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COMMENTS

CIVIL LIABILITY FOR BULLYING:

HOW FEDERAL STATUTES AND STATE TORT LAW CAN PROTECT OUR CHILDREN

JESSICA BROOKSHIRE

I. INTRODUCTION

There is a developing area of law dealing with civil liability for the bullying of young people. This comment will analyze emerging trends in bullying legislation, tort liability, challenges, and forms of relief in bullying lawsuits. Section I will provide a basic overview of the definition of bullying and the legal and social problems that it presents. Next, Section II will explore potential claims for which relief may be granted, including state tort claims, as well as claims arising under federal anti-discrimination statutes and constitutional provisions. Exploring these claims will include an examination of viable defendants within each cause of action. Section III will explore possible immunities and other hurdles that a plaintiff may face when attempting to sue a school district or school official. Finally, Section IV will address the issue of relief by analyzing potential damage awards in bullying lawsuits.

A. What is bullying?

Bullying is a hot-button issue across the nation. With all of the national attention and legislative debates surrounding the topic, bullying is no longer just a rite of passage. As the number of suicides in young people rises, bullying can no longer be brushed aside as just "kids being kids." Bullying is a serious problem, and with the worsening of this problem comes an emerging area of law. Perhaps the first step to dealing with bullying is to understand exactly what bullying is and why it is such a focal point of conversation.

The U.S. Department of Health and Human Services defines bullying as "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance.

The behavior is repeated, or has the potential to be repeated, over time."[1] Dr. Dan Olweus, creator of the *Olweus Bullying Prevention Program*,[2] provides a more comprehensive definition: "'A person is bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself.'"[3] Dr. Olweus further highlights three vital components of this definition[4]: "Bullying is aggressive behavior that involves unwanted, negative actions,"[5] which "involves a pattern of behavior repeated over time[,]"[6] and also "involves an imbalance of power or strength."[7] These definitions each mention aggressive behavior, which can appear in many forms.[8] Bullying can be verbal, social or relational, or physical.[9] Verbal bullying includes teasing, taunting, and verbal threats.[10] Social bullying, also called relational bullying, is the harming of "someone's reputation or relationships" and includes social exclusion, spreading rumors, and public embarrassment.[11] Physical bullying tends to be the most commonly recognized form of bullying and includes hitting, kicking, pushing, spitting, or other aggressive physical behavior towards another student.[12] The United States Department of Education ("DOE") Office for Civil Rights groups bullying in with "harassing conduct," which is defined as:

> Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that

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[1] U.S. Dep't of Health & Human Servs., *What Is Bullying: Bullying Definition*, STOPBULLYING.GOV, http://www.stopbullying.gov/what-is-bullying/definition/index.html (last visited Feb. 15, 2014).

[2] *See* Hazelden Foundation, VIOLENCE PREVENTION WORKS, http://www.violencepreventionworks.org/public/olweus_bullying_prevention_program.page (last visited Feb. 15, 2014).

[3] Hazelden Foundation, *Recognizing Bullying*, VIOLENCE PREVENTION WORKS, www.violencepreventionworks.org/public/recognizing_bullying.page (last visited Feb. 15, 2014).

[4] *See id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See id.*

[9] *What Is Bullying: Bullying Definition*, *supra* note 1.

[10] *See id.*

[11] *Id.*

[12] *See id.*

> may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.[13]

This definition is interesting because, although comprehensive, it expressly eliminates the element of repetitive conduct that other organizations deem to be vital in classifying conduct as "bullying."[14]

The definition of bullying seems to be expanding with increased awareness of the issue. Expanding the definition of the term "to encompass both appalling violence or harassment *and* a few mean words"[15] seems to provide more protection for victims from the ever-evolving creature that bullying has become. However, the expansion has also led to an overuse of the word, which ultimately poses a threat to solving the problem it presents. We often see headlines describing instances of "bullying" across the nation, "even though we know that 'bullying' isn't the same as garden-variety teasing or a two-way conflict."[16] The harm in overusing or misusing the word "bullying" is that it makes "the real but limited problem seem impossible to solve."[17] The bullying epidemic cannot be contained and eliminated if we continue to believe that "bullying" is every conflict, every harsh word, or every bad thing that happens everywhere. The flood of anti-bullying legislation over the past fourteen years has continually complicated the definition of "bullying" by adding a multitude of different statutory definitions.[18] Some of these "overly

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[13] Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to School Officials 2 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [hereinafter Dear Colleague Letter].

[14] *See id.*

[15] Emily Bazelon, Op-Ed., *Defining Bullying Down*, N.Y. TIMES, Mar. 12, 2013, at A23 (emphasis added).

[16] *Id.*

[17] *Id.*

[18] Forty-one states define bullying by statute. DENA T. SACCO ET AL., BERKMAN CTR. FOR INTERNET & SOC'Y AT HARVARD UNIV., AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS 4 (2012), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf. Hawaii, Maine, New Mexico, Virginia, and Wisconsin allow the state department of education discretion to define bullying, so long as the definition is included in the state's model bullying policy. *Id.* Arizona

broad legal definitions of bullying—for example, ones that leave out the factors of repetition or power imbalance—can lead parents to cry bully whenever their child has a conflict with another child."[19] A comprehensive understanding of the definition of bullying is vital to furthering the imposition of civil liability for bullying, because a cause of action cannot be maintained without a clear and proper working definition of the offense.

B. Understanding Why We Have to Talk About Bullying

Bullying is a dangerous problem. Many people incorrectly believe bullying to be the typical playground scuffle that all school-aged children encounter. Bullying has worsened in recent years, bringing with it numerous and oftentimes tragic effects.[20] Victims of bullying often experience mental and physical problems, as well as negative academic effects related to bullying.[21] Victims of bullying are more likely to experience depression, anxiety, increased feelings of sadness and loneliness, changes in sleep and eating patterns, loss of interest in activities they once enjoyed, and decreased academic achievement and school participation.[22] Victims are more likely to skip school or drop out of school altogether.[23] In extreme cases, victims of bullying may resort to violent retaliatory measures, including horrific tragedies such as school shootings.[24] Perhaps the most commonly publicized effect of bullying is suicide. "Connecting students' suicidal behavior to peer bullying is not difficult,"[25] and even the courts have recognized this deadly combination.[26] It is

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and Minnesota "leave the definition of bullying entirely up to local school districts." *Id.* Alabama, Colorado, Florida, Indiana, Massachusetts, Nebraska, Ohio, and Vermont define bullying as only including behaviors that are repetitive, systematic, or continuous. *Id.* at app. 1, tbl. 1. California, Illinois, Kansas, Louisiana, and Pennsylvania require the conduct to be "severe or pervasive" in order to be classified as bullying. *Id.*

[19] Bazelon, *supra* note 15.

[20] *See* Michael Dhar, *Bullying Increasingly Seen as a Public Health Issue*, HUFFINGTON POST (Nov. 8, 2013, 6:20 PM), http://www.huffingtonpost.com/2013/11/08/bullying-public-health-issue_n_4241468.html.

[21] U.S. Dept. of Health & Human Servs., *Effects of Bullying*, STOPBULLYING.GOV, http://www.stopbullying.gov/at-risk/effects/ (last visited Feb. 15, 2014).

[22] *Id.*

[23] *Id.*

[24] *Id.* "In 12 of 15 school shooting cases in the 1990s, the shooters had a history of being bullied." *Id.*

[25] Perry A. Zirkel, *Public School Student Bullying and Suicidal Behaviors: A Fatal Combination?*, 42 J.L. & EDUC. 633, 634 (2013).

[26] *See* Kowalski v. Berkeley Cnty. Sch. Dist., 652 F.3d 565, 572 (4th Cir. 2011)

worth noting that while victims of bullying are at risk for suicide, oftentimes bullying is not the only factor in suicidal thoughts or tendencies.[27] Researches have investigated the potential causal connection between bullying and suicide.[28] The study, led by Dr. Young-Shin Kim, "analyzed [thirty-seven] studies that examined bullying and suicide among children and adolescents."[29] "Almost all of the studies found connections between being bullied and suicidal thoughts among children. Five reported that bullying victims were two to nine times more likely to report suicidal thoughts than other children were."[30]

The effects of bullying can be detrimental to a school environment, negatively affecting our educational system as a whole. The Department of Education's Office for Civil Rights noted the dangers of bullying in schools in a dear colleague letter,[31] stating "[b]ullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."[32] Bullying continues to expand as a serious problem in our society, and its effects reach far beyond the schoolyard.

Bullying is frequently hackneyed as students shoving one another into lockers or mean-girls gossiping and spreading rumors. These images "emphasize bullying as a social ill,"[33] but "medical professionals increasingly see bullying as a public

("[S]tudent-on-student bullying is a 'major concern' in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide."); T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 298 (E.D.N.Y. 2012) ("More recently, stories of bullied victims taking their own lives have become common.").

[27] *See Effects of Bullying*, *supra* note 21.

[28] Karen N. Peart, *Bullying-Suicide Link Explored by Researchers at Yale*, YALENEWS (July 16, 2008), http://news.yale.edu/2008/07/16/bullying-suicide-link-explored-new-study-researchers-yale.

[29] Dr. Young-Shin Kim is the review lead author of this study and an assistant professor at Yale School of Medicine's Child Study Center. *Id.*

[30] *Id.*

[31] A "dear colleague letter" refers to a letter sent by an individual to all other members of an organization or group. These letters are often used to garner support for new bills in the legislature, although many government entities use the format to inform groups or organizations about certain issues. JACOB R. STRAUS, CONG. RESEARCH SERV., RL34636, "DEAR COLLEAGUE" LETTERS: CURRENT PRACTICES 1 (Nov. 25, 2008).

[32] Dear Colleague Letter, *supra* note 13, at 1.

[33] Dhar, *supra* note 20.

health issue."[34] Both bullies and their victims often complain of headaches, stomachaches, and difficulty falling asleep.[35] Dr. Jorge Srabstein[36] says that these symptoms rarely occur individually.[37] Instead, victims and bullies alike tend to complain of "headaches accompanied by anxiety, stomachaches and depression."[38] According to Dr. Srabstein, such "clustering" of multiple symptoms "grants the appearance of a medical syndrome . . . though there's not yet enough evidence to declare a 'bullying syndrome.'"[39] The Children's National Medical Center (CNMC) "estimates [ten] percent of U.S. children suffer this cluster of symptoms."[40] Whether or not bullying truly is a public health issue, few can argue with the fact that bullying is a real, dangerous, and growing problem that plagues schoolchildren across the nation.

C. How Can the Legal World Help?

Currently, forty-nine states have passed some form of anti-bullying legislation.[41] These laws vary greatly from state to state. The Department of Education ("DOE") released a report in 2011 analyzing state bullying laws and policies.[42] At the time

> [forty-six] states had bullying laws, [forty-five] of which directed school districts to adopt bullying policies. Forty-one states had model bullying policies. Thirty-six states included provisions in their education codes prohibiting cyberbullying or bullying using electronic media. Thirteen states specified that schools have jurisdiction over off-campus behavior if it creates a hostile school environment.[43]

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[34] *Id.*

[35] *Id.*

[36] Dr. Jorge Srabstein is the Medical Director of the Clinic for Health Problems Related to Bullying at the Children's National Medical Center. *Id.*

[37] *See id.*

[38] *Id.*

[39] Dhar, *supra* note 20.

