Brigham Young University Education and Law Journal

Volume 2015 | Number 1 Article 4

Spring 3-1-2015

Bullying Issues Impacting Students with Disabilities: Highlights of Section 1983, Title IX, Section 504, ADA, and IDEA Cases

Cynthia A. Dieterich

Nicole DiRadio Snyder

Christine Villani

BULLYING ISSUES IMPACTING STUDENTS WITH DISABILITIES: HIGHLIGHTS OF SECTION 1983, TITLE IX, SECTION 504, ADA, AND IDEA CASES

Cynthia A. Dieterich, Nicole DiRado Snyder† & Christine Villani‡*

I. INTRODUCTION

As student-on-student bullying in K–12 schools receives increasing national attention, there has been a corresponding increase in litigation based on bullying and harassment claims.[1] Students with and without disabilities experience bullying that can result in "significant negative emotional, educational and physical results . . ., [however] students with disabilities are both uniquely vulnerable and disproportionately impacted by the bullying phenomena."[2] Specifically, some students with a disability may "look or act different than their peers as a result of their physical, intellectual, or emotional impairments and these characteristics make them natural targets for harass-

* Cynthia A. Dieterich is a visiting faculty member at the College of Education at Cleveland State University. She teaches graduate and undergraduate courses in Special Education. She is also an education consultant, providing research and educational support to individuals and organizations. She received her Ph.D. in Special Education and Psychometrics from Kent State University and a M.Ed. in Curriculum and Instruction: Learning Disabilities and Behavior Disorders from Cleveland State University.

† Nicole DiRado Snyder is an associate at Latsha, Davis, Yohe & McKenna, P.C. She practices in charter school law, education law, special education law, litigation, and insurance defense and has defended clients in a variety of matters including IDEA and Section 504. She received her J.D. from Villanova University School of Law.

‡ Christine Villani is a Professor of Elementary Education at Southern Connecticut State University. She teaches graduate and postgraduate level courses in education and educational foundations. She received her Ed.D. from Fordham University, and also holds Masters degrees in Psychology and Speech and Language Pathology.

[1] *See* Seamus Boyce, Anne Littlefield & James D. Long, *Zeno, OCR & the State: Recent Developments in Bullying & Harassment Regulation*, NSBA COUNCIL OF SCHOOL ATTORNEYS, 1, 2 (2013).

[2] Jonathan Young, Ari Ne'eman & Sara Gesler, *Bullying and Students with Disabilities: A Briefing Paper from the National Council on Disability*, NATIONAL COUNCIL ON DISABILITY, Mar. 9, 2011, at http://www.ncd.gov/publications/2011/March92011.

ment."[3] Findings of recent research in the social sciences indicate that students with disabilities are more likely to be bullied, and at greater risk of being the perpetrator of harassing behavior.[4] In social science research, bullying is typically measured and defined based on data collected from standardized measures of behavior, office referrals, and self-reporting of bullying behavior.[5] However, defining "bullying" for an empirical study can be dramatically different than a legal interpretation of bullying.

Bullying is not defined with specificity by federal law,[6] and states have used the traditional states' right approach to enact anti-bullying legislation.[7] According to a report released by the United States Department of Education, states have enacted bullying laws that range from comprehensive and explicit to lean and open for broad interpretation.[8] Although no federal

[3] David Ellis Ferster, *Deliberately Different: Bullying as Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191, 199 (2008).

[4] *See generally* Susan M. Swearer, Cixin Wang, John W. Maag, Amanda B. Siebecker & Lynae J. Frerichs, *Understanding the Bullying Dynamic Among Students in Special and General Education,* 50 J. OF SCH. PSYCHOL. 503 (2012) (results from a study indicated that students with behavioral disorders and those with observable disabilities reported bullying others more than being victimized more than their general education counterparts); Christopher B. Forrest, Katherine B. Bevans, Anne W. Riley, Richard Crespo, & Thomas A. Louis, *School Outcomes of Children With Special Health Care Needs*, PEDIATRICS, (July 25, 2011), http://pediatrics.aappublications.org/content/128/2/303.full (A study showed that children with special health care needs had lower motivation to do well in school, more disruptive behaviors, and more frequent experiences as a bully victim); Connie Anderson, *IAN Research Report: Bullying and Children with ASD*, INTERACTIVE AUTISM NETWORK, (Mar. 26, 2012), http://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying; (Children with ASD are often bully victims, children who had been bullied and had also bullied others); Chad A. Rose, Dorothy L. Espelage, Steven R. Aragon & John Elliott, *Bullying and Victimization Among Students in Special Education and General Education Curricula,* 21 EXCEPTIONALITY EDUC. INT'L 2 (2011) (Data from a study suggested that students with disabilities engaged in higher rates of bullying and fighting perpetration, and were victimized more than their general education peers)

[5] *See generally* Rose et al., *supra* note 4 at 7 (Data for bullying research was collected in collaboration with school adminsitrators, teachers, and community representatives and consent forms were mailed to parents); Swearer et al., *supra* note 4 at 504 (Data on students' involvement in bullying, office referrals, and prosocial behavior was collected for bullying study).

[6] *See* Samantha Neiman, Brandon Robers & Simone Robers, *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 603–04 (2012).

[7] *See* U.S. DEPT. HEALTH HUM. SERV., *Policies & Laws*,(Mar. 31, 1014), http://www.stopbullying.gov/laws/index.html (presently forty-nine states have bullying laws).

[8] *Analysis of State Bullying Laws and Policies*, U.S. DEPT. EDUC., (2011).

law directly prohibits bullying, states must be careful not to juxtapose or directly conflict their bullying laws with other federal laws that a plaintiff might use to take action in a bullying case. Claims against schools failing to protect students with disabilities against bullying have typically been made under Title IX of the Education Amendments of 1972,[9] Section 1983 of the Civil Rights Act,[10] Section 504 of the Rehabilitation Act,[11] the Americans with Disabilities Act,[12] and/or the Individuals with Disabilities Education Improvement Act.[13] Hence, states need to recognize the minimal criteria a state law can set so as to not contradict these "cousin"[14] laws at the federal level. Understanding the legal precedent that states need to consider when determining state legislation will afford school districts a standard to establish local and school-specific policies that best address the issue of bullying and children with disabilities.

II. OVERVIEW OF FEDERAL LAWS PROTECTING STUDENTS WITH DISABILITIES

A. Section 1983 of the Civil Rights Act

Section 1983 provides individuals the right to sue government actors who have violated one's civil rights.[15] Specifically, "[e]very person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf (last visited on November 1, 2014).

[9] Title IX of the Education Amendments, 20 U.S.C. § 1681(1972) [hereinafter Title IX].

[10] 42 U.S.C. § 1983 (2006) [hereinafter Section 1983].

[11] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1973) [hereinafter 504].

[12] 42 U.S.C.A. § 12132 (1990) [hereinafter ADA, which is used as the common term although it was amended in 2008 as the Americans with Disabilities Act Amendments Act (ADA AA)].

[13] Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 (2004) [hereafter IDEA].

[14] Using the term "cousin" to suggest that Section 1983, Title IX, 504, and IDEA are related legislation that plaintiffs can use to bring suit in response to the misconduct of students toward their child with a disability in lieu of a specific federal bullying law.

