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A School's Duty to Protect Students from Peer-Inflicted Abuse

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A SCHOOL'S DUTY TO PROTECT STUDENTS FROM PEER-INFLICTED ABUSE: *NABOZNY V. PODLESNY*, 92 F.3d 446 (7th Cir. 1996)

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I. INTRODUCTION

For years a child could continually be harassed, beaten, and urinated upon by fellow classmates at school; the school, however, has no affirmative duty to protect the child from such a clearly known danger. Jamie Nabozny endured four years of such torture as his classmates repeatedly harassed him, beat him, urinated upon him, and performed a mock rape on him because he was gay.[1] Eventually, at age seventeen, he dropped out of school in order to protect himself.[2] After Nabozny sued the school district for failing to protect him, the Seventh Circuit held that the school violated Nabozny's equal protection rights but not his substantive due process rights.[3] The school violated Nabozny's equal protection rights because the school failed to give him the equivalent levels of protection that it would give female students and students who are harassed for reasons other than sexual orientation.[4] The court, however, held

1. Nabozny v. Podlesny, 92 F.3d 446, 451-52 (7th Cir. 1996).

2. *Id.* at 452. *See generally* Don Terry, *Suit Says Schools Failed to Protect a Gay Student*, N.Y. TIMES, March 29, 1996, at A14 (discussing Nabozny's victory with the equal protection claim and providing helpful background material relating to the facts of the case).

3. *Nabozny*, 92 F.3d at 460-61. On November 21, 1996, Jamie Nabozny settled his equal prortection claim for $900,000. *Gay Man Abused As a Student Wins $900,000*, N.Y. TIMES, Nov. 21, 1996, at A12.

4. *Id.* at 454. One student was suspended for calling his girlfriend names but went unpunished for abusing Nabozny. *Gay Student Settles Harassment Lawsuit*, DAYTON DAILY NEWS, Nov. 21, 1996.

that Nabozny's substantive due process rights were not violated because the state had no duty to protect students from peer-inflicted abuse.[5] The court reasoned that because children and parents have substantial freedom to act in order to protect themselves, the school had no affirmative duty to protect students from known peer-inflicted abuse.[6]

This Note argues that public schools do have an affirmative duty, grounded in substantive due process, to protect their students from any clearly established risk of physical harm and harassment created by classmates.[7] Section II of this Note examines the facts and holding of *Nabozny v. Podlesny*.[8] Section III first discusses when a state has an affirmative duty to act in order to provide safety.[9] Next, this section argues that the Seventh Circuit standard established in *J.O. v. Alton Community Unit School District 11*[10] and applied in *Nabozny* is incorrect because Nabozny did not have substantial freedom to act on his own behalf. [11] State laws and school policies, grounded in the *in loco parentis*[12] doctrine, limited his freedom to act on his own behalf.[13] Section III then argues that the requirement for an affirmative duty, set forth by the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*,[14] was met based upon the facts of *Nabozny* and state limitations placed on Nabozny under the power of *in loco parentis*.[15] Finally, Section IV concludes that since state laws and school policies allow school administrators and teachers to limit students' freedom to act on their own behalf, the school, once it has exercised its *in loco parentis* power, has an affirmative duty to protect its students.