[40] *Id.*

[41] BULLY POLICE USA, http://www.bullypolice.org (last updated Apr. 2014). The only state without an anti-bullying law is Montana. *Id.*

[42] VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES (2011), *available at* http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf.

[43] *Analysis of State Bullying Laws and Policies*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/opepd/ppss/reports.html#state-bullying-laws (last modified Feb. 5, 2015) (summarizing key findings in STUART-CASSEL ET AL., *supra* note 42, at x)

After the Columbine shootings in 1999, Georgia was the first state to enact legislation to combat bullying.[44] From 1999 to 2010 state legislatures enacted more than 120 bills introducing or amending education and criminal statutes to confront "bullying and related behaviors" in schools.[45] This wave of anti-bullying legislation demonstrates a trend towards criminalization of bullying behaviors.[46] The DOE noted this trend in "[r]ecent state legislation and policy addressing school bullying has emphasized an expanded role for law enforcement and the criminal justice system in managing bullying on school campuses."[47] Bullying among schoolchildren has traditionally fallen "almost exclusively under the purview of school systems."[48] However, new "legislation governing the consequences for bullying behavior reflects a recent trend toward treating the most serious forms of bullying as criminal conduct that should be handled through the criminal justice system."[49] States all have criminal laws applicable to certain bullying behaviors.[50] In addition, some states have created new crimes targeting bullying,[51] while other states modified existing crimes to apply to bullying behavior.[52] This legislative shift provides criminal liability for extreme cases of bullying and is being implemented nationwide with increasing

[44] STUART-CASSEL ET AL., *supra* note 42, at xi.

[45] *Id.*

[46] *See id.*

[47] *Id.* at 19.

[48] *Id.* at 19–20.

[49] *Id.* at 20.

[50] SACCO ET AL., *supra* note 18, at 9.

[51] An Arkansas statute makes cyber-bullying a crime. ARK. CODE ANN. § 5-71-217 (West 2014). Idaho, Louisiana, and North Carolina specifically provide criminal consequences for bullying. IDAHO CODE ANN. § 18-917A (West 2014); LA. REV. STAT. ANN. § 14:40.7 (West 2014); N.C. GEN. STAT. § 14-458.1 (West 2014).

[52] *See* GA. CODE ANN. § 20-2-1181 (2014) ("Any person violating this Code section shall be guilty of a misdemeanor of a high and aggravated nature."); KY. REV. STAT. ANN. § 525.080 (West 2014) (adding bullying and cyberbullying conduct to the crime of harassing communications); MASS. GEN. LAWS ANN. ch. 265, §§ 43, 43A (West 2014) (adding bullying conduct to the crimes of stalking and criminal harassment); MASS. GEN. LAWS ANN. ch. 265, § 13B (West 2014) (outlining fines and incarceration for indecent assault and battery against a child under age 14); MASS. GEN. LAWS ANN. ch. 269, § 14A (West 2014) (incorporating cyberbullying and harassment through electronic communication); MO. ANN. STAT. § 565.090 (West 2014) (adding bullying conduct to the crime of harassment); NEV. REV. STAT. ANN. § 392.915 (West 2014) (making bullying and cyberbullying misdemeanors or gross misdemeanors depending upon the circumstances).

frequency.[53] In fact, criminal liability for bullying seems to be well established. In contrast, civil liability for bullying appears to be barely emerging as an area of law. However, the General Counsel for the National School Boards Association, Francisco Negron, stated in 2011 that "'anecdotal evidence shows an obvious increase'" in bullying law suits.[54]

D. In an age of frequent frivolous litigation, why are we looking for more lawsuits?

With a variety of failed causes of action and a lack of civil suits, many victims of bullying are left wondering what help the civil side can offer? It is well settled that the purpose of civil liability is to provide redress for plaintiffs injured as a result of the action or inaction of another person or persons.[55] Bullying causes injury, and that injury is inherently at the hands of another person or persons—so where is the relief?

We can't make parents teach their kids to respect others and act with compassion. But we can keep our kids safer by making schools do a better job of protecting them from bullying. Litigation against school districts and officials who fail to respond appropriately to bullying is a critical tool for accomplishing this.[56]

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[53] *See* Steve Almasy, Kim Segal & John Couwels, *Sheriff: Taunting Post Leads to Arrests in Rebecca Sedwick Bullying Death*, CNN (Oct. 16, 2013, 8:53 AM), http://www.cnn.com/2013/10/15/justice/rebecca-sedwick-bullying-death-arrests/; Alyssa Creamer, *Seven Grafton Teens Arrested on Felony Witness Intimidation Charges For Allegedly Cyber-Bullying the Victim of a Violent Crime*, BOSTON.COM (Jan. 25, 2014), http://www.boston.com/news/local/massachusetts/2014/01/25/seven-grafton-teens-arrested-felony-witness-intimidation-charges-for-allegedly-cyber-bullying-the-victim-violent-crime/V7sn8b4axyorUa535jA0XK/story.html; Jacqueline Ingles, *15-Year-Old Girl Arrested on Stalking Charges, Accused of Cyber Bullying Peers*, ABC ACTION NEWS WFTS TAMPA BAY (Nov. 7, 2013, 3:12 PM), http://www.abcactionnews.com/news/region-south-pinellas/st-petersburg/15-year-old-girl-arrested-on-stalking-charges-accused-of-cyber-bullying-peers; Ari Mason, *Stamford 12-Year-Old Arrested for Bullying: Police*, NBC CONN. (Oct. 3, 2013, 9:15 AM), http://www.nbcconnecticut.com/news/local/Stamford-12-Year-Old-Arrested-for-Bullying-Police-226199071.html; *Students Arrested for Cyber Bullying*, WAFB, http://www.wafb.com/story/2774728/students-arrested-for-cyber-bullying (last visited Mar. 6, 2014).

[54] Cynthia Hsu, *Are Bullying Lawsuits on the Rise?*, LAW & DAILY LIFE (Sept. 12, 2011, 3:03 PM), http://blogs.findlaw.com/law_and_life/2011/09/are-bullying-lawsuits-on-the-rise.html.

[55] *See* RUSSELL L. WEAVER ET AL., TORTS CASES, PROBLEMS, AND EXERCISES 1 (4th ed. 2013).

[56] Adrian Alvarez, *Why We Litigate to Protect Students From Bullying*, PUB. JUST. (Sept. 16, 2013), http://publicjustice.net/blog/why-we-litigate-to-protect-students-from-bullying.

II. CAUSES OF ACTION

A. Helping Victims Before it is Too Late

As a preliminary matter, schools are obligated to address bullying, and that obligation is not limited to the requirements described in school or state anti-bullying policies.[57] In fact, depending on the specific facts and circumstances surrounding each incident, some bullying may trigger responsibilities under state tort law, federal statutes, and even the U.S. Constitution.[58] Bullying based upon race, color, national origin, sex, or disability may constitute violations of a variety of federal anti-discrimination statutes.[59] If the bullying is not based on any of the aforementioned features or the victim does not qualify as a member of a "protected" or "identifiable" class, then a claim under state tort law may prove more advantageous.[60] As discussed below, state claims may be better for potential plaintiffs than federal claims because some state civil rights statutes cover a wider range of discrimination than federal statutes, and state standards for establishing liability may be less stringent than federal standards.[61]

Wrongful death claims for children who have committed suicide due to bullying can be found on news stations across the country.[62] Grieving parents turn to the legal system to hold the perpetrators responsible for their actions.[63] Regardless of its success or failure, a wrongful death claim is too little, too late for families. With the plethora of causes of action available, bullying

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[57] Adele Kimmel & Adrian Alvarez, *Litigating Bullying Cases: Holding School Districts and Officials Accountable*, PUB. JUST. 3 (Apr. 2013), http://publicjustice.net/sites/default/files/downloads/Bullying-Litigation-Primer-April-2013_1.pdf.

[58] *See id. See also infra* Section III (covering the legal protections afforded to school districts and officials in bullying litigation).

[59] *See* 42 U.S.C. § 2000d (2012) (Title VI of the Civil Rights Act of 1964); 20 U.S.C. § 1681 (2012) (Title IX of the Education Amendments of 1972); 29 U.S.C. § 794 (2012) (Title V, § 504 of the Rehabilitation Act of 1973); 42 U.S.C. § 12131 (2012) (Title II of the Americans with Disabilities Act of 1990).

[60] *See* Kimmel & Alvarez, *supra* note 57, at 22.

[61] *Id.*

[62] *See, e.g.*, Julia Dahl, *Bullied Girl's Mom Announces Lawsuit, "Rebecca's Law,"* CBS NEWS (Nov. 25, 2013, 10:52 AM), http://www.cbsnews.com/news/bullied-girls-mom-announces-lawsuit-rebeccas-law/; *see also* Complaint, Moore v. Chilton Cnty. Bd. of Educ., 936 F. Supp. 2d 1300 (M.D. Ala. 2013) (No. 2:12-CV-424-WKW [WO]); Complaint, Logan v. Sycamore Cmty. Sch. Bd. of Educ., 780 F. Supp. 2d 594 (S.D. Ohio 2011) (No. 1:09-CV-00885).

[63] *See* sources cited *supra* notes 54 & 62.

certainly satisfies the elements of more than just a wrongful death claim. The legal system can offer better assistance and protection to children than waiting for a child to commit suicide and then suing for wrongful death.

B. Is Bullying a Tort?

The realm of tort law focuses on legal remedies for wrongs committed against individuals. It is well settled that a tort is "a civil wrong for which the law recognizes a legal remedy on behalf of a private individual."[64] Bullying, by definition, is a wrong committed against an individual.[65] Many of the actions that are classified as bullying meet the elemental requirements of a variety of tort claims, and therefore should be available for victims of bullying. Civil liability encourages manufacturers to produce safer products, compels doctors to take certain precautions in procedural matters, and "reminds citizens to avoid negligent behavior."[66] This comment posits that schools should be held to similar standards. Exposure to liability for injuries caused by school bullying will make schools "take necessary steps to curtail the bullying epidemic."[67]

1. Negligence

Indirect liability allows a plaintiff-bullying victim to sue the school district rather than, or in addition to, the bullies themselves.[68] The chief state level claim against a school district in a bullying incident is negligence.[69] Some states recognize claims against school districts or their employees for negligent supervision of students.[70] The prevailing logic supporting such negligence claims is that schools are in a unique position to protect

[64] WEAVER ET AL., *supra* note 55, at 1.

[65] *See supra* Section I.A.

[66] Katelyn Deady, Note, *Victims With No Access to the Courts: Why Liability Should Be Imposed on School Districts for Bullying*, LOY. U. CHI. CHILDLAW & EDUC. INST. F. 12 (2012), http://www.luc.edu/media/lucedu/law/centers/childlaw/childed/pdfs/2012studentpapers/deady.pdf.

[67] *Id.*

[68] *See* WEAVER ET AL., *supra* note 55, at 567–78.

[69] Zirkel, *supra* note 25, at 636.