[15] *See* 42 U.S.C. § 1983.

shall be liable to the party injured . . ."[16] Claims are often raised in actions against school officials for deprivation of constitutional rights under the Due Process or Equal Protection clauses of the 14th Amendment or of a right created by federal statute.[17] Under Section 1983, victims of peer harassment have a civil cause of action to remedy federal constitutional or statutory right violations.[18] However, there are "several major hurdles to a finding of liability under § 1983 that greatly reduce its utility as an avenue of redress for bullying victims."[19] Claims of immunity by individuals or school entities; exclusive avenue and statutory preclusion issues; exhaustion of other remedies, including administrative remedies; and protracted litigation are all potential impediments to successful recovery for claims under Section 1983.[20]

B. Title IX

Title IX prohibits discrimination on the basis of gender by providing that "no person shall be . . . denied benefits for . . . any education program or activity receiving federal financial assistance."[21] Although Title IX imposes liability for peer harassment, districts are not liable for the conduct of school bullies unless they officially chose to ignore the known harassment.[22] In *Davis v. Monroe*, the U.S. Supreme Court held that Title IX could provide a remedy against a school for creating a hostile environment by failing to take disciplinary action against offending students.[23] However, in order to establish that a hostile environment for which a school could be liable exists, as set forth in Davis a plaintiff must show that (1) the school board has adequate notice of liability for the harassment; (2) the school board was aware of harassment and

---

[16] *Id.*

[17] Neiman et al., *supra* note 6 at 625.

[18] 42 U.S.C. § 1983.

[19] *See* Neiman *supra* note 6 at 625.

[20] *Id.* at 625–26.

[21] 20 U.S.C. § 1681(a).

[22] *Id.*

[23] Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Ed., 526 U.S. 629 (1999). *See* Annette Thacker, *Helping Students Who Can't Help Themselves: Special Education and the Deliberate Indifference Standard for Title IX Peer Sexual Harassment,* 2011 BYU EDUC. & L.J. 701,701 (2011) (discussing Title IX, sexual harassment, and special education).

acted deliberately indifferent; (3) the harassment is so severe, pervasive, and offensive that the victim's access to an educational benefit or activity is denied; and (4) the school board demonstrates control of the harasser and the context of the harassment.[24] Hence, the bar for recovery is high. That said, schools should ensure that appropriate action is taken to create a safe, nurturing, harassment-free environment for all of their students.

C. Section 504 and the ADA

Section 504 of the Rehabilitation Act ("Section 504") and the Americans with Disabilities Act ("ADA") prohibit schools that receive federal funds from discrimination against individuals with qualifying disabilities.[25] A plaintiff seeking to state a claim under Section 504 must show that solely by reason of his or her disability, he or she must not be excluded from the participation in, or be denied the benefits of, or be subjected to any discrimination under any program or activity receiving Federal financial assistance.[26] Further, a plaintiff seeking to state a claim under the ADA against a school receiving federal financial assistance must show that he or she is: (1) disabled under the statute, (2) otherwise qualified for participation in the program, and (3) being excluded from participation in, denied the benefits of, or subjected to discrimination under the program by reason of his or her disability.[27] If disabled under Section 504, the school district needs to determine if the child's educational needs are being met as adequately as the needs of nondisabled peers with a program specifically designed to meet those needs.[28]

Apart from Section 504's limitation to denials of benefits solely by reason of disability and its reach of only federally funded as opposed to public entities, the "reach and requirements of both Section 504 and ADA are precisely the

---

[24] Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Ed., 526 U.S. at 629.

[25] *See* Perry Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA,* 282 ED. LAW REP. 767 (2012) (overview of similarities and differences among these laws). *See also* Mark A. Paige and Perry Zirkel, *Teaching Termination Based on Performance Evaluations: Age and Disability Discrimination*? 300 ED. LAW REP. 1 (2014) (discussing treating ADA and 504 "as a pair" because of "their close relationship").

[26] 29 U.S.C.A. § 794.

[27] 42 U.S.C.A. § 12132.

[28] 29 U.S.C.A. § 794.

same."[29] Thus, the statutes are often analyzed together because the statutes provide the same remedies, procedures and rights. However, "claiming intentional discrimination under either statute requires a plaintiff to show that a defendant acted in either 'bad faith' or with 'gross misjudgment.'"[30]

D. IDEA

Under the Individuals with Disabilities Education Act ("IDEA"), states that receive federal education funding are required to provide disabled children with a free appropriate public education (FAPE)[31] that is provided in the least restrictive environment (LRE)[32] in conformity with an Individualized Education Program (IEP). [33] If a student's rights are violated under IDEA, a parent may request a formal due process hearing and seek relief in the form of compensatory education or tuition reimbursement, but generally not compensatory damages.[34] Upon exhaustion of administrative remedies, a party has the right to judicial review in state or federal court.[35] Courts interpreting IDEA have held that school districts must put into place academic and educational safeguards that assure that each IEP confers a FAPE.[36] Any IEP should, where needed, be accompanied by a plan for the student that outlines positive behavior supports and interventions.[37] An IEP may be effectively used to address a special education student's needs where that student is being bullied and/or is the alleged perpetrator of bullying. Failure to provide FAPE, however, may subject a school entity to liability even if the school has complied with other federal laws

---

[29] *See* Weixel v. Bd. of Educ. of the City of New York, 287 F.3d 138,146 (2d Cir. 2002).

[30] Julie Sacks & Robert S. Salem, *Victims without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 170 (2009).

[31] 20 U.S.C. § 1412 (2005).

[32] *Id.*

[33] 20 U.S.C. § 1414 (2005).

[34] 20 U.S.C. § 1415 (2005).

[35] *Id.*

[36] *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176 (1982).

[37] *Id.*

discussed in the prior section.[38] Below is a discussion of bullying cases related to special education and the "cousin" laws, a case summary chart, [39] and a conclusion with recommendations for practice.

[38] 20 U.S.C. § 1415 (2005).

[39] Table 1 provides a chronological summary of all cases presented in this discussion. Note that earlier cases brought claims under IDEA and often excluded all other cousin laws. Compared to more recent cases where claims are more often made under 504 and ADA with a few including 1983 and Title IX claims. Cases were selected based on the following criteria: (1) plaintiffs were students who qualified as having a disability; (2) claims were made because they had the disability (3) students were either the victim and/or a perpetrator in bullying; and (4) final decisions were between 2014 and 1996. A box is checked as "filed" if the parents used that law to make a claim against the school. In the "held" column a check indicates that the parents were successful in their claim for that law. Conversely, an "X" indicates that they were not successful in their claim. Comments include a brief description of the child's disability. An asterisk indicates a case was remanded.

