

# The University of New Hampshire Law Review

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Volume 2

Number 2 *Pierce Law Review*

Article 7

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June 2004

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### Repository Citation

Alison Bethel, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 *Pierce L. Rev.* 183 (2004), available at [http://scholars.unh.edu/unh\\_lr/vol2/iss2/7](http://scholars.unh.edu/unh_lr/vol2/iss2/7)

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## Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students

ALISON BETHEL\*

[E]ducation is perhaps the most important function of state and local governments. . . . *Brown v. Board of Education*.<sup>1</sup>

### I. INTRODUCTION

Cleveland, Ohio, November 2003: Three eighth-grade boys tie jump ropes around the legs and neck of a sixth-grade boy and drag him around the school's stage during gym class.<sup>2</sup> None of the three teachers on duty see the incident and the boy is left at the mercy of the bullies until they grow tired of torturing him.<sup>3</sup> Monroe, Louisiana, October 2003: A fourteen year-old boy enters his classroom and pulls out a gun, leaving with his teacher's keys and a fellow classmate as hostage.<sup>4</sup> He leads police on a high-speed chase, before surrendering near the Arkansas state line.<sup>5</sup> Boston, Massachusetts, September 2003: A fight breaks out on an overcrowded school bus - a twelve year-old stabs another twelve year-old in the chest.<sup>6</sup> Minneapolis, Minnesota, September 2003: A high school student shoots two fellow students during gym class, killing both.<sup>7</sup> New Orleans, Louisiana, September 2003: Eight girls are arrested after one girl is stabbed

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1. 347 U.S. 483, 493 (1954) (“ . . . it is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”).

2. Ebony Reed & Janet Okoben, *Schools Fail to Expel Crime; Hundreds of Assaults, Fights Occur in Cleveland Schools, Statistics Show*, Plain Dealer (Cleveland, Ohio) A1 (Nov. 9, 2003).

3. *Id.*

4. Robbie Evans, *Police Halt Armed Teen*, The News-Star (Monroe, La.) A-1A (Oct. 30, 2003).

5. *Id.*

6. Megan Tench, *Boy, 12, Charged in Bus Stabbing 7th-Grade Victim in Stable Condition*, The Boston Globe B1 (Sept. 25, 2003).

7. James Walsh & Randy Furst, *Cold Spring School Shooting; Both Teenagers are Described as Well-Liked*, Star Tribune (Minneapolis, Minn.) 12A (Sept. 25, 2003).

during a fight at a high school.<sup>8</sup> Littleton, Colorado, April 1999: fifteen people, students and teachers, are killed before the two responsible for the deaths, students at Columbine High School, take their own lives.<sup>9</sup>

These are but a few of the many instances of school violence which fill newspapers throughout our country each day. While the situation is not as grim as some news reporters make it out to be,<sup>10</sup> school-violence is still all too common.<sup>11</sup> During the 2002-03 school year sixteen students died as a result of school-associated violence, and scores of others were injured.<sup>12</sup> And while the number of homicides occurring at schools has decreased, the percentage of students who are victims of school bullies has increased.<sup>13</sup> In addition, students fear more for their safety at school, or traveling to and from school, than they do when they are away from school.<sup>14</sup>

Federal statutes have attempted to make schools safer by providing grants to assist schools in becoming violence-free.<sup>15</sup> Similarly, some states have passed “bullying laws,” which mandate procedures for school officials to follow when dealing with bullying.<sup>16</sup> These statutes, however, do not provide adequate remedies for students who are harmed by their peers

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8. *Eight Girls Held, Three Sought in Stabbing; Cohen High Student is Cut in School Fight*, Times-Picayune (New Orleans, La.) Metro 1 (Sept. 10, 2003).

9. Mark Obmascik, *Healing Begins Colorado, World Mourn Deaths at Columbine High*, The Denver Post (Denver, Colo.) A-01 (Apr. 22, 1999).

10. Between July 1, 1998 and June 30, 2003 the number of homicides that occurred at schools decreased from thirty-three during the 1998-99 school year to fourteen during the 2001-02 school year. National Center for Education Statistics & Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2003*, 54 <http://nces.ed.gov/pubs2004/2004004.pdf> (accessed Apr. 30, 2004) [hereinafter *Indicators of School Crime*].

11. Although decreasing, school violence is a worldwide epidemic. See e.g. Ian Johnston, *The Stabbing to Death of 14-Year-Old Luke Walmsley Shocked the Country. So Why Weren't the Police Surprised?* Scotland on Sunday (Scotland) 14 (Nov. 9, 2003).

12. *Indicators of School Crime*, supra n. 10, at 2. (The deaths resulted from homicide, suicide, unintentional shootings on school-grounds, and legal intervention). During the 2001-2002 school year, there were seventeen school-related violent deaths. National School Safety and Security Services, *School Deaths, School Shootings and High-Profile Incidents of School Violence*, [http://www.schoolsecurity.org/trends/school\\_violence.html](http://www.schoolsecurity.org/trends/school_violence.html) (accessed Apr. 30, 2004).

13. *Indicators of School Crime*, supra n. 10, at 16. The percentage of students indicating that they are bullied increased from five percent in 1999 to eight percent in 2001. *Id.*

14. *Id.* at 36 (this report was consistent in 1999 and 2001); see also National Center for Education Statistics & Bureau of Justice Statistics, *Percent of Students in Grades 9 Through 12 Who Reported Experience with Drugs and Violence on School Property, by Race/Ethnicity, Grade, and Sex: 1997, 1999, and 2001*, <http://nces.ed.gov/programs/digest/d02/tables/dt146.asp> (accessed Apr. 30, 2004) (In 2001, 6.6% of students reported that they felt too unsafe to go to school; in 1999, only 5.2% of students had reported the same. In 2001, 8.9% of students reported that they were threatened or injured with a weapon on school property; in 1999, only 7.7% of students reported similar threats or injuries).

15. See e.g. 20 U.S.C. § 5965(a)(8) (2000) (schools receiving grant funds under the Safe Schools Act can choose to use the funds for violence prevention activities).

