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***DeShaney's* Legacy in Foster Care and Public School Settings**

Mary Kate Kearney*

I. INTRODUCTION

Over the past several years, children who have been abused in foster care, non-residential and residential public schools have sued the State under 42 U.S.C. § 1983. In a § 1983 claim, the plaintiff must establish that a right protected by the laws or Constitution of the United States was violated and that the violation was committed by a person acting under color of State law.¹ The children in these cases have based their claims on a violation of their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.²

The Due Process Clause prohibits a State from denying its citizens "life, liberty, or property, without due process of law"³ The Supreme Court has interpreted the clause to mean that an individual does not have an affirmative right to government aid even if that person might need that aid to exercise life, liberty or property interests.⁴ According to the Court, the Due Process Clause only prohibits the State from depriving a person of those interests once the person already has them.⁵ In this way, the Court has determined that the Due

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1. 42 U.S.C. § 1983 (1996) provides that:

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

See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986) ("[I]n any § 1983 action the initial inquiry must focus on . . . (1) whether the conduct complained of was committed by a person acting under color of state law and; (2) whether this conduct deprived a person of rights . . . secured by the Constitution or laws of the United States.").

2. See discussion *infra* Parts I.B-IV.

3. U.S. CONST. amend. XIV, § 1. For a discussion of procedural due process see generally Randy Lee, Comment, *Twenty-Five Years After Goldberg v. Kelly: Traveling From the Right Spot on the Wrong Road to the Wrong Place*, 23 CAP. U. L. REV. 863 (1994).

4. See Randy Lee & Mary Kate Kearney, *Setting the Legal Context: What is the Meaning of Equal Access to Mental Health Services?*, in STANDARDS OF CARE FOR THE DELIVERY OF MENTAL HEALTH SERVICES TO DEAF AND HARD OF HEARING PERSONS 1-11 (Randall R. Myers ed., 1995); *Youngberg v. Romeo*, 475 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border.").

5. See *Youngberg*, 475 U.S. at 317.

Process Clause operates as “a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”⁶

A corresponding principle is that the government has no affirmative obligation to aid someone who may have been deprived of his life, liberty or property interests by someone other than the government.⁷ In the context of a child abuse case, the Court has interpreted this to mean that the government has no obligation to protect a child from private violence.⁸ In *DeShaney v. Winnebago County Department of Social Services*,⁹ the Supreme Court determined that the State was not liable for the harm inflicted on a child by his father because the State’s affirmative duty of protection did not reach into the father’s home.¹⁰

The issue left unresolved by *DeShaney* is under what circumstances the State does owe a child an affirmative duty of protection. Part I of this Article reviews the Supreme Court decisions that form the basis of that obligation with particular emphasis on *DeShaney*. After evaluating Justice Rehnquist’s and Brennan’s opinions in *DeShaney*, I conclude that Justice Brennan’s approach to the State’s due process obligations is more consistent with Supreme Court precedent and more faithful to the spirit of the Constitution. Parts II, III and IV examine the legacy of *DeShaney* and the State’s obligation to protect children in three situations: foster care, residential public schools, and non-residential public schools. Part V concludes that the courts are interpreting the Due Process Clause too restrictively in certain contexts and recommends a basis for imposing State liability to children who are abused.

II. THE SUPREME COURT’S TRILOGY

A. *Estelle v. Gamble* and *Youngberg v. Romeo*

The United States Supreme Court carved out the State’s affirmative obligation to assist certain individuals in two cases. In *Estelle v. Gamble*,¹¹ the Court established the government’s duty to provide medical care to a prisoner,¹² and in *Youngberg v. Romeo*,¹³ the Court

6. *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 195 (1989).

7. *Id.* at 196; see also Lawrence G. Albrecht & Curry First, *Constitutional Justice for Konerak Sinthasomphone and Other “Snake Pit” Victims: Litigating Post-DeShaney “Special Relationship” Cases*, in 8 NAT’L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK I-2 (Steven Saltzman & Barbara M. Wolvovitz eds., 1992) (“Philosophically, the decision rests on the prevailing judicial view that the Bill of Rights was enshrined as a negative charter of liberties, whereby individuals are guaranteed special protections from abusive state action but are not inherently endowed with specific positive rights, including state protection from private violence or other injuries.”).

8. *DeShaney*, 489 U.S. at 197, 201.

9. 489 U.S. 197 (1989).

10. *Id.* at 201.

11. 429 U.S. 97 (1976).

12. *Id.* at 103.

13. 457 U.S. 307 (1982).

affirmed the State's obligation to take care of a mentally retarded patient in its custody.¹⁴ Taken together, these cases provide the foundation for the argument that the government has a duty to protect children in its custody from abuse.

In *Estelle v. Gamble*, the Supreme Court determined that a State's deprivation of medical care to a prisoner could amount to a violation of the cruel and unusual punishment clause of the Eighth Amendment, although it did not in this case.¹⁵ The Court explained that a prisoner must rely on the State for medical care and would not receive any care unless the State provided it.¹⁶ Since the State has assumed responsibility for the prisoner, the Court concluded that "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty care for himself."¹⁷

In *Youngberg v. Romeo*, the Supreme Court extended this analysis to claims brought under the Due Process Clause of the Fourteenth Amendment.¹⁸ The Court held that the State had a constitutional duty to provide adequate food, shelter, clothing and medical care to a resident of a State psychiatric institution and to provide for his safety.¹⁹ In reaching that conclusion, the Supreme Court stated that the Fourteenth Amendment does not impose on the State a general obligation to provide services or protect citizens.²⁰ A duty to provide certain services and protections may arise, however, when the State has assumed responsibility for a person. In *Youngberg*, the Court explained that this duty arose "[w]hen a person is institutionalized—and wholly dependent on the State."²¹ As in *Estelle*, that dependence arose from the nature of the individual's relationship with the State.²² People who are institutionalized or incarcerated cannot meet their own needs nor do they have access to other sources of assistance. They must rely on the State for protection, and the State, which has deprived them of their liberty, is constitutionally obligated to provide that protection.

14. *See id.* at 324.

15. *Estelle*, 429 U.S. at 104, 107.

16. *Id.* at 103.

17. *Id.* at 104.

18. *Youngberg*, 457 U.S. at 314.

19. *Id.* at 324.

20. *Id.* at 317.

21. *Id.*; *see also* Catherine A. Crosby-Currie & N. Dickon Reppucci, *The Missing Child in Child Protection: The Constitutional Context of Child Maltreatment from Meyer to DeShaney*, 21 *LAW & POL'Y* 129, 144 (1999) ("*Youngberg v. Romeo* (1982) provides the sticking points for the Court's analysis because it involved what appeared to be all the important elements of *DeShaney* — an innocent, incompetent individual who was harmed by a nongovernmental actor while a recipient of state intervention services. The injured party in the *Youngberg* case was a profoundly mentally retarded adult who had been involuntarily committed to a state hospital where he suffered injuries both at his own hands and 'by the reactions of other residents to him.' A unanimous Court held that 'when a person is institutionalized — and wholly dependent on the state . . . a duty to provide certain services and care does exist.'").

22. *Estelle*, 429 U.S. at 103.

