

Students, Schools, and Special Relationships

Sarah Zimmerman '22

I. INTRODUCTION

Generally, the Constitution does not require affirmative action on the part of the government, but rather describes restrictions on government power.¹ In this vein, the Due Process Clause is traditionally read to “protect the people from the State,” rather than to confer a right to government aid.² In certain contexts, however, the Constitution charges governments with affirmative duties to protect individuals from private harm.³ One such situation is where the state and the individual are in a “special relationship,” such that the state has constrained the individual’s liberty. Courts have refused to extend this exception to students, in spite of the national ubiquity of compulsory attendance statutes and the nature of schools providing for students’ basic needs. This Article will argue that the failure of courts to apply the “special relationship” exception to students is a constitutional oversight that (i) denies the practical realities of modern schooling in America and (ii) fails to protect children from harm.

II. THE EXISTENCE OF A “SPECIAL RELATIONSHIP”

In *DeShaney v. Winnebago County Department of Social Services*, the Court held that failure to protect an individual against private violence does not violate the Constitution.⁴ A number of exceptions to the *DeShaney* rule have been recognized, including when the state has a “special relationship” with the plaintiff where their individual liberty is restrained—such as through institutionalization or incarceration—or when the state itself creates the danger.⁵ The special relationship exception is born out of the recognition

¹ See Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 204 (2006).

² *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989).

³ Aviel, *supra* note 1, at 205.

⁴ See 489 U.S. at 202.

⁵ *Id.* *DeShaney* itself suggested these exceptions. It implied a “special relationship” exception when it stated that the State may have a duty arising from the “limitations which it has imposed on [an individual’s] freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty.” 489 U.S. at 190. The court indicated a “state-created danger”

that these individuals' liberty is so constrained that they must rely on the state to provide for their basic needs.⁶ The Third Circuit applied the special relationship exception to foster children in *Nicini v. Morra*, explaining that foster children, "like the incarcerated or the involuntarily committed," are placed in a custodial setting and rely on the state to meet their basic needs.⁷ In contrast, courts have generally held that schools do not satisfy the special relationship exception to *DeShaney*, reasoning that parents are still students' primary caretakers, and can choose to change their child's school placement if they wish.⁸

For example, in *Patel v. Kent School District*, the United States Court of Appeals for the Ninth Circuit found that a public school owed no duty to protect a developmentally disabled student from sexual encounters with another student.⁹ The plaintiff argued that the school-student relationship, especially in light of mandatory attendance statutes, created a special relationship that justified a duty to intervene on the part of the school when the student was exposed to third-party harm.¹⁰ The court disagreed, aligning its holding with seven other circuits that have found that compulsory attendance alone does not satisfy the special-relationship exception to *DeShaney*.¹¹ The court explained that mandatory schooling does not restrict a student's liberty in the same way as incarceration and institutionalization.¹² Parents are still the student's primary caretakers, attending to their basic needs.¹³ Moreover, although students are "statutorily required to attend school *somewhere*," parents can remove their children from a particular school and enroll them elsewhere.¹⁴ Thus, the "school's authority did not 'create the type of physical custody necessary to bring it within *DeShaney*.'"¹⁵

exception by holding that a duty of affirmative protection from private harms may arise when the state "play[s] a part in their creation" or "renders [an individual] more vulnerable to them." *Id.*

⁶ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

⁷ 212 F.3d 798, 808 (3d Cir. 2000).

⁸ See, e.g., *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995).

⁹ See *Patel*, 648 F.3d at 974.

¹⁰ *Id.* at 972.

¹¹ *Id.* at 973.

¹² *Id.* at 973-74.

¹³ *Id.* at 973.

¹⁴ *Id.* at 974 (citing Wash. Rev. Code § 28A.225.010(1)).

¹⁵ *Id.* at 973 (quoting D.R., 972 F.2d at 1372).

The court’s analysis *in D.R.* focuses on the rights of a parent to “put [their child] in a different school or educate [them] at home,” but these rights are not so easily exercised as to make them practicable.¹⁶ Residency requirements, the rules of which vary among states and districts, demand that students prove they are residents of the local school district before enrolling.¹⁷ Access limitations, including districts with only one high school and complicated online enrollment procedures, circumscribe the efficacy of open enrollment policies and counter the assumption that parents can easily change their child's school. While charters are an option in some areas, they are not ubiquitous.¹⁸ Further, even if a student might be able to access a charter school, the quality or method of education offered may be different than that of their public school.¹⁹ Finally, low-income parents often cannot afford to home school their children, which would require being home during the day and potentially forsaking income from employment.²⁰ Therefore, in practice, parents often do not retain the autonomy to remove their children from a particular school while still meeting compulsory education requirements, as suggested by the court in *Kent* and elsewhere.

Although public school students usually do go home at the end of the day and rely on parents to attend to many of their basic needs, students spend more hours awake at school than they do at home with their parents.²¹ Students are statutorily required to be in school; although this restriction on freedom of movement is less severe than incarceration or institutionalization, it similarly infringes on a fundamental right of freedom

¹⁶ Patel, 648 F.3d at 973.