BULLYING AND SPECIAL EDUCATION CASE LAW

Case	1983		Title IX		504		ADA		IDEA		COMMENTS
	Filed	Held	Filed	Held	Filed	Held	Filed	Held	Filed	Held	
Estate of Lance v. Lewisville Indep. Sch. Dist. (5th Cir. 2014)	✓	x			✓	x	✓	x			Speech impairment, ADHD, and eventually emotional disturbance.
Moore et al v. Chilton County Board of Education (M.D. Ala.2014)	✓	x	✓	x	✓	x	✓	x			Blounts disease, eating disorder.
Long v. Murray County School District (11th Cir. 2013)					✓	x	✓	x			Asperger's. Inability to make friends did not limit major life activity.
Joseph Galloway v. Chesapeake Union Exempt. Vill. Sch. Bd. of	✓	✓	✓	✓	✓	✓	✓	✓			Asperger's, ADHD, seizure disorder, specific learning disability.
M.S. by Shihadeh v. Marple Newtown Sch. Dist.(E.D. Pa. Sept. 4, 2012)					✓	✓	✓	✓			Anxiety disorder, post-traumatic stress disorder.
Preston v. Hilton Central School District (W.D.N.Y. July, 2012)	✓	x	✓	x	✓	✓	✓	✓			Asperger's
Hoffman v. Saginaw Pub. Schs. (E.D. Mich. June 27, 2012)			✓	x	✓	x	✓	x			Exostoses. District took comprehensive measures to respond to bullying.
Weidow v. Scranton Sch. Dist. (3d Cir. 2012)					✓	x	✓	x			Bipolar disorder
Braden v. Mountain Home Sch. Dist (W.D. Ark. 2012)	✓	✓	✓	✓	✓	✓	✓	✓			ADHD
J.E. v. Boyertown Area School District (3rd Cir. Nov. 17, 2011)									✓	x	Asperger's, learning disability. FAPE not require a district to prove a child would not face future bullying.
T.K. & S.K.. v. New York City Dept. of Educ. (E.D.N.Y. Apr. 25, 2011)									✓	✓	Austistic and later reclassified as a learning disability
T.B. v. Waynesboro Area School Dist. (M.D. Pa, 2011)					✓	x	✓	x	✓	x	Asperger's Syndrome that was later changed to speech lanugage impairments

BULLYING AND SPECIAL EDUCATION CASE LAW											
Case	**1983**		**Title IX**		**504**		**ADA**		**IDEA**		**COMMENTS**
	Filed	**Held**	**Filed**	**Held**	**Filed**	**Held**	**Filed**	**Held**	**Filed**	**Held**	
K.R. v. Sch. Dist. of Philadelphia (3rd Circ. 2010)	✓	x			✓	x	✓	x	✓	x	Autism spectrum disorder
S.S v. Eastern Kentucky University (6th Cir. 2008)	✓	x			✓	x	✓	x			Cerebral palsy, ADHD, dyslexia, PDD
Emily D. v. Mt. Lebanon Sch. Dist. (W.D. Pa,, 2007)	✓	x			✓	x	✓	x	✓	x	Other health impaired because of nonverbal learning disability
Werth v. Bd.of Dirs. Of the Pub.Scho. Of Milwaukee (E.D. Wis.2007)	✓	x			✓	x	✓	x			Cleidocranial dystosis. Disavvowed claims under IDEA
Smith v. Guilford Board of Education, (2d Cir. 2007)									✓	*	ADHD. *Remanded.
Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.(3d Cir. 2004)									✓	✓	Perceptual impairment, later changed to emotional disturbance.
M.L. v. Federal Way Sch. Dist. (9th Circ. 2004)									✓	*	Autism, mental retardation, maccrocephaly. *Remanded.
Charlie F. v. Bd. Of Educ. Of Skokie (7th Circ. 1996)									✓	*	Obsessive/complusive, ADHD, panic disorder, anxiety disorder. *Remanded.

III. CASE ANALYSIS

A. IDEA

Early cases[40] of bullying and disability were typically brought under IDEA by plaintiffs using that as a source to seek relief. In the Seventh Circuit case, *Charlie F. v. Board of Education of Skokie,*[41] Charlie was an eleven-year-old boy with obsessive/compulsive disorder, attention deficit disorder, panic disorder, and anxiety disorder. While in fourth grade, his "teacher invited her pupils to express their complaints about Charlie . . . leading to humiliation, fistfights, mistrust, loss of confidence and self esteem, and disruption of Charlie's educational progress."[42] Students were also told not to tell anyone about these sessions.[43] Charlie's parents unilaterally removed him from the school and placed him in another nearby public school.[44] Once he was in his new school his parents were satisfied with his placement, but disturbed by his fourth grade experience.[45] They brought suit on Charlie's behalf seeking damages from the teacher, the school's principal (who knew about the gripe sessions), the school district's superintendent, and the school district itself.[46] In Judge Easterbrook's opinion, he noted that "both the genesis and the manifestations of the problem are educational; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA."[47] However, the decision was remanded to the district court "with instructions to dismiss for failure to use the IDEA's administrative remedies."[48] Charlie's parents did not exhaust administrative remedies as part of their dissatisfaction with the school district; hence, Judge Easterbrook's claim that Charlie's circumstances did suggest relief under IDEA went untested.

---

[40] Early cases refer to *teasing* when students engage in misconduct against another student. It then evolved into *harassment* and *bullying*.

[41] Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F. 3d 989 (7th Cir. 1996).(In the case of *Charlie F.* there was no direct reference to teasing, bullying, or harassment, but to students taunting Charlie that "inflicted emotional distress on him").

[42] *Id.* at 990.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 5.

A similar decision was made by the Ninth Circuit in *M.L., a minor; C.D., his parent; S.L., his parent, Petitioners-Appellants, v. Federal Way School District.*[49] Even though facts of the case indicated that a child with a disability was bullied, the parents did not take all necessary steps, as in *Charlie*, to ensure a FAPE; thus no claims were ruled in favor of the parent and the case was remanded to the district court.[50] Similarly, in *M.L. v. Federal Way,* a parent alleged bullying and unilaterally removed her child from the classroom after five days. In its ruling, the Ninth Circuit Court asserted that by removing her child after only five days the mother did not allow the school "a reasonable opportunity to find a way to prevent the other students from teasing M.L."[51] Thus, there was not sufficient evidence that "teasing resulted in the loss of an educational benefit."[52]

Another case remanded on the merits of IDEA claims was *Smith v. Guilford Board of Education.*[53] In that case, Jeremy was a high school student identified as having attention deficit hyperactive disorder, yet his complaint alleged that the bullying was the result of his diminutive size, not his learning disability. Even though he qualified as disabled under IDEA, there was no evidence in the parents' claim that the bullying was directly related to his disability.[54]

The outcome of *Charlie F., M.L.,* and *Smith* fall flat in determining the legitimacy of a bullying claim under IDEA. Yet the rulings are a reminder that school districts need to closely monitor appropriate procedural due process under IDEA to minimize costly litigation regardless of parental claims. In addition, parents need to understand that even if their child has a disability and is bullied, if the bullying is a result of another intervening variable, such as in *Smith*, it is less likely they will be successful in a claim under IDEA.

Conversely, favorable rulings for parents in their IDEA claims occurred when a child with a disability experienced intense bullying incidents.[55] A decision by the Third Circuit

---

[49] M.L. v. Fed. Way Sch. Dist., 387 F.3d 1101 (9th Cir. 2004)

[50] *Id.*

[51] *Id.* at 1107.