B. *DeShaney v. Winnebago County Department of Social Services*

1. *Justice Rehnquist's Opinion*

In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court determined that the protections offered to the petitioners in *Estelle* and *Youngberg* did not extend to Joshua DeShaney, a child whose safety had been compromised repeatedly when the State left him in his father's home.²³ The Court determined that the State had not deprived the child of his liberty interests under the Due Process Clause of the Fourteenth Amendment when it failed to protect him from his father's repeated abuse.²⁴

The *DeShaney* case arose when the State left four-year-old Joshua DeShaney in the custody of his father, Randy, despite a county social worker's knowledge that Randy was beating his son severely.²⁵ The State had received several reports of ongoing abuse from family friends and medical personnel.²⁶ Even the county social worker assigned to the case documented several incidents of suspected abuse but still did nothing to remove Joshua permanently from his father's custody.²⁷ Finally, Mr. DeShaney beat Joshua to the point at which he fell into a coma with extensive brain damage.²⁸ Joshua and his mother sued the State under 42 U.S.C. § 1983 and argued that the State had deprived Joshua of his liberty interests under the Fourteenth Amendment by failing to protect him from his father's known violence.²⁹

The majority opinion, authored by Chief Justice Rehnquist, began with the observation that the Due Process Clause of the Fourteenth Amendment does not impose an affirmative obligation on the State to aid its citizens.³⁰ For that reason, the State does not automatically have a duty to protect an individual from private violence.³¹

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

24. *Id.* at 191, 202.

25. In *DeShaney*, the petitioner was a boy named Joshua. Joshua was the victim of repeated abuse by his father who had been awarded custody of his son in 1980. Joshua's father moved the boy to Winnebago County, Wisconsin where the authorities there suspected child abuse in the DeShaney home as early as January 1982. This concern was based on a complaint by DeShaney's second wife, information about three suspicious visits to the hospital, plus reports of abuse by neighbors. All of these reports were relayed to the county's Department of Social Services (DSS). Despite these reports and multiple visits to the DeShaney home by a social worker, no action was taken by the DSS to remove Joshua from the home. In March 1984, Joshua was beaten so badly by his father that he fell into a coma and suffered permanent brain damage. *Id.* at 191-93.

26. *Id.* at 192-93.

27. *Id.* ("[T]he caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney home was physically abusing Joshua, but she did nothing more.")

28. *Id.* at 193.

29. *Id.*

30. *Id.* at 195, 196.

31. *Id.* at 197.

Although the State has no general obligation to protect its citizens, a duty can arise when it assumes responsibility for a particular individual by entering into a special relationship with him.³² For example, the State entered into special relationships with the prisoner in *Estelle* and the institutionalized mentally retarded patient in *Youngberg* because they had been deprived of their liberty and rendered unable to take care of themselves.³³ Because the State had limited their freedom to act on their own behalf, Justice Rehnquist observed that it was only “just” that the State should assume responsibility for their safety.³⁴

Justice Rehnquist explained that the State can “restrain the individual’s freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint.”³⁵ He characterized the restraint as the product of a combination of the State depriving a person of liberty so that he is unable to take care of himself and failing to provide for his basic needs.³⁶ His narrow construction of *Estelle* and *Youngberg* led him to conclude that the cases stood for the proposition that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”³⁷

To Justice Rehnquist, the State’s conduct toward Joshua DeShaney did not amount to restraint similar to incarceration or institutionalization.³⁸ Although Justice Rehnquist conceded that the State may have been aware of the dangers to Joshua at his father’s hands, Justice Rehnquist said that it had not created those dangers nor had it made Joshua more vulnerable to them.³⁹ The Court determined that Joshua had not been harmed while he was in State custody; all of his injuries occurred in his father’s home.⁴⁰ Because Joshua’s father was a

32. *Id.* at 198; see Crosby-Currie & Reppucci, *supra* note 21, at 144-45 (discussing the “special relationship doctrine” in accordance with the Court in *DeShaney*).

33. *DeShaney*, 489 U.S. at 198-99.

34. *Id.* at 199, 200.

35. *Id.* at 200.

36. Justice Rehnquist stated: “The rationale for this principle is simple enough: 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 needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *Id.*

37. *Id.* at 199-200.

38. *Id.* at 201.

39. *Id.* However, Justice Rehnquist stated, “It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.” *Id.* at 201-02. See generally Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405 (1994). For a discussion of when tort law imposes an affirmative obligation on educators to protect students in Canada, Australia, and the United Kingdom see generally Laura C. Hamson Hoyano, *The “Prudent Parent”: The Elusive Standard of Care*, 18 U.B.C. L. REV. 1 (1984).

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

private actor instead of a State official, the State was not responsible for protecting Joshua from his father's conduct.⁴¹ For those reasons, the Court concluded that the State had no special relationship with Joshua that would create an affirmative duty of protection.⁴²

2. Justice Brennan's Dissenting Opinion

Justice Brennan, in a dissenting opinion, started from the "opposite direction" by considering all of the affirmative actions that the State had taken toward Joshua.⁴³ He asserted that by acting to separate Joshua from other sources of aid, the State had created a special relationship with him.⁴⁴

Justice Brennan posited that his analysis was consistent with the Court's reasoning in *Estelle* and *Youngberg*.⁴⁵ He said that the majority read those opinions too narrowly by focusing on the State's constitutional duty arising exclusively from its restraints on a person's ability to act on his own behalf.⁴⁶ When applied to *Youngberg*, that interpretation would mean that the State could only be responsible for the petitioner if it had rendered him unable to care for himself.⁴⁷ Because the petitioner's mental retardation was the cause of his inability to take care of himself, rather than any conduct on the State's part, the State had not created the situation that gave rise to its affirmative obligation to aid him.⁴⁸

According to Justice Brennan, the State's obligation to care for the patient in *Youngberg* arose because it had taken affirmative steps to separate him from other sources of aid.⁴⁹ Justice Brennan enumerated all of the ways that the State had separated Joshua from those sources. The State had created a child welfare system, "which invite[d] – even direct[ed] – citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse."⁵⁰ The State's reporting system furthermore directed private citizens, medical personnel and even the police to report suspected child abuse to a designated county agency.⁵¹ The system also

41. *Id.*

42. *Id.* at 201, 202; see Crosby-Currie & Reppucci, *supra* note 21, at 148-49 (discussing "state-created-danger test of a special relationship").

43. Justice Brennan emphasized that he "would begin from the opposite direction. [He] would focus first on the action that Wisconsin has taken with respect to Joshua and children like him, rather than on the actions that the State failed to take. Such a method is not new to [the Supreme] Court." *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting).

44. *Id.* (Brennan, J., dissenting).

45. *Id.* at 206-07 (Brennan, J., dissenting).

46. *Id.* at 206 (Brennan, J., dissenting).

47. *Id.* at 205-06 (Brennan, J., dissenting).

48. *Id.* (Brennan, J., dissenting).

49. *Id.* (Brennan, J., dissenting).

50. *Id.* at 208 (Brennan, J., dissenting).

