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Addressing the Bullying and Harassment of Students with Disabilities Through School Compliance to Avoid Litigation

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ADDRESSING THE BULLYING AND HARASSMENT OF STUDENTS WITH DISABILITIES THROUGH SCHOOL COMPLIANCE TO AVOID LITIGATION

"Today, education is perhaps the most important function of state and local governments. . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education"[1]

I. INTRODUCTION

Education laws have continued to develop since the Supreme Court first articulated the equal education standard in the 1954 civil rights decision, *Brown v. Board of Education*.[2]While the Court's promise of an equal education forced both state and federal governments to desegregate schools and to offer equitable terms for a student's education, regardless of race, that same promise was consistently denied to a different demographic: disabled students.[3]

For years these students' needs were ignored, dating back to the late 19th century compulsory education laws and court cases such as *Watson v. City of Cambridge* (1893)[4]and *Beattie v. Board of Education* (1919).[5]However, in 1910 the first White House Conference on Children focused national attention on children and youth with disabilities.[6]The results of the conference led to the emergence of advocacy groups that spanned the nation such as The Council for Excep-

1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (U.S. Supreme Court Chief Justice Earl Warren (1891 – 1974)).

2. *Id.*

3. At the close of the *Brown* decision in 1954, the Supreme Court made a similar decision in the *Bolling v. Sharpe*, 347 U.S. 497, (1954) case. The justices found that while *Brown* required the states to desegregate schools, the applicable laws of the District of Columbia did not hold the federal government to a standard of desegregation. The justices used their interpretation of the Fifth Amendment, suggesting that the segregation of public schools in Washington D.C. violated the students' due process rights. In an unanimous decision the Court ruled that the D.C. schools would desegregate and that segregation was indeed a violation of a person's due process rights, guaranteed by the Fifth Amendment.

4. Watson v. City of Cambridge, 32 N.E. 864 (Mass. 1893) (upholding a school committee's authority to make the final decision on whether to admit a student with special needs, and preventing that decision from being reviewed by the courts).

5. Beattie v. Bd. of Educ., 172 N.W. 153 (Wis. 1919). *See generally*, MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 46 (2012).

6. *Id.* at 47.

tional Children (1922)[7]and The National Association for Retarded Children (1950).[8]

In the 1960's and 1970's a spark of "right-to-education" interest, fueled by the legal precedent of *Brown v. Board*, ignited a flame of extensive advocacy for equal educational opportunity for students with disabilities.[9]Parents of exceptional students, frustrated by the expanding education rights of non-handicapped students, claimed that their children were entitled to the same educational benefits.[10]Of course, this frustration was not met without reconciliation. In 1971, the Pennsylvania Association for Retarded Children (PARC) argued that students with mental retardation were denied a publicly funded, constitutionally justified education.[11]PARC blamed the secretaries of Education and Public Welfare, the state Board of Education, and 13 school districts for ignoring or delaying the needs of these students and for violating the student's equal protection rights guaranteed under the 14th Amendment.[12]While the court's decision was not a win for all students with disabilities, the district court's decision in *PARC v. Commonwealth of Pennsylvania* gave the promise of a free education to students with mental retardation ages 8 through 17.[13]Additionally, the ruling also established the early groundwork for an equal education, one comparable to the education that non-handicapped children received.[14]Under similar principles, the Supreme Court de-

7. The Council for Exceptional Children was founded by a group of concerned students attending the Teachers College at Columbia University in New York. The council's "three aims" included uniting those interested in educational problems of special children, emphasize the education of special children rather than his/her identification, and establish professional standards for teachers in the field of Special Education. *See* Margaret J. McLaughlin, *Remarks on the 90th Anniversary of the Council for Exceptional Children (CEC)*, (2012), http://www.cec90.org/cecs-founding.html.

8. The National Association for Retarded Children was created following the annual meeting of the American Association on Mental Deficiency, held in Columbus, Ohio. The organization was primarily concerned with the exclusion of retarded children from school, the lack of community services for these children and their families, the conditions of state institutions, and the lack of political involvement. The association changed its name in 1974 to The National Association for Retarded Citizens, replacing children with the word citizens. *See* Robert Segal, *The National Association for Retarded Citizens*, http://www.thearc.org/who-we-are/history/segal-account.

9. *See* YELL, *supra* note 5, at 47-50.

10. *Id.*

11. *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F.Supp. 279, 283 (E.D. Penn. 1972)

12. *Id.* at 282–83.

13. *Id.* at 302–03.

14. *See* YELL, *supra* note 5, at 47–50.

cided in *Mills v. Board of Education of the District of Columbia* (1972) that the exclusion of students with any disability was as unconstitutional as the segregation of the races in schools.[15]In addition, the Court established a series of due process safeguards that entitled exceptional students and their families the right to a hearing, the right to appeal, the right to access records, and the requirement of written notice at all stages of the process.[16]These procedural safeguards, along with accompanying statutory law, developed into The Education for All Handicapped Children Act (EAHCA) of 1975.[17]

These landmark civil rights cases spurned early federal involvement in the arena of Special Education.[18]Congress passed a series of bills to influence the availability of education to students with disabilities and ensure its high-quality outcomes. The statutes include The Education of Mentally Retarded Children Act of 1958,[19]The Elementary and Secondary Education Act of 1965,[20]and The Education of the Handicapped Act of 1970 (EHA).[21]Then, in 1973, Congress issued the Rehabilitation Act.[22]Incorporated within the statute, Section 504 was the first federal civil rights law to prohibit discrimination and to protect the rights of persons with disabilities.[23]The legislation placed all federally funded agencies within its scope, mandating that schools comply with the Act's provisions and regulations, specifically to provide services equivalent to those offered to persons without disabilities and not discriminate based on handicapping conditions.[24]

Twenty-two years after the passage of the Rehabilitation Act, the legislature amended the EAHCA and renamed it The Individuals with Disabilities Education Act (IDEA 1990).[25]The Act changed dis-

15. Mills v. Bd. Of Educ. Of D.C., 348 F. Supp. 866, 875 (D.D.C. 1972).

16. *Id.* at 878.