16. See e.g. Conn. Gen. Stat. § 10-222d (2003) (requiring regional and local school boards develop policies to address school bullying); N.H. Rev. Stat. Ann. § 193-F *et seq.* (2003) (pupil safety and violence prevention); W. Va. Code § 18-2C-3 (2003) (policy prohibiting bullying and harassment).

during the school day.<sup>17</sup> The majority of courts that have addressed student-on-student violence have declined to hold that compulsory education creates the type of special relationship needed to impose an affirmative duty on schools to protect students from harm by other students.<sup>18</sup> While I agree that compulsory education laws do not restrain students' freedom in the same manner as, for example, a jailor restrains a prisoner,<sup>19</sup> compulsory education laws do restrict students' freedom by requiring students to attend school, under the care of their teachers.<sup>20</sup> When teachers or school officials reasonably believe that students are being harmed by their peers, they should be required to inform their superiors who in turn should inform the parents. Teachers who know that one student is harming another student should have a duty to protect that student from harm. Requiring school officials to protect students from actual harm would, at the very least, make schools feel safer to students,<sup>21</sup> thereby creating school environments more conducive to learning.<sup>22</sup>

This article argues that federal law should impose on school officials an affirmative, albeit limited, duty to protect students from harm by other students when school officials know, or reasonably should know, that students are harming other students. Part II of the article contains a brief historical overview of the official liability under 42 U.S.C. § 1983, as well as the current theories for holding state officials liable for harm caused by private actors. Part III discusses some recent cases where parents of children injured at school by other students have sued a school or school official(s) under section 1983. The decisions in these cases represent the ma-

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17. See 20 U.S.C. § 5812 (2000) (establishing national educational goals but no student remedies if goals are not accomplished); 20 U.S.C. §5961 (2000) (indicating that the purpose of the Safe Schools Act is to assist school systems in creating and maintaining drug-free and violence-free schools by the year 2000); Conn. Gen. Stat. § 10-222d (no requirement that bullying policies include remedies other than reporting).

18. See *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989) (holding that absent limited exceptions, the State does not have an affirmative duty to protect citizens from harm caused by private actors). *DeShaney* will be discussed in detail in part II, *infra*. See e.g. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (holding that the typical school-student relationship is not one of the recognized exceptions discussed in *DeShaney*); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir.1992).

19. The following are examples of instances where courts have found that a special relationship exists between individuals and the state: *Estelle v. Gamble*, 429 U.S. 97 (1976) (prisoners); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed patients); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983) (persons injured while being apprehended by police); *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994) (students living at state operated residential schools), *aff'd* 41 F.3d 1497 (11th Cir. 1995).

20. See e.g. N.H. Rev. Stat. Ann. § 193:1 (2003) (requiring parents to send children between the ages of six and sixteen to school).

21. *Indicators of School Crime*, *supra* n. 10, at 36 (“[s]chool violence can make students fearful and affect their readiness and ability to learn”).

22. *N.J. v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell & O'Connor, JJ., concurring) (“[w]ithout first . . . maintaining order, teachers cannot begin to educate their students”).

majority view that schools do not have an affirmative duty under the Due Process Clause to protect students from harm by other students.<sup>23</sup> Part IV discusses the minority view, which imposes a duty under certain circumstances. Part V describes other remedies available to students who are harmed by other students, and discusses some state responses to school violence. Part VI argues that courts should adopt the minority view and impose a limited duty on schools, thus requiring school officials to protect students when they are aware or have a reasonable belief that students are being harmed by other students. The article concludes with the policy reasons that support a limited duty, and the implications of imposing such a duty on schools.

## II. HISTORICAL OVERVIEW

The Due Process Clause of the Fourteenth Amendment guarantees that the states will not “deprive any person of life, liberty, or property, without due process of law...”<sup>24</sup> While this guarantee may protect individuals from “certain government actions,”<sup>25</sup> it does not provide a remedy for the individual whose rights are violated. 42 U.S.C. § 1983 was enacted to provide a means of redress for individuals harmed by state actors.<sup>26</sup> To prove that a section 1983 violation occurred, a plaintiff must show: “1) that an act or omission deprived [the] Plaintiff of a right, privilege or immunity secured by the Constitution or laws of the U.S.; and 2) that the act or omission was done by a person acting under color of law.”<sup>27</sup>

The Due Process Clause does not impose an affirmative duty of protection on the states, unless a state actor causes the harm.<sup>28</sup> Consequently, section 1983 is generally not available to individuals who are injured by private actors, even when the state has notice of the potential for harm, or has notice that an actual harm is occurring.<sup>29</sup> In *DeShaney v. Winnebago*

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23. Many courts have imposed liability on schools when students have been injured by their teachers or other school employees. See *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992); *Canty v. Old Rochester Regl. Sch. Dist.*, 54 F.Supp.2d 66 (D. Mass. 1999); *C.M. v. Southeast Delco Sch. Dist.*, 828 F.Supp. 1179 (E.D. Pa. 1993); *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995).

24. U.S. Const. amend. XIV, § 1.

25. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (examples of government actions that individuals are entitled to protection from include intentional destruction of property, stomach pumping, and excessive corporal punishment).

26. Section 1983 states “[e]very person who, under color of any statute, ordinance, regulation, custom or usage, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” 42 U.S.C. § 1983 (2000). Damages are available to parties who can prove liability under § 1983.

27. *Nizioi v. Dist. Sch. Bd. of Pasco County, Fla.*, 240 F.Supp.2d 1194, 1203 (D. Fla. 2002).

28. *DeShaney*, 489 U.S. at 197.

29. *Id.* at 195.

*County Department of Social Services*, the state social services office received notice that Joshua DeShaney, a two-year-old child, was being abused by his father.<sup>30</sup> The State allowed DeShaney to continue living with his father, even though social workers making visits to their home suspected child abuse.<sup>31</sup> Ultimately, DeShaney's father beat him into a coma.<sup>32</sup> DeShaney's mother sued the state under section 1983, alleging that the Department of Social Services deprived Joshua of his Fourteenth Amendment rights by permitting him to remain in his father's custody when they suspected that Joshua was being abused by his father.<sup>33</sup>

In rejecting DeShaney's section 1983 claim, the Supreme Court first instructed that the Due Process Clause does not require the state to protect individuals from harm inflicted by private actors.<sup>34</sup> The Court then noted two exceptions to that rule: the state-created danger exception and the special relationship exception.<sup>35</sup> Under the state-created danger exception, the state is liable for harm caused by private actors when the state either creates or enhances the danger that caused the harm.<sup>36</sup> The Court held that this exception did not apply because the state's failure to remove Joshua from his father's custody did not create or enhance the harm that Joshua suffered.<sup>37</sup>

The Court also held the special relationship exception inapplicable because the State did not restrict DeShaney's "freedom to act on his own behalf."<sup>38</sup> The Court stated that a special relationship is formed

when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its ex-

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30. *Id.* at 192.

31. *Id.* at 192-193.

32. *Id.* at 193.

33. *Id.*

34. *Id.* at 195.

35. *Id.* at 198-202.

36. *Id.* at 201. Victims of school violence have attempted to use the state created danger exception to impose § 1983 liability on schools for harms caused by private actors and courts generally hold that this exception does not apply in the school setting. See e.g. *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200-202 (5th Cir. 1994). For additional analysis of the state created danger exception see Thomas J. Sullivan & Richard L. Bitter, Jr., *Abused Children, Schools, and the Affirmative Duty to Protect: How the DeShaney Decision Cast Children into a Constitutional Void*, 13 Geo. Mason U. Civ. Rights L.J. 243 (2003); Joseph M. Pellicciotti, "State-Created Danger," or Similar Theory, as Basis for Civil Rights Action Under 42 U.S.C.A. § 1983, 159 A.L.R. Fed. 37 (2000).

37. *DeShaney*, 489 U.S. at 201.