51. *Id.* (Brennan, J., dissenting).

signaled that reporting would discharge these individuals' responsibilities and that the agency would investigate and intervene, if necessary, to protect the child.⁵² In these ways, the State had prevented Joshua from getting help from others and therefore separated him from other sources of aid.⁵³

Justice Brennan also disagreed with the majority's characterization of the kind of custodial relationship that would impose an affirmative obligation on the State to assist or protect an individual.⁵⁴ He stated that the majority gave *Estelle* and *Youngberg* a "stingy scope" when it interpreted them to require the State to have "direct physical control" over an individual.⁵⁵ From Justice Brennan's perspective, the State's failure to step in and protect Joshua DeShaney from further harm, despite its knowledge of his situation, placed *DeShaney* "solidly in the tradition of cases like *Youngberg* and *Estelle*."⁵⁶ Justice Brennan explained that the State had acted to restrain Joshua's freedom when it knew of the abuse and expressed its intent to help him through its child protection program.⁵⁷ This active intervention in Joshua's life "effectively confined [him] within the walls of Randy DeShaney's violent home."⁵⁸ For Justice Brennan, that conduct deprived Joshua DeShaney of his liberty interests and thus violated the Due Process Clause of the Fourteenth Amendment.⁵⁹

Justice Brennan's opinion is a better interpretation of the Fourteenth Amendment's Due Process Clause than Justice Rehnquist's on different levels. First, his analysis is consistent with the texts of *Estelle* and *Youngberg*. The basis for the State's affirmative duty in those cases rested on the steps that it had taken to separate the prisoner and the patient from other sources of aid. Both petitioners were deprived of access to other sources of assistance and dependent on the State for protection. Despite Justice Rehnquist's contrary assertions in *DeShaney*, the Court in those cases did not focus on whether or how the State had rendered the petitioners unable to take care of themselves. The issue in *Estelle* and *Youngberg* was what the State did with the "helpless" petitioners to separate them from other sources of aid.

In Joshua DeShaney's case, the State also took measures to deprive Joshua of other sources of protection. The State held itself out as the entity that would protect children from child abuse and failed to

52. *Id.* at 208, 210 (Brennan, J., dissenting).

53. *Id.* at 207, 210 (Brennan, J., dissenting).

54. *Id.* at 206-07 (Brennan, J., dissenting).

55. *Id.* (Brennan, J., dissenting).

56. Justice Brennan stated that the majority's opinion permitted the State to "displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent." *Id.* at 212 (Brennan, J., dissenting).

57. *Id.* at 207-10 (Brennan, J., dissenting).

58. *Id.* at 210 (Brennan, J., dissenting).

59. *Id.* at 212 (Brennan, J., dissenting).

do so. The State assumed responsibility for Joshua's welfare when it established a child protection agency and channeled all reports of abuse to that agency, and assured the public that it was taking all of the necessary steps to investigate and address instances of child abuse. In those ways, the State could have and should have protected Joshua but did not do so.

Second, Justice Brennan's broader definition of custody reflects values that are consistent with the Due Process Clause. Although the Due Process Clause may not have been intended to impose an affirmative general duty on the State, it certainly was not designed as an escape hatch from liability. Justice Rehnquist defined custody narrowly to require the State to have physical custody over Joshua and concluded that the State did not because he remained in his father's home.⁶⁰ Justice Brennan explained that the State had constructive or functional custody of Joshua when it had the obligation and ability to help him but failed to do so.⁶¹ When the State did not remove the child from his father's custody, it "effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home."⁶²

The physical custody interpretation may appear more attractive to courts because it sets forth a bright line standard as to when the State has an affirmative duty. As such, it provides an objective, easily verifiable way of determining State liability. The State only owes a duty of care to a child within its physical custody. This easy rule, however, ignores the important point that the State still can assume responsibility for a child who is not in its physical control. When the State sets up a child welfare system for someone in Joshua's exact situation and the system fails the child every step of the way, the State has assumed the same level of responsibility for the child as if it had physical custody of him. Because functional custody is so analogous to physical custody, the two should be treated as giving rise to a similar State obligation.

This functional custody approach yields a "just" result in this case.⁶³ A just result is one which holds the State equally accountable to children for whom it has assumed responsibility, regardless of whether it has physical custody over them. Furthermore, a just result

60. In his dissenting opinion, Justice Brennan stated "the only fact that seemed to count [to the majority] as an 'affirmative act of restraining the individual's freedom to act on his own behalf' is direct physical control." *Id.* at 206 (Brennan, J., dissenting). Justice Rehnquist characterized the restraint as "when the State takes a person into its custody and holds him there against his will." *Id.* at 199-200.

61. Joshua's social worker reacted to the news of his final and most serious injury by saying, "I just knew the phone would ring some day and Joshua would be dead." *Id.* at 209 (Brennan, J., dissenting).

62. *Id.* at 210.

63. *Id.* at 199; see Crosby-Currie & Reppucci, *supra* note 21, at 148 (discussing state custody versus private custody).

evaluates the State's expressed willingness and ability to help a child such as Joshua and holds it accountable for failing to do so. Justice Brennan expressed this eloquently when he wrote that the government should be held accountable for its "failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and ignores it."⁶⁴

In *DeShaney*, a child sustained permanent brain damage as a result of the State's failure to protect him.⁶⁵ The State had many opportunities to prevent his injuries but failed to take them. Justice Rehnquist acknowledged the "tragic" nature of the situation but gave the State license to turn away by relieving it of any constitutional duty to Joshua DeShaney.⁶⁶ Justice Brennan, in contrast, could not read the Constitution as being "indifferent to such indifference" and would have imposed liability.⁶⁷ His would have been a more just result.

III. FOSTER CARE

In *DeShaney*, the Supreme Court left open the issue of whether the state had an affirmative duty to protect children in foster care. Justice Rehnquist wrote that the obligation was created by the "State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty."⁶⁸ The remaining question was whether foster care fell in the category of a "similar restraint of personal liberty."⁶⁹ In a footnote, Justice Rehnquist acknowledged the possibility that it would when it stated that a foster care placement might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."⁷⁰

64. *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting); *see generally* Albrecht & First, *supra* note 7 (discussing governmental action and inaction when a special relationship and constitutional responsibility exists).

65. *DeShaney*, 489 U.S. at 191.

66. *Id.* at 202.

67. *Id.* at 212 (Brennan, J., dissenting).

68. *Id.* at 200.

69. Courts have consistently determined that a state's failure to protect a child in a foster home violated the child's liberty interests under the Due Process Clause of the Fourteenth Amendment. For example, the United States Court of Appeals for the Seventh Circuit compared children in foster care placements to prisoners and involuntarily committed mental patients and found similarities because all are "placed . . . in a custodial environment . . . unable to seek alternative living arrangements." *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987).

70. *DeShaney*, 489 U.S. at 201 n.9. Several courts have accepted the analogy between children placed in foster care and individuals who are incarcerated or institutionalized by the State. *See, e.g.*, *Lintz v. Skipski*, 25 F.3d 304 (6th Cir. 1994); *Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *see* Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV., 113, 130-47 (1990) (discussing foster care abuse cases after *DeShaney*).

Lower courts considering this issue have found that a special relationship does exist between the State and children in foster care placements.⁷¹ A foster child's substantial dependence on the State creates the situation envisioned by Justice Brennan in his dissent in *DeShaney*. When the State assumes responsibility for a person, it has separated the individual from other sources of aid.⁷² The child is in foster care precisely because he cannot meet his own needs and requires someone else to take care of him. Once the child is in foster care, the State controls both the child's environment and his welfare.