17. Education for All Handicapped Children Act (EAHCA) of 1975, Pub. L. No. 94-142, 89 Stat. 773.

18. *See* YELL, *supra* note 5, at 51. In the years following Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257, (1971), and Mills v. Board of Education, 348 F. Supp. 866, (1972), 46 other "right-to-education" cases were filed on behalf of students with disabilities in 28 states.

19. Pub. L. No. 85-926.

20. Pub. L. No. 89-10, 79 Stat. 27.

21. Pub. L. No. 91-230.

22. 29 U.S.C. 701, Pub. L. No. 114-95.

23. *Id.*

24. *Id.*

25. Individuals with Disabilities Education Act of 1975, Pub. L. No. 101-476, 104 Stat. 1142.

ciplinary procedures within the EAHCA and included a new element, "manifestation of determination," to help school officials address a student's behavioral problems.[26]In addition, the legislation provided transition services that extended opportunities for students in post-school education, vocational training, and integrated employment.[27]Amended in 1997[28]and again in 2004,[29]the latest requirements of IDEA emphasize student performance,[30]adoption of Child Find programs,[31]and require that all Special Education teachers be certified in Special Education and meet higher teacher qualifications requirements.[32]While the legislature has provided ample statutes to regulate the education of students with disabilities across the nation, the need to define our current understanding of the broad IDEA legislation relies heavily on the history of legal precedent associated with Special Education.

Notable examples of court cases that have defined the various components of IDEA include *Rowley v. Hendrick Hudson School District* (1982), *Smith v. Robinson* (1984), *Irving Independent School District v. Amber Tatro* (1984), *Cedar Rapids v. Garret F.* (1999), and *Forest Grove School District v. T.A.* (2009). The legal precedent established in each of these cases has provided indispensable information regarding the definition of IDEA principles and how Section 504 provisions and ADA compliance mandates should be implemented in educational agencies. In *Rowley*, the U.S. Supreme Court defined the term "appropriate" in Free Appropriate Public Education (FAPE) and determined how schools could meet the standard of FAPE when applying Special Education resources and instructions to students with disabilities.[33]In *Robinson*, the Court denied the petitioner reimbursement of attorney's fees after a lengthy and expensive series of lawsuits.[34]However, Congress overturned the Supreme Court's decision by passing the Handicapped Children's Protection Act in 1986, allowing parents and parties representing students with disabilities who were successful in court to collect at-

26. *Id.*
27. IDEA Regulations, 34 C.F.R. § 300.18.
28. Pub. L. No. 105–17.
29. Pub. L. No. 108–446.
30. *Id.*
31. *Id.*
32. *Id.*
33. 458 U.S. 176, 177 (1982).
34. 468 U.S. 992, 993 (1984).

torney's fees.[35]In both *Irving* and *Garret*, the Supreme Court defined medical services as "related services" under Section 504, requiring districts to fund the cost of providing these medical services.[36]Finally, in *Forest Grove*, the Supreme Court held that the IDEA allowed reimbursement for private school Special Education services, regardless of whether the student had received such services from the public school.[37]

The history of Special Education legislation did not end in 2004 with the amendments to IDEA. Since then, a stream of guidelines, recommendations, and policies associated with Special Education have demanded the attention of teachers, administrators, attorneys, and courts throughout the nation.

For example, the Office of Civil Rights (OCR), an office of the U.S. Department of Education, serves two roles in increasing understanding of civil rights protections in Special Education—educator and enforcer.[38]In their role as educators, the OCR has distributed a series of letters to administrators and teachers throughout the country. These letters, entitled "Dear Colleague Letters," addressed specific topics like harassment of students with disabilities,[39]first amendment issues,[40]and gender equality,[41]and created model policy for schools.[42]The agency has released at least four "Dear Colleague Letters" to date on the specific topic of bullying and harassment of students with disabilities and several other letters on harassment related to other protected classes.[43]

Developing caselaw, legislation, and agency action has sought to improve the educational opportunities available to students with disabilities since these exceptional students were first granted a free, public education. To continue this forward-moving trend, courts,

35. Pub. L. No. 99–372.

36. 468 U.S. 883, 884 (1984); 526 U.S. 66, 67 (1999).

37. 557 U.S. 230, 231 (2009).

38. U.S. DEP'T OF EDUC. Office of Civil Rights, Overview of the Agency (2014), http://www2.ed.gov/about/offices/list/ocr/index.html.

39. U.S. Dept. of Ed., *Dear Colleague Letter: Prohibited Disability Harassment* (2000).

40. U.S. Dept. of Ed., *Dear Colleague Letter: First Amendment* (2003)

41. U.S. Dept. of Ed., *Dear Colleague Letter on Gender Equity in Career and Technical Education* (2016).

42. U.S. Dept. of Ed., *Dear Colleague Letter: Sex Discrimination* (2017)

43. U.S. Dept. of Ed, *Dear Colleague Letter: Racial Incident and Harassment Against Students* (1994); *Dear Colleague Letter: Prohibited Disability Harassment* (2000); *Dear Colleague Letter: Harassment and Bullying* (2010); and *Dear Colleague Letter: Bullying and Harassment and Effective Evidence-Based Practices for Preventing and Addressing Bullying* (2013).

legislatures, and education professionals should be committed to compliance-driven modalities to address the evolving and developing issue of harassment in special education.