38. *Id.* at 200.

pressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . [I]t is the State's affirmative act of restraining the individuals' freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.<sup>39</sup>

Since DeShaney was not in state custody when harmed, his freedom was not then restrained by the state and the special relationship exception did not apply.<sup>40</sup> Thus, the state was not liable for his injuries.<sup>41</sup>

When a special relationship exists the state has an affirmative duty to protect individuals from harm, even if the individual causing the harm is a private actor.<sup>42</sup> Thus far, courts have held that a special relationship exists only in certain situations, including in prisons,<sup>43</sup> state-operated residential schools,<sup>44</sup> and where patients have been committed involuntarily.<sup>45</sup> As the following section illustrates, most courts have declined to hold that compulsory education laws create the type of special relationship that, under *DeShaney*, would require the states to protect citizens from harm by private actors.<sup>46</sup>

### III. MAJORITY VIEW: NO DUTY

Alleging violations of section 1983, parents of children injured by other students have tried to hold schools and school officials liable.<sup>47</sup> Post-*DeShaney*, these parents have argued that, by requiring students to attend school, the state compulsory education laws create a special relationship between students and school officials, who act under color of state law.<sup>48</sup> Most courts, however, have rejected this argument, holding that compulsory education laws do not create a special relationship, and therefore,

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39. *Id.* (citations omitted).

40. *Id.* at 201.

41. *Id.* at 203.

42. *Id.* at 200.

43. *Estelle*, 429 U.S. at 103-104.

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

45. *Youngberg*, 457 U.S. at 316.

46. *See e.g. D.R.*, 972 F.2d at 1372.

47. *See e.g. D.R.*, 972 F.2d 1364; *Graham v. Indep. Sch. Dist.*, 22 F.3d 991 (10th Cir. 1994); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F.Supp. 1006 (W.D. Mo. 1995); *Young v. Austin Indep. Sch. Dist.*, 885 F.Supp. 972 (W.D. Tex. 1995) *B.M.H. v. Sch. Bd. of the City of Chesapeake, Va.*, 833 F.Supp. 560 (E.D. Va. 1993).

48. *See e.g. D.R.*, 972 F.2d at 1367.

school officials have no affirmative duty to protect students from harm by other students.<sup>49</sup>

In *D.R. v. Middle Bucks Area Vocational Technical School*, D.R. alleged that she and a fellow student were physically, verbally, and sexually assaulted by several male students in a school bathroom.<sup>50</sup> D.R. claimed that the male students forced her into the bathroom, which adjoined the classroom, on a regular basis (an average of two to four times per week for a period of four months) and argued that her teacher should have been in the classroom while the acts were occurring and heard, or should have heard, the assaults taking place.<sup>51</sup> The district court held that Pennsylvania's compulsory education laws created a special relationship between the students and the school officials, which in turn created an affirmative duty requiring school officials to protect plaintiffs from the injuries caused by their fellow students.<sup>52</sup>

The Third Circuit Court of Appeals reversed the district court's ruling, reasoning that although the state compulsory education laws mandate attendance, parents, and not school officials, are still the students' "primary caretakers."<sup>53</sup> Pennsylvania law permits parents to determine *where* their children will be educated.<sup>54</sup> It also gives parents who enroll their children in public schools the right to withdraw their children from specific classes.<sup>55</sup> Thus, according to the court, the state's requirement that children receive an education does not restrict students' freedom to the extent that they are unable to meet their own basic needs.<sup>56</sup> "Although these acts allegedly took place during the school day, the court found that "D.R. could, and did, leave the school building every day."<sup>57</sup> The state did nothing to restrict her liberty after school hours and thus did not deny her

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49. See e.g. *Graham*, 22 F.3d 991. Prior to *DeShaney*, at least one court had held that compulsory education laws puts "students . . . in what may be viewed as functional custody of the school authorities" and thereby created a custodial relationship that placed an affirmative duty on school officials to protect students from harm. *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 601 (3d Cir. 1988), *aff'd on other grounds*, 882 F.2d 720 (3d Cir. 1989) (distinguishing *DeShaney*, where the harm was caused by a private actor, from these facts where the student was harmed by a public school official).

50. *D.R.*, 972 F.2d at 1366.

51. *Id.*

52. *Id.* at 1367 (the district court dismissed the complaint because the allegations did not establish that the school had knowledge of the incidents to establish reckless indifference, as required under § 1983).

53. *Id.* at 1371.

54. *Id.* (indicating that children can receive an education at a public or private school, or be home-schooled).

55. *Id.* (citing Pa. Stat. Ann. tit 24, § 15-1546 (1962 & Supp. 1991) (religious instruction); 22 Pa. Code § 11.26 (1992) (non-school sponsored educational trips and tours); Pa. Stat. Ann. tit. 24, §13-1329 (1962) (healthcare)).

56. *Id.* at 1372. The court also noted that the state law granting teachers and principals *in loco parentis* status did not affect the parents' status as primary caretakers. *Id.* at 1371.

57. *Id.* at 1372.



meaningful access to sources of help.”<sup>58</sup> Since the compulsory education laws did not create a special relationship, school officials had no affirmative duty to protect D.R. from harm.<sup>59</sup>

Similarly, in *Dorothy J. v. Little Rock School District*, the Eighth Circuit rejected the plaintiff’s argument that compulsory education laws created a special relationship that would impose an affirmative duty on school officials.<sup>60</sup> In *Dorothy J.*, a “mentally retarded ward of the State” sexually assaulted and raped another student while in class at their high school.<sup>61</sup> Dorothy J., the mother of the student victim, sued the school district, alleging a violation of section 1983.<sup>62</sup> Relying on cases from other circuits,<sup>63</sup> the Eighth Circuit held that compulsory education laws do not create the type of custodial relationship that imposes a duty to protect upon the State.<sup>64</sup> “Public school attendance does not render a child’s guardians unable to care for the child’s basic needs. In this regard, public schools are simply not analogous to prisons and mental institutions.”<sup>65</sup> Thus, the Eighth Circuit held that compulsory education laws did not create a special relationship between students and the school.<sup>66</sup>

Most recently, in *Crispim v. Athanson*, the United States District Court for the District of Connecticut held that public elementary school officials were not liable to a student who was repeatedly harassed by other students because compulsory education laws do not create a special relationship between students and the state.<sup>67</sup> Crispim alleged that her son, an elementary school student, was harassed by other students both during and after school hours.<sup>68</sup> Although school officials were notified and the children harassing Crispim’s son were identified, nothing was done to prevent the harassment from continuing during school hours.<sup>69</sup> The harassment continued until Crispim removed her son from school and moved to a nearby town to enroll him in its public school system.<sup>70</sup> Crispim sued several school officials, alleging violations of section 1983.<sup>71</sup> The court noted that

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58. *Id.*

59. *Id.* at 1376. The court also discussed, and rejected, the state-created danger theory as an alternate basis for liability. *Id.* at 1373-1376.