The nature of the foster care placement separates the child from other possible sources of protection.⁷³ One court commented on this isolation: "No persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without investigation, supervision and constant contact required by a statute, a child placed in a foster home is at the mercy of the foster parents."⁷⁴ The child's resulting dependence on the State therefore creates a custodial environment sufficiently analogous to incarceration or involuntary commitment. In turn, the State's special relationship with the foster child gives rise to a constitutional obligation to protect the child from harm.

In *Nicini v. Morra*,⁷⁵ for example, the Third Circuit held that the State had a special relationship with a teenager, Anthony Nicini, who had entered the State's foster care system.⁷⁶ After various unsuccessful placements, the State and the teen agreed that he could stay with a friend's family even though the home was not an officially approved foster care placement.⁷⁷ When Nicini was sexually abused by the father in that home, the court found the State liable for failing to protect him from harm.⁷⁸ In reaching that decision, the Third Circuit explicitly declined to consider the voluntary nature of the arrangement and

71. See *Nicini v. Morra*, 212 F.3d 798, 809 (3d Cir. 2000); *Norfleet*, 989 F.2d at 293. See generally Albrecht & First, *supra* note 7.

72. *DeShaney*, 489 U.S. at 206 (Brennan, J., dissenting) (explaining *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

73. See *Norfleet*, 989 F.2d at 293 (The Eighth Circuit explained that a child placed in foster care, like a prisoner, is deprived of "freedom and the ability to make decisions about his own welfare, and must rely on the State to take care of his needs.").

74. *Miracle v. Spooner*, 978 F. Supp. 1161, 1169 (N.D. Ga. 1997) (quoting *Taylor*, 818 F.2d at 795). In *Miracle v. Spooner*, the plaintiff children were removed from their home after being abused by their parents. The parents had severe drinking problems and had abused the children on several occasions. The state then placed the children into a foster home where they were also abused. One child was beaten into a coma while another was beaten to death. *Id.* at 1163-64. The court used reasoning from *Taylor v. Ledbetter* and stated that "the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to ensure the continuing safety of that environment." *Id.* at 1169 (quoting *Taylor*, 818 F.2d at 795).

75. 212 F.3d 798 (3d Cir. 2000).

76. *Nicini*, 212 F.3d at 808.

77. *Id.* at 802.

78. *Id.* at 808.

the fact that the home was not a State-approved foster placement.⁷⁹ Instead, the court enumerated the ways that the State had assumed responsibility for the teenager while he was in foster care.⁸⁰ As soon as the teen's father had signed a placement agreement, the State became responsible for his living arrangements.⁸¹ The State had arranged for several unsuccessful foster care placements and returned Nicini to the family's home on at least one occasion.⁸² The *Nicini* court concluded that the State's control over the placements made Nicini "substantially dependent" on the State for care and protection.⁸³

According to the Third Circuit and other courts, State liability should be determined by the nature of the ongoing custodial relationship between the foster child and State as opposed to the way in which it was created.⁸⁴ For these courts, it is not important whether the child's initial foster care placement was voluntary or involuntary.⁸⁵ Both kinds of placements can give rise to the State's affirmative duty to protect as long as the resulting placement places the child in a dependent relationship with the State.⁸⁶

In *McMahon v. Tompkins County Department of Social Services*,⁸⁷ the federal court for the Northern District of New York rejected the State's argument that it had no duty to protect children

79. *Id.* at 808-09.

80. *Id.* at 809.

81. *Id.*

82. *Id.*

83. *Id.*

84. *But see* *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 991 (1st Cir. 1992) ("Because the state did not commit Monahan involuntarily, it did not take an 'affirmative act' of restraining his liberty, an act which may trigger a corresponding due process duty to assume a special responsibility for his protection."); *Milburn v. Anne Arundel County Dep't of Soc. Serv.*, 871 F.2d 474, 476 (4th Cir. 1989) ("The State of Maryland by the affirmative exercise of its power had not restrained the plaintiff's liberty; he was voluntarily placed in the foster home by his natural parents."); *Wilson v. Formigoni*, 832 F. Supp. 1152, 1156 (N.D. Ill. 1993) ("[T]he courts have interpreted [*DeShaney's*] holding to mean that involuntarily committed patients have due process rights to reasonable care and safety while voluntarily committed patients generally do not.").

85. The more appropriate analysis arises when the court reasons that the duty to foster care is present regardless of how the child got there. *See Miracle*, 978 F. Supp. at 1169 ("Without the protection of the state, a child who is in foster care is at the mercy of the foster parents whether or not his natural parents consented to the placement into foster care. From the child's point of view, foster care will always constitute involuntary custody because the state does not give the child an alternative to the foster home the state has chosen."); Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 *LOY. L.A. L. REV.* 435, 444 (1994) ("Common sense and notions of basic fairness dictate that all children, whether placed voluntarily or involuntarily in the state's care, should be entitled to equal rights under the Constitution."); Oren, *supra* note 70, at 130-47 (explaining that "voluntary" foster care placement should not be the basis for the constitutional right to protection).

86. *Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289, 293 (8th Cir. 1993). *See generally* Blum, *supra* note 85, at 440-44 (discussing *Norfleet* and voluntary versus involuntary foster care placements).

87. No. 95-CV-1134(RSP/GJD), 1998 WL 187421 (N.D.N.Y. Apr. 14, 1998).

voluntarily placed in foster care.⁸⁸ In that case, the children's court-appointed attorney had requested that they be placed in foster care after they were removed from their parents' custody.⁸⁹ In an unpublished, memorandum opinion the court stated that the fact that the placement was voluntary should not affect the State's duty to protect children while they were in State care.⁹⁰ The court explained that such an arbitrary distinction "would create an alarming precedent in which children involuntarily placed in foster care would be entitled to the full panoply of due process rights, while those voluntarily placed would not."⁹¹ The court stated that the result of such a distinction was "neither acceptable nor constitutionally sound."⁹²

The court explained that the appropriate basis for State liability was the amount of control that the State had over the children while they were in foster care.⁹³ The court concluded that the State exercised sufficient control over the children because it regulated the children's access to their biological parents.⁹⁴ Because the State had restricted the children's access to their family, it had separated them from other sources of aid and assured their dependence on the State.⁹⁵

Taken together, these cases underscore the importance of the State's control over the foster child once he is in State custody. The way in which the State takes custody of the child is less relevant than the effect of the State having that child in its care.⁹⁶ Once the child is in foster care, the State has rendered the child "helpless" and isolated him from the assistance of others.⁹⁷ The child's resulting dependence on the State means that the State has assumed responsibility for his well-being and will be held liable for failing to secure that well-being.

IV. RESIDENTIAL PUBLIC SCHOOLS

In contrast, most courts have not imposed an affirmative duty of protection on the State when a child is abused in a residential public

88. *McMahon v. Tompkins County Dep't of Soc. Serv.*, No. 95-CV-1134(RSP/GJD), 1998 WL 187421, at *3 (N.D.N.Y. Apr. 14, 1998).

89. *Id.* at *1.

90. *Id.* at *3.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.*

96. The line between voluntary and involuntary foster care placements may be difficult to draw. For example, a parent may "voluntarily" relinquish temporary custody of her child to foster care to avoid the state taking action to remove her child involuntarily. The parent may do this at the suggestion of a caseworker because the parent has been led to believe that it will be easier to regain permanent custody under a voluntary placement. *See Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 834 (1977); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1807-09 (1987); *see also* Blum, *supra* note 85, at 444 ("Custody, as a status rather than a situation, is an unsatisfactory indicator of when a constitutional duty is owed.").