II. BACKGROUND

In 1995, in *Nabozny v. Podlesny*,[16] a student, Jamie Nabozny, filed suit

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5. *Id.* at 459.
6. *Id.*
7. *See infra* notes 68-121 and accompanying text.
8. *See infra* notes 16-67 and accompanying text.
9. *See infra* notes 68-86 and accompanying text.
10. 909 F.2d 267 (7th Cir. 1990).
11. *See infra* notes 87-109 and accompanying text.
12. "A person is said to stand *in loco parentis* when he puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relation[ship] without going through the formalities incident to a legal adoption." Webb v. McCullough, 828 F.2d 1151, 1156 (1987) (quoting 59 AM. JUR. 2D *Parent & Child* § 75 (1987)).
13. *See infra* notes 87-109 and accompanying text.
14. 489 U.S. 189 (1988). This Note is not a critique of *DeShaney*. For discussion on *DeShaney* see Stephan Faberman, *The Lessons of* DeShaney*: Special Relationships, Schools, & the Fifth Circuit*, 35 B.C. L. REV. 97 (1993); Susanna M. Kim, *Section 1983 Liability in the Public Schools After* DeShaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101 (1994); and Barbara Howitz, *The Duty of Schools to Protect Students from Sexual Harassment: How Much Recovery Will the Law Allow?*, 62 U. CIN. L. REV. 1165 (1994).
15. *See infra* notes 110-21 and accompanying text.
16. 92 F.3d 446 (7th Cir. 1996).

against Ashland Public School Board and Administrators.[17] Nabozny was subjected to continual peer-inflicted abuse while the school took no action to discipline the offending students.[18] The Seventh Circuit held that Nabozny's equal protection rights were violated but that his substantive due process rights were not violated because the school had no duty to act in order to provide Nabozny with protection.

A. Facts in Nabozny v. Podlesny

Over a four year period, Jamie Nabozny had endured despicable treatment from his peers because he was gay.[19] In 1988, when Nabozny entered Ashland Middle School, his classmates realized that he was gay and began abusing him.[20] His classmates continually harassed Nabozny by calling him a "faggot" and soon began hitting him and spitting on him.[21] Nabozny informed his school guidance counselor of the abuse and why the abuse occurred.[22] The guidance counselor then disciplined two of the students for their behavior.[23]

Unfortunately, the abuse subsided only temporarily and Nabozny was again subjected to harassment from his student peers.[24] Nabozny informed a new guidance counselor of the continual abuse, who turned the situation over to school principal Mary Podlesny.[25] Podlesny promised Nabozny that she would discipline the offending students, but actually did nothing.[26]

The abuse from his classmates intensified,[27] and for the third time, Nabozny informed the guidance counselor about the abuse; school administrators, however, merely "spoke to the students."[28] Still, the abuse continued. For example, while Nabozny was in a science classroom two students:

> held Nabozny down and performed a mock rape on Nabozny, exclaiming that Nabozny should enjoy it. The boys carried out the mock rape as twenty other students looked on and laughed. Nabozny escaped and fled to Podlesny's office. Podlesny's alleged response is somewhat astonishing; she said that "boys will be boys" and told Nabozny that if he was "going to be so openly gay," he should "expect" such behavior from his fellow students.[29]

Nabozny was required to speak with a counselor the following day, "not

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17. *Id.* at 449.
18. *Id.*
19. *Id.* at 451-52.
20. *Id.* at 451.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* Specifically, Nabozny's classmates continued to harass and abuse him with name calling, spitting, and hitting. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

because he was subject to a mock rape in a classroom, but because he left school without obtaining the proper permission."[30] After the incident in science class, Nabozny was terrified to attend school since no disciplinary action was ever taken against the students whom performed the mock rape.[31] The peer-inflicted abuse continued throughout the school year.[32]

When Nabozny entered the eighth grade the harassment resumed.[33] His parents then met with school officials and the offending students, but the students denied harassing Nabozny,[34] and consequently, the students went unpunished.[35] Throughout the remainder of the school year the abuse continued; each time Nabozny and his parents reported the abuse to Podlesny and identified the offending students.[36] Each time Podlesny promised to discipline the offending students but never did.[37] The severe abuse drove Nabozny to attempt suicide at the end of his eighth grade year.[38] He then finished the remainder of that school year in a Catholic school.[39]