60. 7 F.3d 729, 734 (8th Cir. 1993).

61. *Id.* at 731.

62. *Id.*

63. See *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990); *D.R.*, 972 F.2d 1364, 1369-73; *Maldonado*, 975 F.2d at 731-733.

64. *Id.* at 732.

65. *Id.*

66. *Id.*

67. 275 F.Supp.2d 240 (D. Conn. 2003).

68. *Id.* at 243.

69. *Id.*

70. *Id.* at 244.

71. *Id.* at 242-244.

a few courts have imposed a limited duty on school officials to protect students from certain harms, but declined to follow those cases.<sup>72</sup> Following the majority view, the court reasoned that since parents have the right to decide where their children will be educated, they remain the primary caretakers of their children.<sup>73</sup> Because students remain able to provide for their own basic needs, compulsory education laws do not create a special relationship that would impose a duty on the school to protect students from harm.<sup>74</sup>

Post-*DeShaney*, the majority of courts, reasoning that compulsory education laws do not render students or their parents unable to care for the child's basic needs, have held that schools have no affirmative duty to protect students from harm by other students.<sup>75</sup> As the following section illustrates, however, a few courts have held that compulsory education laws do impose on schools a limited duty to protect students from harm by other students. The limited duty imposed by these courts requires schools to protect students from "foreseeable risks of injury or loss of life"<sup>76</sup> and from behavior that shocks the conscience.<sup>77</sup>

#### IV. MINORITY VIEW: A LIMITED DUTY

A few courts have imposed a limited duty on schools, requiring school officials to protect students from harm inflicted by other students.<sup>78</sup> These courts reasoned that although parents remain the primary caretakers, schools should protect students who, because of compulsory education laws, are in the care and supervision of school officials during school-hours.<sup>79</sup> These courts have not made the duty absolute, but they recognized that compulsory education laws do restrain the freedom of students and parents, and consequently mandate limited protection for students during school-hours.<sup>80</sup>

*Pagano v. Massapequa Public Schools* was the first case, post-*DeShaney*, where a court held that school officials owe a duty of care to students required to attend school.<sup>81</sup> In *Pagano*, the plaintiff, an elemen-

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72. *Id.* at 247 (citing *Pagano v. Massapequa Pub. Schs.*, 714 F.Supp. 641, 643 (E.D.N.Y. 1989); *Lichtler v. County of Orange*, 813 F.Supp. 1054, 1056 (S.D.N.Y. 1993)).

73. *Id.* at 247.

74. *Id.*

75. *See e.g. Dorothy J.*, 7 F.3d at 732.

76. *Lichtler*, 813 F.Supp. at 1056.

77. *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73 (1st Cir. 1999).

78. *See Hasenfus*, 175 F.3d 68; *Lichtler*, 813 F.Supp. 1054; *Pagano*, 714 F.Supp. 641.

79. *See e.g. Hasenfus*, 175 F.3d at 72.

80. *See Hasenfus*, 175 F.3d 68; *Lichtler*, 813 F.Supp. 1054; *Pagano*, 714 F.Supp. 641.

81. 714 F.Supp. at 643.

tary student in the Massapequa, New York school district, was physically and verbally assaulted by fellow students.<sup>82</sup> The Plaintiff alleged that school officials knew of the incidents and had assured the students' parents that they would take steps to prevent future harassment.<sup>83</sup> Since the school took no preventative steps, the plaintiff alleged that the school district violated his due process rights.<sup>84</sup> The court agreed with the plaintiff's argument that the school setting was similar to a foster-home situation, because "the victim and the perpetrator(s) were under the care of the school in its *parens patriae* capacity at the time the[] alleged incidents occurred."<sup>85</sup> The court stated: "[w]e consider elementary school students who are required to attend school, the truancy laws still being in effect, to be owed *some* duty of care by defendants."<sup>86</sup> Due to the school district's "failure to take preventative action" the court denied the school district's motion to dismiss.<sup>87</sup>

Four years later, in *Lichtler v. County of Orange*, another New York court held that "[a] state imposing compulsory attendance upon school children must take reasonable steps to protect those required to attend from foreseeable risks of personal injury or death."<sup>88</sup> In *Lichtler*, students were injured when a tornado and windstorm struck the school.<sup>89</sup> The school had failed to implement emergency procedures; Plaintiffs alleged a violation of section 1983, arguing that the state's compulsory education laws and the Fourteenth Amendment required the school, and the state, to reasonably care for the children, which the school failed to do by not having proper emergency procedures.<sup>90</sup> The court stated "[s]ince power implies responsibility, where governmental agencies or entities utilize sovereign compulsion to exercise coercive powers, a correlative duty exists of due care toward those subjected to such compulsion."<sup>91</sup> The court held that compulsory education laws sufficiently restrain students so as to impose a duty on the state to protect students from "foreseeable risks of personal injury or death."<sup>92</sup>

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82. *Id.* at 642.

83. *Id.*

84. *Id.*

85. *Id.* at 643.

86. *Id.* (italics in original) (leaving open the definition of "some duty").

87. *Id.*

88. *Lichtler*, 813 F.Supp. at 1056.

89. *Id.* at 1055.

90. *Id.* (the plaintiff's also argued that the County's disaster planning was inadequate and violated the life, liberty and property of the children without due process).

91. *Id.* at 1056.

92. *Id.*; compare *Lichtler*, 813 F.Supp. at 1056 with *Graham*, 22 F.3d at 994 (holding "foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship").

The First Circuit has also imposed a limited duty on the state to protect students from behavior that is “conscience-shocking or outrageous.”<sup>93</sup> In *Hasenfus v. LaJeunesse*, the parents of an eighth-grade girl who tried to hang herself in the school locker-room, sued the school alleging a violation of section 1983.<sup>94</sup> The student had been reprimanded by her gym teacher for misconduct during physical education class and was told to return to the locker room, which was unsupervised.<sup>95</sup> Prior to this incident, the student, a rape-victim, had received counseling from the school guidance counselor and the school nurse.<sup>96</sup> The plaintiff’s complaint alleged that the gym teacher, who was married to the school nurse, “knew or should have known of the rape and should not have sent [the student] alone and unsupervised away from the area he was monitoring when he knew or should reasonably have known that she was despondent or distressed.”<sup>97</sup> In addition, in the three months before her suicide attempt, seven other students had attempted suicide, and several of the attempts had occurred at school or at school events.<sup>98</sup> The plaintiff argued that compulsory education laws and *in loco parentis* status made the student-school relationship similar to the relationships that the state has with prisoners and involuntarily-committed patients.<sup>99</sup>

The court began by noting that the plaintiff’s argument had been rejected by the majority of courts that had addressed the issue.<sup>100</sup> The court then stated:

We are loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a due process violation. From a common-sense vantage, [the student] is not just like a prisoner in custody who may be owed broad (but far from absolute) ‘duty to protect.’ But neither is she just like the young child in *DeShaney* who was at home in his father’s custody and merely subject to visits by busy social workers who neglected to intervene. For limited purposes and *for a portion of the day, students are entrusted by their parents to the control and supervision of teachers in situations where—at least as to very young children—they are manifestly unable to look after themselves.*<sup>101</sup>

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93. 175 F.3d at 73.