97. *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987).

school.⁹⁸ In those instances, the courts have determined that the State has not entered into a special relationship with students who reside at its schools.⁹⁹ That determination has focused incorrectly on the voluntariness of the child's placement in a residential school rather than on the nature and extent of the custodial relationship between the child and State.¹⁰⁰

The seminal case in this area is the Fifth Circuit's decision in *Walton v. Alexander*.¹⁰¹ In that case, Walton, a residential student at the Mississippi School for the Deaf, sued the school superintendent for failing to protect him from another student's sexual assault.¹⁰² Walton focused on the fact that while in residence at the school, he was in State custody for twenty-four hours a day and subject to the school's strict rules.¹⁰³ The State emphasized that Mississippi had private schools for the deaf so that Walton had options available to him.¹⁰⁴ The Fifth Circuit determined that Walton did not stand in a special relationship with the State because he had entered the State's custody voluntarily.¹⁰⁵

In reaching that decision, the court reviewed the Supreme Court's decisions in *Estelle*, *Youngberg*, and *DeShaney*. Judge Jolly, writing for the majority, first noted that according to *Estelle* and *Youngberg*, the State's affirmative duty to protect arises when "the state deprives a person of his liberty so that he is unable to care for

98. See *Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir. 1994) (stating that despite the presence of a known danger to the student, there was no liability without a custodial relationship); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993) (ruling that a special relationship does not arise out of state-mandated school attendance); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) (holding that no affirmative duty for the State to protect school children was created through compulsory state school attendance); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (finding that because a child's attendance in a public school was voluntary, public school teachers did not have a duty to protect); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir. 1990) (providing that no affirmative duty to protect arose because the school administration did not render its school children helpless).

99. Most residential school cases involve children with disabilities, such as blindness, deafness, or mental impairments, whose special needs require additional services. See *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995); *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994), *withdrawn in part, affirmed in part by*, 41 F.3d 1497 (11th Cir. 1995).

100. For additional discussion of residential school cases see Matthew J. Conigliaro, *Walton v. Alexander: The Fifth Circuit Limits a State's Fourteenth Amendment Duty to Protect to Instances of Involuntary Restraint*, 70 TUL. L. REV. 393 (1995); Yama Shansab, *And What of the Meek?: Devising a Constitutionally Recognized Duty to Protect the Disabled at State Residential Schools*, 6 WM. & MARY BILL RTS. J. 777 (1998). The primary focus regarding the State's duty to protect should be the amount of care and control it has over students while they are physically present in a state-controlled environment. See generally Blum, *supra* note 85; Stephen F. Huefner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940, 1957 (1990); Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools After DeShaney: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101, 1126 (1994).

101. 44 F.3d 1297 (5th Cir. 1995).

102. *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995).

103. *Id.* at 1299, 1304-05.

104. *Id.* at 1305.

105. *Id.* at 1305-06.

himself.”¹⁰⁶ From the court’s perspective, the State’s conduct in rendering an individual dependent on it for his basic needs provided the foundation for the duty.¹⁰⁷

The court next interpreted *DeShaney* “strictly” as standing for the proposition that a special relationship is created only when the State “has custody over an individual involuntarily or against his will.”¹⁰⁸ In applying that standard to the situation at hand, the court did not object to the characterization of the State’s relationship with Walton as custodial.¹⁰⁹ The court acknowledged that the record supported Walton’s assertions that he was dependent on the school for his basic needs.¹¹⁰ The court stated that the school controlled Walton’s sleeping and eating schedules and determined when he could leave campus.¹¹¹ In those ways, Walton asserted that he experienced a restraint of personal liberty similar to that endured by the parties in *Estelle* and *Youngberg*.¹¹² He argued that the State held him in its custody and therefore entered into a special relationship with him.¹¹³

The Fifth Circuit instead focused its attention on the issue of involuntariness and concluded that the State had not taken Walton into custody against his will.¹¹⁴ Judge Jolly explained that Walton and his parents had chosen that particular school for him despite other alternatives.¹¹⁵ Furthermore, he noted that Walton could have withdrawn from the school at any time but had not done so.¹¹⁶ In addition, Walton was not relinquishing all of his freedom.¹¹⁷ The court stated that the “small fraction of liberty” that he gave up was not on the same scale as the “almost total deprivation” experienced by the prisoner in *Estelle* or the mental patient in *Youngberg*.¹¹⁸ For these reasons, the court concluded that the State did not enter into a special relationship when the State “exercises custodial control over an individual . . . [who] voluntarily resides in a state facility under its custodial rules.”¹¹⁹ Thus, in this case, the State did not have an affirmative obligation to protect Walton against “private violence.”¹²⁰

106. *Id.* at 1302.

107. *Id.*

108. *Id.* at 1303.

109. *Id.* at 1305.

110. *Id.*

111. *Id.*

112. *See id.* at 1304-05.

113. *Id.*

114. *Id.* at 1305 (“But far more important for our purposes today, the record also reflects that Walton attended the school through his own free will (or that of his parents) without any coercion by the state.”).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.*

A concurring opinion, authored by Judge Parker, sharply criticized the majority's interpretation and application of the special relationship exception from *DeShaney* as "arbitrary, illogical and formalistic."¹²¹ Judge Parker stated that the issue confronting the court was whether the State had restricted Walton's liberty to the point where it owed him a duty of protection.¹²² Judge Parker said that the Supreme Court had found enough restrictions on liberty in *Estelle* and *Youngberg*.¹²³ Even though the Court had not found sufficient restrictions in *DeShaney*, Judge Parker noted that the Court did not foreclose the possibility that they could be present in other cases.¹²⁴ In fact, according to Judge Parker, the Court in *DeShaney* left open what restraints of personal liberty were analogous to incarceration or institutionalization.¹²⁵

Judge Parker said that the majority incorrectly emphasized the manner in which the child entered State custody.¹²⁶ Judge Parker stated that the important issue was not whether the State assumed custody of the child voluntarily or involuntarily.¹²⁷ He focused instead on "the conditions of the particular custodial relationship."¹²⁸ If the nature of the custodial relationship restricted a child's freedom to the point where he was dependent on the State for his basic needs, then a special relationship was created.¹²⁹ That relationship imposes an affirmative obligation on the State to protect the child.¹³⁰

According to Judge Parker, several factors determined whether a special relationship existed between the State and an individual.¹³¹ All of those factors relate to the extent and nature of the State's control over the individual in its custody. The more responsibility that

121. *Id.* at 1306 (Parker, J., concurring); see Crosby-Currie & Reppucci, *supra* note 21, at 144-45 (discussing the "special relationship doctrine" from *DeShaney*).

122. *Id.* at 1307 (Parker, J., concurring).

123. *Id.* at 1308 (Parker, J., concurring).

124. *Id.* at 1307 (Parker, J., concurring).

125. *Id.* at 1307-08 (Parker, J., concurring).