Because the Catholic school did not offer classes beyond the eighth grade, Nabozny had to return to Ashland High[40] where the abuse resumed.[41] For example, while Nabozny was using a urinal, the same two students who performed the mock rape forced him to fall into the urinal by hitting him in the back of the knees.[42] One of the students then urinated on Nabozny.[43] To no avail, Nabozny and his parents repeatedly met with school administrators to discuss this incident and the overall danger to Nabozny at school.[44] No action was ever taken against the two offending students who attacked and urinated on Nabozny. Nabozny again attempted suicide.[45]

Nabozny then ran away from home so that he did not have to attend Ashland High.[46] His parents promised him that if he returned home, he would not have to attend Ashland High School.[47] He returned home, but since his

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* For instance, while Nabozny was in the bathroom several students attacked him by striking him and pushing his books to the floor. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 452.
39. *Id.*
40. *Id.*
41. *Id.* Moreover, Nabozny stated during his lawsuit that he recalled being beaten by a group of boys in ninth grade but did not report the abuse out of fear. Terry, *supra* note 2, at A14. Further, during the trial one abuser testified that he beat Nabozny because "he didn't act like we did. He was girlish." *Gay Student Settles Harassment Lawsuit*, *supra* note 4.
42. *Nabozny*, 92 F.3d at 452.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

parents were unable to afford private education, Nabozny did not attend school at all.[48] Children's Services ordered him back to Ashland High School.[49]

Upon his return to Ashland High School, Nabozny, then in tenth grade, was beaten so badly by classmates that he collapsed from internal bleeding.[50] He wanted to press charges against the offending students but a school official persuaded him not to by promising to discipline the students.[51] The abuse continued, as did the pleas by Nabozny and his parents for protection.[52] The school always promised to take action, but the action taken, if any, was minimal.[53] In eleventh grade, at age seventeen, Nabozny withdrew from high school.[54] He then brought equal protection and substantive due process claims against the school for their failure to protect him from a known danger pursuant to 42 U.S.C. § 1983.[55]

B. Reasoning and Holding

The Seventh Circuit held that the Wisconsin public school had violated Nabozny's equal protection rights, but found no violation of his substantive due process rights.[56] The court reasoned that Nabozny's due process argument failed because the school had no duty to act in order to protect Nabozny.[57] Therefore, its failure to act did not constitute a violation of Nabozny's substantive due process rights.[58] Following *DeShaney*[59] and *J.O. v. Alton Community Unit School District 11*[60] the court stated that no special relationship existed between Nabozny and the school to trigger an affirmative duty to act.[61] The Seventh Circuit upheld its prior ruling in *Alton*, which held that no

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48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* When Nabozny was continually harassed on the school bus by classmates, he was placed in a seat directly behind the driver where all the elementary children sat in the bus. Terry, *supra* note 2, at A14. Further, following several attacks in the bathroom, school authorities had Nabozny use the restroom in the Home Economics room. *Id.* Nabozny stated that "accommodations like the use of a separate restroom made him feel like a prisoner in a protective custody unit, charged with being gay and unashamed." *Id.*
54. *Nabozny*, 92 F.3d at 452.
55. *Id.* at 453. Under 42 U.S.C. § 1983 children who are injured while in the custody of the state can bring a federal cause of action. § 1983 (1994). Specifically any person who, under color of title, subjects "any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured." *Id.*
56. *Nabozny*, 92 F.3d at 460-61.
57. *Id.* at 460.
58. *Id.*
59. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989) (holding that the state had no duty to protect a child from the known danger of his abusive father because the harm did not occur while the child was in state custody).
60. 909 F.2d 267 (7th Cir. 1990). The *Alton* court applied *DeShaney* and held that school authorities did not have an affirmative duty under substantive due process to protect children from sexual abuse by a teacher during school hours because the state did not have permanent custody of the child. *Id.* at 272-73.
61. *Nabozny*, 92 F.3d at 459-60.

special relationship exits between public schools and students because children and parents have substantial freedom to act in order to provide reasonable safety for the children.[62]