[70] *See, e.g.*, Ward v. Barnes, 545 F. Supp. 2d 400, 416 (D.N.J. 2008) (teacher not immune for negligent supervision where he allegedly directed or witnessed assault of student by fellow classmates); Smith v. Poughkeepsie City Sch. Dist., 41 A.D.3d 579, 580–81 (N.Y. App. Div. 2007) (negligent supervision claim based on district's alleged knowledge of student's history of bullying).

victims of bullying.[71] School officials have a "'comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'"[72] In the past, the Supreme Court recognized "that the nature of [the State's] power [over public schoolchildren] is *custodial* and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[73] In *New Jersey v. TLO*,[74] the Supreme Court stated that "[t]eachers and school administrators . . . act *in loco parentis* in their dealings with students: their authority is that of the parent."[75]

The elements of a negligence cause of action are well established.[76] However, a victim of bullying faces certain hurdles that must be overcome to maintain a claim for negligence against a school district. While school districts do have a duty to safeguard students while at school from "reasonably foreseeable dangerous conditions including the dangerous acts of fellow students," districts "are not expected to be insurers of the safety of students while they are at school."[77] The crux of any negligence claim is to establish a duty of care that the defendant owed to the plaintiff.[78] Schools have a general duty to supervise students in their care, and a failure to protect students from foreseeable injuries may result in liability.[79]

In *Phillips* ex rel *Gentry*, a Tennessee court affirmed a judgment for $300,000 in a state negligence suit where a classmate—who the plaintiff and the plaintiff's mother had reported for prior incidents of bullying and teasing—hit a disabled student in

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[71] *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646 (1999).

[72] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U. S. 503, 507 (1969)).

[73] Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (emphasis added).

[74] 469 U.S. 325 (1985).

[75] *Id.* at 336.

[76] The elements required to establish negligence are: a duty of care owed by the defendant to the plaintiff, breach by the defendant of that duty of care, injury or loss, cause in fact, and proximate or legal cause. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

[77] Phillips *ex rel.* Gentry v. Robertson Cnty. Bd. of Educ., No. M2012-00401-COA-R3CV, 2012 WL 3984637, at *4 (Tenn. Ct. App. Sept. 11, 2012) (citations omitted).

[78] *See Phillips*, 2012 WL 3984637, at *4 (citing *Hale v. Ostrow*, 166 S.W.3d 713, 716 (Tenn. 2005); *Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997)).

[79] *Cf.* Shabot v. E. Ramapo Sch. Dist., 269 A.D.2d 587 (N.Y. App. Div. 2000) (granting summary judgment for the school district where "spontaneous and unforeseeable act[s] of two students . . . could not have been anticipated").

the eye with a book while the teacher was out of the classroom.[80] The trial court found that the teacher "was negligent in failing to follow the school board's policy and the instructions of the principal and assistant principal with regard to leaving students in the classroom unattended."[81] The trial court further found that "[t]he principal and other school officials were negligent in failing to properly advise [the teacher] of [the victim's] condition and in failing to properly follow through with regards to the accommodations they had agreed to make for [the victim]."[82] The Court of Appeals of Tennessee agreed in affirming the trial court that in light of the plaintiff's disability, "the school board should have foreseen that he could be injured by another student when left unsupervised."[83]

In *Heidenberg v. Hillel School of Tampa*,[84] a twelve-year-old boy was assaulted several times by a classmate.[85] The victim's father reported the bullying to the principal and asked the principal to protect the victim.[86] After the incidents were reported, the bully assaulted the victim again on school grounds, leaving the victim with a broken arm and permanent nerve damage. The victim sued the school for negligence.[87] The jury found for the plaintiff, awarding a $4 million verdict.[88] Similarly, a jury awarded $50,000 to a victim of bullying who claimed negligence after her classmates photoshopped sexually suggestive pictures of the plaintiff, and posted them on flyers in school hallways and bathrooms including the plaintiff's phone number.[89] The com-

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[80] *See Phillips*, 2012 WL 3984637, at *4, *7 (Tenn. Ct. App. Sept. 11, 2012)); *see also Jury Verdicts & Settlements in Bullying Cases*, PUB. JUST. 26 (Jan. 2014), https://publicjustice.net/sites/default/files/downloads/BullyingVerdictsandSettlements-020714.pdf (summarizing *Phillips*).

[81] *Phillips*, 2012 WL 3984637, at *6.

[82] *Id.*

[83] *Id.* at *7.

[84] Heidenberg v. Hillel Sch. of Tampa, No. 06-CA-512, 2007 WL 5084586 (Fla. Cir. Ct. Dec. 13, 2007).

[85] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 7 (summarizing *Heidenberg*, 2007 WL 5084586).

[86] *Id.*

[87] *Id.*

[88] *Heidenberg*, 2007 WL 5084586, at *1. The judge later granted the defendant's motion for remittitur and reduced the award to $600,000 because the closing argument by plaintiff's attorney was found to "compel[] an improper and prejudicial analysis by the jury." *Id.* at *6.

[89] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 7; *see also* Jenny Runevitch, *Madison Co. School District Found Liable in Bullying Case*, WTHR.COM

mon theme in these cases that seems to support a finding of liability is the amount of notice or knowledge that the school district had regarding the bullying. The amount of notice afforded to the school district has a direct correlation to the element of foreseeability of the harm necessary to maintain a negligence cause of action.

The issue of foreseeability arises in any negligence claim, but is especially crucial to a negligence claim for bullying. Foreseeability is an essential part of proving proximate—or legal—cause.[90] If the plaintiff's injury "could not have been reasonably foreseen or anticipated," there is no basis for proximate cause.[91] Courts have applied this notion in lawsuits against school districts, using notice or knowledge as the basis for determining foreseeability. There is no requirement that the school district foresee the exact manner in which the injury took place.[92] Rather, it must be determined that the school district "could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury occurred."[93] Again, this standard turns on whether or not the school district knew or reasonably should have known that the bullying was likely to lead to some form of injury.

Another potential claim for negligence arises from the school's failure to do something that it otherwise should have. For example, a school's failure to comply with or enforce its own bullying policies may result in liability. A fourteen-year-old student sued one California school district for failing to suspend the bullies under its zero-tolerance bullying policy after the student was subjected to anti-Semitic and anti-gay taunts and eventually attempted suicide in the school bathroom.[94] The parties reached a settlement of $1.35 million.[95]

Next, a New Jersey jury awarded $16.3 million to a plaintiff who sued the Irvington Board of Education under state tort law

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(Oct. 16, 2013, 5:28 PM), http://www.wthr.com/story/23700742/2013/10/15/madison-county-school-district-found-liable-in-bullying-case.

[90] *Roberts v. Robertson Cnty. Bd. of Educ.*, 692 S.W.2d 863, 872 (Tenn. Ct. App. 1985).

[91] *Id.*

[92] *See id.*

[93] *See id.*

[94] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 2–3 (summarizing Doe v. Roe Sch. Dist., Confidential Docket No. (Cal. Los Angeles Cnty. Super. Ct. 2012)).

[95] *Id.* at 2.

claims.[96] In that case, a fifteen-year-old student was left a quadriplegic and brain damaged after his seventeen-year-old classmate severely beat him.[97] The most shocking part of this case is that the perpetrator had been suspended from school the day before the incident, but because of a series of lapses in administrative steps, the school allowed him to return the next morning.[98] The jury's finding that the school district was liable because it ignored policies that could have prevented the beating supports that "while the school district [did not] commit the crime, it shouldered much of the responsibility."[99] The jury found the school district to be 80% responsible for the plaintiff's injuries ($13 million), and the perpetrator to be 20% responsible ($3.3 million).[100]

School districts absolutely *must* take steps to ensure that the school environment is safe and conducive to learning. When a district fails to act in a manner that meets that duty, permitting and even encouraging the bullying to continue, that district and its employees should be held responsible. Such landmark verdicts may act as a warning to school districts across the nation and encourage districts to create, implement, and enforce anti-bullying policies to protect students on school property.

2. Intentional Torts

Depending on the facts of each case, victims of bullying may assert state tort law claims for a variety of intentional torts including assault, battery, and intentional infliction of emotional distress. A state tort claim for assault "requires the plaintiff's reasonable apprehension of an immediate harmful or offensive contact."[101] An assault claim may arise anytime that bullying reaches the point of physically manifested threats of physical

[96] Patterson v. Irvington Bd. of Educ., No. ESX-L-1093-09, 2012 WL 6755699 (N.J. Super. Ct. Law Div. Nov. 1, 2012).

[97] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 18 (summarizing *Patterson*, 2012 WL 6755699).

[98] *See id.*; *see also* Alexi Friedman, *Irvington Teen Left Paralyzed after Beating Is Awarded $16.3M*, NJ.COM (Oct. 12, 2012, 5:13 PM), http://www.nj.com/essex/index.ssf/2012/10/irvington_teen_left_brain_dama.html.

[99] Friedman, *supra* note 98.

[100] *Id*. The perpetrator is also serving a five-year prison sentence for convictions related to the assault. *Id*.

[101] Holloway v. Wachovia Bank & Trust Co., 428 S.E.2d 453, 460 (N.C. Ct. App. 1993).

harm.[102] Oftentimes, bullying does not stop with just an assault; the bully usually crosses into the realm of battery immediately following an assault.[103] The tort of battery requires the plaintiff to prove that the defendant acted "intending to cause a harmful or offensive contact with the [plaintiff] or a third person, or an imminent apprehension of such a contact, and a harmful contact with the person of the other directly or indirectly results."[104] Therefore, any time a student suffers harmful contact as a result of the physical actions of another student, a claim for battery may lie.[105]

Intentional infliction of emotional distress may also be a cause of action available to victims of bullying, but can be more difficult and complex to establish. A claim for intentional infliction of emotional distress ("IIED") requires four elements: "(1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; [and] (4) the emotional distress must be severe."[106] Courts "have made it clear that liability for the tort of [IIED] should be imposed sparingly"[107] because such recovery is "reserved for those wounds that are truly severe and incapable of healing themselves."[108] For an IIED claim to lie, the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[109] Many cases of bullying certainly seem to fit the requirements of an IIED cause of action.

Fifteen-year-old Phoebe Prince hung herself in January

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[102] *See* WEAVER ET AL., *supra* note 55, at 24.

[103] In nearly every case of physical assault included in the Public Justice's 2014 survey of settlements and verdicts in bullying cases, the incident also involved verbal harassment, taunts, or threats. *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80.

[104] RESTATEMENT (SECOND) OF TORTS § 13 (1965).

[105] *See id.*

[106] Figueiredo-Torres v. Nickel, 584 A.2d 69, 74–75 (Md. 1991) (citing Harris v. Jones, 380 A.2d 611, 614 (Md. 1987)).

[107] *See* Caldor, Inc. v. Bowden, 625 A.2d 959, 963 (Md. 1993).

[108] Hamilton v. Ford Motor Credit Co., 502 A.2d 1057, 1065 (Md. Ct. Spec. App. 1986).

[109] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

2010 after enduring months of torment at the hands of her classmates.[110] When news of Phoebe's death reached her bullies, they continued to ridicule Phoebe on social media.[111] One bully responded to Phoebe's suicide by updating her Facebook status to say "accomplished."[112] In March 2007, seventeen-year-old Eric Mohat fatally shot himself after one of his bullies told him to "go home and shoot yourself."[113] A nine-year-old girl was physically assaulted in a school bathroom before her bullies forced her to drink toilet water.[114] As a result of the incident, the girl spent five weeks in a psychiatric facility.[115] Are these examples of conduct that is sufficiently outrageous to qualify for IIED? Perhaps the most shocking and disturbing fact of all is that these are not isolated incidents. Children of all ages across the nation suffer from similar (and sometimes worse) torture on a daily basis. Although the courts are hesitant to impose liability for IIED,[116] bullying seems to be a realm where a claim for IIED can survive. Many IIED claims have ended in sizeable settlements, and jury awards in favor of plaintiffs have shown that a claim for IIED may not be as rare as the courts would like to think.[117]

A freshman football player sued the Gustine Unified School District in California for injuries resulting from peer harassment and bullying.[118] Upperclassmen harassed the student at a school-sponsored camp by sodomizing him, groping him in the shower, and beating him in the head and face with a pillowcase full of heavy objects.[119] As a result, the freshman student became

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[110] *Worst Cases of Bullying: Phoebe Prince*, CRIME LIBRARY, http://www.crimelibrary.com/photogallery/worst-cases-of-bullying.html?curPhoto=3 (last visited Feb. 15, 2014).