[52] *Id.*

[53] Smith v. Guilford Bd. of Educ., 226 F. App'x 58 (2d Cir. 2007)

[54] *Id.*

[55] Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 196 (3d Cir.

reversed and remanded a district court's finding that the school district provided a FAPE as required by IDEA as erroneous because no matter what program the district implemented, the student would not have been adequately protected from harassment.[56] Curiously, the school district rationalized that they could not grant a parent's request for a new school placement because they "would have to grant the request of non-disabled students who wished to attend"[57] a different school. In light of *Rowley*,[58] denying a different school because other non-disabled students might make the same request has never been the standard when determining a FAPE.

By the very nature of special education and related services, students with disabilities are often afforded an education that is quite different from their non-disabled peers.[59] Parents in this case were not seeking to maximize their child's educational benefits, but to eliminate or at the very least minimize the bullying experiences so that their child would benefit from the special education program.[60] Matriculating to the same school as the bullying peers produced a greater likelihood of bullying incidences as opposed to staying at a new school where he was demonstrating academic success. Was the district court "[substituting] their own notions of sound educational policy"[61] rather than reviewing suggestions by both the parent and an independent evaluation that provided evidence that the student would and did thrive at the neighboring school? It was not that the school district could not control the bullying that made the placement inappropriate as the district court suggested. It was that the intense bullying did not afford the student an opportunity to benefit from his special education program.[62]

2004)(Bullies constantly called P.S. names such as "faggot," "gay," "homo," "transvestite," "transsexual," "slut," "queer," "loser," "big tits," and "fat ass." Bullies told new students not to socialize with P.S. Children threw rocks at P.S., and one student hit him with a padlock in gym class. When P.S. sat down at a cafeteria table, the other students moved. Despite repeated complaints, the school administration failed to remedy the situation).

[56] *Id.*

[57] *Id.*

[58] Bd. of Educ. of Hendrick Hudson Cent.Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176 (1982).

[59] *Id.*

[60] *Shore*, 381 F.3d 194

[61] *Id.* at 20.

[62] *Id.*

In another IDEA case, Judge Weinstein also ruled in favor of the parent's IDEA claims and set forth a four-point directive in a New York District Court case where a child experienced frequent bullying that often went ignored by school supervisors – even though in some instances the child bullied was also the aggressor.[63] In his opinion, Judge Weinstein asserted that schools (1) must promptly act to investigate any reported harassment, (2) take steps to prevent the harassment in the future, (3) have a duty even if the misconduct is covered by its anti-bullying policy, and (4) the school must be proactive rather than waiting for complaints from students before taking action.[64]

Conversely, rulings were in favor of school districts when they provided a FAPE that addressed the unique needs of the child even if the child continued to experience difficulty in social situations.[65] Courts recognized that a student with a disability may face bullying, but "a fair appropriate public education does not require that the District be able to prove that a student will not face future bullying at a placement, as this is impossible."[66] It would be an onerous task for districts to prove that a child would never experience bullying even under the most ideal circumstances. Schools are responsible for providing individualized instruction that meets the unique needs of the child, not to guarantee that the child will always have close friends or be free of any negative social situations.[67] Similarly, schools were not held liable when there was evidence of only a few incidents of bullying.[68] Schools cannot expect to provide intense intervention when there is limited evidence of harassment, particularly in light of the *Davis* standard.[69]

School districts also experienced a high rate of success, even in the face of bullying, when they were not indifferent, took a

---

[63] T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 295 (E.D.N.Y. 2011) (Students would not touch things after she handled them and evidence of "constant negative interactions." Teacher aides reported that the student experienced a great deal of teasing; from her peers; students would "physically push her away for fun." In addition, the student was also the aggressor, including one report "where she is accused of hitting her teacher").

[64] *Id.* at 317.

[65] J.E. v. Boyertown Area Sch. Dist., 452 F. App'x 172 (3d Cir. 2011).

[66] *Id.* at 177.

[67] *See id.*

[68] *See* K.R. v. Sch. Dist. of Philadelphia, No. 06-2388, 2008 U.S. Dist. LEXIS 49064 (E.D. Pa. June 26, 2008.).

[69] Davis, 526 U.S. 629 (1999).

number of steps to address any negative incidents,[70] and took prompt action.[71] By implementing a comprehensive bullying plan for the classroom and responding to a student's individual needs in response to bullying, districts were more likely to be found to be providing the child with a FAPE, particularly when the student was making positive progress under his IEP.[72] Courts recognize that it is unfortunate that an IEP and its implementation cannot always prevent altercations.[73] However, a bullying incident does not negate the appropriateness of an educational program.[74]

A few examples of courts finding that districts provided an appropriate program to meet the unique needs of the child with the disability, who was bullied, include those implemented in *Emily D. v. Mt. Lebanon Sch. Dist.*[75] and *T.B. v. Waynesboro Area School.*[76] In *Emily D.,* the district designed a comprehensive plan to respond to student harassment including: conducting a functional behavioral assessment (FBA); designing a behavioral intervention plan (BIP); providing an inclusion specialist for additional classroom support; providing a personal care assistant to help the child interact with other students "on the playground, during lunch, and in the hallways;"[77] and providing "social skills training in a small group setting two times a week."[78] When incidents did occur, the principal would meet with both children and speak to all the children in the classroom about appropriate school behavior.[79]

A similar comprehensive plan was designed by the Waynesboro Area Schools to meet the needs of a student who experienced difficulty dealing with social situations and

---

[70] Emily Z. v. Mt Leb. Sch. Dist., 2007 U.S. Dist. LEXIS 79890 (W.D. Pa. Oct. 24, 2007); K.R. v. Sch. Dist. of Philadelphia., 373 F. App'x 204, (3d Cir. 2010); T.B. v. Waynesboro Area Sch. Dist., 2011 U.S. Dist. LEXIS 23534 (M.D. Pa. Jan. 19, 2011). (Parents also brought unsuccessful claims under 504 and ADA).

[71] T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 295 (E.D.N.Y. 2011)

[72] *T.B.*, 2011 U.S. Dist. LEXIS 23534.

[73] *Id.*

[74] *Id.*

[75] Emily Z. v. Mt Leb. Sch. Dist., 2007 U.S. Dist. LEXIS 79890 (W.D. Pa. Oct. 24, 2007).

[76] T.B., 2011 U.S. Dist. LEXIS 23534.

[77] Emily Z., 2007 U.S. Dist. LEXIS 79890 at *2.

[78] *Id.*

[79] *Id.*

communicating effectively with peers.[80] In designing the IEP, they used visual and verbal cues and prompts; role-playing situations; positive reinforcement; peers to provide good models; monitoring use of appropriate social skills such as using non-threatening words and good problem solving strategies; being concrete and specific, providing information about change in routine; and talking him through stressful situations or allowing him time in a stress-free environment.[81] Location and the frequency of each service were also identified on the IEP.[82]

In sum, it is evident that under IDEA claims, courts expect school districts to respond to bullying by addressing the student's needs and designing an IEP that meets academic needs. Additionally, it must provide for ongoing social skill development, particularly in cases when a child experiences difficulty with peer-to-peer social interactions. When a district avoids investigating intense bullying behavior, is not proactive in preventing potential bullying incidents, and does not design an IEP that includes strategies to meet the needs of the student with the disability who is bullied, the courts are more likely to rule in favor of the parents.