The *Nabozny* court reasoned that a special relationship, triggering an affirmative duty to protect, arises when the state places limitations on an individual's freedom to act on his own behalf.[63] Further, the court stated that an affirmative duty is not created from the state's knowledge of a danger to a student or from someone's request for protection.[64] The court found it irrelevant that Nabozny and his parents had continually asked for assistance in its conclusion that the school did not violate Nabozny's substantive due process rights.[65] Additionally, an affirmative duty is not created by the state compelling the student to attend school.[66] The court found that the school had no duty to respond to the pleas for help because a special relationship did not exist between Nabozny and Ashland Public School District.[67]

III. ANALYSIS

The Seventh Circuit failed to establish that the Ashland Schools had an affirmative duty to protect Nabozny. The court did not recognize a special relationship between Nabozny and the State. This Note argues that a special relationship was indeed created when the state laws and school policies limited Nabozny's freedom to act on his own behalf. The United States Supreme Court has established the basis of a special relationship in three primary cases but has yet to decide specifically whether a school has a special relationship with students in its custody. The doctrine of *in loco parentis* logically creates the necessary special relationship required to create a duty to act. Therefore, Nabozny should have prevailed in his suit.

A. The Basis of a Special Relationship and a Substantive Due Process Claim

A special relationship arises when one's freedom to act on his or her own behalf is limited by state action.[68] For example, a prison inmate must rely on the state for medical treatment because he is not at liberty to seek medical assistance elsewhere.[69] The Supreme Court reasoned that if the state failed to provide an inmate with medical care the inmate could be left to suffer, to be

62. *Id.*; *Alton*, 909 F.2d at 272-73.
63. *Nabozny*, 92 F.3d at 459.
64. *Id.*
65. *Id.* at 460.
66. *Id.* at 458-59.
67. *Id.* at 459.
68. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199 (1989).
69. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

tortured, or to die.[70] Because the state's action limits an inmate's ability to act on his or her own behalf to obtain medical care, a special relationship existed that triggered the state's duty to provide medical care to inmates.[71] Thus, since the state had an affirmative duty to act for an inmate in this circumstance,[72] its failure to do so violated the inmate's substantive due process rights.

Further, the Supreme Court held in *Youngberg v. Romeo*[73] that the state also has an affirmative duty to provide reasonable care and safety for persons involuntarily committed to a state mental institution.[74] The Court reasoned that a special relationship was created, which triggered an affirmative duty, because the State limited the patient's ability to act on his or her own behalf.[75] The Court stated, "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[76]

Moreover, in *DeShaney*, the Supreme Court, for the first time, dealt with the issue of whether, and in what circumstances, a special relationship exists between the state and children. In that case, the Department of Social Services received reports that a father abused his son.[77] The State of Wisconsin did not immediately remove the child from the father's custody but agreed to investigate and observe the situation.[78] The observations led the caseworker to believe that the child was in fact being abused by the father. The state however did not exercise its *in loco parentis* power to remove the child from the father's custody.[79] Subsequently, the father abused the son, causing brain damage so severe that the child was profoundly retarded.[80] The Court held that the child did not have a basis for a substantive due process claim because a special relationship did not exist between the state and the child since the injuries occurred while the child was in his father's custody, not in the State's custody.[81] The Court, however, suggested that had the child been in the State's custody when he was injured, the child would have a substantive due process claim against the state child welfare department. Moreover, the Court reasoned that the purpose of the Due Process Clause is to protect individuals from the State, not to require the State to protect individuals from each other.[82]

Although students are in the state's custody temporarily, the Seventh Circuit held in *Alton* that school authorities do not have an affirmative duty

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70. *DeShaney*, 489 U.S. at 199 (citing Estelle v. Gamble, 429 U.S. 97, 103-04 (1976)).
71. *Id.*
72. *Id.*
73. 457 U.S. 307 (1982).
74. *Id.* at 324.
75. *Id.*
76. *Id.* at 321-22.
77. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 192 (1989).
78. *Id.*
79. *Id.*; see *infra* notes 89-97 and accompanying text regarding *in loco parentis*.
80. *DeShaney*, 489 U.S. at 193.
81. *Id.* at 201.
82. *Id.* at 196-97.