II. DEFINITION OF DISABILITY

When the IDEA of 1990 was passed, that legislation replaced the ambiguous word "handicapped" with the more appropriate word "disability."[44]Section 504 defines a person as disabled in three parts: (1) the person "has a physical or mental impairment that substantially limits one or more major life activities;"[45](2) the individual has a "record of impairment,"[46]but may have overcome that disability; and (3) "has a physical or mental impairment that does not substantially limit major life activities."[47]The individuals and students discussed within the scope of this article meet the conditions for "disabled" under Part 1 of Section 504.[48]

III. CASE LAW ANALYSIS

Judicial opinions and legal precedents continue to wrestle with the ever-changing landscape of Special Education law.[49]Sadly enough, in some instances the consequences of disability discrimination and harassment in schools have resulted in students attempting to take their own lives.[50]For example, researchers found that 29% of

44. Pub. L. No. 101–476.

45. Section 504 of the Rehabilitation Act, 34 C.F.R. § 104 (1973).

46. *Id.*

47. *Id. See* YELL, *supra* note 5, at 96-99.

48. *Id.* These students' disabilities range from neurological, musculoskeletal, cosmetic, and sensory deficiencies.

49. *See Generally, Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Marcum v. Board of Educ. of Bloom-Carroll*, 727 F.Supp. 657 (2010); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2nd Cir. 2012); *Carabello v. N.Y. C. Dep't of Educ.,* 928 F.Supp. 2d 627 (E.D.N.Y. 2013); *Lance v. Lewisville Independent School District*, 743 F.3d 982 (5th Cir. 2014).

50. According to statistics reported by the Megan Meier Foundation, approximately 12% of bullying in schools is based on a student's disability. Some studies suggest that children with disabilities were "two to three times more likely to be bullied than their nondisabled peers." The National Autistic Society claims that 40% of children with autism and 60% of children with Asperger's syndrome have experienced bullying. Even more shocking are statistics that report that about 30% of frequent bullying victims have suicidal thoughts or report an attempt at suicide, and these victims are 3 times more likely to attempt suicide than their non-bullied peers. Megan Meier Foundation, Bullying, Cyberbullying & Suicide Statistics, http://www.meganmeierfoundation.org/traditional-bullying-.html.

bullying victims reported suicidal thinking or a suicide attempt in 2012.[51]

The following analysis of case law on the topic will illustrate the courts' definition of bullying and harassment, the determined scope of liability a school district is responsible for, and the legal precedents established from these cases.

A. Deliberate Indifference

The legal concept of deliberate indifference was introduced into the appellate and Supreme Court systems some time in the late 1980's, and is defined as intentional and informed disregard for the harmful and dangerous consequences for one's actions toward another.[52]However, the concept was not applied to the field of education until the late 1990's. In *Davis v. Monroe,* 526 U.S. 629, (1999), one of the first cases heard by the Supreme Court regarding the bullying and harassment of students in schools, the petitioners claimed that they were entitled to monetary and injunctive relief after their 5th grade female student was subjected to sexual harassment by another student in her class.[53]The respondent school district appealed the Eleventh Circuit Court's decision, which claimed that petitioner had no ground for a private cause of action under Title IX of the Education Amendments of 1972.[54]The Supreme Court reversed the deci-

51. Borowsky, Taliaferro, & McMorris, *Suicidal Thinking and Behavior Among Youth Involved in Verbal and Social Bullying: Risk and Protective Facts*, 53 J. ADOLESCENT HEALTH 4 (July 2013).

52. *See* Jon Loevy, *Section 1983 Litigation in a Nutshell: Make a Case Out of it!,* 17 J. DUPAGE CTY. B. ASS'N (2004–05), http://www.dcbabrief.org/vol171004art2.html. Here *Loevy* outlines two cases that fall under the legal definition of "deliberate indifference," namely Salazar v. City of Chicago, 940 F.2d 233, (7th Cir. 1991) and City of Canton v. Harris, 489 U.S. 378, (1989). An additional case concerning deliberate indifference was heard by the Supreme Court in 1994 entitled, Farmer v. Brennan, 511 U.S. 825, (1994). Each of these provided the higher courts with an opportunity to define the concept of deliberate indifference within their respective spheres. For *Salazar,* the issue occurred within a medical institution, for *Harris* the issue occurred within a police department, and for *Farmer* the issue occurred within a prison.

53. 526 U.S. 629, 632–33 (1999).

54. According to the Department of Justice, "Title IX is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. The principal objective of Title IX is to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practice. . . . Title IX also applies to any education or training program operated by a recipient of federal financial assistance." *See* The U.S. Department of Justice, Title IX of the Education Amendments of 1972, http://www.justice.gov/crt/about/cor/coord/titleix.php and Title IX, History of Title IX, (2014) http://www.titleix.info/History/History-

sion of the appeals court and granted the petitioner action under Title IX.[55]The Court clarified that the district "could be liable in damages only where their own deliberate indifference effectively 'caused' the discrimination."[56]By implication then, a petitioner in a similar case would be required to provide substantial evidence suggesting that the district or educational agency had indeed acted with deliberate indifference towards the known acts of bullying, discrimination, or harassment. The Court's rationale suggests that not only must evidence indicate that the school acted with deliberate indifference, but that a petitioner must prove the indifference caused or contributed to the actual harassment.[57]

In *Davis,* petitioners successfully demonstrated the failure of the Monroe School District to take proactive measures to address the harassment of one of its own students.[58]On several occasions, the harassment was reported directly to teachers, but when a request was made for the victimized student to speak with an administrator, they were denied.[59]Petitioner claimed as well that no efforts were made to separate the harassed student from the perpetrator.[60]

The *Davis* case set a legal precedent for the *Zeno v. Pine Plains Central School District* case.[61]In a series of escalated bullying and harassment targeting a minority student, the school district flagrantly dismissed the accounts of harassment reported to school administration both by the harassed student and his mother.[62]The intensity and brutality of the harassment was such that the student's mother filed a $1 million claim in damages.[63]

Overview.aspx.