94. *Id.* at 69, 70.

95. *Id.*

96. *Id.* at 70.

97. *Id.*

98. *Id.*

99. *Id.* at 71.

100. *Id.*

101. *Id.* at 72 (emphasis added).

Ultimately, the First Circuit found that “in narrow circumstances there might be a ‘specific’ [constitutional] duty [to protect].”<sup>102</sup>

The court then discussed instances when such a duty would arise, noting that the circumstances would have to be extreme.<sup>103</sup> Action,<sup>104</sup> or inaction, by school officials that “shocks the conscience” would violate the due process rights owed to students;<sup>105</sup> to “shock[] the conscience,” conduct must be “truly outrageous, uncivilized, and intolerable.”<sup>106</sup> The teacher’s conduct, even when combined with the knowledge that the plaintiff was a rape victim and that other students had attempted suicide, was not “truly outrageous, uncivilized or intolerable.”<sup>107</sup> Since the conduct that occurred in *Hasenfus* was not conscience shocking, there was no due process violation and the section 1983 claim failed.<sup>108</sup>

As these cases indicate, a few courts have held that compulsory education laws impose a limited duty upon school officials to protect students from certain types of conduct. While not creating the same type of special relationship that exists between prisoner and jailor, compulsory education laws do restrict the freedom of students and their parents, by mandating that children receive an education and attend school.<sup>109</sup> For the duration of the school day, students must attend school and may not seek assistance

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102. *Id.*

103. *Id.*

104. The court stated “[w]here a state official acts so as to create or even markedly increase a risk, due process constraints may exist, even if inaction alone would raise no constitutional concern.” *Id.* at 73.

105. *Id.* at 72 (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

106. *Id.* The court listed cases where they had found that state conduct shocked the conscience such that it violated the due process rights of the victim; the facts in those cases included: a police officer raping an individual during a traffic stop and a 57-day unlawful detention despite repeated requests for release. *Id.* (citations omitted).

107. *Id.* at 73.

108. *Id.* The court noted that the school may have been negligent, but that negligence does not rise to the level of a due process violation. *Id.* In *Armijo v. Wagon Mound Pub. Schs.*, a sixteen-year-old special education student was suspended for violent behavior at school and was driven home by the school counselor. 159 F.3d 1253, 1256 (10th Cir. 1998). The school failed to notify his parents that the student was taken home. *Id.* Before his parents arrived home, the student committed suicide. *Id.* The court held that there was not a special relationship, but that the school might be liable if sending the student home alone increased the danger to the student and “shocked the conscience.” *Id.* at 1261-62.

109. See e.g. Ala. Code § 16-28-3 (2003) (requiring all children between the ages of seven and sixteen to attend school); Conn. Gen. Stat. § 10-184 (2003) (requiring all children between the ages of five and eighteen to attend school unless the child is a high school graduate or has reached the age of sixteen and with the parent’s consent has withdrawn from school); N.H. Rev. Stat. Ann. § 193:1 (requiring all children between the ages of six and sixteen to attend school); see also National Center for Education Statistics & Bureau of Justice Statistics, *Ages for Compulsory School Attendance, Special Education Services for Students, Policies for Year-Round Schools and Kindergarten Programs, by state: 1997 and 2000*, <http://nces.ed.gov/programs/digest/d02/tables/dt150.asp> (accessed Apr. 30, 2004) (indicating, for each state, the ages that children are required to attend school pursuant to the state compulsory education laws).

from their parents when victimized by their peers.<sup>110</sup> Truancy laws further restrict students' ability to seek assistance from their parents during the school day by imposing punishments on parents who violate the compulsory education laws.<sup>111</sup> If a parent removes her child because of danger in the school, the parent could be subject to prosecution for violation of truancy laws.<sup>112</sup> School officials should therefore be constitutionally required to protect students who are being harmed by other students, on school-grounds, during the school day.

## V. OTHER REMEDIES

Currently most school districts are not liable under section 1983 when one student injures another student; however, state legislatures and tort law have provided remedies in limited situations.<sup>113</sup>

Section 320 of the Second Restatement of Torts states:

One who is required by law to take . . . custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.<sup>114</sup>

A person is in custody when he is "deprive[d] . . . of his normal ability to defend himself, or . . . deprive[d] . . . of the protection of someone who, if present, would be under a duty to protect him, or though under no such duty would be likely to do so."<sup>115</sup> Consequently, section 320 applies to "teachers or other persons in charge of a public school"<sup>116</sup> because students

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110. See *Hasenfus*, 175 F.3d at 72.

111. See e.g. Pa. Stat. Ann. tit. 24, § 13-1333(a)(1) (2003) (a parent or guardian found guilty of failure to comply with compulsory education laws shall be sentenced to pay a fine and court costs, or to complete a parenting education program).

112. See *id.*

113. See Ala. Code § 16-1-24.1 (2003) (safe school policy); *Restatement (Second) of Torts* § 320 (1965) (duty of person having custody of another to control conduct of third person); *Restatement (Second) of Torts* § 314A illus. 7 (1965) (special relationships giving rise to a duty to protect include teacher-student relationships).

114. *Restatement (Second) of Torts* § 320 (2000).

115. *Id.* at cmt. b.

116. *Id.* at cmt. a.

are “deprived of the protection of [their] parents or guardians.”<sup>117</sup> Comment (d) to section 320 also requires people with custody of others to give them effective protection should the need arise.<sup>118</sup> Comment (d) states:

A schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor *is or is not* under a duty to take custody of the other.<sup>119</sup>

Thus, tort law requires teachers to protect students from harm by other students. Tort law also requires teachers to anticipate harms and intervene to prevent them from occurring.

Courts have recognized this duty drawn from the Restatements when confronted with cases involving injured students who sue their school for negligence.<sup>120</sup> Courts recognize that children must attend school and while there, the protection that they receive from their parents is “*mandatorily substituted*” with the protection that they should receive from their teachers.<sup>121</sup> In *Mirand v. City of New York*, a school was held liable for failing to protect a student who had informed a teacher that another student threatened to kill her.<sup>122</sup> The teacher did nothing to protect the student, who was attacked at the end of the school day.<sup>123</sup> The court held that the school was liable because school officials had a “duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.”<sup>124</sup>

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117. *Id.* at cmt. b.

118. *Id.* at cmt. d.

119. *Id.* (italics added).