under the Due Process Clause to protect a student from a teacher's sexual molestation.[83] The court stated, "Only where the State has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise."[84] The court further reasoned that a special relationship does not exist because children, unlike prisoners and mental patients, are not so helpless that an affirmative duty to protect them arises.[85] The Seventh Circuit argued that because children and their parents retain substantial freedom to act, no constitutional duty exists for the state to protect the children in school.[86] Applying *Alton* to Nabozny's situation, however, the Seventh Circuit could have found the much needed special relationship between Nabozny and the school authorities because school policies limit a student's freedom to act.

B. The Creation of a Special Relationship: State Statutes, Grounded in the In Loco Parentis *Doctrine, Place Limits on Students' Freedom to Act to Protect Themselves from Peer-Inflicted Abuse*

Applying the *Alton* standard[87] to *Nabozny*, the Seventh Circuit should have found that state statutes and school polices, which gave Ashland School the authority to limit Nabozny's liberty, created a special relationship. The state's statutes and school policies, grounded in the *in loco parentis* doctrine, limited Nabozny's freedom to act against the peer-inflicted abuse.[88] Therefore, the school should have protected Nabozny from peer-inflicted abuse; its failure to do so violated Nabozny's substantive due process rights.

Generally speaking, the doctrine of *in loco parentis*[89] allows schools to limit students' freedom to act in various ways.[90] For instance, in *New Jersey v. T.L.O.*,[91] concerning the authority of a school to search a student, the court held:

> [T]hat the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does *not* require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.[92]

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83. J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

84. *Id.* at 272.

85. *Id.* at 272-73.

86. *Id.* The court, however, failed to elaborate on what a student could possibly do to protect himself or herself from a teacher's sexual abuse.

87. *See supra* notes 83-86 and accompanying text; *see infra* note 97 and accompanying text.

88. *See infra* notes 97-109 and accompanying text.

89. *Supra* note 12.

90. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969) (holding that school boards have the authority to control students' behavior if it "would materially and substantially disrupt the work and discipline of the school").

91. New Jersey v. T.L.O., 469 U.S. 325 (1985).

92. *Id.* at 341 (emphasis added) (holding that the search of a student depends merely upon the reasonableness of the search). For example, the Sixth Circuit held that a principal's search of a student's hotel room during a field trip was reasonable on the basis of *in loco parentis*. Webb v. McCullough, 828 F.2d

The authority which allows schools to control a student's conduct also limits the student's liberty. For example, Wisconsin legislation, which governs the Ashland School District, gives public school districts, administrators, and teachers the authority to "[m]ake rules for the organization, gradation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere."[93] For instance, Wisconsin legislation prohibits students' use of electronic communicative devices while at school.[94] Further, schools have the authority to expel students for any conduct which endangers the property, health, or safety of others whether or not the students are under the custody of the school at the time of the conduct.[95] Moreover, a school may expel a student when it finds that a student repeatedly refuses to obey school polices.[96] While there is a great need for a school to have the authority to regulate students' conduct in order to effectively run a school system, the regulations limit a student's freedom to act on his or her own behalf against peer-inflicted abuse.

School policies allowed by state statutes, grounded in the *in loco parentis* doctrine, limited Jamie Nabozny's substantial freedom to act on his own behalf against the abuse from his classmates. According to *Alton,* since children have substantial freedom to act on their own behalf at school, a special relationship does not exist.[97] In situations similar to Nabozny's, however, where a student is subjected to continual peer-inflicted abuse and the school does not take action to end the abuse, state legislation and school policies limit a student's freedom to act.