55. *Davis*, 526 U.S. at 654.

56. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, (1998).

57. It is important to note that the Court's ruling does not suggest that a district is liable solely for student-on-student harassment. Rather, action is justified under Title IX if the school district fails to address the bullying in a satisfactory manner or show reasonable efforts to prevent harassment.

58. *See Generally, Davis*, 526 U.S. 629.

59. *Id.* at 635.

60. *Id.*, *but see* Marcum v. Bd. of Educ. of Bloom-Carroll, 727 F. Supp. 2d 657, (2010). In this case the school decided that the best and most responsible course of action to take following a student's harassment after sexual conduct with another student was to simply separate the students from each other.

61. Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, (2nd Cir. 2012).

62. *Id.* at 658–63.

63. *Id.* at 662–63. When the petitioner (student) was introduced to his high school he was immediately confronted with verbal assault suggesting that he leave the school and "go back to where [he] came from." The assault escalated to the point that the student was told by

Other court cases demonstrate a school adequately addressing harassment, despite a claim that the district acted with deliberate indifference towards the incidents. For example, in *Doe v. Big Walnut* (2011), a district court for the Southern District of Ohio responded to a petitioner's claim that their student, diagnosed with Cognitive Disorder, had been subjected to bullying by his peers and that the school district had acted with deliberate indifference towards the incidents.[64]The court found, however, that the district "took steps to protect John Doe, including meeting regularly with his parents, disciplining the offending students, involving police when necessary and instituting a multi-faceted safety plan and then meeting to review that plan to ensure it was working."[65]In this instance, the school district's actions were far-reaching, comprehensive, and carefully implemented sufficiently to defy the petitioner's claim. The courts have consistently recognized the efforts of school districts to make adequate (although varying) provisions to confront issues of harassment among their students to avoid being subject and liable to serious compensatory or damages claims.[66]

B. Implications on Quality of Education

Since the *Davis v. Monroe* decision in 1999, several cases have come forwarded relying on the legal precedent established by *Davis* and others.[67]These courts primarily evaluated claims and legal actions against school districts by determining if the districts acted with deliberate indifference towards the harassment of students within their jurisdiction.[68]A shift in judicial rationale commenced at the beginning of 21st century court hearings and has evolved into today's standard

peers verbally and in writing that they wanted to kill him. Several accounts indicate that the student was threatened with physical harm such as students attempting to throw objects like chairs at him. While student did nothing to provoke such brutality, school administrators refused to believe his or his mother's claims.

64. Doe v. Big Walnut*,* 837 F. Supp. 2d 742, 744 (2011).

65. *Id.* at 753–54.

66. Similar rulings in which a court has defied a petitioner's claim that a school district acted with deliberate indifference towards the harassment of a student can be found in the following: Marcum v. Bd. of Educ. of Bloom-Carroll*,* 727 F. Supp. 2d 657, (2010), Bowman v. Williamson Cty. Bd. of Educ.*,* 488 F. Supp. 2d 679, (2007), and S.S. v. E. Ky. Univ.*,* 532 F.3d 445, (6th Cir. 2008).

67. *See generally*, Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497 (2005); Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655 (2012); S.B. ex rel. A.L. v. Bd. of Educ. of Hartford Cty., 819 F.3d 69 (4th Cir. 2016).

68. *Jackson*, 125 S.Ct. at 1500; *Zeno*, 702 F.3d at 665; *S.B.*, 819 F.3d at 72.

for evaluating claims brought against school districts.[69]The language of the cases suggest that if harassment is severe, pervasive, or objectively offensive, it denies the victimized student of educational benefits.[70]The *Davis* case, although it relied heavily on its evaluation of deliberate indifference, suggests an example to determine whether harassment is severe, pervasive, or objectively offensive enough to deny educational benefits. The Court declared:

> The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource. . . It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.[71]

Assuming that such restriction to school resources undermines and detracts from the quality of a student's education, the Court's argument follows logically. It is necessary to observe the Court's distinction between gender-based restriction to educational resources and harassment-based restriction.[72]While both are civil rights issues, the latter is separated from the former because harassment of a student can be justifiably prosecuted if it is severe, pervasive, or objectively offensive and undermines a student's education, regardless of gender.

69. *See* Davis v. Monroe, 526 U.S. 629, (1999), Marcum v. Bd. of Educ. of Bloom-Carroll, 727 F. Supp. 2d 657, (2010), Doe v. Big Walnut, 837 F. Supp. 2d 742, (2011), and Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, (2nd Cir. 2012). Each of the cases addressed here are mentioned in the article for the use of evaluating the court's definition of "deliberate indifference." However, each case is also noted for its use of the language "severe, pervasive, or objectively offensive." The article would argue that the evaluation of deliberate indifference played a more significant role in developing the court's opinion.

70. *See generally*, Morrison v. Bd. of Educ. of Boyd Cty., 521 F.3d 602 (6th Cir. 2008); Carabello v. N. Y. C. Dep't of Educ., 928 F. Supp. 2d 627 (E.D.N.Y. 2013); T. F. v. Fox Chapel Area Sch. Dist., 2013 WL 5936411 (W.D. Penn. 2013).

