

## Litigating Bullying Cases: Holding School Districts and Officials Accountable

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### I. Introduction

Bullying is devastating our children. It is hurting, traumatizing, and sometimes even killing our kids. The consensus among physicians, social scientists, and educators alike is that bullying can seriously impair the physical and psychological health of victims and their educational achievement. The short- and long-term psychological impact alone can be highly destructive, increasing the risk of suicide. Bullying needs to be treated as the serious problem it is, not as a normal rite of passage to be left alone and endured.

Today we stand at a “tipping point” on bullying. Behaviors we once took for granted are no longer acceptable. This normative shift is being reflected in state anti-bullying laws and courts throughout the country. Forty-nine states now have anti-bullying laws that require schools to take appropriate action to address and prevent bullying.<sup>1</sup> Although there is no federal law that specifically applies to bullying, when harassment is based on race, color, national origin, sex, disability or religion, schools are obligated to address it.

Far too often, however, schools are not doing what the law and their own anti-bullying policies require. In fact, half of our country’s school officials and teachers have not received training on how to respond to bullying.<sup>2</sup> And eight out of every ten times that a child gets bullied at school, no adult intervenes.<sup>3</sup>

Public Justice has launched an Anti-Bullying Campaign to change this. Through litigation, we intend to enforce the law, protect our nation’s children, and hold school districts and officials accountable for failing to respond to bullying as they should. Because bullying litigation is an emerging area of law, Public Justice has prepared this primer to help maximize attorneys’ effectiveness when representing bullying victims.<sup>4</sup>

First, this primer explains what “bullying” is—and what it isn’t. Because there is no definition of bullying under federal law, and because a wave of recent anti-bullying legislation includes at least 10 different definitions under state laws, it is helpful to start with a basic understanding of bullying. This will help attorneys evaluate whether a plaintiff is a victim of bullying—or something else.

Second, this primer provides an overview of federal legal theories available to school bullying victims, which are generally much more developed than state legal theories. In addition to discussing federal legal standards and remedies, this primer will discuss potential obstacles to recovery, including immunity issues.

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Third, this primer provides a brief overview of state legal theories available to school bullying victims. A review of all fifty states' laws is beyond the scope of this primer, but it addresses the legal theories generally available under state laws, as well as potential obstacles to recovery.

It is our hope that this primer will serve as a useful resource in navigating this emerging area of law. In addition, if you are involved in, know of, or learn of a school bullying case in which you think Public Justice can help, please don't hesitate to contact us. Working together, we can make a difference.

## II. The Definition of Bullying

The definition of bullying adopted by most psychologists is “physical or verbal abuse, repeated over time, and involving a power imbalance.”<sup>5</sup> The U.S. Department of Health and Human Services (HHS) has adopted a similar definition of bullying on its website, [www.stopbullying.gov](http://www.stopbullying.gov). According to HHS, bullying is “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance” and “is repeated, or has the potential to be repeated, over time.”<sup>6</sup> In simple terms, bullying involves one child (or group) lording it over another child, over and over again, to humiliate, scare or isolate the child.<sup>7</sup>

“Bullying” is not garden-variety teasing or a two-way conflict involving peers with equal power or social status. Nor is it the “drama” that is typical of teenagers’ ordinary interpersonal conflicts. Interpersonal conflicts and “drama” among equal peers is a normal rite of childhood passage. Bullying, properly defined, is not.

HHS, in accordance with educational research, identifies three types of peer bullying suffered by school aged children:

1. Verbal bullying, which is saying or writing mean things. Verbal bullying includes:

- Teasing
- Name-calling
- Inappropriate sexual comments
- Taunting
- Threatening to cause harm

2. Social or “relational” bullying, which involves hurting someone’s reputation or relationships. Social bullying includes:

- Excluding someone on purpose
- Telling other children not to be friends with someone
- Spreading rumors about someone
- Embarrassing someone in public

3. Physical bullying, which involves hurting a person’s body or possessions. Physical bullying includes:

- Hitting, kicking and pinching
- Spitting
- Tripping and pushing
- Taking or breaking someone's things
- Making mean or rude hand gestures<sup>8</sup>

School bullying is not limited to bullying that happens during school hours in a school building. It can occur after hours, during extracurricular activities. It can also occur in other places, such as on the playground, athletic fields or the bus, when travelling to or from school. It can also occur on the Internet.<sup>9</sup>

Evaluating potential bullying cases through the definitional lens provided by HHS and most psychologists is helpful, particularly when evaluating potential federal claims to address peer bullying. It will help you weed out garden-variety peer conflict from true bullying. However, a thorough evaluation of potential claims to address peer bullying *must* include an examination of your state's anti-bullying laws and policies, as well as the local school district's anti-bullying policies.

