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DUE PROCESS—FIFTH CIRCUIT INCORRECTLY HOLDS SCHOOL LACKS *DESHANEY* SPECIAL RELATIONSHIP WITH STUDENTS

*Lindsey Hovland**

ON six separate occasions, a nine-year-old child was released from her school during the school day into the custody of an unidentified adult male, who then raped her and returned her to school.¹ In *Doe v. Covington County School District*, the Fifth Circuit held that the student (“Jane Doe”) had not established a constitutional claim against the school district because she lacked a special relationship with the school district under *DeShaney v. Winnebago County Department of Social Services*.² While the decision comports with Fifth Circuit and sister circuit precedent, it is premised on a flawed characterization of the school environment and an excessively narrow reading of *DeShaney* that seems motivated more by a desire to limit liability than an actual analysis of the case at hand. Unless and until the Supreme Court overrules the extremely narrow reading of the *DeShaney* special relationship exception that is consistently applied in all circuits that have addressed the issue, public schools will be essentially immune from 42 U.S.C. § 1983 actions, no matter how egregious the school’s inaction toward the student’s safety when threatened by outside actors.

The Covington County School District promulgated a policy whereby school officials were permitted to release a student to an adult without verifying the adult’s identity or ensuring that the adult was listed on the “Permission to Check-Out” form filled out by the student’s parent or guardian.³ Under this policy, the school released nine-year-old Jane Doe on six separate occasions to an adult male whose identity was never checked, even though he repeatedly signed her out as her father and once

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1. *Doe v. Covington Cnty. Sch. Dist. (Covington III)*, 675 F.3d 849, 853 (5th Cir. 2012).

2. *Id.* at 852.

3. *Id.* at 853.

as her mother.⁴ The school also failed to check the permission form.⁵ On each of these occasions, the man took Jane Doe off school property, raped her, then returned her to school.⁶

Jane Doe, along with her father and grandmother, sued the school district, its board, its superintendent, and various other defendants for constitutional violations under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and Mississippi tort law.⁷ Only the § 1983 claim and special relationship theory are addressed in this Note. The district court granted the defendants' 12(b)(6) motion to dismiss for failure to state a claim, finding that the plaintiffs had not sufficiently pleaded a constitutional violation based on the special relationship exception.⁸ Initially, a Fifth Circuit panel reversed, holding that the plaintiffs pleaded a plausible substantive due process violation because the compulsory attendance laws and affirmative action of placing Jane Doe in her molester's custody created a special relationship under *DeShaney*.⁹

On rehearing, the Fifth Circuit, sitting en banc, vacated the judgment of the initial panel and affirmed the district court's ruling granting the motion to dismiss.¹⁰ In reaching this conclusion, the court relied heavily on *DeShaney*, where the Supreme Court addressed what duty, if any, the Due Process Clause creates for the state to protect individuals from each other.¹¹ "The Due Process Clause of the Fourteenth Amendment provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.'"¹² The language of the Due Process Clause, said the Court, "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."¹³ In that case, four-year-old Joshua Deshaney's father beat him so severely that Joshua was left permanently and severely retarded.¹⁴ Joshua's mother sued the state on due process grounds claiming the state had failed to protect Joshua from his father's beatings, even though they knew of the danger.¹⁵ The Court held that Joshua's mother had not alleged a constitutional violation because the Due Process Clause imposes no affirmative duty on the government to protect citizens from each other.¹⁶ The Court did, however, carve out the

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Doe v. Covington Cnty. Sch. Dist. (Covington I)*, 637 F. Supp. 2d 392, 395 (S.D. Miss. 2009).

9. *Doe v. Covington Cnty. Sch. Dist. (Covington II)*, 649 F.3d 335, 366 (5th Cir. 2011).

10. *Id.* at 852.

11. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989).

12. *Id.* at 194-95.

13. *See id.* at 195.

14. *Id.* at 193.

15. *Id.*

16. *Id.* at 196-97.