71. *Davis*, 526 U.S. at 650–51.

72. *Id.*

This transition in judicial evaluation includes an important distinction between Section 504 cases based on deliberate indifference and IDEA cases based on adverse effects to a student's education.[73] In the former, petitioners must provide substantial evidence that the school district acted with clear deliberate indifference towards the bullying, and that the bullying was "severe, pervasive, and objectively offensive" enough to adversely affect the child's education.[74] The latter, however, only requires that the petitioner provide evidence that there is a *potential* for bullying and harassment to negatively affect the child's education.[75] These distinctions are evident in several cases where the court's rationale advances from the *Davis* holding.

One such case is *Lance v. Lewisville Independent School District*.[76] The issue before the appeals court examined whether parents of a special needs child who committed suicide while in the school's disciplinary program were entitled to legal action and compensatory rewards.[77] The facts of the case suggest that the student in question qualified under IDEA categories including speech impediment, learning disability (Attention Deficit Hyperactivity Disorder, ADHD), and emotional disturbance.[78] Subsequently, the child was provided an IEP (Individualized Education Program) and a BIP (Behavioral Improvement Plan) to address the student's unique educational needs.[79] Bullying directed towards the student's disabilities began sometime during the 2nd grade and intensified to the point that the student began making threats to hurt himself.[80] Due to an altercation where a peer shoved the petitioner's student and a nearby teacher witnessed both the physical action and the profanities that followed from the victim-student's mouth, the petitioner's student was sent to speak with the assistant principal.[81] While waiting to speak with the administrator, the student requested to use the restroom located in the nurse's office.[82] After some time in the restroom, the peti-

73. *See generally*, *S.B.*, 819 F.3d at 76; *Davis*, 526 U.S. at 650–51.
74. *S.B.*, 819 F.3d at 76.
75. *Davis,* 526 U.S. at 650–51.
76. 743 F.3d 982 (5th Cir. 2014).
77. Lance, 743 F.3d at 988.
78. *Id.* at 987.
79. *Id.*
80. *Id.* at 987–88.
81. *Id.* at 988.
82. *Id.*

tioner's student stopped responding to calls from the nurse.[83]The nurse and a janitor entered the restroom to find that the student had hung himself with his belt.[84]

In response to the tragic events, the student's parents sued the school district, alleging claims under § 1983 and § 504.[85]The court ruled in favor of the school district arguing that the parents had failed to establish a claim of deliberate indifference towards the harassment of their student.[86]In addition, the court found that the district had provided educational services necessary to satisfy the Free Appropriate Public Education (FAPE) requirement of § 504 of the Rehabilitation Act.[87]While petitioner argued that the IEP had been formed in a discriminatory manner that neglected their child's unique educational needs, the court ruled otherwise suggesting that the district had made adequate provisions to address both the student's needs as well as plans to confront the bullying the student was subjected to.[88]

In another case, entitled *T.K. v. New York City Department of Education,* the U.S. District Court for the Eastern District of New York established a framework for school officials to evaluate their response to the harassment of students with disabilities[89]The case was

83. *Id.*

84. *Id.*

85. *Id.* 42 U.S.C. § 1983 (2012) gives an individual the right to bring a "private, civil cause of action for violations of their constitutionally protected rights." *See* Loevy, *supra* note 49.

86. Lance, 743 F.3d at 1000.

87. *Id.* at 992.

88. *Id.* The court's ruling in *Lance* relied heavily on legal precedent established in a similar case entitled Doe v. Bellefonte Area Sch. Dist., 106 Fed. Appx. 798, (3rd Cir. 2004). In this case an appeals court heard a claim against a school district that suggested the school had been deliberately indifferent towards three years of peer sexual harassment the student encountered. The court, however, found that whenever the student reported the harassment, the district responded appropriately and effectively decreased the occurrence of harassment. *Lance* cited this case stating, "The relevant inquiry for purposes of evaluating whether the School District here was deliberately indifferent to known circumstances of harassment is to review its response to reported incidents of harassment." *See* Lance, *supra* note 32, at 997.

89. T.K. v. N. Y. C. Dep't of Educ., 779 F. Supp. 2d 289, (E.D.N.Y. 2011). School officials failed to take appropriate action when L.K., daughter of the parents in the lawsuit, was harassed both physically and verbally by students in her class. As a result of the harassment, L.K. gained considerable weight, became "emotionally unavailable to learn," and felt reluctant to attend school. L.K.'s parents arranged for her transfer to a private school where her educational and social needs could be met in a non-hostile educational environment. When the school proposed a new Individualized Education Program and a Behavioral Intervention Plan, the parents rejected the provisions and notified the Department of Education of their decision. They requested reimbursement for their private school tuition expenses and pursued due process hearing when their mediation efforts did not guarantee their requests. Although the Independent Hearing Office and State Representative Office denied the parent's their request the

heard in two parts, first in 2011 setting an applicable standard for schools to follow and again in 2014 to elaborate on the standard set in 2011.[90]

In *T.K.* 2011, the court reaffirmed an obligation set by the Department of Education's Office of Civil Rights and imposed it on schools for compliance.[91]The case quotes the standard set by the department:

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. In some situations, harassment may be in plain sight, widespread or well-known to students and to staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment.[92]

Relying on the Department of Education's standard, the court interpreted the department's policy and demanded that schools take prompt and appropriate action and investigate claims of harassment.[93]Should a school discover that harassment had actually taken place, the court held that the school must take action to prevent it from occurring again, regardless of whether an anti-bullying program was already in place, whether the student had complained about the bullying, or whether the harassment had been identified as a form of discrimination.[94]

In *T.K* 2014, the court elaborated on the rules set forth from their 2011 ruling, creating a Free Appropriate Public Education (FAPE) "Bullying Standard."[95]The court's standard determined that a disabled student is deprived of a FAPE when "school personnel are deliberately indifferent to or fail to take reasonable steps to prevent

parents successfully appealed to the District Court who reversed the IHO and SRO's decisions and offered L.K.'s parents reimbursement for her private school education.

