks Dissent*

In *Middle Bucks*, five judges dissented from the court's decision.[100]

90. *Id.*

91. *Id.*

92. *Id.* at 1375. The Third Circuit concluded that the same abuse could have occurred even if the bathroom was not a unisex bathroom. *Id.* Further, the court rejected the theory that the darkroom created a dangerous environment merely because the darkroom had to be closed off from the main classroom in order to serve its purpose. *Id.*

93. *Id.*

94. *Id.* Rather, the court concluded that in order to state a § 1983 claim, the violation alleged must be one of federal statutory law or constitutional rights, and not merely a violation of a state law duty. *Id.*

95. *Id.*

96. *Id.* at 1376; *see Stoneking II*, 882 F.2d at 725. For a discussion of this theory of § 1983 liability, as stated in *Stoneking II* and based upon the Supreme Court case of City of Canton v. Harris, 489 U.S. 378 (1989), see *supra* note 53 and accompanying text.

97. *Middle Bucks*, 972 F.2d at 1376.

98. *Id.* at 1376-77.

99. *Id.* at 1377.

100. *Middle Bucks*, 972 F.2d at 1377-84 (Sloviter, C.J. and Becker, J., dissenting). One dissenting opinion was written by Chief Judge Sloviter and joined

The dissent primarily rejected the majority's application of *DeShaney*.[101] Specifically, the dissenters believed that the factors involved in *Middle Bucks* combined to create a special relationship between the students and the public school giving rise to an affirmative duty on the part of the school to protect the students.[102] These factors included the existence of state compulsory education laws, the status of the students as minors, the authority given to the public schools by the state to control the students, and the control the public school exercised over the students while the students were in school.[103]

After concluding that this prerequisite special relationship existed, the dissenters discussed whether the student plaintiffs had sufficiently alleged "deliberate and reckless indifference by school officials."[104] The dissenters concluded that because the public school's employees knew of the misconduct taking place in the classroom and did nothing to stop it, the school employees' conduct amounted to deliberate and reckless indifference.[105]

The dissenters distinguished *DeShaney* from *Middle Bucks* on several grounds.[106] First, the dissenters noted that in *DeShaney* the Supreme Court did not merely limit the scope of physical custody to incarceration or institutionalization, but recognized that it could occur through "other similar restraint[s] of personal liberty."[107] The dissenters thus argued that the *DeShaney* holding did not prevent the court from finding that compulsory school attendance may qualify as a restraint of personal lib-

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by Judges Mansmann, Scirica and Nygaard. *Id.* at 1377 (Sloviter, C.J., dissenting). Another dissenting opinion was written by Judge Becker. *Id.* at 1384 (Becker, J., dissenting).

101. *Id.* at 1377 (Sloviter, C.J., dissenting). Chief Judge Sloviter wrote:

> [t]he majority opinion is based on the premise that the types of relationships which can give rise to a constitutional duty of a state to protect its school children from harm from third parties is mandated by the Supreme Court's opinion in *DeShaney* . . . . I believe that is too narrow a reading of *DeShaney*, and that the scope of the Due Process Clause's duty to protect, while limited, extends beyond the narrow compass of those persons involuntarily committed to prisons and mental institutions.

Id. (Sloviter, C.J., dissenting).

102. *Id.* at 1377 (Sloviter, C.J., dissenting).

103. *Id.* (Sloviter, C.J., dissenting).

104. *Id.* at 1378 (Sloviter, C.J., dissenting). The dissenters explained that "[t]he majority does not address the question whether the plaintiffs adequately asserted a claim under the standards of culpability applicable to claims under 42 U.S.C. § 1983." *Id.* (Sloviter, C.J., dissenting).

105. *Id.* at 1378 (Sloviter, C.J., dissenting). However, the dissenters recognized that because the harm was inflicted by private third parties and not by school officials, an issue remained as to whether the school district itself deprived the student plaintiffs of their Fourteenth Amendment liberty interest. *Id.* at 1378-79 (Sloviter, C.J., dissenting).

106. *See id.* at 1379-83 (Sloviter, C.J., dissenting).

107. *Id.* at 1379 (Sloviter, C.J., dissenting) (quoting DeShaney v. Winnebago County Department of Social Services, 498 U.S. 189, 200 (1989)).

erty.[108] The dissenting opinion also criticized the majority for emphasizing that children have the option of attending a private school, or pursuing education at home, as alternatives to attending public school.[109] Finally, the dissent distinguished *DeShaney* by emphasizing that the injury in *DeShaney* did not occur while the child was in the custody of the state, whereas the injury to the students in *Middle Bucks* occurred during school hours.[110] The *Middle Bucks* dissenters thus concluded that the state owed "immature school children attending public school who are seriously injured as a result of a policy of deliberate indifference to their danger no less a remedy than we are willing to provide to incarcerated criminals."[111]

V. CONCLUSION

Until the United States Supreme Court further defines the parameters of state liability under section 1983 in the public school context, the Third Circuit's decision in *Middle Bucks* will serve an important example for other courts. The Third Circuit's decision essentially eliminated public school liability under section 1983 based on the theory of a special custodial relationship. This will seriously impair the ability of the public school students to recover for sexual abuse that they suffer at public schools. As a result of the Third Circuit's opinion in *Middle Bucks*, public school students who wish to bring actions under section 1983 will need to explore other theories. More importantly, by rejecting the special relationship theory in the school context, the *Middle Bucks* court has left school children unprotected from physical and sexual abuse.

In light of the increasing instances of child abuse reported at schools, future courts should reconsider the special relationship grounds to protect students. The courts' special relationship analysis should focus not only on the control that the state asserts, but also on the extent that the state has created the victim's dependency.[112] Courts

108. *Id.* The dissenters explained that

> *DeShaney* contains no language to support the majority's holding that the duty to protect can be triggered only by involuntary, round-the-clock, legal custody. Nothing in the opinion suggests that compulsory school attendance cannot qualify as the type of state restraint of personal liberty which gives rise to a duty to protect.

Id. at 1379 (Sloviter, C.J., dissenting). The dissent thus concluded that "*DeShaney* requires [only] that the state have imposed some kind of limitation on a victim's ability to act in his own interests." *Id.* (Sloviter, C.J., dissenting) (quoting Horton v. Flenory, 889 F.2d 454, 458 (3d Cir. 1989)).

109. *Middle Bucks*, 972 F.2d at 1380.

110. *Id.* at 1380-81.

111. *Id.* at 1384.

112. *See* Huefner, Note, *supra* note 3, at 1957. One commentator noted that

> courts seeking to determine the custodial nature of victim-state relationships in section 1983 actions . . . should be concerned principally with the extent to which the state, by limiting the victim's freedom or by taking upon itself the resonsibility for some of her care, increases the

could also consider permitting exceptions to the rule that the school does not have a special relationship with its students when the student can show that such a relationship was established through exceptional circumstances.[113] Until a standard is adopted that will obligate the school to protect its students, the problem of sexual abuse will continue.

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victim's dependence on state protection. Affirmative duties should exist whenever the state has created this dependency, regardless of whether it arises out of a relationship that is technically custodial.

Id.

113. *See* Valente, *supra* note 1, at 1027 (arguing that "[c]ourts could establish a presumptive rule that no special relationships exist between the school and the general student body, but still allow exceptions where a claimant demonstrates exceptional circumstances that justify a finding that the school relationship is akin to full custody.")