State anti-bullying laws and model policies address and define bullying in many different ways. In addition, though some state laws define bullying, others leave the definition of bullying to local school boards. Thus, it is important to review your state's anti-bullying laws and policies, as well as your local school district's anti-bullying policies, when evaluating a potential bullying case. There are two websites that make it easy for you to find your state's anti-bullying laws and policies: [www.stopbullying.gov](http://www.stopbullying.gov) and <http://bullypolice.org/>. In addition, most schools and districts post their anti-bullying policies on their websites.

### **III. Overview of Federal Claims to Address Bullying**

When evaluating a potential peer bullying case, it is important to know that a school's responsibilities to address bullying are not limited to the responsibilities described in the school's (or the state's) anti-bullying policies. Some types of bullying may also trigger responsibilities under one or more of the federal anti-discrimination statutes, as well as the U.S. Constitution.

If you have evidence that the bullying was based on race, color, national origin, sex, and/or disability, you should consider asserting claims under the following federal anti-discrimination statutes: Title VI of the Civil Rights Act of 1964 (Title VI),<sup>10</sup> which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX),<sup>11</sup> which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973 (Section 504),<sup>12</sup> which prohibits discrimination on the basis of disability; and Title II of the Americans with Disability Act of 1990 (Title II),<sup>13</sup> which also prohibits discrimination on the basis of disability.<sup>14</sup> School districts may violate these civil rights statutes and the U.S. Department of Education's implementing regulations<sup>15</sup> when peer bullying based on race, color, national origin, sex, or disability "is sufficiently serious that it creates a hostile environment and such harassment is encouraged, not adequately addressed, or ignored by school employees."<sup>16</sup>

Although these federal civil rights statutes do not prohibit discrimination based on sexual orientation or religion, in some circumstances such bullying may be covered by Title IX or Title

VI, respectively. As explained below, if the bullying of a student who is gay or perceived to be gay can properly be characterized as a form of gender-based stereotyping, then Title IX would apply.<sup>17</sup> Similarly, if, for example, a Jewish, Muslim, or Sikh student is bullied on the basis of actual or perceived shared ancestry or ethnic characteristics, rather than solely on their religious practices, Title VI would apply.<sup>18</sup>

Bullying based on race, color, national origin, sex, disability, or religion may also give rise to a claim under 42 U.S.C. § 1983 for violations of the student's constitutional right to equal treatment under the Fourteenth Amendment's Equal Protection Clause or the student's right to substantive due process under the Amendment's Due Process Clause.<sup>19</sup> In addition to the traits covered by the federal anti-discrimination statutes, the Constitution also covers discrimination based on religion.

Discussed below are the legal standards applicable to each of these potential federal claims. In addition, this primer discusses available remedies, as well as some potential obstacles to recovery.

#### **A. Title IX Claims for Sexual Harassment and Gender-Based Bullying**

Title IX prohibits discrimination on the basis of sex in schools that receive federal funding—which includes every public school district in the country.<sup>20</sup> The statute prohibits all forms of sex-based harassment, including sexual harassment, harassment based on a student's failure to conform to gender stereotypes, and sexual assault. It protects girls and boys alike. In addition, the bully and victim do not need to be of different sexes. Under Title IX, schools must protect students from sex-based harassment at school, on the school bus, on field trips, and at any other school-sponsored events.

If your client has a potential Title IX claim for sex-based harassment, it is important to note that the student may only assert such a claim against the recipient of the federal funding—i.e., the school district or school board of education—not against individual school officials.<sup>21</sup>

As mentioned above, sex-based harassment can take different forms. Much of the Title IX peer harassment case law addresses two different types of harassment—sexual harassment and gender-based harassment.<sup>22</sup> Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal, or physical conduct of a sexual nature. Examples of prohibited conduct can include sexual touching; sexual comments, jokes, gestures or graffiti; and sexually explicit drawings, pictures or written materials.<sup>23</sup>

Gender-based harassment includes acts of verbal, non-verbal, or physical aggression, intimidation or hostility based on sex-stereotyping. This involves harassing a student for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.<sup>24</sup> Although Title IX does not prohibit discrimination based on sexual orientation, it does protect all students—including lesbian, gay, bisexual, and transgender (LGBT) students—from sex-based harassment. For example, a gay student might have a Title IX claim for gender-based harassment where he was subjected to anti-gay slurs, physically assaulted, threatened, and ridiculed because he did not

conform to stereotypical notions of how boys are expected to act and appear, instead displaying effeminate mannerisms, surrounding himself with mostly female friends, participating in non-traditional choices of extracurricular activities, and wearing non-traditional clothing.<sup>25</sup>

The legal standards applicable to Title IX claims for sex-based harassment are discussed in detail below. It is fair to say that the standard of liability for sex-based peer harassment under Title IX is high and difficult to satisfy. In general, the successful Title IX bullying cases involve egregious fact patterns, both in terms of the nature of the bullying and schools' failure to respond appropriately.