[111] *Id.*

[112] *Id.*

[113] *Worst Cases of Bullying: Eric Mohat*, CRIME LIBRARY, http://www.crimelibrary.com/photogallery/worst-cases-of-bullying.html?curPhoto=10 (last visited Feb. 15, 2014).

[114] Carolina Leid, *Family Plans to File $11M Bullying Lawsuit*, ABC LOCAL (Dec. 1, 2010, 2:48 AM), http://abclocal.go.com/wabc/story?section=news/local/new_York&id=7817884.

[115] *Id.*

[116] *See* Caldor, Inc. v. Bowden, 625 A.2d 959, 963 (Md. 1993).

[117] *See Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 2–3, 5, 6, 9–10, 17 (describing cases across multiple jurisdictions where plaintiffs claiming IIED won settlements ranging from injunctive relief to over $450,000).

[118] Callahan *ex rel.* Roe v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1011 (E.D. Cal. 2009).

[119] *See id.* at 1013–14.

the center of anti-gay teasing and harassment.[120] The plaintiff sued the school district under both federal and state tort law claims.[121] The state tort claims alleged were sexual battery, assault and battery, intentional infliction of emotional distress, negligent supervision, negligent training, and negligence per se.[122] The school district reached an undisclosed settlement.[123] In Connecticut, an elementary school student sued the school district for negligent and intentional infliction of emotional distress after the student endured four years of daily taunting and teasing.[124] The parties eventually settled out of court, issuing a joint statement which included "an apology from the school district and a promise to review and revise" its anti-bullying policy.[125]

A claim for IIED may also be available against school officials directly. A Nevada high school student who had suffered physical and verbal harassment from his classmates because of his sexual orientation was lassoed around the neck and threatened with being dragged behind a pickup truck.[126] When the student escaped the attack, the Assistant Vice Principal laughed at the student for being visibly upset.[127] The student transferred schools several times, and had a principal at one school warn him against "acting like a fag," and police officers at another school stand by while a classmate punched the student in the face.[128] Among a variety of other claims, the student brought suit against school officials for IIED.[129] The parties eventually settled for $451,000 and agreed upon injunctive relief to provide the proper policies and training to prevent future incidents from happening to gay and lesbian students.[130] Many cases detail similar facts where teachers and school employees encourage or

[120] *Id.* at 1014.

[121] *Id.* at 1015–16.

[122] *Id.*

[123] *See Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 2. However, it is important to note that the court granted summary judgment in favor of the defendants as to the state tort law claims. *Callahan*, 678 F. Supp. 2d at 1045–46. *See infra* Section III.

[124] *Id.* at 6.

[125] *Conn. Bullying Lawsuit Settled*, INS. J. (Aug. 23, 2005), http://www.insurancejournal.com/news/east/2005/08/23/58659.htm.

[126] Henkle v. Gregory, 150 F. Supp. 2d 1067, 1069 (D. Nev. 2001).

[127] *Id.*

[128] *Id.* at 1070–71.

[129] *Id.* at 1078 n.4.

[130] *Jury Verdicts & Settlements in Bullying Cases*, supra note 80, at 17.

even join in the bullying,[131] and in these cases it seems logical that a plaintiff can hold those individuals personally responsible for their intentional acts that result in severe emotional distress.[132]

Because bullying is an ever-evolving phenomenon, a variety of other torts may arise in different fact specific scenarios. Some victims of rumors and related harassment may, for example, find relief in state tort claims for defamation.[133] Defamation claims can be complicated because they raise constitutional issues as to the First Amendment rights of the harasser[134]—students' First Amendment rights do not vanish at the schoolhouse doors.[135] To illustrate the challenges schools face in ascertaining their responsibility for monitoring student speech, in *Sobieralski v. Bartholomew Consolidated School Corporation* a high school student spread sexual rumors about a female classmate because she would not go out with him.[136] The plaintiff alleged a number of claims, including a state tort claim for slander against the bully harasser.[137] The Fourth Circuit determined that a student's First Amendment rights were not limited when a school district suspended the student for creating a hate website against another

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[131] *See* Nabozny v. Podlesny, 92 F.3d 446, 451–52 (7th Cir. 1996). For years the plaintiff in *Nabozny* was subjected to anti-gay physical and verbal abuse, including classmates urinating on him, pretending to rape him, and on one occasion repeatedly kicking him in the stomach so hard that the plaintiff later collapsed due to internal bleeding. *Id.* Each time the incidents were reported, school officials took no action and told the student and his parents that he "should expect such incidents because he is 'openly' gay." *Id. Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 27 (describing a 1997 Washington case similar to *Nabozny*: "One teacher allegedly told [male] plaintiff, 'I already have 20 girls in my class. I don't need another' and publicly questioned whether [plaintiff] was qualified to give blood, based on the perception that he was gay").

[132] *Cf. Nabozny*, 92 F.3d at 457–58, 460–61 (finding that school administrators violated the plaintiff's equal protection rights under the Fourteenth Amendment by unlawfully discriminating against plaintiff based on his sexual orientation).

[133] *See* WEAVER ET AL., *supra* note 55, at 780 (defamation requires a defamatory or false statement, of and concerning the plaintiff, that is published to a third party and causes damage to the plaintiff's reputation).

[134] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[135] *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

[136] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 9–10 (summarizing the facts of the case, No. 10-CV-407-SEB-MJD (S.D. Ind. 2010), which settled before trial).

[137] *Id.* at 10. The parties settled with the family of the alleged bully for $50,000. *Id.* at 9.

student at school.[138] In doing so, the court said that the student's speech created actual or reasonably foreseeable "substantial disorder and disruption" at school.[139] The speech was determined to be the type that a school is not required to tolerate, and therefore unworthy of First Amendment protection.[140] The Eighth Circuit case in which the court held that a student's statements threatening to shoot classmates were not protected speech,[141] because such statements qualify as "true threats"[142] as well as statements that might reasonably lead to substantial disruption or material interference with school activities.[143] Other cases, however, cut against school responsibility for bullying speech, such as the Third Circuit case holding that school districts do not have the authority to punish students for off-campus expressive conduct, if that conduct is not disruptive to school function.[144] Accordingly, where school districts may be responsible for monitoring some types of bullying speech, there remain avenues outside of school control and responsibility.

C. Bullying and Federal Statutes

Under federal law, school districts are "responsible for addressing harassment incidents about which [the districts] know[] or reasonably should have known."[145] As the recipients of federal funding, public school districts face certain statutory obligations under federal antidiscrimination statutes.[146] In 2010 the Department of Education Office for Civil Rights ("OCR") reminded schools "that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws."[147] Schools may violate any number of federal antidiscrimination statutes in certain bullying instances, including Title VI of the Civil Rights Act of 1964 ("Title VI"),[148] Title IX of the Education

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[138] *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011).
[139] *Id.*
[140] *See id.*
[141] D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 765 (8th Cir. 2011).
[142] *Id.* at 762.
[143] *Id.* at 766.
[144] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 925, 928 (3d Cir. 2011); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011).
[145] Dear Colleague Letter, *supra* note 13, at 2.
[146] *See, e.g.*, 42 U.S.C. § 2000d (2012).
[147] Dear Colleague Letter, *supra* note 13, at 1.
[148] 42 U.S.C. § 2000d (2012) (prohibiting discrimination on the basis of race, color,

Amendments of 1972 ("Title IX"),[149] Section 504 of the Rehabilitation Act of 1973 ("Section 504"),[150] and Title II of the Americans with Disabilities Act of 1990 ("Title II").[151] A school district may violate these statutes if the student-on-student harassment is based on race, color, national origin, sex, or disability.[152] The standards required for liability for this type of harassment deem that the conduct must be "sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."[153] So when does a bullying incident trigger liability under these federal statutes?

A school must address instances of harassment about which it knows or reasonably should have known.[154] Such notice occurs "if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment."[155] In the case of peer harassment that takes place in hallways, classes, extracurricular activities, or on a school bus, the obvious signs of harassment are sufficient to put the school on notice because this is the type of harassment that may be well known to students and school staff.[156] Some instances of bullying and harassment may not be openly obvious, but a school may become aware of the issue, "triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment."[157] Although the specific steps taken may vary,[158] the Department of Education requires that when investigating a bullying complaint, schools do so in a manner that is "prompt, thorough, and impartial."[159] Upon finding that discriminatory harassment has occurred, the school has a responsibility to "take prompt and effective steps reasonably calculated

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or national origin).

[149] 20 U.S.C. § 1681 (2012) (prohibiting discrimination on the basis of sex).

[150] 29 U.S.C. § 794 (2012) (prohibiting discrimination on the basis of disability under federal grants and programs).

[151] 42 U.S.C. § 12132 (2012) (prohibiting discrimination on the basis of disability by public entities).

[152] Dear Colleague Letter, *supra* note 13, at 1.

[153] *Id.* (citing 34 C.F.R. §§ 100, 104, 106 (protecting students from harassment by school employees, other students, and third parties)).

[154] *Id.* at 2.

[155] *Id.* at 2 n.9.

[156] *Id.* at 2.

[157] *Id.*

[158] Dear Colleague Letter, *supra* note 13, at 2.

[159] *Id.*

to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring."[160]

1. Sexual Harassment and Gender-Based Bullying: Title IX Claims

The Supreme Court has held that a private damages action could lie against a school board, as a recipient of federal funds, in cases of student-on-student harassment when the school board acts with "deliberate indifference" to known acts of harassment in programs or activities.[161] However, the Court specified that this only applies to harassment that is so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[162] The potential for school district liability for peer-to-peer harassment under Title IX[163] can be assessed under a five-part test:

> (1) The student is a member of a statutorily protected class [gender, race, disability] . . . (2) The peer harassment is based upon the protected class . . . (3) The harassment is severe, pervasive, and objectively offensive . . . (4) A school official with authority to address the harassment has actual knowledge of it . . . (5) The school is deliberately indifferent to the harassment.[164]

Once these elements are established, likelihood of success on the merits must be assessed. A prima facie case for peer harassment under Title IX requires satisfaction of two elements: 1) The federal funding recipient was deliberately indifferent to known acts of harassment; and 2) the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to educational benefits or opportunities provided by the school.[165] However, when asserting a claim for damages under Title IX, it is important to understand that "a recipient of federal funds may be liable in damages under Title IX *only for its own misconduct*."[166] In *Davis*, the Supreme Court

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[160] *Id.* at 2–3.

[161] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

[162] *Id.*

[163] Title IX prohibits gender discrimination in federally funded education programs. *See* 20 U.S.C. § 1681 (2012).

[164] *See* Séamus P. Boyce & Andrew A. Manna, *School Liability for Bullying & Harassment*, LEADERSHIP INSIDER 1–3 (Aug. 2011), http://www.nsbf.org/BoardLeadership/Governance/Policies/Newsletters/Leadership-Insider-August-2011.pdf.

[165] *See Davis*, 526 U.S. at 633, 650.