“special relationship” exception, which requires the state to protect a citizen when the state maintains custody of the citizen against his will, depriving him of his ability to provide for his own basic needs, as in cases of incarceration and involuntary institutionalization.¹⁷

Writing for a majority in *Covington*, Judge King took a very narrow view of the special relationship exception from *DeShaney*, limiting the exception only to those cases specifically recognized by *DeShaney* and in the context of foster children.¹⁸ Quoting *DeShaney*, Judge King explained that a special relationship is created only “when the State takes a person into its custody and holds him there against his will.”¹⁹ She further used the *DeShaney* reasoning, stating “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”—it breaches the boundaries set by the Due Process Clause.²⁰ Finding none of the characteristics of a *DeShaney* special relationship, the court held that neither in this case, nor in any other case, do compulsory attendance laws create a special relationship between a school and its students.²¹

The majority cited numerous decisions from the Fifth Circuit and sister circuits to explain why no special relationship exists between public schools and their students, but discussed two Fifth Circuit en banc decisions at length.²² First, the court discussed *Walton v. Alexander*.²³ In that case, the court found no special relationship existed between a residential public school for deaf children and a student.²⁴ The court adhered to a strict and literal reading of *DeShaney* so as not to expand the words of the Due Process Clause.²⁵ Only under “extreme circumstances,” where the state severely restricts a person’s liberty so that he cannot provide for his own basic needs, is there a special relationship.²⁶ The court next discussed *Doe v. Hillsboro Independent School District*, where it distinguished compulsory school attendance from the enumerated special relationships from *DeShaney* because “the custody is intermittent, the student returns home each day, and the parents remain the primary source for the basic needs of their children.”²⁷ Thus, the court in *Covington* found that the school did not take and hold Jane Doe against her

17. *Id.* at 198–200.

18. *Covington III*, 675 F.3d 849, 855–56 (5th Cir. 2012).

19. *Id.* at 856.

20. *Id.*

21. *Id.* at 858.

22. *Id.* at 856–58.

23. *Id.* at 856–57. In *Walton*, a student was sexually assaulted by a fellow student while attending a residential public school for the deaf. In its analysis, the court noted that the victim attended voluntarily and could leave at will. *Id.* at 856.

24. *Covington III*, 675 F.3d at 856.

25. *Id.* at 856–57.

26. *Id.* at 857.

27. *Id.* In *Hillsboro*, a janitor sexually assaulted a student who had been kept after school and sent to a remote part of the school on an errand for her teacher. *Id.*

will.²⁸ Jane Doe was “not attending the school through the ‘affirmative exercise of state power,’” but rather was attending voluntarily as one way to fulfill her schooling requirement.²⁹

Unlike the majority in *Covington*, the dissent focused not on whether a public school can ever have a special relationship with a student, but instead on the effect Jane Doe’s young age and isolation from classmates should have on the analysis.³⁰ Judge Wiener cited to *Ingraham v. Wright* to support the position that very young students who are unable to leave the school’s custody freely and who are isolated from teachers and pupils do have a special relationship with the school.³¹ He refuted the majority’s assertion that any age distinction is “arbitrary” by explaining that schools exercise significantly greater control over a nine-year-old child than over older children.³² This control, he wrote, coupled with the inability of young children to protect themselves and the isolation of Jane Doe, created the special relationship.³³

The court’s holding in *Covington* certainly comports with Fifth Circuit precedent.³⁴ As Judge Jolly pointed out in his concurrence, this was the third time that the en banc court had addressed the precise question of whether a special relationship existed between public schools and students.³⁵ In those cases, the court unequivocally held that students, as voluntary attendees of the school capable of providing for their own basic needs, are not owed a duty of protection by the school from the danger of nonschool actors.³⁶ Thus, the significance of *Covington* lies not in any additional analysis or change in position, but in the clarity with which it displays the faults of the entire line of post-*DeShaney* precedent.

According to the concurrence in *Walton*, “it is clear that the *DeShaney* court did not foreclose ‘special relationships’ in all cases of non-incarcerated and non-institutionalized persons 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.”³⁷ The concurrence continues, “such a narrow application of this duty clearly was not contemplated in *DeShaney*.”³⁸ By explaining that “incarceration, institutionalization, or other similar restraint of personal liberty” can trigger the special relationship, the *DeShaney* Court indicated that the special relationship extends to more situations than *Covington* allowed.³⁹ The school–student

28. *Id.* at 861.

29. *Id.*

30. *See id.* at 877–78 (Wiener, J., dissenting).

31. *Id.* at 877 (citing 430 U.S. 651 (1977)).

32. *Id.* at 877–79.

33. *Id.* at 877–78, 880–81.

34. *See id.* at 856–58 (majority opinion).

35. *Id.* at 870 (Jolly, J., concurring).

36. *Id.*

37. *Walton v. Alexander*, 44 F.3d 1297, 1307–08 (5th Cir. 1995).

38. *Id.* at 1308.