126. *Id.* at 1308 (Parker, J., concurring) ("The majority's holding that custody must be 'involuntary' and 'against [a person's] will' is so restrictive that it precludes any type of custody short of incarceration or institutionalization giving rise to the duty of protection. In effect, the majority has confined the duty of protection to the circumstances found in *Estelle* and *Youngberg*. Such a narrow application of this duty clearly was not contemplated in *DeShaney*.").

127. *Id.* (Parker, J., concurring). See generally Blum, *supra* note 85; Oren, *supra* note 70.

128. *Walton*, 44 F.3d at 1308 (Parker, J., concurring). See generally Blum, *supra* note 85; Oren, *supra* note 70.

129. See *Walton*, 44 F.3d at 1308 (Parker, J., concurring).

130. *Id.* at 1309 (Parker, J., concurring) ("The question is not so much *how* the individual got into state custody, but to what extent the State exercises dominion and control over that individual.").

131. *Id.* at 1309-10 (Parker, J., concurring) ("Instead of asking whether a person was taken into custody involuntarily, we should consider several factors to determine whether a special relationship exists in a particular case: 1) the authority and discretion state actors have to control the environment and the behavior of the individuals in their custody, 2) the responsibilities assumed by the State, 3) the extent to which an individual in state custody must rely on the State to provide for his or her basic needs, and 4) the degree of control actually exercised by the State in a given situation.").

the State has assumed for an individual and the individual's corresponding dependence on the State for his well-being, the more likely a special relationship exists.

The concurrence discussed all of the ways that the State exercised control over Walton's life. While in residence at the school five days a week, the school controlled every aspect of Walton's schedule from when he got up to what he ate.¹³² During the period that Walton was at the school, he was dependent on the State for all of his needs.¹³³ Therefore, Judge Parker concluded that the State had entered into a special relationship with Walton.¹³⁴

The concurrence also explored the social policy implications of focusing on whether the custody was voluntary or involuntary.¹³⁵ Judge Parker stated that parents should feel confident entrusting their children to State care.¹³⁶ When the State abuses that trust by failing to protect those children, it should not be able to avoid liability because the placement was voluntary.¹³⁷ Instead, the State should be obligated to protect its most "vulnerable citizens" or face the legal consequences of failing to do so.¹³⁸

Judge Parker noted, moreover, that many parents cannot afford private residential schools for their special needs children.¹³⁹ Those parents therefore do not have the choice in placement that the majority assumed they did and may not be able to withdraw their children from a bad placement.¹⁴⁰ Finally, in an allusion to the constitutional protection afforded the prisoner in *Estelle v. Gamble*, Judge Parker noted the irony of holding the State responsible for the well-being of criminals but not children.¹⁴¹

132. *Id.* at 1310 (Parker, J., concurring).

133. *Id.* (Parker, J., concurring).

134. *Id.* (Parker, J., concurring).

135. *Id.* (Parker, J., concurring).

136. *See id.* (Parker, J., concurring).

137. *See id.* (Parker, J., concurring). *See generally* Blum, *supra* note 85; Oren, *supra* note 70.

138. *Id.* at 1310 (Parker, J., concurring). As the court in *Johnson v. Dallas Independent School District*, 38 F.3d 198, 203 n.7 (5th Cir. 1994) observed, "[t]o suggest that parents somehow are in a better position than the schools to protect their children from the ravages of weapons smuggled onto campus during the school day is cruelly irrational. To hope that students who are unarmed can protect themselves from the depredation of armed criminals in their midst is ridiculous. *Id.* at 1309. *See* Maldonado v. Josey, 975 F.2d 727, 735 (10th Cir. 1992) (Seymour, J., concurring) ("I cannot fathom who, other than a teacher or other school staff member, is capable of ensuring the 'reasonable safety' of schoolchildren during the school day and class periods.").

139. *See Walton*, 44 F.3d at 1309 (Parker, J., concurring).

140. *See id.* (Parker, J., concurring).

141. Judge Parker noted that,

[u]nder the holding of [*Walton*], law abiding, tax-paying citizens who, because they may be simply obeying the compulsory attendance laws or because they have no other economic choice, deliver a child to the care, custody, and control of the State, do so at their own risk. At the same time, those who find themselves in the care, custody, and control of the State because they are criminals are wrapped in the protective cloak of the Constitution.

Judge Parker's analysis is consistent with Justice Brennan's discussion in *DeShaney* and draws the line for State liability in the appropriate place. In both cases, the State assumed responsibility for a child's welfare by separating him from other sources of aid. Arguably, the State's extensive control over Walton even met Justice Rehnquist's requirement of direct, physical control. At the very least, however, Walton could not turn to his parents or others for assistance because the State had assumed responsibility for his welfare.

Moreover, Judge Parker's approach, like Justice Brennan's, would yield a just result. Both judges read *Estelle* and *Youngberg* as examples of the State's affirmative duty to protect but would not limit liability only to those instances. Both enumerated the ways that the State had acted to restrain the child's liberty.¹⁴² Finally, both understood that the State's assumption of responsibility for a child in its care should give rise to a corresponding legal duty.

Other circuits have addressed the question of whether a student residing at a State school was in State custody.¹⁴³ Those circuits concluded that the student was not in custody in a way that would give rise to a State duty to protect the individual from acts of private violence.

In *Stevens v. Umsted*,¹⁴⁴ the Seventh Circuit affirmed the dismissal of a claim brought by a student who was sexually assaulted by other students at a State school for students with disabilities.¹⁴⁵ The Seventh Circuit determined that the State did not have custody of the student because he remained in his father's legal custody.¹⁴⁶ Because the child was not in State custody, the Seventh Circuit concluded that the State did not have a duty to protect him from private violence.¹⁴⁷

The Eleventh Circuit initially reached the opposite conclusion to the decisions in *Walton* and *Stevens* when it determined that the State had a special relationship with a residential student at a school for the deaf.¹⁴⁸ In *Spivey v. Elliott*,¹⁴⁹ the Eleventh Circuit determined that the special relationship imposed a duty on the State to protect the

Id. at 1310 (Parker, J., concurring). See *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883, 894 (10th Cir. 1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)) ("The compelling appeal of the argument . . . is that . . . children, like involuntarily committed patients, are 'entitled to more considerate treatment and conditions than criminals.'").

142. See *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 208-09 (1989) (Brennan, J., dissenting); *Walton*, 44 F.3d at 1308-09 (Parker, J., concurring).

143. See generally *Stevens v. Umsted*, 131 F.3d 697, 699, 707 (7th Cir. 1997).

144. 131 F.3d 697 (7th Cir. 1997).

145. *Stevens*, 131 F.3d at 699, 707.

146. *Id.* at 703.

147. *Id.* at 704.

148. *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994).

149. 29 F.3d 1522 (11th Cir. 1994).

student from sexual assaults by a classmate but later withdrew that portion of its opinion.¹⁵⁰

The court parted company with the Fifth and Seventh Circuits over the relevance of the issue of whether the student had voluntarily entered State custody.¹⁵¹ The Eleventh Circuit stated that the manner in which the individual entered State custody was not dispositive.¹⁵² The critical question was the extent to which the State “exercises dominion and control over that individual” once he has entered State custody.¹⁵³ In this case, the court concluded that the State had exercised dominion and control over the child because his young age and severe handicap made him dependent on the State while he was in its care.¹⁵⁴

Although the Eleventh Circuit withdrew its ruling on this issue, its opinion provides a valuable counterpoint to the rationale of *Walton* and *Stevens*. The Fifth and Seventh Circuits read *DeShaney* narrowly by focusing on the manner in which the child came into State custody as opposed to the extent of State control once the child was in State custody. That interpretation is not supported by a close reading of *DeShaney*, *Estelle* and *Youngberg*.