120. See e.g. *Simmons v. Beauregard Parish Sch. Bd.*, 315 So.2d 883, 886-887 (La. App. 3d Cir. 1975) (holding school liable when a thirteen-year-old student, under the supervision of the “school bus-duty teachers,” was injured by an explosion that occurred when he demonstrated his model volcano to his friends); *Eisel v. Bd. of Educ. of Montgomery County*, 597 A.2d 447, 456 (Md. 1991) (imposing a duty on school counselors to “use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student’s suicidal intent”); *Ferraro v. Bd. of Educ. of N.Y.C.*, 212 N.Y.S.2d 615 (N.Y. App. Div. 2d Dept. 1961), *aff’d* 221 N.Y.S.2d 279 (N.Y. App. Div. 2d Dept. 1961) (school liable when one student harmed by another). Compare *Simmons*, 315 So.2d at 886-87 with *Guerrero v. South Bay Union Sch. Dist.*, 2003 WL 22928861 (Cal. App. Dec. 12, 2003) (no duty to supervise children properly dismissed from school while they are waiting for parents to arrive); *Young v. Salt Lake City Sch. Dist.*, 52 P.3d 1230 (Utah 2002) (no duty of care owed to student who was injured while riding a bicycle to a mandatory parent-student-teacher conference).

121. *McLeod v. Grant County Sch. Dist. No. 128*, 255 P.2d 360, 362 (Wash. 1953) (emphasis added).

122. 614 N.Y.S.2d 372 (N.Y. 1994).

123. *Id.* at 374.

124. *Id.* at 375.

A few courts have held that even colleges have a duty to protect students from harm by third parties.<sup>125</sup> This duty exists even though compulsory education laws do not require individuals to attend college. In *Peterson v. San Francisco Community College District*, the Supreme Court of California held that a community college had to exercise due care to protect students from foreseeable harm.<sup>126</sup>

In the closed environment of a school campus where students pay tuition . . . , where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.<sup>127</sup>

Similarly, the Third Circuit has imposed a tort-law duty on colleges who recruit student-athletes.<sup>128</sup>

Duty, in any given situation, is predicated on the relationship existing between the parties at the relevant time . . . . [Therefore,] the College owed [the student] a duty of care in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate athletic activity for which he had been recruited.<sup>129</sup>

While no one must attend college, these courts have been willing to impose a duty to protect students based on the relationship created once the students opted to attend.

As these cases indicate, courts have been willing to impose tort-law duties on school officials to anticipate and protect students from harm inflicted by third parties. These tort-law duties, however, do not create constitutional protections,<sup>130</sup> and lack the benefits that section 1983 provides for plaintiffs.<sup>131</sup> In addition, in states that recognize a defense of sovereign immunity from tort action, injured students would be precluded from suing

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125. *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993); *Peterson v. S.F. Community College*, 685 P.2d 1193, 1201 (Ca. 1984).

126. 685 P.2d at 1201.

127. *Id.*

128. *Kleinknecht*, 989 F.2d 1360.

129. *Id.* at 1366-1369; compare *Kleinknecht*, 989 F.2d at 1366-1369 with *Bradshaw v. Rawlings*, 612 F.2d 135, 141 (3d Cir. 1979) (holding that a college does not take custody of students by prohibiting all students under twenty-one from consuming alcoholic beverages, therefore no duty was owed to students who chose to consume alcohol in violation of the regulation).

130. See *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting plaintiff's argument that the Fourteenth Amendment should be read to protect individuals from injuries whenever states have acted negligently because it "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States").

131. For example, 42 U.S.C. § 1988(b) (2000) permits the prevailing party in a § 1983 suit to recover costs and attorneys fees.



a school district for negligence.<sup>132</sup> Thus, imposing section 1983 liability on school officials would be more beneficial to injured students than tort law remedies.

State laws attempting to create safe school environments similarly fall short of benefits of section 1983. Some state legislatures, in trying to create a safer school environment, have responded to incidents of school violence by passing bullying laws.<sup>133</sup> These statutes recognize the importance of safe schools and they generally require

Any school employee, or employee of a company under contract with a school or school district, who has witnessed or has reliable information that a pupil has been subjected to insults, taunts, or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response

to report the incident to the principal.<sup>134</sup> School employees who report violations are then immune from any cause of action that might arise from a failure to remedy the incident.<sup>135</sup>

The federal government has even created a website, Take a Stand, Lend a Hand, Stop Bullying Now, that provides resources for children and parents interested in preventing bullying.<sup>136</sup> The website provides information for children who are being bullied,<sup>137</sup> who witness bullying,<sup>138</sup> and who are bullying others.<sup>139</sup> It also provides information for adults, includ-

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132. *Gamble v. Ware County Bd. Of Educ.*, 561 S.E.2d 837, 842 (Ga. App. 2002) (plaintiff's tort claims against board of education dismissed because Georgia's limited waiver of sovereign immunity does not apply to school districts); *Arteman v. Clinton Community Unit Sch. Dist.*, 763 N.E.2d 756, 760 (Ill. 2002) (school boards and school districts immune from tort liability); *Black's Law Dictionary* 753 (Bryan A. Garner ed., 7th ed., West 1999) ("A state's immunity from being sued in federal court by the state's own citizens"). This defense would not prohibit students from suing individual teachers for negligence, although in some states teachers who act on behalf of the school district within the scope of their employment are immune from liability. See Tex. Educ. Code § 22.051(a) (2003).

133. See Conn. Gen. Stat. § 10-222d (policy on bullying behavior); N.H. Rev. Stat. Ann. § 193-F:3 (2003) (requiring local school boards to adopt a pupil safety and violence prevention policy that addresses pupil harassment); Pa. Stat. Ann. tit. 24, § 13-1310-A (2003) (creating a safe schools advocate for each school district). The Connecticut legislature passed the bullying law after a twelve-year old boy, who had been bullied on a daily basis by fellow students, committed suicide. See *60 Minutes II*, "Suicide of a 12-year-old" (CBS Oct. 29, 2003) (TV series).

134. N.H. Rev. Stat. Ann. § 193-F:3(II).

135. N.H. Rev. Stat. Ann. § 193-F:3(IV).

136. United States Department of Health and Human Services, Maternal and Child Health Bureau, *Take a Stand, Lend a Hand, Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/index.asp> (accessed Apr. 28, 2004) [hereinafter Stop Bullying Now].

137. *Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/index.asp?Area=areyou> (accessed Apr. 28, 2004) (providing information for children who are being bullied by other children).

138. *Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/index.asp?Area=witness> (accessed Apr. 28, 2004) (providing information for children who witness bullying).

139. *Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/index.asp?Area=others> (accessed Apr. 28, 2004) (providing information for children who bully others).

ing ways to recognize whether a child is being bullied or is a bully, and ways to stop bullying.<sup>140</sup> This website, while an important step towards improving the safety of our schools, does not provide any remedies for children injured at school; thus, liability under section 1983 is still a necessary and important remedy.

Although there are some remedies available to students who are harmed by other students, they are not as adequate as a constitutional remedy would be. Unlike section 1983, tort law and the bullying statutes do not statutorily permit the prevailing party to recover attorney's fees.<sup>141</sup> In addition, not all states have passed bullying statutes, and tort law remedies vary from state to state.<sup>142</sup> A limited Fourteenth Amendment duty, enforceable through section 1983, would benefit injured students, as well as non-injured students, by requiring school officials to protect students from harm that they know, or should know, is occurring. Unlike tort law remedies and state bullying laws, this federal constitutional requirement would be imposed on every school, in every state, creating safer learning environments for all students.