90. *T.K.* 779 F. Supp. 2d 289, (E.D.N.Y. 2011); & *T.K. v. N.Y.C. Dep't of Educ.*, 32 F. Supp. 3d 405 (E.D.N.Y. 2014).

91. T.K. 779 F. Supp. 2d at 316.

92. *Id.*

93. *Id.* at 317.

94. *Id.*

95. T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417 (E.D.N.Y. 2014).

bullying that substantially restricts a child with learning disabilities in [their] educational opportunities."[96]According to the court, such actions constitute a "hostile environment" and restrict students with disabilities from resources they need to meet their unique educational needs.[97]In *T.K.*, the petitioner successfully demonstrated the negative consequences of harassment directed to their student by illustrating physical, mental, and emotional implications that adversely affected the quality of education their child received.[98]

The court's ruling in the case established legal precedent and appropriate procedures that school officials, attorneys, and judges should note. When the existence of bullying has the potential to severely restrict the education of a student with disabilities, "as a matter of law the IEP team is required to consider evidence of bullying in developing an appropriate Individual Education Program (IEP)" that includes the provision of an anti-bullying program.[99]In turn, the court determined that such an IEP cannot be written "in abstract terms incomprehensible to . . . parents."[100]By implication, any school district that has failed to identify the risk of bullying towards the education of students with disabilities, and has failed to take necessary steps towards addressing the bullying while formulating an individual's IEP, may be liable for adversely affecting the quality of the student's education and denying them a FAPE.

The current trends of judicial policy have adopted the practice of examining claims under the scope of the above stated methods. Rulings in the past five years have been determined by a petitioner's ability, or inability, to demonstrate both the deliberate indifference a school district paid to a student's harassment, and whether this harassment resulted in the denial of a FAPE to the harassed student[101]The evaluation methods employed by justices across the na-

96. *Id.*
97. *Id.*
98. *Id.* at 427.
99. *Id.* at 411.
100. *Id.*
101. *Id.* at 417 (*See also, T.K.* 779 F. Supp. 2d at 316; *Lance*, 743 F.3d at 1000). The same trend is seen in the developing "cyber bullying" issues threatening schools. In the 2011 case, *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, (4th Cir. 2011), a student used her home computer to create a webpage whereby she ridiculed her fellow classmate. When the school district suspended her, the student filed suit against the district claiming her free speech rights had been violated. The United States Court of Appeals for the Fourth Circuit upheld the school district's argument. They claimed the school district had not only acted justly on behalf of the school's well-being, but that the suspended student had abridged the privacy and security

tion have made it clear when schools are liable or not liable for the bullying and harassment of their students, particularly those with disabilities.

IV. SUGGESTIONS FOR SCHOOL OFFICIALS AND ATTORNEYS

Education professionals face significant challenges in the arena of special education law. To avoid litigation and meet each student's individual needs, these professionals must develop a balanced, comprehensive understanding of the law, and tailor their practices to comply. Some scholars have already taken on the daunting task of confronting these issues and finding practical solutions for the problems education professionals face.[102]

On the thirty-fifth anniversary of the Individuals with Disabilities Education Act, U.S. Secretary of Education, Arne Duncan, stated, "We can all agree that we haven't completely fulfilled the promise of IDEA. Our children continue to face prejudices and lingering roadblocks. In order to remove these prejudices and roadblocks from our nation's schools, school leaders must be at the forefront, creating change and advocating for students with disabilities."[103]Who better to tackle the surmounting opposition students with disabilities face in school than the administrators and officials who supervise their education? The role of an administrator is such that he or she is directly responsible for meeting the standards of virtually all special education provisions.[104]Yet, we live in a world where some school officials claim "that they do not understand special education, they have no desire to understand special education, and they delegate the responsibility whenever possible."[105]It may certainly be true that the attitude such

of the targeted student, and her actions had a clear and foreseeable impact on the student's quality of education. The court found that when speech violates another student's right to privacy and a quality education, such speech is not protected, nor should it be tolerated. What is perhaps more interesting is the court's ruling that even when such speech takes place outside of the physical domain of the school campus, if the speech has a direct effect on a student's education, the speech is prohibited and liable for punishment.

102. *See* PAMELA N. MOODY, WHAT VIRGINIA PRINCIPALS SHOULD KNOW AND BE ABLE TO DO TO MINIMIZE SCHOOL EDUCATION DISPUTES BETWEEN FAMILIES AND SCHOOLS: A DELPHI STUDY 28 (2014).