The Court’s reasoning in those three cases does not rest on a distinction between voluntary and involuntary confinement. In *Estelle*, the Court considered the restraints on a prisoner’s liberty and imposed liability on the State because of the prisoner’s corresponding reliance on the State for his needs.¹⁵⁵ In *Youngberg*, the Court acknowledged that the petitioner was involuntarily institutionalized and then considered his dependence on the State as the foundation of the State’s affirmative duty.¹⁵⁶ In *DeShaney*, the Court emphasized the absence of a custodial relationship between the State and Joshua DeShaney as the reason that the State did not owe him a duty of protection.¹⁵⁷ Nowhere in *DeShaney* did Justice Rehnquist state that the issue was whether the individual has come into State custody voluntarily or involuntarily. None of these cases made the manner in which

150. *Spivey v. Elliott*, 41 F.3d 1497 (11th Cir. 1995).

151. *Spivey*, 29 F.3d at 1526.

152. *Id.*

153. *Id.* (“The question is not so much *how* the individual got into state custody, but to what extent the State exercises dominion and control over that individual.”).

154. *Id.*

155. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (The government has an obligation “to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”).

156. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1992) (“When a person is institutionalized – and wholly dependent on the State – it is conceded by petitioners that a duty to provide certain services and care does exist . . .”).

157. *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 201, 202 (1989).

the individual entered State custody a criterion for whether a special relationship had been created.

Instead, the courts in all of these cases premised State responsibility on the nature of the confinement after it occurred. According to Justice Rehnquist, the State's control over Joshua DeShaney was significantly less than it was over the petitioners in *Estelle* and *Youngberg* because Joshua remained in his father's physical custody throughout his ordeal.¹⁵⁸ Justice Rehnquist concluded that the State, therefore, had not assumed responsibility for Joshua's well-being while he was living with his father.¹⁵⁹

In the residential school cases, the State's control over the individual once he is in the State's hands, is pervasive and extensive.¹⁶⁰ As the Fifth Circuit explained, students residing at the Mississippi School for the Deaf "were under the twenty-four hour custody of the School and subjected to strict rules concerning what they were allowed to do and when they could come and go."¹⁶¹ This amount of control places the State in a supervisory, even parental, role toward the students.¹⁶² The State has assumed responsibility for residential students in the same way that it does for prisoners and institutionalized patients. The State has made the students "wholly dependent" on it for care and has deprived the students of other sources of assistance.¹⁶³ The fact that the State so deprived these students of the opportunity to act on their own behalf through the custodial relationship should trigger the protections of the Due Process Clause.

V. NON-RESIDENTIAL PUBLIC SCHOOLS

Courts have also held that the State does not have a constitutional obligation to protect students in non-residential public schools.¹⁶⁴ Those courts have determined that no special relationship

158. *Id.* at 201 ("The *Estelle-Youngberg* analysis simply has no applicability in the present case. Petitioners conceded that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor.").

159. *See id.*

160. *Id.* at 200 ("The affirmative duty to protect arises . . . from the limitation which [the state] has imposed on [the individual's] ability to act on his own behalf.").

161. *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995). Other circuits emphasize the extent of the State's control over the child. *See Spivey v. Elliott*, 29 F.3d 1522, 1526 (11th Cir. 1994) ("The State exercised added control over Tremain because of his young age and severe handicap.").

162. *See Huefner*, *supra* note 100, at 1966-67 ("[B]ecause schools do restrict students' abilities to act on their own behalf . . . [s]chools have traditionally been viewed as surrogate parents . . ."). *See generally* Deborah Austern Colson, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169 (1995).

163. *Youngberg v. Romeo*, 457 U.S. 307, 318 (1992).

164. *See Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Sargi v. Kent City Bd. of Educ.*, 1995 FED. App. 0342P (6th Cir.); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir. 1994); *Dorothy J. v. Little Rock Sch. Dist.*, 7

existed between schools and their students because schools did not have students in their custody.¹⁶⁵

In *D.R. v. Middle Bucks Area Vocational Technical School*,¹⁶⁶ for example, the Third Circuit explained why the State did not owe a duty to a disabled public school student who was sexually abused at school by another student.¹⁶⁷ The disabled student was sexually assaulted repeatedly in a unisex school lavatory despite her repeated requests to use a single-sex facility.¹⁶⁸ The student argued that the school's restraint of her personal liberty during school hours amounted to the kind of custodial relationship experienced by the petitioners in *Estelle* and *Youngberg*.¹⁶⁹ In this case, she argued that the custody arose from the State's compulsory attendance laws and the school standing in loco parentis to its students.¹⁷⁰

The majority opinion, authored by Judge Seitz, did not agree with the analogy and distinguished the student's situation from the prisoner in *Estelle* and the involuntarily institutionalized patient in *Youngberg*.¹⁷¹ The court explained that the *Estelle-Youngberg* type of custody arose from the "full time severe and continuous State restriction of liberty" that resulted in the plaintiffs' total dependence on the State for life's necessities.¹⁷² In those situations, the petitioners could not take care of themselves nor could they turn to anyone else for assistance. The State's complete physical custody of them gave rise to a corresponding duty of care.

In contrast, the court explained that the State did not exercise similar physical custody over a public school student.¹⁷³ The student's parents were their child's primary caretakers and made the large and small decisions about her education.¹⁷⁴ According to the court, al-

F.3d 729, 732 (8th Cir. 1993); *Maldonado v. Josey*, 975 F.2d 727, 731 (10th Cir. 1992). *But see* *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 529 (5th Cir. 1994) ("[W]e need not go so far as have some of our sister circuits and conclude that no special relationship can ever exist between an ordinary public school district and its students . . .").

165. *See* *Colson*, *supra* note 162, at 179 ("Most courts analogize the relationship between students and their schools to that of Joshua and his social worker, asserting that teachers play only a secondary role in students' lives. Parents are viewed as the primary caretakers of school children, even during school hours. In *J.O. v. Alton Community Unit School District 11*, for example, the Seventh Circuit rejected the plaintiffs' claim against school officials for failing to protect students from sexual abuse by a teacher. The court stated that 'parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child. By mandating school attendance for children under the age sixteen, the state of Illinois has not assumed responsibility for their entire personal lives; these children and their parents still retain substantial freedom to act.'). *Huefner*, *supra* note 100.

166. 972 F.2d 1364 (3d Cir. 1992).

167. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367-77 (3d Cir. 1992).

168. *Id.* at 1366.

169. *Id.* at 1371.

170. *Id.* at 1370.

171. *Id.* at 1371.

172. *Id.*

173. *Id.* at 1371-72.