B. Section 504, ADA, Section 1983, and Title IX when Parents Prevail

In the last few years, litigants have chosen to bring federal suits against school districts under the other cousin laws (i.e., Section 1983, Title IX, Section 504, and the ADA) rather than under IDEA, with the majority making 504 and ADA claims.[83] Parents enjoyed a higher rate of success in 504 and ADA claims compared to early cases making claims under IDEA.[84] Parents were successful in only two incidences under Section 1983 and Title IX.[85] Federal district and circuit courts have analyzed 504

---

[80] T.B. 2011 U.S. Dist. LEXIS 23534

[81] *Id.*

[82] *Id.*

[83] Note in Table 1 that in the last few years parents have filed special education cases related to bullying under the cousin laws rather than IDEA.

[84] *See* Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ., 2012 U.S. Dist. LEXIS 152080 (S.D. Oh. 2012); M.S. v. Marple Newtown Sch. Dist., 2012 U.S. Dist. LEXIS 125091 (E.D. Pa. 2012); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235 (W.D.N.Y 2012); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729 (W.D. Ark. 2012).

[85] *See* Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729 (W.D. Ark.

and ADA claims related to bullying students with a disability in a similar fashion to IDEA cases, with parents prevailing when the district did not respond appropriately to bullying, or when the district was deliberately indifferent to ongoing, intense bullying.[86]

When a district turns a blind eye to blatant incidents of bullying, and acts in bad faith and with gross misjudgment, parents are successful with 504 and ADA claims.[87] Further, in such circumstances, parents are also successful with Title IX and Section 1983 claims, particularly when a student with a disability is sexually harassed.[88] For example, in *Joseph Galloway v. Chesapeake Union Exempted Village Schools Board of Education,* Joseph was confronted with almost daily bulling including:

> [O]ne teacher repeatedly questioned Joseph about his seizures in front of the entire class and questioned whether he really had seizures; students threw water on their pants to mock the fact that during seizures Joseph could become incontinent; students would call Joseph 'seizure boy,' with the knowledge and approval of the teacher; . . . students would . . . hide his belongings, shove him, threaten to break his computer, steal his backpack . . . a student punched Joseph in the back; students encouraged Joseph to commit suicide; and the bullying culminated in several sexual assaults, in which students would come up behind Joseph in a locker room and grind their penises into Joseph's back.[89]

2012); Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ., 2012 U.S. Dist. LEXIS 152080 (S.D. Oh. 2012).

[86] *See supra* note 74 and accompanying material.

[87] *See Braden*, 903 F. Supp. 2d at 732–35, 739 (Where a student repeatedly sexually harassed a student with a disability by "periodically exposing his genitalia in class, simulating masturbation, and, on one occasion, placing his penis on the classroom overhead projector in front of the other students . . . assaulting [the disabled student] by forcing [the student's] head into [his own] genital area while a teacher was present in the classroom . . . [and], in the presence of a paraprofessional, [by] pull[ing] down his shorts during math class, expos[ing] himself to [the disabled student], and compel[ing] [him] to perform oral sex on him, which [he] did while another student watched").

[88] *Id.*

[89] Galloway, 2012 U.S. Dist. LEXIS 152080 at *4. Other incidents include

> a) [d]uring a Project Lead-the-Way class in Joseph's tenth grade year, two other students told Joseph they wanted him to 'hang himself, let us watch, we will tighten the noose, dig your grave, cut the rope after you're dead and cover you up with dirt.' Joseph asked the teacher, Mrs. Williams, if he could be taken out of the group in which he was placed and the teacher refused, so Joseph went to the Chesapeake High School assistant principal, who told him he needed to learn to

After presenting their case to 15 different school teachers and officials with no resolution, the parents brought action under Section 1983, 504, the ADA, and Title IX. [90] When ruling on the 504 and ADA claims the court found there was sufficient evidence that the district was aware of bullying occurring in the classroom and that Joseph was "discriminated against due to his disability."[91] Using the *Davis* standard for claims made under Title IX, the court concluded that the Amended Complaint clearly alleges more than simple acts of teasing among school children and "[we] cannot say beyond doubt that Plaintiffs can prove no set of facts in support of a Title IX claim which would entitle Joseph Galloway to relief" and therefore denied the school district's motions to dismiss.[92] Finally, on the 1983 claim the court ruled that the parents properly alleged that the school district knew about the incidences described above resulting in disparate treatment of Joseph by its faculty and staff. However, the school did nothing to remedy the problem, which constitutes knowing acquiescence. Therefore, the claims against individual employees were not dismissed.[93]

'work it out;'

Id. at *18, *20 and b) "Joseph joined the Chesapeake Junior High School wrestling team and after one wrestling match, on the bus on the way home, several students pulled out their penises, telling him to 'touch my dick, you know you want to'. *Id.* at *27. "During wrestling practice at Chesapeake High School, on several occasions in the locker room and in the school hallways, other students would come up behind Joseph and pull his pants down." *Id.*

[90] *Id.* at *15. Although the parents also brought action under substantive due process, equal protection, negligence, and Title V (unconstitutional municipal policy, practices, and procedures) for the purpose of this paper the findings will only be discussed within the context of an endnote. The court dismissed the substantive due process and equal protection claims against the School District and against school officials in their official capacities; however, equal protection claims against the school officials in their individual capacities survived. *Id.* at 38. The court also denied the motion to dismiss the negligence claims and held that the defendants' actions fell within the exception to immunity under Ohio law. *Id.* School district's motion to dismiss the Title V claim was granted. *Id.*

[91] *Id.* at *25.

[92] *Id.* at *29.

[93] *Id.* at *18–20. Examples of allegations against employees include the following: (a) "Mr. Rase said that Joseph was starting to act out in class and he showed them [Mr. and Mrs. Galloway] a document which he said was a petition signed by several students in Joseph's CCC classes saying they wanted Joseph 'out of there' Mr. Rase indicated that the teacher of the class, Kim Williams, a Lawrence County employee, had also signed the document;" (b) "In sixth grade, his teacher Mrs. Jeannie Harmon asked [Joseph], in front of the entire class, if he really had seizures and questioned what the seizures looked like because 'I have never seen you have a seizure.' Joseph was so embarrassed he came home crying that day;" (c) "In sixth grade, during a parent-teacher conference, Mrs. Harmon told Mr. and Mr. Galloway that it

It is not surprising that the court held for the parents in *Galloway,* particularly since courts are only likely to rule on behalf of school districts when districts provide ongoing resolutions to bullying incidents, which was not the case in *Galloway*. When employees not only ignore bullying behavior of their students, but are tacitly or directly involved in an incident, courts hold them accountable if not as a school employee, then individually. Such was the case in *Galloway* where the court dismissed claims against individuals in their official capacity, but held that as individuals that they did display disparate treatment.[94]

Finally, not unlike cases under IDEA, when a parent makes repeated requests for the school to provide a remedy for ongoing bullying, when a school shows indifference to those requests, and if a student's performance continues to fall in the midst of the ongoing bullying, the courts have ruled in favor of the parents under the cousin laws.[95] In some instances, a simple action such as scheduling the bully in a different class, as the parent requested, would have shown a good faith effort that the district was acting in the best interest of the child with the disability so that the child could successfully access special education.[96] Or, at the very least, the district could have exacted consequences for bullying behavior in an attempt to decrease the rate of future behavior.[97] Although no school district can eliminate all bullying behavior, complete inaction lends itself to a district being found to have acted deliberately indifferent.