¹⁷ See *50-State Comparison: Open Enrollment Policies (2018 Update)*, EDUCATION COMMISSION OF THE STATES, <https://www.ecs.org/open-enrollment-policies/> (last visited March 13, 2021).

¹⁸ See *Fast Facts: Charter Schools*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited March 13, 2021).

¹⁹ Dennis Epple, Richard Romano, and Ron Zimmer, *Charter Schools: A Survey of Research on Their Characteristics and Effectiveness*, National Bureau of Economic Research, June 2015, <https://www.nber.org/papers/w21256>.

²⁰ See Stacey Bielick, Kathryn Chandle, and Stephen Broughman, *Homeschooling in the United States: 1999* (Oct. 2, 2001), available at <https://nces.ed.gov/pubs2001/2001033.pdf>.

²¹ Jenna Schuh, *Children Spend More Awake Hours In School Than They Do at Home*, TOURO COLLEGE GRADUATE SCHOOL OF EDUCATION (Dec. 27, 2017), <https://gse.touro.edu/news/stories/children-spend-more-awake-hours-in-school-than-they-do-at-home.php> (“Children spend more awake hours in school than they do at home.”).

of movement.²² The Supreme Court recognized this in *Vernonia School District 47J v. Acton*, when it held that public schools act “in loco parentis,” and that the nature of the relationship between school and student is “custodial and tutelary.”²³ Because schools control so much of a child’s life, compulsory attendance or “in your seat” policies constitute such deprivation of freedom of movement as to create a special relationship exception under *DeShaney*.

III. PROTECTING CHILDREN FROM HARM

The line of cases denying the existence of a special relationship between schools and its students becomes even harder to stomach when examining the jurisprudence around private harm at public boarding schools. In *Walton v. Alexander*, the Fifth Circuit found that there was no special relationship between a state-run boarding school and a student who was sexually assaulted while in attendance.²⁴ The school in question was a publicly funded boarding school for the deaf and hard of hearing.²⁵ The court rejected a special relationship between the school and the plaintiff, holding that the exception applies only when the state “has custody over an individual *involuntarily or against his will*.”²⁶ Because the plaintiff was voluntarily attending the school, “without any coercion by the state,” there was no special relationship that would give rise to an affirmative duty to protect him.²⁷

As described above, the requirement that a student be held involuntarily before a special relationship arises, such that they have no other option but that particular school, contradicts the reality of school choice law and parenting responsibilities. Mandatory attendance statutes required the

²² *Wallace v. Batavia Sch. Dist.*, 101 F.3d 1010, 1013 (7th Cir. 1995) (“[L]aw compels students to attend school, which deprives them of a level of freedom of mobility. Once under the control of the school, students’ movement and location are subject to the ordering and direction of teachers and administrators.”); *but see* 78A C.J.S. *Schools and School Districts* §1013 (2021) (“Compulsory school attendance statutes generally are valid when they are not unconstitutionally vague or overbroad.”).

²³ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

²⁴ *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995).

²⁵ *Id.*

²⁶ *Id.* at 1303 (emphasis in original).

²⁷ *Id.* at 1305.

plaintiff in *Walton* to be at school, and, as a deaf student, he had even fewer options of schools to choose from.²⁸

More troubling, however, is the way in which a boarding school further restricts students' liberty. *DeShaney* held that when the state "so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.* food, clothing, shelter, medical care, and reasonable safety— it transgresses [the Constitution]."²⁹ In running a boarding school, the state imposes extensive limitations on students' liberty; they may not come and go as they please. Required to stay on campus, students are unable to provide for their basic needs, but instead rely on the state to provide such necessities as food and shelter. They do not return home to their parents; the school is their daily custodian. Each of these factors points to the boarding school student being in a special relationship with the school, and therefore with the state, even more so than an ordinary public school day student.

IV. CONCLUSION

While students and parents have options for recovery under state tort law, finding a special relationship between student and school under *DeShaney* would allow plaintiffs to collect higher damages, more in line with the actual harm that they have experienced. In addition, state court judges are likely to be more friendly to state school districts, suggesting that individuals will have more luck suing in federal court. Finally, low-income parents and students may not be able to afford litigation in state court, but federal fee-shifting would allow for the attorney's fees of successful litigants to be recouped. Ultimately, classifying the student-school relationship as an exception to *DeShaney* would encourage state actors to act more responsibly towards the students in their care, ensuring that they are protected from danger—no matter who is inflicting it.

²⁸ See generally *Deaf Students Education Services*, U.S. DEP'T OF EDUC. OFF. FOR CIV RTS. (June 29, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/hq9806.html> ([E]ffective methods of instruction that can be implemented in a variety of educational settings are still not available.”).

²⁹ *Id.* at 1303 (quoting 489 U.S. at 200).