## VI. ARGUMENT IN FAVOR OF A LIMITED DUTY

The importance of education and of a safe school environment is well documented in our nation's jurisprudence.<sup>143</sup> "[A]part from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern."<sup>144</sup> Congress has expressly stated "education is fundamental to the development of individual citizens and the progress of the Nation . . . the impor-

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140. *Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/indexAdult.asp?Area=childrenwhoarebullied> (accessed Apr. 28, 2004) (providing information about recognizing when a child is being bullied); *Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/indexAdult.asp?Area=childrenwhobully> (accessed Apr. 28, 2004) (providing information about recognizing when a child is a bully) (accessed Apr. 28, 2004); *Stop Bullying Now*, <http://www.stopbullyingnow.hrsa.gov/indexAdult.asp?Area=howyoucanhelp> (accessed Apr. 28, 2004) (providing information for adults interested in stopping bullying).

141. See 42 U.S.C. § 1988(b) (permits the prevailing party in a § 1983 suit to recover costs and attorneys fees); see e.g. Conn. Gen. Stat. § 10-222d (providing no remedies for victims of bullying).

142. Seventeen states currently have bullying laws. *Bully Police*, <http://bullypolice.org> (accessed Jan. 31, 2004).

143. See e.g. 20 U.S.C. § 3401(1) (2000) ("[e]ducation is fundamental to development of individual citizens and the progress of the Nation"); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) ("public education must prepare pupils for citizenship") (citations omitted); *T.L.O.*, 469 U.S. at 350 (Powell & O'Connor, JJ., concurring); *Brown v. Bd. of Educ.*, 347 U.S. at 493 ("education is perhaps the most important function of state and local governments").

144. See *T.L.O.*, 469 U.S. at 350 (Powell & O'Connor, JJ., concurring).

tance of education is increasing as new technologies . . . are considered [and] as society becomes more complex.”<sup>145</sup> In addition, Congress enacted National Educational Goals to “promot[e] coherent, nationwide, systematic education reform [and] improv[e] the quality of learning and teaching in the classroom.”<sup>146</sup> National Educational Goal seven indicates Congress’ recognition of the importance of safe schools, by striving for “safe, disciplined, . . . drug-free school zones” throughout the country.<sup>147</sup> Yet government recognition of the importance of education and a safe school environment is insufficient, as violence continues to occur in schools throughout the country.<sup>148</sup>

The special relationship exception to the Due Process Clause should encompass students who are compelled to attend school.<sup>149</sup> Although compulsory education laws do not render parents unable to care for their children’s basic needs, they do restrain students’ freedom to act on their own behalf by requiring students to attend school. The “nature [of the State’s power over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”<sup>150</sup> Because compulsory education laws mandate attendance, “for a portion of the day, students are entrusted by their parents to the control and supervision of teachers.”<sup>151</sup> School officials, therefore should be required to protect students whom they know, or should know, are being harmed by other students.

This duty should not be absolute. As under the bullying laws, students would have no recourse against school officials who were not aware, or could not reasonably have become aware, of the harm. Nor should school officials who made a reasonable attempt to protect the student-victim be held liable for their inability to adequately protect the student,<sup>152</sup> unless the

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145. 20 U.S.C. §§ 3401(1), (6).

146. 20 U.S.C. §§ 5801(1)-(2) (2000).

147. 20 U.S.C. § 5812.

148. For examples of incidents of school violence, review *supra* notes 2-9 and accompanying text.

149. In *Goss v. Lopez*, the Supreme Court held that students have a protected interest in a public education that could not be taken away by suspension absent minimal procedural safeguards such as notice and hearing. 419 U.S. 565 (1975).

Although [the states] may not be constitutionally obligated to establish and maintain a public school system, [they have] nevertheless done so and [have] required [their] children to attend. Those young people do not ‘shed their constitutional rights at the schoolhouse door.’ ‘The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted. *Id.* at 574 (citations omitted).

150. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995). The Court also states, in dicta, that it is not suggesting “that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect.” *Id.*

151. *Hasenfus*, 175 F.3d at 72.

152. See *Pagano*, 714 F.Supp. at 643 (single act of ordinary negligence may not form the basis of a civil rights claim).

teacher's behavior is conscience shocking.<sup>153</sup> Courts should only hold liable the school officials who are aware, or should reasonably be aware, that students are harming other students, as it is these officials who have failed to adequately protect students from danger.

Although students' freedom to act on their own behalf while at school is not as limited as a prisoner's, compulsory education laws do require children to attend school and truancy laws do punish students who do not attend school as well as their parents. These restrictions on freedom constitute a sufficient restraint of personal liberty to justify finding a special relationship. Furthermore, while at school, students are bound by school rules. If harmed by other students, and school officials fail to protect them, then students have no other recourse until they return home at the end of the school day. If a student chooses to leave school during the day, the child could be subject to truancy laws or punishment by the school for skipping class. If a student is repeatedly victimized, and if the student's parent cannot convince school officials to intervene, then the student is forced to withstand the harassment. Contrary to the Third Circuit's belief, in these situations, the state *does* deny the student and her parents "meaningful access to sources of help."<sup>154</sup>

In instances such as this, the state can argue that compulsory education laws do not mandate *where* the student receives an education, only that the student receives one; therefore, the state does not restrain parents from enrolling their child in a different school.<sup>155</sup> Not all parents, however, have the luxury of deciding where to educate their children. In 2001, 15.1% of U.S. children between the ages of five and seventeen-years-old lived in poverty.<sup>156</sup> In 1999-2000, the average cost of tuition for a private school

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153. *Hasenfus*, 175 F.3d at 73.

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

155. In some parts of the country, however, the state's argument could fail due to desegregation plans. In some areas, these plans require students to be bussed to specific schools based on the racial composition of the area schools. See e.g. *Drummond v. Acree*, 409 U.S. 1228, 1231 (1972) (bus transportation is a permissible method to achieve desegregation); *Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1229 (1971) (permitting school district to bus students to different schools to accomplish desegregation); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971) (permitting school board to determine which school students attend based on the school's racial composition). Thus, parents would not be free to enroll their children in different public schools while the desegregation plans are in effect, as attendance at each school is determined by the desegregation plan. See also *Lee v. U.S.*, 849 F.Supp. 1474, 1502 (M.D. Ala. 1994) (denying a city's request to operate as a school district separate from the county school district because the separate district would impede desegregation in the remainder of the county - county desegregation plan requires bussing to the city's schools); cf. *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 249-250 (1991) (permitting dissolution of desegregation plan when the School Board complies in good faith with the desegregation decree and when the "vestiges of past discrimination ha[ve] been eliminated to the extent practicable").