C. Section 504, the ADA, Section 1983, and Title IX when Districts Prevail

In contrast, federal district and circuit courts have decided cases involving the bullying of students with a disability where

was 'nuisance to teach Joseph,' that he was 'lazy,' not disabled, and that his parents were 'enabling' him to feel like a victim;" (d) "Throughout his sixth grade year, Mrs. Harmon continued to quiz Joseph in front the entire class about the validity of his seizure disorder;" (e) "During a seizure, Joseph often became incontinent, and other children in his class mimicked him by throwing water on their pants and shaking themselves violently, and calling Joseph 'seizure boy,' all with the knowledge and approval of Mrs. Harmon". *Id.*

94 Galloway, 2012 U.S. Dist. LEXIS 152080 at *4

95 *See Marple*, 2012 U.S. Dist. LEXIS 125091 at *2–3

96 *See id.*

97 *See, e.g.*, *Preston*, 876 F. Supp. 2d at 242.

districts took clear measures to punish or work with the bully as well as providing alternative arrangements and educational supports for the child who was bullied.[98] In these cases, even if the outcome for the taunted student was similar to those mentioned above, school districts have not been found to have acted with deliberate indifference. Without deliberate indifference, claims made under any of the "cousin" federal laws seeking damages that a child with a disability was bullied were more likely found for the school.[99]

A few cases reflect the challenges administrators face, under extreme circumstances, when parents claim that their child with a disability committed suicide as a direct result of the district's deliberate indifference.[100] Although tragic, a district is not found to have demonstrated disability harassment under the ADA and 504, to have deprived a student a Constitutional right under Section 1983, or to be liable for Title IX claims because the parent did not provide sufficient evidence that created a triable issue of fact; therefore their claims did not survive. [101]

Schools might have a lack of knowledge that bullying is occurring, particularly at the high school level where it is typically socially unacceptable to "tattle" on perpetrators. For example in *Jill Moore v. Chilton County,* an overweight student who had Blount's disease was harassed almost exclusively away from any other adults,[102] with the teasing stopping when "students saw a teacher in the vicinity."[103] Thus, in large part, the bullying took place out of ear shot so teachers and administrators would not be aware of the occurrences unless

---

[98] In Table 1, cases that are marked with an "X" under held were ruled in favor of the school district based. In all incidents there was some evidence that the school provided some type of intervention for the child with disabilities who was bullied.

[99] *Id.*

[100] *See, e.g.*, Moore v. Chilton Cnty. Bd. of Educ., U.S. Dist. LEXIS 26631 (M.D. Al. 2014); Long v. Murray Cnty. Sch. Dist., 2012 U.S.Dist. LEXIS 86155 (N.D. Ga. 2012); Estate of Montana Lance; Jason Lance, Deborah Lance v. Lewisville Indep. Sch. Distr. No. 12-41139, 2014 U.S. App. LEXIS 3863 (5th Circ. Feb. 28, 2014).

[101] *See* Moore v. Chilton Cnty. Bd. of Educ., 2014 U.S. Dist. LEXIS 26631 (M.D. Al. 2014); Long v. Murray Cnty. Sch. Dist., 2012 U.S.Dist. LEXIS 86155 (N.D. Ga. 2012).

[102] Moore v. Chilton Cnty. Bd. of Educ., 2014 U.S. Dist. LEXIS 26631 at *2 (M.D. Al. 2014) (When Jill was eight or nine years old she was diagnosed with Blount's Disease a "progressive disorder of the proximal growth plate of the tibia, resulting in a range of bowing deformity of the legs").

[103] *Id.* at *4.

they were reported by the student. In her attempt to manage the teasing, the student ignored the harassment and called students out to stop the name calling, yet she did not have the necessary skills to avoid internalizing the incidents, eventually taking her own life.[104] Even when a student commits suicide, the court reminds us that "[d]eliberate indifference is an exacting standard; school administrators will only be deemed deliberately indifferent if their 'response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'"[105] Given the lack of knowledge by school personnel in *Moore,* it is understandable that the court ruled in favor of the school. The school was unaware that the intense bullying occurred; therefore, it could not have known that a response to bullying was needed.

Courts do not expect schools to be prognosticators and predict each and every possible incident of bullying, particularly when the school district implemented an individualized education program that the parents consented to at every stage of the child's academic career.

Even in the case of *Lance v. Lewisville Independent School District*,[106] where the facts revealed that a nine-year-old student hanged himself, the Fifth Circuit used the *Covington* standard and held that "the evidence does not demonstrate that the 'school district knew about an immediate danger to [Montana's] safety."[107] Courts expect school districts to design and implement a comprehensive bullying prevention and intervention plan. However, it is highly unlikely that even with a solid plan in place that the courts expect schools to prevent unexpected circumstances as was the case with the suicides in *Moore* and *Lance.*

Similar to success under IDEA cases, school districts prevailed under cousin law cases when responses were

---

[104] *Id.*

[105] Long v. Murray County School District, No. 4:10-CV-00015-HLM, 2012 U.S.Dist. LEXIS 86155, at *96–97 (D. Ga. May 21, 2012).

[106] Estate of Montana Lance; Jason Lance, Deborah Lance v. Lewisville Indep. Sch. Distr. No. 12-41139, 2014 U.S. App. LEXIS 3863 (5th Circ. Feb. 28, 2014).

[107] *Id.* at 18 ("[T]he school district placed the student in the same area as a school custodian who had no known criminal record, sexual or otherwise, with school teachers in the same building but not in the immediate area. . . . Such post hoc attribution of known danger would turn inside out this limited exception to the principle of no duty."). Covington, 675 F.3d at 866; *see also* Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc).

reasonable, when there was no indication that the schools' responses either "caused additional harassment,"[108] or when the schools did not take necessary measures to "remedy disability harassment."[109] In *Long v. Murray*,[110] extensive measures were taken to respond to bullying including a plan to discipline harassers; increasing adult monitoring during class; taking remedial measures to prevent future, similar incidents; diligently investigating each reported incident; meeting every semester to address any parental or student concerns to adjust the IEP plan if necessary; and using monitoring techniques to prevent future bullying. The court reasoned that even though these measures did not completely eradicate all bullying, the district is not found to be deliberately indifferent "simply because the measures it takes are ultimately ineffective in stopping harassment."[111] This suggests that the courts expect school districts to design and implement a comprehensive bullying prevention and intervention plan. However, it is highly unlikely that even with a solid plan in place that the courts expect schools to stop all future bullying.

Evidence of a clear and present strategy was also the standard for a school's successful outcome under cousin laws in a Sixth Circuit ruling where a school prevailed when there was a record of action taken on behalf of the student.[112] The school district evidenced action by investigating bullying allegations even when the child with the disability was the perpetrator; disciplining all students involved; separating the bullying peers when necessary; conducting trainings and mediation sessions; and contacting parents and police when appropriate.[113] When a school can design an intervention based on the needs of the child they have the flexibility to tailor responses to circumstances. When there is a record of "active responses by the School District to incidents involving [the student], no discriminatory intent . . . may be imputed to the school

---

[108] Long v. Murray County School District, No. 4:10-CV-00015-HLM, 2012 U.S.Dist. LEXIS 86155, at *123 (D. Ga. May 21, 2012).