First, following the mock rape assault by his classmates, Nabozny fled to the principal's office. When the principal took no action, Nabozny protected himself by running home.[98] The following day, school authorities reprimanded Nabozny for having left school without adequate permission.[99] When a student, such as Nabozny, is subjected to severe abuse and the school takes no action to protect him, the student might seek to protect himself by leaving the dangerous situation. In Nabozny's case, however, Ashland School's policy against

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115 (6th Cir. 1987). In *T.L.O.*, the Supreme Court also pointed out that the public school's need for authority is not just a result of *in loco parentis*, it is needed for the state to achieve its commitment to educating children. *T.L.O.*, 469 U.S. at 336. Specifically, the Court argued that "[t]oday's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.*

93. WIS. STAT. ANN.. § 120:13(1) (West 1991 & Supp. 1996).

94. WIS. STAT. ANN. § 118.258(1) (West 1991).

95. WIS. STAT. ANN. § 120.13(1)(c).

96. *Id.*

97. J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990).

98. Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996).

99. *Id.*; SCHOOL DISTRICT OF ASHLAND, ASHLAND HIGH SCHOOL PARENT/STUDENT HANDBOOK 6-7 (June 1996) [hereinafter ASHLAND HIGH]; SCHOOL DISTRICT OF ASHLAND, ASHLAND MIDDLE SCHOOL HANDBOOK 4-5 (1996-97) [hereinafter ASHLAND MIDDLE].

leaving school without adequate permission limited his freedom to act on his own behalf. Further, if Nabozny continued to leave school each time he was abused by classmates, he could have been expelled for repeated refusal to obey the "adequate permission rule" before leaving school for his safety.[100] In this situation, the school's expulsion policy limits students' freedom to act on their own behalf. Instead, students subjected to abuse by classmates may remain at school and continually be harassed and abused rather than endure the negative stigma of expulsion. Therefore, both the state statutes, which permit local school boards to establish rules of conduct for students, and the specific Ashland School policy, limited Nabozny's substantial freedom to act on his own behalf thus establishing a special relationship.

Second, given the fact that Nabozny's communication to the school proved fruitless in producing assistance, the school might not allow Nabozny access to a telephone to call a parent for assistance. Students at Ashland are permitted to use a pay telephone from 8:00 a.m. to 8:30 a.m. and after school, but the school only allowed use of the office telephone for emergency situations.[101] Since the school was unwilling to take Nabozny's pleas for help seriously, the school probably did not consider his situation an emergency. Thus, Nabozny did not have access to a phone during school hours. A student in Nabozny's situation may want to bring a cellular phone to school in order to contact someone outside of the school for assistance. Some states, however, prohibit students from bringing electronic communicative devices to school.[102] This policy limits a student's freedom to act in order to enhance his safety in a situation where the school refuses to take action to discipline abusers. Although Nabozny did not attempt to bring an electronic communicative device to school, it is plausible that a student in his situation may desire to do so, but the state has the authority to limit this freedom to act on his own behalf.

Third, the state limited Nabozny's freedom to act in order to "fight back" against his classmates. In his situation, where the school does not punish offending students, Nabozny could have decided to defend himself and fight back. A student in a desperate situation may even decide to fight back with weapons. Outside of the school setting, fighting back may constitute self-defense under tort law. In a public school setting, however, striking another student, regardless of the reason, is grounds for expulsion because it constitutes conduct that endangers the safety of others.[103] Thus, state statutes and school policies prevented Nabozny from acting on his own behalf.

In addition to limiting Nabozny's freedom to protect himself, Wisconsin law also prevented Nabozny's parents from taking action appropriate to protect

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100. WIS. STAT. ANN. § 120.13(1)(c) (West 1991 & Supp. 1996); ASHLAND HIGH, *supra* note 99, at 16-17.

101. ASHLAND MIDDLE, *supra* note 99, at 16.

102. *E.g.*, WIS. STAT. ANN § 118.258 (1991 & Supp. 1996). *See also* ASHLAND HIGH, *supra* note 99, at 11.