156. National Center for Education Statistics & Bureau of Justice Statistics, *Household Income and Poverty Rates, by State: 1990 and 1999-2001*, <http://nces.ed.gov/programs/digest/d02/tables/dt020.asp> (accessed Apr. 28, 2004).

was \$4,689 per year.<sup>157</sup> The average cost for non-sectarian private schools during the same school year was \$10,992.<sup>158</sup> During the 1999-00 school year, 58,167,000 children were enrolled in public schools, while only 9,504,000 children were enrolled in private schools.<sup>159</sup> Many parents cannot choose where their children receive an education. If unable to afford alternate school settings, a student must attend the local public school. In these types of situations, the state is affirmatively restraining the student's freedom to act on her own behalf, and should therefore be required to affirmatively act to protect the student from harm.

State statutes further restrict students' freedom to act on their own behalf, making the educational relationship even more similar to the prisoner-jailor relationship. Teachers are statutorily authorized to act *in loco parentis* in certain situations, including discipline<sup>160</sup> and the provision of food to poor or undernourished children.<sup>161</sup> Some state statutes explicitly grant teachers authority equivalent to a parent's authority in those specific situations.<sup>162</sup> States allowing corporal punishment permit teachers to use reasonable force to discipline students or to protect themselves, without fear of being held liable for injuries to the student.<sup>163</sup> Other states have enacted statutes specifically prohibiting corporal punishment, but permitting teachers to use reasonable force to prevent students from harming themselves, others, or property.<sup>164</sup> A few states also limit parents freedom to act on their child's behalf through statutes that permit school officials to send students home for health reasons, even if the parent believes that the child can attend school.<sup>165</sup> In addition to compulsory education laws and truancy laws, these statutes, which grant teachers authority over students and parents, provide more evidence of the restraints that the state places on stu-

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157. National Center for Education Statistics & Bureau of Justice Statistics, *Private Elementary and Secondary Enrollment and Schools, by Amount of Tuition, Level and Orientation of School: 1999-2000*, <http://nces.ed.gov/programs/digest/d02/tables/dt061.asp> (accessed Apr. 28, 2004).

158. *Id.*

159. National Center for Education Statistics & Bureau of Justice Statistics, *Enrollment in Educational Institutions, by Level and Control of Institution: Fall 1980 to Fall 2005*, <http://nces.ed.gov/programs/digest/d02/tables/dt002.asp> (accessed Apr. 28, 2004).

160. See Ala. Code § 16-28-A-1 (2003); Ark. Code Ann. § 6-18-505 (2003).

161. See Pa. Stat. Ann. tit. 24, § 13-1335 (2003); Pa. Stat. Ann. tit. 24, § 13-1337 (2003). Pennsylvania also requires that children without food, shelter, or clothing be reported to relief agencies so that the children may attend schools. Pa. Stat. Ann. tit. 24, § 13-1334 (2003).

162. See Del. Code Ann. tit. 14, § 701(b) (2003); Ga. Code Ann. § 20-2-215 (2003); Pa. Stat. Ann. tit. 24, § 13-1317 (2003); see also *T.L.O.*, 469 U.S. at 336 (majority) (“[t]eachers and school administrators, it is said, act *in loco parentis* in their dealings with students; their authority is that of the parent, not the State”).

163. See Ala. Code § 16-28A-1.

164. See Haw. Rev. Stat. § 302A-1141 (2003); Iowa Code § 280.21 (2003); N.D. Cent. Code § 15.1-19-02 (2003).

165. See Ca. Educ. Code Ann. § 48213 (West 2004); Utah Code Ann. § 53A-11-802 (2003); Va. Code Ann. § 22.1-279.1 (2003).

dents' freedom to act on their own behalf. Taken together, these limitations should be sufficient to create a special relationship between students and school officials that would enable injured students to sue school officials for violations of section 1983.

A limited Fourteenth Amendment duty would permit victimized students to recover damages under section 1983 when the student could show that the school officials were aware of the harm and did nothing to prevent it, or when students could show that the school officials' behavior was conscience shocking. Teachers must "protect the very safety of students and school personnel"<sup>166</sup> because "government has a heightened obligation to safeguard students whom it compels to attend school."<sup>167</sup> This variation of the *DeShaney* special relationship exception would require school officials to act to protect students from harm and would therefore assist in ensuring that all children have the opportunity to receive the best education possible, in the safest environment possible.

## VII. CONCLUSION

In *Brown v. Board of Education*, the Court wrote, "education is perhaps the most important function of state and local governments."<sup>168</sup> The existence of numerous state compulsory education laws and strict attendance requirements supports this proposition.<sup>169</sup> Children receiving an education must have the opportunity to learn in a safe environment, because "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students."<sup>170</sup> Many of the states that have chosen to enact bullying laws indicated that they did so because "a safe and civil environment in school is necessary for students to learn and achieve high academic standards."<sup>171</sup> Not all states have bullying laws, however, which permits teachers, should they choose to do so, to ignore bullying and ultimately leaves many student-victims to fend for themselves.

School safety is best accomplished by placing an affirmative duty on school officials to protect students from harm. School officials limit students' freedom to act on their own behalf by mandating attendance and

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166. *T.L.O.*, 469 U.S. at 357 (Brennan & Marshall, JJ., concurring in part and dissenting in part).

167. *Id.* at 353 (Blackmun, J., concurring).

168. *Brown*, 347 U.S. at 493.

169. *See e.g.* Ala. Code § 16-28-3.

170. *T.L.O.*, 469 U.S. at 350 (Powell & O'Connor, JJ., concurring).

171. W. Va. Code § 18-2C-1 (2003).

requiring students to conform their behavior to school rules.<sup>172</sup> As such, school officials should be liable to students who are injured by other students when school officials knew, or should have known, that the student was being injured, or about to be injured, and did not attempt to protect that student. Requiring school officials to protect students ensures that the parents are aware that their children are causing problems in school, and enables those who are responsible for the child - parents and teachers - to work together to prevent the child from acting out. In addition, students will be able to learn more effectively in an environment where they do not fear their peers.<sup>173</sup>

Tort law and the state bullying statutes are inadequate remedies for children who are victims of school violence. It is only through a limited Fourteenth Amendment duty, arising from the restraint, placed by the states, on students' freedom to act on their own behalf, that school officials will be affirmatively required to protect students from harm caused by other students. During the school-day, "students are entrusted by their parents to the control and supervision of teachers" and are placed "in situations where . . . they are manifestly unable to look after themselves."<sup>174</sup> Requiring those who are best suited to protect students during the school day to do so will assist states in achieving the safe schools that both they and the federal legislature strive for.

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172. See *DeShaney*, 489 U.S. at 200 ("it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause").

173. *Indicators of School Crime*, *supra* n. 10, at 36; see also *T.L.O.*, 469 U.S. at 350 (Powell & O'Connor, JJ., concurring) ("[w]ithout first . . . maintaining order, teachers cannot begin to educate their students").

174. *Hasenfus*, 175 F.3d at 72.