[109] *Id.*

[110] Long v. Murray County School District, No. 4:10-CV-00015-HLM, 2012 U.S.Dist. LEXIS 86155 (D. Ga. May 21, 2012).

[111] *Id.* at *123.

[112] S.S v. Eastern Kentucky University, No. 06-6165, 2008 U.S. App. LEXIS 13852 (6th Cir. July 2, 2008).

[113] *Id.*

district."[114]

Finally, using the same IDEA standard that a few incidents of bullying are not sufficient to allege harassment of a disability, courts favored school districts under cousin laws when there was a limited record of bullying incidents.[115] Courts also applied the standard used for IDEA cases in accordance with *Davis* – that when harassment is not severe, pervasive, or systemic,[116] rulings were in the district's favor. In addition, the Third Circuit also held that a limited record of bullying instances provides insufficient evidence to make a bullying claim under the cousin law.[117] Further, when a student has clearly demonstrated the ability to make friends, socialize with acquaintances, successfully complete high school, and pursue a college education, it is evidence that he or she was not severely restricted despite the limited bullying incidents.[118]

IV. CONCLUSION

An analysis of federal and circuit court cases where parents took action under IDEA and all the cousin laws reveals that there was a higher rate of success when the district was deliberately indifferent and demonstrated a lack of responsiveness to the parental complaints. Specifically, parents prevailed when evidence showed that their child was not demonstrating an educational benefit in the setting where the bullying occurred, and that the school did not provide a resolution to their request to intervene on behalf of their child.

---

[114] Estate of Montana Lance; Jason Lance, Deborah Lance v. Lewisville Indep. Sch. Distr. No. 12-41139, 2014 U.S. App. LEXIS 3863, at 1000 (5th Circ. Feb. 28, 2014).

[115] Hoffman v. Saginaw Pub. Schs. No. 12-10354, 2012 U.S. Dist. LEXIS 88967, at *1(D. Mich. June 27, 2012). (In its decision, the court asserted that one instance when teasing was about her son's posture was not a sufficient allegation that the harassment was because of the disability. Her son was born with hereditary exostoses"..the condition is hereditary and involves multiple benign bone tumors and growths. . .").

[116] Werth v. Bd. Of Dirs. Of Pub. Schs. No. 05-C-0040, 2007, U.S. Dist. LEXIS 4535, 1129 (D. Wisc. Jan. 22, 2007) ("Different offenders, on different dates, three months apart" and not harassment that had a *"systemic* effect of denying the victim equal access to an educational program." Joseph Werth was born with cleidocranial dysostosis, "a congenital disorder of bone development, characterized by absent or incompletely-formed collar bones, an abnormally shaped skull, characteristic facial appearance, short stature, and dental abnormalities").

[117] Weidow v. Scranton Sch. Dist., No. 11-1389, 2012 U.S. App. LEXIS 2422 (3rd Cir. Jan. 13, 2012).

[118] *Id.*

Parents also were successful when there was evidence that school personnel (i.e., teachers, supervisors, administrators) were fully aware of the bullying, but failed to take action. In some instances, school personnel not only ignored the bullying, but also contributed to the harassment. Court rulings also favored parents when there was evidence of multiple incidents of their child being bullied or evidence of more than one individual involved in the bullying. This was particularly true when the school district demonstrated a lack of action to remedy the problem, even in cases where the child with the disability was the perpetrator.

Parents were not always successful in their claims against the school district, particularly when they did not exhaust administrative remedies prior to seeking relief. Courts were also limited in their support of parental claims when the parent did not allow a sufficient amount of time prior to unilaterally removing their child from the school because of bullying (e.g., five days), or when there were only a few recorded incidents. In addition, courts did not support harassment based on disability when parents claimed that their child with a disability was bullied if the disability was not the root cause of the harassment. Merely having a disability does not necessarily suggest that claims made on behalf of that disability will be successful. Finally, even though their child may have been bullied, parental claims did not survive if the district offered credible evidence that the school provided a plan including specific steps/strategies taken for the victims and the perpetrators; as well as, plans to limit future bullying.

It is clear that when there was evidence of documentation, individualized decision making, and ongoing intervention, the courts ruled in favor of the school or district. Specifically, when there was a comprehensive plan that showed a good faith effort to respond to bullying—including, but not limited to, following up on bullying incidents, disciplining offenders, regularly communicating with the parents, and adjusting the IEP to meet the bullied child's needs—schools were more often granted summary judgment as was the case in *Emily, T.B., Long,* and *S.S.* This does not suggest that the school has the burden to guarantee a student will never be bullied in the future,[119] nor is it plausible to expect a school district to

[119] J.E., et al., v. Boyertown Area Sch. Dist., No. 10-2958, 2011 U.S. Dist. LEXIS

monitor and intervene on all bullying incidents against a student with or without a disability.[120]

In cases in which there were multiple incidents of bullying with repeated intensity and deliberate indifference rising to the level of the *Davis* standard, as in *Shore, T.K. Galloway*, and *Braden,* the courts ruled with a heavy hand against school districts that failed in their obligations to monitor and protect the student with a disability. In these cases, parents' concerns went unanswered, student performance was affected, and in some instances, teachers either ignored or contributed to the bullying. Failure to appropriately address issues with regard to bullying for students with disabilities in these cases may leave a school's programs susceptible to compensatory education claims and years of costly litigation and their students without sufficient support to combat the long-term and adverse effects of bullying.[121]

Although school district administrators are in the business of managing a school, they also are in the business of leading educators to provide programs that meet the needs of their students. They must therefore consider solutions to minimize litigation. As part of any successful special education program, districts need to regularly monitor a child's behavior to determine if the child is at risk for either bullying or being bullied and not denied a FAPE. Educators and parents need to be cognizant as to what extent a child's disability may increase the likelihood of being bullied and/or being at-risk for bullying. To what extent would a child with a disability who has difficulty discriminating between appropriate and inappropriate behavior go along to fit in and engage in

12555, at *10 (D. Pa. February 4, 2011). ("[A] fair appropriate public education does not require that the District be able to prove that a student will not face future bullying at a placement, as this is impossible").

[120] *See* Vance v. Spencer County Public School Dist., 231 F.3d 253, 260–61 (citing and quoting *Davis*). David Patterson and Dena Patterson v. Hudson Area Schls., No. 08-1008, 2009 U.S. App. LEXIS 25; 2009 FED App. 0002P at * 18 (6th Cir. Jan. 6, 2009). ("It is manifestly unreasonable to read the guidelines and *Vance* as holding that a school district may be responsible for not preventing *future* harassment by *entirely separate and new* harassers. To suggest otherwise, as the majority does, comes extremely close to requiring that schools be 'purged' of all offensive behavior and be completely harassment-free, which the Supreme Court and Sixth Circuit have unequivocally held is not required—or possible").