[166] *Id.* at 640 (emphasis added).

rejected the school district's argument that the student sought to hold the school board liable for the actions of the bully,[167] finding instead that the victim sought to hold the school board responsible "[f]or its *own* decision to remain idle in the face of known student-on-student harassment in its schools."[168]

The scope of *Davis*'s application of Title IX to school districts is notable. Under *Davis*, students attending schools that receive federal funding are protected from discrimination on the basis of sex.[169] Because all public schools receive federal funding, this means that Title IX protects all students in every single public school district in the nation.[170] Title IX forbids all types of sex-based harassment, including sexual harassment, harassment based on a student's failure to conform to gender stereotypes, and sexual assault.[171] There are a few features of Title IX that should be considered when pursuing a claim under this statute. First, Title IX protects both girls and boys.[172] Second, the victim and bully need not be of different sexes.[173] Third, schools *must* protect students from sex-based harassment at school, on the school bus, on field trips, and at any other school-sponsored events.[174] Finally, a claim under Title IX may not be asserted against individual school officials, it must be asserted directly against the recipient of federal funding, which is the school district.[175]

Sex-based harassment under Title IX comes in several

[167] *Id.* at 641.

[168] *Id.*

[169] "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2012).

[170] *See* Kimmel & Alvarez, *supra* note 57, at 4.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] Smith v. Metro. Sch. Dist. of Perry Twp., 128 F.3d 1014, 1018–19 (7th Cir. 1997) (finding no individual liability under Title IX).

forms.[176] The two main areas of sex-based harassment that appear in case law are sexual harassment[177] and gender-based harassment.[178] While Title IX does not expressly protect students from discrimination based on sexual orientation, students may find a Title IX claim for gender-based harassment where the student suffers anti-gay slurs or assault or ridicule because of perceived sexual orientation.[179] Claims under Title IX face fairly high standards for liability, which are often difficult to satisfy.[180] The prima facie elements set forth in *Davis*[181]—that the federal funding recipient must be deliberately indifferent to known acts of harassment so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to educational benefits or opportunities provided by the school[182]—set the stage for a difficult battle for any plaintiff wishing to succeed in a Title IX claim against a school district.

The first prong does not make a school district liable for the actions and conduct of students who bully other students.[183] Instead, school districts may only be held liable for their own misconduct in responding to known harassment.[184] Therefore, bullying that is not reported to or observed by school employees or administrators cannot be used as a basis for holding the district liable.[185] As a practical matter, the *Davis* Court said that a school district need not expel bullies nor engage in any particular disciplinary action to remedy peer harassment.[186] A school district must only take action in instances of known peer harassment in

[176] Kimmel & Alvarez, *supra* note 57, at 4.

[177] *Id.* (citing Dear Colleague Letter, *supra* note 13, at 6) ("Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal, or physical conduct of a sexual nature. Examples of prohibited conduct can include sexual touching; sexual comments, jokes, gestures or graffiti; and sexually explicit drawings, pictures or written materials.").

[178] *Id.* ("Gender-based harassment includes acts of verbal, non-verbal, or physical aggression, intimidation or hostility based on sex-stereotyping. This involves harassing a student for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.").

[179] *Id.* at 4–5.

[180] *See id.* at 5.

[181] 526 U.S. 629 (1999).

[182] *Id.* at 633, 650.

[183] *See* Kimmel & Alvarez, *supra* note 57, at 4.

[184] *See id.* at 5–6.

[185] *See Davis*, 526 U.S. at 640–42.

[186] *Id.* at 648.

a manner that is not "clearly unreasonable in light of the known circumstances."[187] Although the *Davis* court noted that lower courts may conclude as a matter of law that a school district's response was not "'clearly unreasonable,'"[188] it emphasized the fact that "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[189] Court interpretations of the deliberate indifference standard are still developing, and as of now there is no bright line rule as to what constitutes deliberate indifference.[190] Some courts evaluate "[t]he reasonableness of a district's response to known harassment by considering whether the district imposed consequences reasonably calculated to deter known bullies from repeating the harassment."[191] The problem with this approach is that establishing deliberate indifference is nearly impossible when the victim is bullied by multiple or non-repeat offenders.[192] Rather than determining deliberate indifference based upon the identity of the bully or bullies, other courts have looked to the *victim's* identity and the aggregate effects of comparable bullying incidents by several new bullies to find deliberate indifference.[193]

The first, more stringent approach to deliberate indifference has resulted in a narrow interpretation that makes satisfying the first prong of a Title IX claim difficult for plaintiffs.[194] A district court within the Third Circuit stated that where a school district effectively stops each reported source of harassment, it cannot be deliberately indifferent, even if the victim continues to be bullied by additional students.[195] However, several courts have turned to a second, less stringent interpretation of deliberate indifference, thereby making it easier for plaintiffs to satisfy the first prong of a Title IX claim.[196] In *Vance* ex rel. *Vance v. Spencer County Public School District*,[197] the Sixth Circuit explained

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[187] *Id.* at 648–49.
[188] *Id.* at 649.
[189] *Id.* at 648.
[190] Kimmel & Alvarez, *supra* note 57, at 6.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 9.
[195] *See* Doe *ex rel.* Doe v. Bellefonte Sch. Dist., No. 4:CV-02-1463, 2003 WL 23718302, at *9–10 (M.D. Pa. Sept. 29, 2003), *aff'd*, 106 F. App'x 798 (3d Cir. 2004).
[196] *See* Kimmel & Alvarez, *supra* note 57, at 6.
[197] 231 F.3d 253 (6th Cir. 2000).

deliberate indifference as:

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.[198]

In *Vance*, the plaintiff presented evidence of verbal and physical sexual harassment beginning in sixth grade and continuing through ninth grade, when she finally withdrew from the school.[199] The Sixth Circuit ultimately upheld the jury's finding of deliberate indifference because the school district failed to provide evidence that it disciplined the offending students, informed law enforcement about an assault occurring in science class, investigated the Title IX complaint, or did anything more than talk to the offending students.[200] The court found that fact the school district only continued "'talking to the offenders'" was unreasonable in light of the fact that this method had done nothing to reduce the amount of harassment and established deliberate indifference.[201] Courts have supported the *Vance* approach to deliberate indifference by applying the same standard.[202]

As to the second prong of a Title IX claim, the plaintiff must prove that the peer sexual harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[203] Such severe and pervasive conduct has been

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[198] *Id.* at 261.

[199] *Id.* at 256–57. The harassment began with peers verbally abusing her, calling her "that German gay girl" and asking her to describe oral sex. *Id.* at 256. The harassment escalated when male students began to harass the victim calling her a "whore," hitting her, snapping her bra, and grabbing her butt. *Id.* At its peak, the harassment reached a point where the victim was propositioned or touched inappropriately in virtually every class. *Id.* at 257.

[200] *Vance*, 231 F.3d at 262.

[201] *Id.*

[202] *See* Patterson v. Hudson Area Sch., 551 F.3d 438, 448 (6th Cir. 2009) (relying on *Vance* in holding that "even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable"); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 977 (D. Kan. 2005) ("In this case, like *Vance* . . . a rational trier of fact could infer from the evidence that future harassers were undeterred by the school's minimal responses to the known acts of harassment.").

[203] *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650

found in a variety of cases in several states. The Second Circuit affirmed a Connecticut jury award of $100,000 in favor of a plaintiff who brought a Title IX claim against her school district for deliberate indifference to sexual harassment.[204] The female freshman student was raped by two upperclassmen, which later resulted in endless harassment at school.[205] Male students barked at her, threw tennis balls at her, and regularly called her offensive names.[206] The harassment became so severe that the student had to complete her work in the guidance counselor's office and she would deliberately not attend classes.[207] She was eventually rushed to the emergency room after threatening suicide.[208] Throughout the duration of her harassment, the plaintiff testified that the school board and the school principal were unresponsive to her pleas for help.[209]

In *Sobieralski v. Bartholomew Consolidated School Corporation*,[210] the plaintiff brought several claims against her school district including a Title IX claim for deliberate indifference to sexual harassment.[211] The plaintiff suffered sexual harassment and sexual rumors at the hands of a classmate whom she refused to date.[212] She alleged that school administrators failed to take meaningful steps to protect her from the harassment, even after the harasser graduated high school, at which time the school rehired him as an assistant.[213] The school social worker sent a letter alerting the school administration of the detrimental effects that the harassment had on the plaintiff's emotional health, but the principal allegedly told the social worker that "she was acting unprofessionally."[214]

Jessica Logan sent a nude photo to her boyfriend, and

(1999).

[204] Doe *ex rel.* A.N. v. East Haven Bd. of Educ., 430 F. Supp. 2d 54, 55–56, 67 (D. Conn. 2006), *aff'd*, 200 F. App'x 46 (2d Cir. 2006); *see also Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 6.

[205] *Id.* at 56.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 60.

[209] *Id.* at 63.

[210] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 9–10 (summarizing the facts of the case, No. 10-CV-407-SEB-MJD (S.D. Ind. 2010), which settled before trial).

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* at 10.

within a short period of time that photo was sent to hundreds of other students in at least seven Greater Cincinnati area high schools.[215] Classmates began to attack Jessica with verbal taunts calling her names such as "slut" and "porn queen."[216] Jessica began to skip school to avoid the harassment, but it followed her home where she was inundated with cyber-attacks related to the nude photo.[217] Despite missing a great deal of school due to the bullying, Jessica graduated from high school, but the bullying did not stop.[218] After relentless and hateful taunting from classmates, friends, and even strangers, Jessica Logan hung herself in her bedroom.[219] The Logans sued the Sycamore Community School Board of Education claiming deliberate indifference to sexual harassment under Title IX.[220] The Logans alleged that the school and the school resource officer did not do enough to help Jessica.[221] The parties reached a $154,000 settlement for Jessica's family and $66,000 in attorneys' fees.[222]

Not all Title IX claims deal with sexually explicit harassing behavior. Title IX has also been applied in situations where students are bullied for their sexual orientation. In *Young v. Indianapolis Public Schools*,[223] a male student experienced severe harassment because he did not conform to stereotypical notions of masculinity.[224] Instead of offering protection, however, the school district told the student that the harassment was his own fault and further suggested that the student "be less flamboyant."[225] The student filed suit under Title IX for deliberate indifference to peer harassment, resulting a $65,000 settlement and injunctive relief.[226] A Kansas jury awarded $250,000 to a student who sued his school district for deliberate indifference

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[215] Cindy Kranz, *Nude Photo Led to Suicide*, CINCINNATI.COM (Mar. 22, 2009), http://news.cincinnati.com/article/20090322/NEWS01/903220312/Nude-photo-led-suicide.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] Logan v. Sycamore Cmty. Sch. Bd. of Educ., No. 1:09-CV-00885, 2012 WL 2011037, at *3 (S.D. Ohio June 5, 2012).

[221] Kranz, *supra* note 215, at 2.

[222] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 22.

[223] *Id.* at 10 (summarizing *Young v. Indianapolis Public Schools*, No. 12-CV-1241 (S.D. Ind. 2012)).