174. *Id.*

though the school controlled the student's movements during the school day, the State did not restrict the student's movements to the level of preventing her or her parents from meeting her basic needs.¹⁷⁵

Furthermore, the court noted that the State's custody of the student lasted only for the duration of the school day.¹⁷⁶ Because the student returned home after school, she had access to her parents and others for assistance.¹⁷⁷ Therefore, the State did not deprive her of other sources of assistance as it did to the parties in *Estelle*, *Youngberg*, and even the foster care cases.¹⁷⁸ Thus, the court concluded that the State had not entered into a special relationship with the student, which would invoke the protections of the Fourteenth Amendment.¹⁷⁹

The dissent, written by Judge Sloviter, took the position that the State had entered into a special relationship with the student because it had assumed "functional custody" of her.¹⁸⁰ That functional custody was created by a combination of the State's compulsory attendance laws, the school's control over students during school hours, and the minor's immaturity.¹⁸¹

Judge Sloviter took issue with the majority's reading of *DeShaney* that a duty to protect was "triggered only by involuntary, round-the-clock, legal custody."¹⁸² He asserted that in this case, the school had restricted the student's liberty in two ways.¹⁸³ First, the school had deprived her of her basic needs when it refused her request to use another lavatory.¹⁸⁴ Second, the student did not have other meaningful sources of help because of her disability and her fear of disclosing the assault.¹⁸⁵ Because the school had designed the unisex lavatory and ignored the student's requests, the State had assumed responsibility for her well-being. In failing to protect the student from sexual abuse, Judge Sloviter concluded that the State had breached the special relationship created between "vulnerable school children and their public schools."¹⁸⁶

Judge Sloviter's opinion is in line with Justice Brennan's functional custody standard in *DeShaney* and represents the better approach in several respects. First, Judge Sloviter adopts a totality of the

175. *Id.* at 1372.

176. *Id.*

177. *Id.*

178. *See id.*

179. *Id.*

180. *Id.* at 1377, 1383 (Sloviter, J., dissenting).

181. *Id.* at 1377 (Sloviter, J., dissenting).

182. *Id.* at 1379 (Sloviter, J., dissenting).

183. *Id.* at 1380-81 (Sloviter, J., dissenting).

184. *Id.* (Sloviter, J., dissenting).

185. *Id.* at 1381 (Sloviter, J., dissenting).

186. Judge Sloviter further explained that the scope of that duty would not be as broad as the State's duty to prisoners and institutionalized patients. *Id.* at 1384 (Sloviter, J., dissenting).

circumstances test for evaluating whether a custodial relationship exists rather than a physical control standard. The totality test takes into account all of the relevant ways in which the State has exercised control over a child during the school day and, therefore, is more comprehensive than a bright line test that merely considers physical custody.

In addition, this approach allows courts to consider the actions that the State has taken rather than its inaction. During the school day, the State has control over the child's schedule and determines the child's interactions. While the child is in school, she must depend on the State to secure her well-being. During that time, the State has assumed responsibility for her welfare. The fact that the State's control over the child does not extend beyond school hours is irrelevant in light of the nature and extent of State control while the child is on school premises during the school day.

Finally, *Estelle*, *Youngberg* and *DeShaney* should not be read so narrowly as to require that the Due Process Clause protections are triggered only by the State's permanent, continuous custody of an individual. Rather, those cases stand for the proposition that the State owes an affirmative obligation to a person when it has control over him and then fails to provide for his basic needs.

VI. CONCLUSION

The courts in *DeShaney* and subsequent cases misconstrue the special relationship exception as applied to the State's obligation to protect children from abuse in two significant respects. First, in *DeShaney*, Justice Rehnquist determined that the State had to have a child in its physical custody to trigger its affirmative duty.¹⁸⁷ As Justice Brennan correctly explained, the State "effectively confined" Joshua DeShaney to his father's home through its failed child protection program.¹⁸⁸ The State had "functional custody" over Joshua when it had the means to help him, offered others assurances that it was helping him, and then turned away.¹⁸⁹ Justice Rehnquist's narrow

187. *DeShaney v. Winnebago County Soc. Serv.*, 489 U.S. 189, 201 (1989).

188. *Id.* at 210 (Brennan, J., dissenting).

189. For cases discussing "functional custody" over children, see *D.R.*, 972 F.2d at 1384 (Sloviter, J., dissenting) ("[It is] unlikely that a holding that schools have a duty to protect school children while they are in the functional custody of the school will markedly expand the liability of the school districts."); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 723 (3d Cir. 1989) (*Stoneking II*) ("Arguably, our earlier discussion noting that 'students are in what may be viewed as functional custody of the school authorities' during their presence at school because they are required to attend under Pennsylvania law, . . . is not inconsistent with the *DeShaney* opinion."); *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594, 601 (3d Cir. 1988) (*Stoneking I*), *vacated sub. nom.* *Smith v. Stoneking*, 489 U.S. 1062 (1989) ("The student had been attending school . . . and thus was 'in what may be viewed as functional custody of the school authorities.'"); *Marcolongo v. Sch. Dist. of Philadelphia*, No. CIV.A. 98-5196, 1999 WL 1011899, at *6 (E.D. Pa. 1999) ("The state does have an affirmative duty to protect plaintiffs from due process violations when (1) the plaintiff was in the functional custody of the state when harmed . . ."); *Was v. Young*, 796 F. Supp. 1041, 1046-47 (E.D. Mich. 1992) (discussing functional custody of

interpretation of custody allows the State to “undertake . . . a vital duty and then ignore . . . it” without suffering the consequences of that deliberate decision.¹⁹⁰

Proponents of the physical custody standard might assert that it is easier to apply because it is objective and readily ascertainable. Although this may be true, it does not take into account the important fact that the State had assumed responsibility for Joshua through its child welfare system. In so doing, the State had the equivalent of physical custody of Joshua. Because the State’s functional custody of Joshua has a similar effect on him as its physical control would, the two should be treated similarly.

Second, some post-*DeShaney* courts misread the Supreme Court’s decisions in *Estelle*, *Youngberg* and *DeShaney* to require not only that the State have physical custody of the child but also that the child entered the State’s custody involuntarily. This emphasis on the manner of confinement is misplaced because it focuses on how the child got into State custody rather than on the amount of control that the State has over a child who is in its custody. The State’s duty to protect a child in its custody should be based on the ways that it has assumed responsibility for the child’s well-being. When, for example, the State controls every aspect of a child’s schedule in a residential school, the State should be held liable if the child is injured at that school. By dictating how the child lives at the school and with whom he interacts, the State has set itself up as the child’s guardian and protector. The nature of the State’s dominion over the child determines its level of responsibility to the child.

Thus, the courts have twice narrowed the requirements for the State’s constitutional obligation to protect children: first, in Justice Rehnquist’s interpretation that the child must be in the State’s physical custody, and second, in lower courts’ emphasis on the involuntary manner of the confinement. Both misconstrue the underlying foundation of the State’s obligation. The State enters into a special relationship with children when it holds itself out to them and to society as their protectors, has the opportunity and ability to take care of them, and then fails to do so. In so doing, the State has deprived those children of their liberty interests in violation of the Due Process Clause of the Fourteenth Amendment.

foster children and public school students); *Robert G. v. Newburgh City Sch. Dist.*, No. 89 CIV. 2978 (RPP), 1990 U.S. Dist. LEXIS 91, at *4 (S.D.N.Y. Jan. 5, 1990). “The student had been attending school pursuant to the requirements of New York Education Law § 3205 . . . and thus was ‘in what may be viewed as functional custody of the school authorities.’” *Id.* (quoting *Stoneking I*, 856 F.2d at 601).

190. *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting).