[121] Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not be "a Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1,3 (2005).

bullying? What about a student whose impulsivity is a trait of his or her disability and would also easily engage in bullying activities? Or how does a school address a student with a cognitive processing problem and/or social skill deficits that do not filter rational thinking and act on impulse as was the case in *Lance, S.S., T.K. v. NYC Dept. of Educ.*, and *T.B. v. Waynesboro* where the child with the disability was not only harassed but in some instances was the perpetrator?

V. RECOMMENDATIONS

Given the trend that continues, how do K–12 schools best address the issue of bullying and children with disabilities? An appropriate approach to anti-bullying measures must take into consideration requirements at the federal, state, and local levels, but also individualized and student-specific programming needs under IDEA and Section 504. It is therefore important for schools and districts to develop and implement not only appropriate district-wide, school-wide and classroom-wide responses, but to implement individualized and student-specific responses to each student's disability related needs. Teams should offer appropriate accommodations and supports to students with disabilities in order to minimize bullying and bullying related claims; in order to ensure FAPE for students with disabilities; and in order to hopefully reduce the negative effects of student on student bullying and harassment for all students.

Although parents and educators want all children to thrive in "safe" academic surroundings, we do an injustice to children if we do not provide them with the necessary skills to be self-sufficient in managing the effects of bullying, since upon entering adulthood, they have a larger social society to contend with where adult bullying can be more subtle yet equally hurtful. How will they manage when they are in the work place or higher education and teasing goes "underground" and perpetrators are savvy about minimizing what is observed by a boss or college instructor? A snapshot of this was evident in *Moore* at the high school level, as students clearly understood that they were engaging in inappropriate behavior when all bullying came to a halt if they noticed an adult nearby.[122]

[122] Moore v. Chilton Cnty. Bd. of Educ., U.S. Dist. LEXIS 26631 (M.D. Al. 2014);

Students need to be taught the harmful effects of peer-on-peer teasing as a deterrent to bullying. Additionally, they should be taught a strong set of skills to deflect teasing both as the one being teased and as a potential ally. Simply ignoring and giving a verbal retort may not be sufficient to override the influence of daily taunts on one's self-perception. Further, ignoring cruel behavior also eats away at positive self-perception.

Students may need to have changes in an IEP that reflect their need to develop appropriate social skills to avoid bullying rather than going along to get along with inappropriate, but from their perspective, peer-enhancing, bullying activities. In addition, students who are at risk of being bullied also need to develop life skills that give them methods to either avoid bullying or limit the negative effect of possible bullying in the future. A district cannot depend on students alone to respond to bullying by walking away, telling a teacher, or both. What measures are districts taking to provide students, particularly those with a disability, to avoid the effects of bullying so that even if the student ignores harassment they do not do so at the risk of internalizing the behavior and either acting overtly (becoming a perpetrator) or covertly (committing suicide or developing a eating disorder)? Also, are there elements of parent engagement and training that can assist parents to be effective and proactive advocates for reducing and reporting bullying that affects their children? How can students be taught to advocate for themselves? How can students be taught to appropriately advocate for others? Although we want to protect our most vulnerable children, we cannot legislate the human condition. We can discipline perpetrators, but students with disabilities need to know how to respond beyond the closed environment of the school.

Findings in the cases related to bullying and special education clearly delineate the need for school districts to have a concise action plan to prevent bullying, but also a strategy to intervene during real time incidents. It would behoove schools to take preemptive measures by providing access to current state bullying legislation and local school district policies by distributing copies or making available links to online copies of these documents. To encourage active participation, have

Long v. Murray Cnty. Sch. Dist., 2012 U.S.Dist. LEXIS 86155 (N.D. Ga. 2012).

personnel, parents, and students (when age appropriate) acknowledge in writing their understanding of their obligations under the law and policy. When feasible, conduct school-wide and age specific anti-bullying training and assemblies where the applicable laws and school policies are highlighted and explained in a meaningful way. If bullying incidents do occur, consider revising policies that take into consideration unexpected procedural concerns that arise following the implementation of the original school/district bullying policy. As with any school and district wide plan, consult with legal counsel when necessary to consider appropriate responses to situations and claims, and have legal counsel review applicable laws and policies with Administration.

Another preemptive measure is to make sure that students are supervised appropriately by adults who understand their obligations to provide an immediate intervention that is in accordance with school-wide and student-specific plans, and who do not themselves engage in conduct that could exacerbate situations. When an incident does occur, ask the adult to document responses and results of investigations. This should include providing a standardized protocol sheet for teachers and administrators so they can record the nature of the incident, date, time, who was involved, who was notified of the incident, specific steps taken to respond to the incident for both the bullied and perpetrator, and identify a follow-up date. Further, the standardized protocol sheet should include a section to identify when contact was made with parents, including if it was staff or parent initiated, how the staff responded to any concerns, and an agreed upon date to reconvene for follow-up.

For eligible and/or qualifying students, include in any IEP or 504 plan goals to develop appropriate social skills that teach students to avoid being bullied or engage in bullying and that limit the effect of future bullying. No one is immune to bullying and students need skills to be self-sufficient in responding to bullying well into adulthood. Monitor progress on goals and the effectiveness of specially designed instruction for students. Consider supplementary aids and services that may help students. Consult with behavioral specialists, counselors, social workers and/or other specialists where appropriate to complement the team's expertise. In some instances, a simple resolution to future issues is to separate the individuals by

varying schedules or class assignment.

As part of the design structure of the IEP or 504 plan, consider whether to conduct a Functional Behavioral Assessment (FBA)[123] and implement a Behavior Intervention Plan (BIP)[124] to provide the team with additional information, analysis, and strategies for dealing with bullying, especially when it is interfering with a child's education. [125] Include in the BIP a framework to teach appropriate and/or replacement behaviors to students with an emphasis on research-based strategies (e.g., rational emotive behavior therapy)[126] to teach skills that encourage students to manage emotions appropriately whereby avoiding bullying or minimizing the effects. Or if a BIP is already in place, the team needs to review the plan and modify it, as necessary to address the behavior.

Some suggestions can be implemented without expending significant resources. Others require time on the part of teachers and/or administrators, which can be burdensome, particularly considering the daily curricular, assessment, and logistic demands in the school day. However, devoting time to at least some consistent, standard policies and practices noted above, will yield a benefit worthy of consideration particularly when weighted against the potential for legal action against a school and long-term negative effects that bullying has on victims, perpetrators, and the larger school community.

---

[123] 20 U.S.C.§ 1415 (k)(1)(F)(i).

[124] 20 U.S.C.§ 1415 (k)(1)(F)(ii).

[125] *See* Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process Without Procedure*, 2 BYU EDUC. & L.J. 209, 211-212 (2000) (An early discussion of the statute and regulations related to FBA and BIP). *See* Joseph T. DiMaria, *Disciplining Student with Disabilities: A Comparative Analysis of K–12 and Higher Education*, BYU EDUC. & L.J. 421, 421–23 (2012) (A more recent overview of FBA and BIP).

[126] *See* Tachelle Banks, *Helping Students Manage Emotions: REBT as a Mental Health Educational Curriculum*, 4 EDUC. PSYCH. IN PRAC. 383 (2011) (A general overview of research-based studies using rational emotive behavior therapy (REBT)).