[224] *Id.*

[225] *Id.*

[226] *Id.* The "[s]chool district reversed plaintiff's expulsion from school." *Id.*

to sexual harassment under Title IX after the student was severely bullied by his peers for years during middle and high school until he eventually dropped out of high school during his junior year.[227] Though the victim was not gay or perceived by his bullies to be gay, he was the subject of sexual rumors and homophobic name calling in order to mock his perceived lack of masculinity.[228] In addition to the jury award, the judge awarded $270,000 in attorneys' fees.[229] After the school district appealed the case to the Tenth Circuit, the parties reached a $440,000 settlement.[230]

In *Patterson v. Hudson Area Schools*,[231] the Sixth Circuit again applied the *Vance* deliberate indifference standard to reverse summary judgment where school officials' verbal reprimands did not end harassment of the plaintiff.[232] The plaintiff was bullied for years until he ultimately withdrew from school.[233] The harassment endured by the plaintiff included homophobic name calling, defacement of the plaintiff's locker with drawings of a penis inserted into a rectum, urinating on the plaintiff's clothes, and an assault in the school locker room where a classmate stripped naked and rubbed his genitals on the plaintiff's face.[234] On remand, a jury found for the plaintiff and awarded a verdict of $800,000.[235] Many Title IX claims have resulted in sizeable settlements,[236] which may suggest that the viability of such a

[227] Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 954–61 (D. Kan. 2005). *See also Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 11.

[228] *See Theno*, 377 F. Supp. 2d at 964–65.

[229] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 11.

[230] *Id.*

[231] 551 F.3d 438 (6th Cir. 2009).

[232] *See id.* at 446, 450.

[233] *Id.* at 439–43.

[234] *Id.* at 439–42.

[235] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 13. The jury verdict was later vacated on judgment as a matter of law following the trial. Patterson v. Hudson Area Sch., 724 F. Supp. 2d 682, 701 (E.D. Mich. 2010).

[236] *See* Press Release, Lambda Legal, Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School and Protected From Harassment (Aug. 28, 2002), *available at* http://www.lambdalegal.org/news/ca_20020828_groundbreaking-legal-settlement-first-to-recognize; *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 17, 19, 23–24 (discussing cases in Nevada, New York, and Pennsylvania where plaintiffs reached large settlements on claims involving gender-normative and anti-gay harassment—both verbal and physical).

claim is an increasing phenomenon in the area of bullying litigation.

2. Bullying Based on the Basis of Race, Color, or National Origin: Title VI Claims

In terms of legal standards, a claim under Title VI[237] for bullying is the same as a claim under Title IX. The difference is that Title VI prohibits discrimination based on race, color, or national origin.[238] In addition, Title VI permits a private right of action for intentional discrimination.[239] Although the Supreme Court has not directly addressed whether or not a school district's failure to respond to peer harassment based on race, color, or national origin constitutes intentional discrimination, many lower courts have used the *Davis* standard to hold that plaintiffs can prove intentional discrimination claims under Title VI by showing deliberate indifference.

Zeno v. Pine Plains Central School District[240] further explains the deliberate indifference standard under a Title VI claim.[241] The plaintiff, Anthony Zeno, was a biracial high school student who was bullied by peers for over three years because of his race.[242] The jury determined that the school district acted with deliberate indifference to the harassment, thereby violating Title VI, and awarded Anthony Zeno $1.25 million.[243] The district court denied the school district's motion for judgment as a matter of law, but reduced the jury award to $1 million.[244] The Second Circuit affirmed, holding that there was sufficient evidence to support the jury's finding of deliberate indifference as well as the damages award of $1 million, and therefore affirmed the jury award.[245] In reviewing whether there was sufficient evidence to support the jury determination that the school district violated

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[237] 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

[238] *See id.*; *cf.* 20 U.S.C. § 1681(a) (2012) (prohibiting discrimination on the basis of sex).

[239] Alexander v. Sandoval, 532 U.S. 275, 281 (2001).

[240] 702 F.3d 655 (2d Cir. 2012).

[241] *Id.* at 663–67.

[242] *Id.* at 658–59.

[243] *Id.* at 659.

[244] *Id.*

[245] *Id.* at 671, 673.

Title VI, the court first looked at whether the plaintiff was subjected to actionable harassment.[246] The court held that reasonable jurors could have found that the harassment that the plaintiff endured was "'severe, pervasive, and objectively offensive'" and the harassment denied the plaintiff of educational benefits.[247]

The Second Circuit next determined that a reasonable juror could have found that the plaintiff was denied three educational benefits as a result of the harassment: a supportive, scholastic environment free of racism and harassment, a regular "Regents diploma" that was more likely to be accepted by four-year colleges or employers than the type of diploma that the plaintiff received, and the ability to complete his education at the high school instead of being forced to leave.[248] The court rejected the school district's arguments that it responded reasonably to each reported incident, was under no obligation to implement the reforms suggested by the plaintiff's attorney, and that the district never knew that its responses were insufficient or ineffective.[249] In rejecting these arguments, the Second Circuit noted that there was no question that the district had actual knowledge of the ongoing harassment because faculty, staff members, the plaintiff, the plaintiff's mother, and various third parties reported the harassment.[250] The school district did respond to the plaintiff's complaints,[251] but the court still found that there was sufficient evidence to support the jury's determination that the district's responses were inadequate when taken "in light of . . .

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[246] *See Zeno*, 702 F.3d at 666. For three-and-a-half years, fellow high school students taunted, harassed, menaced, and physically assaulted Anthony. *Id.* His peers made frequent derogatory references to his skin tone, calling him a "nigger" nearly every day. *Id.* at 666–67. He received explicit threats as well as implied threats, such as references to lynching. *Id.* at 667. The court found that such conduct went beyond name-calling and teasing, particularly because of the "use of the reviled epithet 'nigger.'" *Id.* In addition, Anthony suffered more than mere verbal harassment; he endured threats on his life (graffiti warning that "Zeno will die") and physical attacks (some so violent that the high school called the police). *Id.* at 660, 667.

[247] *Zeno*, 702 F.3d at 666–67.

[248] *Id.*

[249] *Id.* at 664, 666.

[250] *Id.* at 668.

[251] *See id.* at 662. The school district had suspended nearly every student identified as harassing Anthony, contacted the harassers' parents, withdrew the harassers' privileges (such as participation in extracurricular activities), and eventually implemented anti-bullying training for students, parents and teachers. *Id.* at 662–63, 668.

all the evidence presented."[252] The Second Circuit explicitly stated three ways in which the responses were inadequate, thereby making the district deliberately indifferent.[253] First, although the school district disciplined many of the perpetrators, it procrastinated for more than a year before implementing any non-disciplinary remedial action.[254] Second, a reasonable juror could have determined that the district's additional corrective actions "were little more than half-hearted measures."[255] Finally, a reasonable juror could have found that the school district "ignored many signals that greater, more directed action was needed."[256] Based on these three items, the Second Circuit affirmed that there was sufficient evidence to establish that the school district's responses to the harassment were inadequate in terms of whether the responses were reasonably calculated to end the harassment.[257]

3. Bullying Based on Disability: Title II, Section 504, & IDEA

Section 504 of the Rehabilitation Act prohibits discrimination against an individual "solely by reason of her or his disability."[258] Title II of the Americans with Disabilities Act of 1990 forbids all public entities, whether or not they receive federal financial assistance, from discriminating against an individual with a qualifying disability "by reason of such disability."[259] The U.S. Department of Education enforces both of these statutes,

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[252] *Zeno*, 702 F.3d at 669.

[253] *See id.* at 669–71.

[254] *Id.* Once a school is aware that its response is ineffective, "a delay before implementing further remedial action is . . . problematic." *Id.* at 670.

[255] *Id.* For example, the district coordinated mediation with the harassers and their parents, but failed to inform Anthony's mother when or where it would be held. *Id.* In addition, its anti-bullying training programs were for only one day, focused on bullying generally rather than on race discrimination in particular, and made attendance optional. *Zeno*, 702 F.3d at 670.

[256] *Id.* at 671.

[257] *Id.* at 669, 672–73 (citing Vance *ex rel.* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000)).

[258] 29 U.S.C. § 794(a) (2012) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

[259] 42 U.S.C. § 12132 (2012) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

and has clearly stated that both statutes prohibit peer harassment in schools that is based on disability.[260] According to the U.S. Department of Education, disability-based peer harassment is defined as "intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program."[261] Examples of this type of bullying may include classmates calling a student who has dyslexia "dumb" or "retarded," resulting in the student's grades declining because he or she is unable to complete class work due to intimidation.[262] Another example would be when students persistently tease or mock a student who has a mental retardation.[263] When bullying becomes so pervasive that it affects the student's education, then the conduct may also violate the Individuals with Disabilities Education Act ("IDEA").[264]

First, it is important to know that although Section 504 and Title II are separate and have certain differences, the courts have equated the liability standards under the two statutes and evaluate claims under the two statutes together.[265] Section 504 and Title II share all of the rights and remedies of Title VI,[266] except that they protect victims from discrimination based on disability

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[260] *See* Letter from Norma V. Cantu, Assistant Sec'y for Civil Rights, & Judith E. Heumann, Assistant Sec'y for Special Educ. & Rehab. Servs., Dep't of Educ., to School Officials, (July 25, 2000), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html.

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *See* 20 U.S.C. § 1412(a)(1)(A) (2012) ("A State is eligible for assistance under this subchapter . . . if the State submits a plan that . . . the State has in effect policies and procedures to ensure that . . . [a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . . including children with disabilities who have been suspended or expelled from school.").

[265] *See* D.A. *ex rel.* Latasha A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 453 (5th Cir. 2010) ("Because this court has equated liability standards under § 504 and the ADA, we evaluate D.A.'s claims under the statutes together.").

[266] 29 U.S.C. § 794(a)(2) (2012) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [Section 504]."); 42 U.S.C. § 12133 (2012) ("The remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II].").

instead of race, color, or national origin.[267] Victims of bullying who wish to assert a claim under Section 504 or Title II face a burden of proving two parts of their claim. The plaintiff must prove that the harassment that they faced was based on their disability, and the plaintiff must additionally make a prima facie showing that they have a "disability"[268] under the meaning of Section 504 or Title II.[269] Bullying claims under Section 504 and Title II also differ from claims under Title IX or Title VI because victims of disability-based bullying may have two separate claims stemming from the harassment: one claim for the school district's failure to adequately respond to the bullying, and a second claim based on the school district's unwillingness to make reasonable accommodations for the disabled student to address the bullying.

The first claim for a school district's failure to adequately respond to the bullying is examined under a deliberate indifference standard, similar to the *Davis* standard.[270] In order to assert

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[267] *Compare* 29 U.S.C. § 794(a)(2) (2012), *and* 42 U.S.C. § 12133, *with* 42 U.S.C. § 2000d.

[268] *See* 42 U.S.C. § 12102(1) ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."). To prove disability discrimination in education, plaintiffs must show that the school district refused to provide them with a reasonable accommodation of their disability. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 515, 519 (5th Cir. 2013). Plaintiffs must administratively exhaust certain claims under Section 504 and Title II, if they seek relief that is also available under the IDEA. 20 U.S.C. § 1415(l) ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], . . . the Rehabilitation Act of 1973 . . . or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.").

[269] In order to allege discrimination under Title II and Section 504, a plaintiff must make a prima facie case of disability discrimination by proving that they are (1) disabled as defined by the statutes; (2) "otherwise qualified" for a benefit or participation in a program covered by the statutes; and (3) were denied the benefits or subjected to discrimination under the program by reason of their disability. S.S. v. E. Ky. Univ., 532 F.3d 445, 453 (6th Cir. 2008); *see* 42 U.S.C. § 12111(8).