103. WIS. STAT. ANN. § 120.13(1)(b). *See* ASHLAND HIGH, *supra* note 99, at 13-15.

their minor son. Parents do have some ability to take action in order to provide reasonable safety for their children. For instance, parents can talk to teachers, administrators, or school board members each time their child has been harassed or abused at school. However, a parent should only be required to take reasonable action in order to protect their child. Parents should not be required to send their child to private school or to relocate their family to another school district because of such unreasonableness.

In this case, Nabozny's parents, to no avail, continually met with school officials and pleaded with the school for assistance.[104] The situation, however, became so unbearable for Nabozny that he ran away from home.[105] His parents promised him that he would not have to return to Ashland School if he returned home.[106] Unfortunately, his parents were not able to afford private education and, therefore, his parents, in order to protect him, did not make him attend school.[107] Social Services, however, ordered him back to Ashland High School where he was subsequently beaten so badly that he collapsed from internal bleeding.[108]

The Seventh Circuit failed to recognize that at the point when the school ordered Nabozny back to Ashland School, the state limited his parents' freedom to act in order to protect their son from continual peer-inflicted abuse. Their only feasible option was to keep their son out of the Ashland school system but, without economic resources to send Nabozny elsewhere, his parents took action to not send him to school at all. This situation is similar in nature to the involuntary mental patient in *Youngberg*.[109] In both cases, the state took action which limited the ability of a person to provide reasonable safety on his or her own behalf. Thus, the court should have recognized that an affirmative duty was further created by the state which limited Nabozny's parents' freedom to act to provide reasonable safety for their son.

The Seventh Circuit was further incorrect in asserting that children have substantial freedom to act in school in order to protect themselves. The state, through legislation grounded in *in loco parentis*, has given local school boards the authority to limit a student's substantial freedom to act in order to provide reasonable safety for himself or herself. These restrictive policies are clearly needed in order to provide a favorable academic and safe atmosphere. A student's safety interest, however, should not be neglected as the price of these much needed policies. The existing school polices did not allow Nabozny to have substantial freedom to act on his own behalf as the *Alton* standard suggests that children possess. Instead, the limits that state legislation and school policies place on students who are subjected to peer-inflicted abuse

104. *Nabozny*, 92 F.3d at 449-61. *See supra* notes 34-55 and accompanying text.
105. *Nabozny*, 92 F.3d at 452.
106. *Id.*
107. *Id.*
108. *Id.*
109. Youngberg v. Romero, 457 U.S. 307 (1982).

establish a special relationship between the student and the school, thus, triggering an affirmative duty to protect the students.

C. Nabozny Can Also Meet the DeShaney *Requirement That the State Must Exercise Its* In Loco Parentis *Power Before a State's Affirmative Duty to Protect a Child Arises*

In *DeShaney*,[110] the Supreme Court held that the state did not violate a child's substantive due process rights when the state did not remove the child from a known child abuser.[111] The Court suggested that, had the state exercised its *parens patriae* power by taking custody of the child and then he were abused by anyone, the child would have had a substantive due process claim.[112] "The *parens patriae* power . . . is the state's limited paternalistic power to protect or promote the welfare of certain individuals, like young children and mental incompetents, who lack the capacity to act in their own best interests."[113] Two examples of a state exercising its *parens patriae* authority are the removal of a child from an abusive home and the implementation of rules and regulations at a public school. Once the state has exercised its *parens patriae* authority over a child, the state is then acting *in loco parentis*,[114] that is, acting in the place of the parent. Once the state has exercised this power, while it is free to place limits on a child's freedom to act, it has thereby established a special relationship.[115] When a school does implement restrictive policies governing students' conduct, the school establishes a special relationship, as in *Nabozny*.[116]

Unlike *DeShaney*, the Ashland school system exercised its *in loco parentis* power over Nabozny, which limited his freedom to act on his own behalf. Specifically, the school implemented rules and regulations grounded in the doctrine of *in loco parentis* in order to protect and promote the welfare of school children. In implementing the rules and regulations, "the state may pursue ends that would be impermissible under the police power because they

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110. *See supra* notes 77-82 and accompanying text.

111. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989).

112. *Id.*

113. *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1157, 1199 (1980) (emphasis added).

114. The doctrine of *in loco parentis* is really a "sub-set" of *parens partriae* power.

115. Similarly, when a state exercises its *parens patriae* power to incarcerate and institutionalize persons, a duty to protect them exists. *See supra* notes 68-76 and accompanying text. *Parens partriae* is the authority by which the state acts *in loco parentis*. When the state authority assumes the role of a parent, even temporarily as in a school, the school is acting *in loco parentis*.

116. The school policies limit a student's freedom to act to protect themselves from peer-inflicted abuse much like laws that limit a prisoner or an involuntary mental patient. Specifically, neither prisoners nor involuntary mental patients are free to leave if mistreated or injured while in the state's custody. Although Nabozny could physically leave school, he did so at the peril of being reprimanded and possibly expelled. As in *Estelle* and *Youngberg*, but unlike *DeShaney*, the state had custody of Nabozny when he was abused. During that time frame in which the state had custody, Nabozny had to abide by school policies which limited his freedom to act.

are unrelated to any harm to third parties or the public welfare."[117] For example, public school handbooks often state that a student may not engage in any behavior that causes harm to others; even in self-defense situations, a child is still subject to punishment.[118] In addition, students are prohibited from leaving school without adequate permission because unauthorized absences from classes violate state compulsory attendance laws.[119] Further, students may also be prohibited from engaging in otherwise permissible activities such as chewing gum, eating candy, using roller skates, or smoking during school hours.[120] All of these regulations demonstrate the state's *in loco parentis* power. This expression of power prohibits a student, like Nabozny, who is subjected to abuse at school from leaving the place where the abuse occurred.[121] Specifically, Ashland School adopted and exercised its *in loco parentis* power with these policies which prohibited Nabozny from leaving school in dangerous situations or from fighting back. The school gave him no options as the power rested with the school.

Outside of a school situation, where a student is not subject to rules grounded in *in loco parentis* power, one who is continually being harassed and abused might either leave the location of the abuse and probably never return, or, if possible, fight back against the offenders. Nabozny, however, had to return to school each day and did not have the liberty to leave school when placed in danger because the state exercised its *parens patriae* authority, and subsequently, *in loco parentis* power. Thus, *Nabozny* is distinguishable from *DeShaney* because the state exercised its *in loco parentis* power. That exercise of power limited Nabozny's freedom to act on his own behalf and triggered the state's affirmative duty to protect him from continual peer-inflicted abuse.

IV. CONCLUSION

For the welfare of the education system, state statutes and school policies allow school authorities to substantially limit students' freedom to act. In order for a successful school system to function, rules and regulations are needed. However, contrary to *Alton*, Nabozny did not have substantial freedom to act in order to protect himself, because he was prevented from doing so by school rules. In fact, a special relationship was created between the school and Nabozny because school polices limited Nabozny's freedom to protect himself from peer-inflicted abuse. Further, Nabozny can meet the *DeShaney* requirement, that the State must exercise its *in loco parentis* power in order for a special relationship to exist. Therefore, the Seventh Circuit should have found

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117. *Developments in the Law: The Constitution and the Family*, *supra* note 113, at 1199.

118. *See, e.g.*, OAKWOOD BOARD OF EDUCATION, OAKWOOD HIGH SCHOOL STUDENT HANDBOOK 18 (1996-97).

119. *Id.* at 18-19.

120. *Id.*

121. *See supra* note 116.

that the Ashland school system violated Nabozny's substantive due process rights because a special relationship was created which triggered the school's affirmative duty to provide reasonable safety for Nabozny.

Maggie J. Randall Robb