39. *Id.* at 1307.

relationship, when accurately characterized, meets this threshold of “similar restraint of personal liberty” envisioned in *DeShaney*.⁴⁰ The *Covington* court, however, distorted the reality of the school–student relationship, producing the bizarre result that a school has no duty to protect students from third-party harm, even though the law mandates attendance.⁴¹

The court’s analysis centered on the school environment’s distinction from the enumerated situations as an open environment with voluntary attendance.⁴² Two issues become immediately apparent. First, the school environment is anything but open. Students, particularly at Jane Doe’s young age, are not free to leave the school campus as they please.⁴³ Elementary schools, middle schools, and many high schools would stop a student attempting simply to walk off campus. Even at a school that allowed older students to leave campus as they please, students likely must have permission either at the beginning of the year or on a case-by-case basis. Thus, the court mischaracterized the school as an open environment.

The second issue arises from the court’s position that school attendance is voluntary. A student has no freedom under the law simply to decline to attend school, with or without a parent’s permission.⁴⁴ The majority attempted to defuse this argument by mentioning that parents may choose alternative educational options for their children.⁴⁵ Judge Wiener addressed this hollow consolation in his dissent, quoting Judge Edith Jones in *Johnson v. Dallas Independent School District*: “To say that student attendance is voluntary because parents may elect to home-school their children or send them to a private school is lamentably, for most parents, a myth.”⁴⁶ In the case at bar, the court dismissed this point after only a cursory consideration.⁴⁷ Regardless, “by requiring that the State take a person into custody involuntarily before gaining a duty to protect that person, the majority has arbitrarily limited due process rights in a way that cannot accurately reflect the nature of the custodial control actually exercised by the State.”⁴⁸ Thus, “rather than simply asking whether a person entered state custody ‘voluntarily,’ we should examine the nature of the custodial relationship that existed between the State and the plaintiff.”⁴⁹

40. *See id.*

41. *Covington III*, 675 F.3d at 863.

42. *Id.* at 861.

43. *Id.* at 879 (Wiener, J., dissenting).

44. *Id.* at 878–79.

45. *Id.* at 861 (majority opinion).

46. *Id.* at 878 (Wiener, J., dissenting) (citing 88 F.3d 198 (5th Cir. 1994)).

47. *See id.* at 861 (majority opinion) (“It may well be true that, for the vast majority of parents in Mississippi, the only way for them to fulfill their obligation is to enroll their children in public school. But that practicality does not alter the fact that Jane’s parents voluntarily sent her to the school as a means of fulfilling their obligation to educate her.”).

48. *Walton v. Alexander*, 44 F.3d 1297, 1309 (5th Cir. 1995).

49. *Id.*

Both of these faults led to errors in the circuit's custody analysis. The court maintained that parents retain custody of their children while at school and are still responsible for their basic needs.⁵⁰ This is false. Parents are not in a better, or even as good of a position to protect the child while at school.⁵¹ The majority attempted to offset this point by borrowing language from the *Hillsboro* decision explaining how school is different from the recognized special relationships: unlike prison or involuntary commitment, school requires only intermittent custody because children return home at night and can ask their parents for help or protection.⁵² These distinctions are of little importance and indeed would provide little comfort to Jane Doe's parents. It is absurd to think that somehow the intermittent nature of school attendance absolves schools from liability for the rape of a child during school hours or the murder of a student at the hands of a school shooter. In neither of these cases would the harm be prevented by returning home at the end of the day. *DeShaney* should not allow a school to turn the other way while a student is harmed, particularly when a school actor facilitated the harm through a deficient policy.

Judge Jones wrote in *Hillsboro*, "I have noted the incongruity and shallow logic underlying the distinction between children in public schools and those who are involuntarily confined full-time . . . Nevertheless, I concur in this *en banc* outcome not because the legal distinction has suddenly become persuasive but because there is no realistic alternative."⁵³ This desire to limit liability likewise appears to be the ulterior rationale in *Covington*. *Covington* is but one in a long line of cases in the Fifth Circuit and others interpreting the special relationship exception so narrowly.⁵⁴ This focus on efficiency and limiting liability at the expense of vindicating a fundamental constitutional right is inconsistent with the spirit of *DeShaney*.

50. *Covington III*, 675 F.3d at 861.

51. *Id.* at 879 (Wiener, J., dissenting); see also *Walton*, 44 F.3d at 1309.

52. *Covington III*, 675 F.3d at 857. Notably, in all three of these cases the circuit panel first held that the school did have a special relationship with the student before the *en banc* court vacated these decisions.

53. *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1417 (5th Cir. 1997) (*en banc*) (Jones, J., concurring).

54. See *Covington III*, 675 F.3d at 856-57.