[270] *See, e.g.*, *E. Ky. Univ.*, 532 F.3d at 452–53 (maintaining that a school district sued for "peer-on-peer" harassment of a disabled student could be liable for the district's own "deliberate indifference" to the harassment at issue, but not for the actions of the harassing students); Moore v. Chilton Cnty. Bd. of Educ., 936 F. Supp. 2d 1300, 1313–15 (M.D. Ala. 2013) (adopting the same "deliberate indifference" analysis in a case of peer-on-peer harassment that allegedly led to deceased's

such a claim, a victim of bullying must demonstrate that:

> (1) [he or she] is an individual with a disability, (2) he or she was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment.[271]

The second claim—based on the school district's unwillingness to make reasonable accommodations for the disabled student to address the bullying—requires that the plaintiff show that the school district "acted in 'bad faith' or with 'gross misconduct' in refusing to make reasonable accommodations to account for the effects of the bullying on the student."[272] The Fifth Circuit differentiated between "deliberate indifference" and "gross misjudgment" in *Stewart v. Waco Independent School District*.[273] Delineating the two standards, the court stated:

> [T]he two theories are distinct. Deliberate indifference applies here only with respect to the District's alleged liability for student-on-student harassment under a Title IX-like theory of disability discrimination. On the other hand, "gross misjudgment"—a species of negligence—applies to the District's refusal to make reasonable accommodations by further modifying Stewart's [Individualized Education Program] . . . .
>
> Thus, although the inquiries have much in common, whether the District's actions were "clearly unreasonable" with respect to peer-occasioned disability harassment remains analytically separate from whether it acted with gross misjudgment as measured by professional standards of educational practice.[274]

In the same case, the court addressed the issue of what establishes a refusal to provide a reasonable accommodation of a student's disability. Kimmel and Alvarez note that, according to the *Stewart* court, "[t]he refusal can take the form of exercising poor professional judgment or failing to take appropriate and effective remedial measures when a school district knows of disability-based harassment."[275] Once an accommodation has been

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suicide).

[271] *E. Ky. Univ.*, 532 F.3d at 454 (quoting Werth v. Bd. of Directors of Pub. Sch. of Milwaukee, 472 F. Supp. 2d 1113, 1127 (E.D. Wis. 2007)).

[272] Kimmel & Alvarez, *supra* note 57, at 14.

[273] 711 F.3d 513, 517–19 (5th Cir. 2013), *vacated & superseded on reh'g*, No. 11-51067, 2013 WL 2398860, at*1 (5th Cir. June 3, 2013).

[274] *Id.* at 524–25 (citations omitted).

[275] Kimmel & Alvarez, *supra* note 57, at 16 (citing *Stewart*, 711 F.3d at 519).

made, the school district must respond to new events or information that may warrant a change of accommodation.[276] When asserting claims for disability-based bullying, victims of bullying should include both of the aforementioned claims. The "gross misjudgment" standard for unwillingness to provide reasonable accommodations is significantly easier to satisfy than the "deliberate indifference" standard for a student-on-student bullying claim.[277]

When a disabled student is denied a "free appropriate public education" (often referred to as "FAPE") as a result of bullying, then the bullying conduct may also violate the IDEA. Courts are slowly recognizing IDEA claims with regards to student bullying. A federal district court in New York held a school district liable under IDEA where "school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities."[278] The court made another vital point in the same opinion, stating that "[i]t is not necessary to show that the bullying prevented *all* opportunity for an appropriate education, but only that it is *likely to affect* the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability."[279] This provision is of particular importance in the realm of bullying incidents today. It is common in schools for students to bully a classmate just because of the classmate's perceived differences. Oftentimes, these "differences" are actually manifestations of social or mental disabilities such as autism, anxiety, or other behavioral disorders. The holding of the federal district court in New York potentially opens the door for students who are victims of bullying because of speech impediments, social or behavioral disorders, learning disabilities, or any other disability, regardless of whether the bullies are targeting that specific disability.[280] Some authorities have commented that claims for bullying under IDEA may prove to be a way of circumventing the stringent *Davis* standard.[281] However, it is important to know

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[276] *Stewart*, 711 F.3d at 524 (citing M.P. *ex rel.* K. v. Indep. Sch. Dist. No. 721, 439 F.3d 865, 868 (8th Cir. 2006)).

[277] *See* Kimmel & Alvarez, *supra* note 57, at 16.

[278] T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 316 (E.D.N.Y. 2011).

[279] *Id.* at 317 (emphasis added).

[280] *See T.K.*, 779 F. Supp. 2d at 318.

[281] *See* David Ellis Ferster, Note, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43

that IDEA does have certain limitations that make other claims more attractive.[282]

A Pennsylvania jury awarded a $400,000 verdict in favor of a disabled seven-year-old plaintiff who suffered post-traumatic stress disorder and ultimately threatened suicide after a high school student masturbated in front of the disabled child while another student tried to convince the child to engage in sexual activity with the masturbating student.[283] The plaintiff had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Asperger's Syndrome[284] at age three.[285] The federal district court affirmed the jury's finding that the school district violated Title II, Section 504, and the IDEA in mishandling the situation with the plaintiff.[286]

A Hawaii school district settled for $5.75 million amidst allegations that the district knew about, and deliberately covered up, a series of robberies, rapes, and sexual assaults at a school for the deaf and blind.[287] The plaintiffs asserted claims for disability discrimination under Title II, Section 504, and the IDEA for the actions of a gang of classmates who sexually assaulted the

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GA. L. REV. 191, 211 (2008).

[282] *See* Kimmel & Alvarez, *supra* note 57, at 18. Because IDEA claims are fairly new to the courts, the standard is not clearly articulated. *Id.* Also, "because IDEA remedies are tailored to the needs of each particular disabled child, there is little opportunity for making systemic change that would benefit other disabled students." *Id.*

[283] Enright v. Springfield Sch. Dist., No. 04-CV-1653, 2007 WL 4570970, at *1–2 (E.D. Pa. Dec. 27, 2007); *see also Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 24.

[284] *See Asperger Syndrome*, AUTISM SPEAKS, http://www.autismspeaks.org/what-autism/asperger-syndrome (last visited Jan. 27, 2015).

> Asperger syndrome is an autism spectrum disorder (ASD) considered to be on the 'high functioning' end of the spectrum. Affected children and adults have difficulty with social interactions and exhibit a restricted range of interests and/or repetitive behaviors. Motor development may be delayed, leading to clumsiness or uncoordinated motor movements. Compared with those affected by other forms of ASD, however, those with Asperger syndrome do not have significant delays or difficulties in language or cognitive development. Some even demonstrate precocious vocabulary—often in a highly specialized field of interest.

Id.

[285] *Enright*, 2007 WL 4570970, at *2.

[286] *Id.* at *11.

[287] *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 9 (summarizing *Doe v. State of Hawaii*, No. 11-CV-0550-KSC (D. Haw. 2011)).

plaintiffs on school grounds.[288] With the rising number of reported diagnoses of ADHD, autism, and other disabilities among school-aged children,[289] Title II, Section 504, and the IDEA seem to offer a certain degree of protection for those students who may face harassment or bullying at school as a result of their disability.

III. PROBLEMS AND HURDLES THAT PLAINTIFFS MAY FACE

Many school districts defend peer harassment and bullying allegations by relying on the *Davis* proposition that "courts should refrain from second-guessing" the disciplinary decisions of school officials.[290] In doing so, school districts seemingly "play the deference card" in reasoning that districts enjoy almost sweeping discretion when deciding how to handle peer harassment and bullying.[291] However, judicial deference to the district's discretion is not a dead-end when suing a school district. The holding in *Zeno*[292] offers plaintiffs a counterargument, demonstrating that courts should not and will not defer to inadequate responses to intolerable and outrageous harassment.[293]

Victims of bullying should note that suing under federal anti-discrimination statutes generally yields an easier course because the doctrine of immunity does not protect school officials whose conduct violates statutorily protected rights.[294] On the other hand, victims of bullying who seek relief under state tort law causes of action will have to deal with the issue of immunity, which may shield a school district from liability. State tort claims for negligence are incredibly common in school litigation.[295]

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[288] *Id.*

[289] *See* Amanda Gardner, *CDC: Autism, ADHD Rates on the Rise*, CNN (May 24, 2011, 7:10 AM), http://www.cnn.com/2011/HEALTH/05/23/autism.adhd.increase.cdc/.

[290] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) (citing New Jersey v. T.L.O., 469 U.S. 325, 342–43, 374 n.9 (1985)).

[291] *See* Kimmel & Alvarez, *supra* note 57, at 13 (internal quotation marks omitted).

[292] Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655 (2d Cir. 2012).

[293] *See id.* at 666.

[294] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565, (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)) (noting that government officials may be immune from suit if the performance of their discretionary functions "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

[295] *See* Peter J. Maher, Kelly Price & Perry A. Zirkel, *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234, 235 (2010) (citing Michael Imber & Gary Thompson, *Developing a Typology of Litigation in Education and Determining the Frequency of Each Category*, 27

However, bare negligence claims against school districts and school officials do not have a high rate of success in favor of the plaintiff.[296] Current news media and organizational campaigns indicate that school negligence is a growing source of liability,[297] which seems to point to a trend towards plaintiff success in negligence lawsuits for bullying. However, allegations of negligence against a school district and/or its employees face the often-insurmountable task of overcoming qualified and governmental immunity.[298]

Generally, when a victim of bullying chooses to sue the school employees individually, those employees, as school officials, may assert qualified immunity from monetary damages.[299] "At its most protective, the doctrine of sovereign immunity offers *absolute immunity* to the state, and governmental entities considered arms of the state, regardless of the level of negligence displayed by its employees."[300] In some states, like Virginia, school districts and school boards enjoy absolute immunity for torts committed by employees.[301] However, most states do not grant absolute immunity to school boards and school officials when they are sued in their individual capacities.[302] Most states grant qualified immunity, which applies only to discretionary acts or acts that are performed negligently.[303] Although this limited immunity provides an avenue for suing school districts and boards for the negligence of their employees, plaintiffs still must demonstrate that the conduct of the school official exceeded ordinary negligence, and courts sometimes grant broad discretion to administrators and teachers.[304] It is also worth noting that

EDUC. ADMIN. Q. 225, 236–37 (1991)).

[296] *See generally id.* (detailing a study analyzing state statutory provisions and case law relevant to immunity of school districts and their employees with regards to negligence claims).

[297] *Id.* at 235.

[298] *Id.* at 247 ("The primary conclusion of this systematic analysis is that both school district immunity and public school employee immunity are, in relation to negligence, alive and relatively robust.").

[299] Kimmel & Alvarez, *supra* note 57, at 18.

[300] *Id.* at 23 (emphasis added).

[301] *See, e.g.*, Kellam v. Sch. Bd. of Norfolk, 117 S.E.2d 96, 97–98 (Va. 1960). *See also* Kimmel & Alvarez, *supra* note 57, at 23.

[302] *See* Kimmel & Alvarez, *supra* note 57, at 23.