103. *Id.*

104. *Id.*

105. *See* JUDITH SMITH & ROBERT COLON, *Legal Responsibilities Towards Students with Disabilities: What Every Administrator Should Know*, 82 NASSP BULLETIN 40, 40 (Jan. 1998).

administrators have towards the responsibility of special education "is directly related to the amount of special education knowledge [that official] has."[106]There is no area that provides more risk of litigation than this area of the law for school districts and yet sometimes it gets the least effort and attention from administrators in some schools.[107]

The demand for a well-informed administrator is one of the more serious implications that contemporary issues in special education law present.[108]Higher education institutions, continuing education programs, and professional development practices all play a critical role in preparing aspiring or current administrators to be successful in their careers.[109]It is likely then that the greater effort these administrators exert to cultivate a wide and comprehensive understanding of special education issues, the more prepared and equipped they will be to face those issues when they present themselves in their own districts. This is particularly true for superintendents. Across the nation, superintendents, and those they delegate over special education services, tend to demonstrate low degrees of comprehension on special education statutes.[110]Their knowledge directly influences those whom they delegate to supervise district-wide special education efforts and accommodations to students with disabilities. The effectiveness of this "top-down" approach is largely influenced by the knowledge and understanding school officials demonstrate in special education proficiency. The result of such efforts trickle down to the local level administrators, including principals, vice principals, and special education directors. These individuals hold the "key to school-level compliance regarding administrative decision-making."[111]

Understanding the statutory, regulatory, and case law for special education is a unique and difficult task for school administrators; but is by no means impossible. While school officials are not expected to have a perfect knowledge of every tacit of information available on the topic, these administrators are charged with "proper interpreta-

106. *See* PATRICIA R. POWELL, AN EXPLORATORY STUDY OF THE PRESENTATION OF SPECIAL EDUCATION LAW IN ADMINISTRATIVE PREPARATION PROGRAMS 4 (2009).

107. *See* Rachel Holler & Perry A. Zirkel, *Legally Best Practices in Section 504 Plans,* 65 THE SCHOOL ADMINISTRATOR (2008), http://www.aasa.org/SchoolAdministratorArticle.aspx?id=4926.

108. *Id.*

109. *See* Powell, *supra* note 101 at 4.

110. *See* Holler & Zirkel, *supra* note 102 at 65.

111. *See* Moody, *supra* note 103 at 26.

tion of special education law while assuming an active leadership role in providing a full continuum of services to students with disabilities."[112]There are, of course, dangerous outcomes when administrators and their staff do not assume the responsibility for knowing the law.[113]Perhaps, the most destructive consequences for such failures are extensive lawsuits that can claim resources, staff time and focus, and large sums of money from school districts and state education agencies.[114]

Such risks are dramatically reduced when the administrators take responsibility for their role as leaders in special education, both in understanding and practice. Indeed, the simple, everyday decisions administrators make seem to have the most effect on the outcomes of special education services provided in their schools.[115]For example, critical hiring practices may ensure that the school's programs are staffed with highly trained and qualified professionals who will work effectively under the administrator's guidance and supervision, so long as the administrators evaluating the potential candidates are themselves well informed on special education matters. Regular performance reviews can hold faculty accountable for their actions and provide opportunities to evaluate their work and the results of their efforts. In turn, these assessments allow administrators to direct professional development opportunities for staff to be trained on the evolving policies and procedures in their line of work. The administrator's efforts to ensure compliance in the school is singularly his or hers. While individuals are clearly responsible for their own actions, the consequences of poor decisions can dramatically affect the administrator's influence in the school, not to mention the quality of education provided to students. Therefore, compliance-driven attitudes and practices in schools cannot be overemphasized. Compliance towards special education policy and procedures is as much a protection as it is a means to confront unique issues that occur in schools. Special education legislation requires that a number of standards be met in providing students with FAPE.[116]And, as the numbers of knowledgeable parents and student advocates increase, questions about

112. *See* Powell, *supra* note 104, at 3.
113. *Id.*
114. *Id.*
115. *Id.*
116. Pub. L. No. 108–446.

these standards are inevitable.[117]The best method for schools to address inevitable claims about the provision of special education services to students with disabilities is to ensure compliance in policy and procedure.

Schools driven towards compliance will benefit considerably from the experience of the tenured faculty. A portion of providing special education services is learned on the job. Teachers, therapists, and administrators involved in providing these services learn over time how to satisfy the demands of legislative standards.[118]Those with substantial experience in the field offer a perspective that others newer to the work, despite how much they know, cannot provide. However, the more experienced faculty are not the sole contributors towards improving compliance efforts. All members of the school must be active contributors towards the development and implementation of special education services. Furthermore, parents of students with disabilities are an invaluable resource for school officials to draw from.[119]Their perspective on the needs of their children is unique and thorough, and a large measure of compliance proficiency depends on parent participation.[120]Pooling together these essential resource is just one step schools can take towards the goal of compliance.

External resources often provide as much assistance to schools as internal resources do.[121]With respect to the bullying and harassment of students with disabilities, the government has provided a number of resources for schools to take advantage of. These government agencies include the U.S. Department of Justice's Community Rela-

117. *See* Smith & Colon, *supra* note 100, at 40.

118. *Id.* at 43.

119. MICHAEL B. SHURAN & M.D. ROBLYER, *Legal Challenge: Characteristics of Special Education Litigation in Tennessee Schools*, 96 NASSP BULLETIN 44, 63 (2012).

120. *Id.* In their article, the two scholars cite the works of Yell, Ryan, Rozalski, and Katsiyannis regarding IEP development and Special Education services. They suggest the following four recommendations: 1) provide district-level training for educators and administrators; 2) provide district-level training for parents; 3) foster ongoing communications and relationships between schools and parents; and 4) seek and expect support from district offices.

121. For example, the U.S. Department of Justice's Community Relations Service (CRS) was established under Title X of the Civil Rights Act in 1964. The agency considers itself a "conflict resolution agency that provides mediation, facilitation, training, and consulting services to help communities . . . address community conflicts and tensions arising from disputes, disagreements, or difficulties over race, color, and national origin." U.S. Department of Justice, CRS History, http://www.justice.gov/crs/about-crs/crs-history. The CRS was expanded under President Barrack Obama when he signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law on October 28, 2009. The extension provided strategies to prevent and respond to violent hate crimes in America's communities. *See CRS History*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crs/about-crs/crs-history (Oct. 23, 2017).

tions Service, the Civil Rights Division, and the U.S. Department of Education's Office of Civil Rights (OCR). The contributions of the OCR, as recommendations for best practices in the field of Special Education, may be translated as a checklist of safeguards to help schools avoid litigation and help attorneys counsel school clientele.