[303] *See id.*

[304] *Id.*

California holds school districts liable under traditional negligence standards,[305] which allows victims of bullying to sue school districts that permit bullying or harassment to continue in schools. Perhaps a sign of hope for victims of bullying seeking to overcome immunity issues is that courts tend to demonstrate an expansive view of the constitutional rights that are "clearly established"—even absent statutes, regulations, or case law that directly supports the notion—when it comes to extreme cases of peer harassment and bullying.[306] The success or failure of many state tort law claims is entirely dependent upon the specific facts, the tort alleged, the court's individual view, and the climate of the state in which the action is brought. For example, the elements of negligent supervision seemingly apply to the typical school bullying case, but the current view of negligent supervision fails to recognize that injuries resulting from bullying are foreseeable, and that those injuries occur when school officials fail to act properly to remedy a bullying situation.[307]

Immunity is not the only hurdle that victims of bullying face when seeking to hold a school district or school official liable under tort theories. "[S]chool districts and officials will not be liable if the bullying committed by students is deemed to be a superseding cause that breaks the chain of proximate causation between the district's wrongful conduct and the plaintiff's injuries."[308] In order to hold school districts and school officials liable for bullying incidents, the plaintiff must prove that the school

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[305] *See* M.W. v. Panama Buena Vista Union Sch. Dist., 110 Cal. App. 4th 508, 518 (Cal. Ct. App. 2003).

[306] *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137 (9th Cir. 2003) (although there was no statute or regulation on point, case law was sufficient to render the law "clearly established"); Nabozny v. Podlesny, 92 F.3d 446, 456–58 (7th Cir. 1996) (stating that "[u]nder the doctrine of qualified immunity, liability is not predicated upon the existence of a prior case that is directly on point," and denying administrators a grant of qualified immunity because "reasonable persons in [their] positions in 1988 would have concluded that discrimination . . . based on . . . sexual orientation was unconstitutional"); K.M. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 363 (S.D.N.Y. 2005) (relying on the Supreme Court's ruling in Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999), to hold that "'competent' public school teachers and administrators would know they could be held liable for peer disability harassment").

[307] Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 643 (2004). "Courts need to redefine negligent supervision with regard to bullying in order to acknowledge the foreseeability of the harms that result from bullying and the causal connection between school officials' inaction and victims' injuries." *Id.*

[308] Kimmel & Alvarez, *supra* note 57, at 23 (citing Weddle, *supra* note 307, at 687).

had prior knowledge of the bullying that would make the injuries foreseeable to school officials.[309] Logically, schools can only be required to prevent "'such risks of harm as are foreseeable.'"[310] Simply stated, we cannot expect or require school districts to prevent that which they could not have expected or foreseen.[311] A school will only be held liable for failure to take reasonable precautions to prevent the injury "where prior knowledge of a threat existed," because most courts view the tortious acts of students as unforeseeable unless the school had prior knowledge of a threat.[312] In the case of a student who proves to be a habitual bully—one that constantly and consistently faces disciplinary action for violence or harassing conduct—the school can be said to have knowledge of the threat that this student might injure another student, and therefore the school probably will be held liable if the school fails to take action to prevent those injuries.[313]

The duty to protect students is an interesting subject. When a school is alerted to the existence of a particular severity and type of threat, and further alerted to the steps that the school should take to abate the threat, the school probably will have a duty to intervene.[314] However, this duty to intervene does not always apply because schools do not always have a duty to protect students from all harms that may arise in a school environment.[315] While it is well settled that a duty arises once a school has knowledge of a threat of harm, the school generally will not have a duty where the school is lacking knowledge.[316]

Even with such obstacles, as the bullying epidemic grows, so does the list of plausible defendants. Michael Simpson, of the National Education Association ("NEA") Office of General Counsel, warns NEA members about the dangers of liability:

> What every NEA member needs to know is that you can be sued personally for money damages if you witness instances of bullying and various types of harassment (based on race, national

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[309] *Id.*

[310] Weddle, *supra* note 307, at 688 (citing J.N. v. Bellingham Sch. Dist., 871 P.2d 1106, 1111 (Wash. Ct. App. 1994)).

[311] *Id.*

[312] *Id.*

[313] *See id.* at 689–91 (citing Fazzolari v. Portland Sch. Dist., 734 P.2d 1326, 1338 (Or. 1987)). "[F]oresight does not demand the precise mechanical imagination of a Rube Goldberg nor a paranoid view of the universe." *Id.* at 689 n.325.

[314] *Id.*

[315] *See* Weddle, *supra* note 307, at 688–90.

[316] *See id.*

> origin, gender, sexual orientation, or disability) and fail to take action to address it or report it. While school districts have traditionally been the targets of these lawsuits, school employees, in increasing numbers, are also being named as defendants.
>
> For example, NEA members in seven states (Washington, Kentucky, Ohio, New Jersey, Massachusetts, Alabama, and Michigan) have recently been sued for allegedly failing to act when they were aware of instances of bullying and harassment. In two lawsuits against NEA members in Kentucky, one involving a student suicide, NEA's insurance carrier paid damages and expenses totaling $280,000 and $275,000 respectively.[317]

To avoid such liability, Simpson recommends that teachers protect themselves by encouraging their schools to provide training and procedures for dealing with bullying incidents.[318] Also, the NEA reminds teachers that they are legally obligated to report bullying when they see it or when a student reports it.[319] This means that plaintiffs may choose to sue the teacher, principal, or other school official in their individual capacity for their actions or inaction that inflamed the bullying or harassment.

IV. DAMAGES

A. Damages for Claims Under State Tort Law

State tort claims can yield any number of remedies including compensatory damages for physical injuries, post-traumatic stress, emotional distress, pain and suffering, and wrongful death, as well as punitive damages.[320] In the previously mentioned case, *Patterson v. Irvington Board of Education*, the school board was found to be liable for its negligence, which resulted in the paralysis of a fifteen-year-old student.[321] The jury awarded

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[317] Michael D. Simpson, *Rights Watch—Confronting the Bullies*, NEA TODAY (Nat'l Educ. Ass'n, Wash., D.C.), May–June 2011, *available at* http://www.nea.org/home/43496.htm.

[318] *Id.*

[319] *Id.*

[320] Ward v. Barnes, 545 F. Supp. 2d 400, 418–19 (D.N.J. 2008); M.W. v. Panama Buena Vista Union Sch. Dist., 110 Cal. App. 4th 508, 515–16, 525 (Cal. Ct. App. 2003) (affirming an award of damages for post-traumatic stress); Ortega v. Pajaro Valley Unified Sch. Dist., 64 Cal. App. 4th 1023, 1061 (Cal. Ct. App. 1998) (damages for pain, suffering, and humiliation available against school district); Angel v. Levittown Union Free Sch. Dist. No. 5, 171 A.D.2d 770, 773–74 (N.Y. App. Div. 1991) (compensatory and punitive damages available in tort action against school district).

[321] *See supra* Section II.B.1.

$3.25 million in compensatory damages for pain, suffering, disability impairment and loss of quality of life.[322] The jury further awarded $10 million in compensatory damages for future medical expenses, and an additional $2 million for future lost wages and earning capacity.[323] The jury also awarded $350,000 to the mother of the injured teen for the loss of her son's services.[324]

Although claims under state tort law may provide a variety of avenues for monetary recovery, the majority of recent bullying cases alleging state tort claims have settled outside of court.[325] For plaintiffs seeking monetary compensation, claims under federal antidiscrimination statutes or claims under state tort law may be equally attractive. However, for victims of bullying who seek to use the legal system as a means of forcing school districts to protect students, then injunctive relief should be sought in any claim.[326]

B. Damages for Claims Under Federal Antidiscrimination Statutes

Plaintiffs suing under Title IX may seek compensatory damages.[327] Although the Supreme Court has not expressly addressed the issue of punitive damages for claims under Title IX, *Barnes v. Gorman*[328] makes a strong argument that punitive damages may not be available under Title VI claims.[329] In *Barnes*, the Court held that punitive damages are not available in suits brought under Section 202 of the Americans with Disabilities Act[330] and Section 504 of the Rehabilitation Act[331] because punitive damages may not be awarded in suits brought under Title VI.[332] As a matter of practice, plaintiffs seeking relief under Title IX for peer sexual harassment should seek injunctive relief[333]

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[322] Jury Verdict Sheet, Patterson v. Irvington Bd. of Educ., No. ESX-L-1093-09 (N.J. Super. Ct. Law Div. 2012), 2012 WL 6707590.

[323] *Id.*

[324] *See id.*

[325] *See, e.g.*, *Jury Verdicts & Settlements in Bullying Cases*, *supra* note 80, at 2 (reviewing a $260,000 settlement on California tort law claims in Doe *ex rel.* Denari v. Kern High Sch. Dist.).

[326] Kimmel & Alvarez, *supra* note 57, at 11.

[327] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633, 650 (1999).

[328] 536 U.S. 181 (2002).

[329] *See id.* at 189.

[330] 42 U.S.C. § 12132 (2012).

[331] 29 U.S.C. § 794(a) (2012).

[332] *Barnes*, 536 U.S. at 189.

[333] "[I]njunctive relief may include . . . implementation of anti-bullying training

and compensatory damages.[334]

Zeno is instructive in evaluating potential compensatory damage awards in peer harassment cases.[335] In *Zeno*, the Second Circuit not only upheld a $1 million verdict for an individual student's psychological and emotional harm, but also briefly reviewed verdicts for students harassed by classmates or teachers.[336] The *Zeno* court also noted that verdicts for such incidents can range from low six-figure amounts up to as much as $1 million.[337]

V. CONCLUSION

Bullying is more than a problem in schools—it is an epidemic that is claiming the lives of children across the nation. As reported incidents of harassment increase in number and intensity, bullying is no longer just a rite of passage. Bullying is a serious problem, and as it worsens, the legal system should take steps to keep up with the problem and offer assistance and protection to victims of bullying. Although this emerging area of law is relatively new, there are a number of well-established principles and theories upon which a claim may be asserted. The purpose of this comment is to provide possible methods of recovery for victims of bullying aside from the common wrongful death claim. Waiting for a child to commit suicide before providing legal assistance is simply unacceptable.

Plaintiffs may find protection under the wing of federal antidiscrimination statutes or state tort law. Although the success or failure of each claim is entirely dependent upon the specific facts surrounding each case, a heightened awareness of the potential for civil liability may prove to be a means of effecting change in school districts. Perhaps school districts and school

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and education programs for school administrators, teachers, and students alike; adoption of policies and guidelines to address the type of bullying suffered by the plaintiff; assignment of a staff member to monitor and address bullying incidents; and maintenance of statistical data on complaints and investigations of bullying incidents." Kimmel & Alvarez, *supra* note 57, at 11.

[334] *See* Alexander v. Sandoval, 532 U.S. 275, 279 (2001) (recognizing that plaintiffs may seek injunctive relief and damages in private suits under Title VI); Cannon v. Univ. of Chi., 441 U.S. 677, 722 (1979) (recognizing a private right of action for injunctive relief where plaintiff alleged discriminatory denial of admission to medical school);

[335] *See* Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 671–73 (2d Cir. 2012).

[336] *Id.*

[337] *Id.* at 673.

officials will realize the legal implications of mishandling bullying situations, or failing to handle them at all, and will take proactive steps to ensure that students are protected from peer harassment while on school grounds. The goal is not an increase in lawsuits, but an increased awareness of the severity of bullying and the need for better safety measures within schools to protect victims. School officials and employees need to realize that their unique position allows them broad discretion and flexibility, as well as a hands on "inside" knowledge of the inner workings of the school.

We do not need to sit idly and watch our children destroy one another. We need to accept the fact that bullying is real, the consequences are grave, and we need to do something to end it. We do not have to watch or read another news story of a student being raped, ridiculed, harassed, assaulted, beaten, and even killed at the hands of bullies. The legal system can offer deterrence and relief—it is time that we take advantage of that relief and start seeking answers.