Of course, another valuable external resource available to schools is an attorney. Professional, meaningful relationships between a school district and their representative attorney (or attorneys) can contribute to the level of compliance a school can achieve. Attorneys fulfill multiple responsibilities for the school districts they represent. Like the work of school officials, the knowledge and skills such attorneys possess can have a direct effect on the ability of schools to provide proper special education services to its students.

The extent of communication that school districts enjoy with their attorneys provides ample opportunities for faculty to receive advice for particular issues that arise in the school. Education attorneys may also be a resource to provide training opportunities by instructing groups in the districts on the policy matters within special education. Attorneys can influence these groups by teaching what is relevant to their position. For example, special education teachers could receive training on appropriate instructional practices, non-discriminatory evaluation methods, and appropriate outcome expectations. On the other hand, general education teachers might be trained on the definitions and standards of a student's least restrictive environment and appropriate accommodations. Schools should seek regular training opportunities from their representative firms as a method for helping faculty and administrators stay current in evolving legislation and meet compliance standards for special education. A final proposition for how to enhance school-attorney relationships includes the compiling of laws and regulations related to special education legislation, such as IDEA, Section 504, and ADA provisions. Attorneys can play a key role in helping schools assemble notebooks, binders, or cabinets that contain this information. This provides school officials with on-hand resources they can easily and quickly refer to as they plan and prepare to provide services to students with disabilities. As legislation changes or new regulations are provided, school officials can work with attorneys to update the information compiled and replace it with the new standards. Although such a task might seem daunting at first, the initial effort to compile the relevant material may prove useful and easier to manage over time.

When administrators fulfill their responsibilities for special education management, ensure compliance within special education provisions, and make full use of their representative attorneys, the desired outcome is to avoid litigation. At the beginning of the twenty-first century, leading up to the reauthorization of IDEA, "the National Council on Disability made recommendations that included an . . . increased dependence on litigation in order to place sanctions on administrators and realize compliance."[122]The council's argument that litigation is a necessary step towards the realization of compliance is a slippery slope. In full consideration of the millions of dollars spent on lawsuits and the strain such financial losses places on schools, it seems wrong to believe that schools are "dependent" on litigation to achieve compliance.[123]Of course, this is not suggesting that litigation is not a natural outcome of a district's effort to achieve compliance. Certainly there has yet to be shown an effective method for preventing all legal claims made against a school district. However, contending that schools should expect and rely on litigation to drive their compliance efforts is counter-productive. Rather, schools should take every possible precaution to avoid costly, damaging litigation and learn the lessons of past lawsuits to prevent new ones from developing.

Other approaches towards resolving disputes have proved quite effective and have been advocated by Congress, including the process of mediation. Ideally, disputes should be resolved prior to the due process hearing or civil litigation since it is generally agreed that due process hearings can have an adverse effect on all parties involved."[124]Mediation efforts have consistently proven to be the preferred method for resolving disputes between parents or legal guardians of students with disabilities and school districts.[125]One proponent of mediation argues that mediation is not just a process for settling disagreements, but is an effective means for protecting the important relationships between parents and school officials.[126]Although school

122. *See* Powell, *supra* note 106, at 6.

123. *See* Public Justice, *Jury Verdicts and Settlements in Bullying Cases* (2016), https://www.publicjustice.net/wp-content/uploads/2016/02/2017.06.12-Spring-Edition-Bullying-Verdicts-and-Settlements-Final.pdf.

124. *See* Shuran & Roblyer, *supra* note 114, at 50.

125. *See* Moody, *supra* note 103, at 28–29.

126. *Id.* Moody suggests seven basic rules to enhance mediation efforts by schools to address the concerns and needs of parents. Mediation must "include the following:
It must be voluntary;

officials cannot always predict whether mediating the issue will result in mutual agreements, administrators should place special emphasis on creating methods in mediation efforts that are positive, beneficial, and focus on people, not issues.

The evolutionary and transformative nature of the law demands time, experience, and determination to be well informed. Despite this increasingly difficult task, leaders in education can meet these demands by seeking outside professional development. As school districts and representative attorneys proactively address the bullying and harassment of students with disabilities, these measures can give them the upper hand in establishing compliance-drive attitudes and practices, avoiding litigation, and increasing overall awareness of special education laws.

V. CONCLUSION

Education is "the most important function of state and local governments," and it is the duty of school officials, faculty, and representative attorneys to safeguard each and every student's right to a quality education that appropriately meets their unique needs.[127] Judicial interpretation of education law will no doubt present challenges for schools to be well informed on these legal issues. Despite this increasingly difficult task, leaders in education can meet these demands by immersing themselves in all aspects of special education law and by making extensive use of internal and external resources provided to them. This nation's body of schools can stay ahead of the curve and provide every student with a chance for success in this life through the opportunity of education.

*Bryson King**

It must not be used to delay or deny a parent's right to a hearing or any other rights;
It must be conducted by a qualified, trained, and impartial mediator;
The state has to bear the cost;
Scheduling must be timely and convenient to the parties;
A written agreement reached at mediation must be signed by both the parent and a school district representative who has binding authority, and it is enforceable in court; and
Mediation discussions, even if an agreement is not reached, are confidential and may not be used as evidence in a due process proceeding or civil litigation." *Id.*

127 Brown, 347 U.S. at 493.

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