The seminal case on peer harassment is the Supreme Court's decision in *Davis v. Monroe County Board of Education*.<sup>26</sup> In *Davis*, a student sued her local school board for allowing known harassment by other students to continue against her.<sup>27</sup> Davis, a fifth-grade girl, endured continual physical and verbal harassment by one of her classmates throughout the school year. Her fellow classmate rubbed against her genital area and breasts and made comments about wanting to feel her boobs and get in bed with her.<sup>28</sup> The girl and her mother complained to the school's teachers and principal on numerous occasions, but nothing was done to stop the harassment.<sup>29</sup> The harassment did not end until the offending classmate was charged with, and pleaded guilty to, sexual battery.<sup>30</sup> The Supreme Court held that students subjected to peer sexual harassment may sue their school districts for damages when the districts "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."<sup>31</sup>

Under *Davis*, a plaintiff must satisfy each of the following elements to establish a *prima facie* case of peer sexual harassment:

1. the federal funding recipient was deliberately indifferent to known acts of harassment; and
2. the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to educational benefits or opportunities provided by the school.<sup>32</sup>

Lower courts have relied on *Davis* to hold that students may sue school districts for deliberate indifference to peer harassment based on race, color, and national origin under Title VI, as well as disability under Title II and Section 504.<sup>33</sup> Because it is substantially easier for plaintiffs to satisfy the "severe and pervasive" prong of the *Davis* test than the deliberate indifference prong, this primer focuses more heavily on the deliberate indifference standard.

### **1) Deliberate Indifference to Known Harassment**

The liability standard articulated in *Davis*—deliberate indifference to known harassment—is very high. It rests on the principle that recipients of federal funds should be held liable only for their own misconduct and not the misconduct of others.<sup>34</sup> Thus, Title IX does not make a school district liable for the conduct of students who are bullies. Rather, a district is liable only for its

own misconduct in responding to *known* harassment. Thus, if bullying is not reported to or observed by school employees or administrators, a district will not be liable.

For a district to avoid liability for “deliberate indifference,” it need not expel bullies, engage in any particular disciplinary action, or remedy peer harassment.<sup>35</sup> The district need only respond to known peer harassment in a manner that is not “clearly unreasonable in light of the known circumstances.”<sup>36</sup> “This is not a mere ‘reasonableness’ standard,” and lower courts may conclude as a matter of law that a school district’s response was not “clearly unreasonable.”<sup>37</sup> Indeed, *Davis* emphasizes that “courts should refrain from second-guessing the disciplinary decisions made by school administrators.”<sup>38</sup>

As discussed below, since *Davis*, lower courts have had the opportunity to decide what qualifies as deliberate indifference to known harassment. Some courts have evaluated the reasonableness of a district’s response to known harassment by considering whether the district imposed consequences reasonably calculated to deter known bullies from repeating the harassment.<sup>39</sup> Under this approach, it is difficult to establish deliberate indifference when a victim is bullied by multiple, non-repeat harassers. Other courts, however, have found deliberate indifference by focusing on the victim’s identity and the cumulative effects of similar incidents by multiple new bullies, rather than on the identities of known bullies.<sup>40</sup> This approach makes deliberate indifference easier to prove.

In short, the interpretation of the deliberate indifference standard is still evolving. There will never be a bright-line rule, however, as a school district’s deliberate indifference is decided based on the facts in each case.

So far, three federal circuits have interpreted the deliberate indifference standard as requiring schools to take remedial action that is reasonably calculated to end the known harassment.<sup>41</sup> As the Sixth Circuit explained in *Vance v. Spencer County Public School District*,

... where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.<sup>42</sup>

In *Vance*, the court upheld a \$220,000 jury verdict for a bullied student, finding that there was sufficient evidence that the school board was deliberately indifferent to known sexual harassment by her peers.<sup>43</sup> The student, Alma McGowen, presented abundant evidence of verbal and physical sexual harassment that began in sixth grade and continued through ninth grade, until she withdrew from the school.<sup>44</sup> The harassment started with peers verbally abusing her, calling her “the gay girl” and asking her to describe oral sex.<sup>45</sup> The harassment escalated, with male students harassing Alma and other female students by calling them “whores,” hitting them, snapping their bras, and grabbing their butts.<sup>46</sup> The harassment increased to the point that Alma was propositioned or touched inappropriately in virtually every class.<sup>47</sup> On one occasion, several students backed Alma against a wall in her science class and held her hands down, while other

students pulled her hair and started yanking off her shirt.<sup>48</sup> It was not until a boy stated that he was going to have sex with her and began to take his pants off that another boy intervened to help Alma.<sup>49</sup> Alma and her mother complained to school guidance counselors, teachers, assistant principals, and principals, among others, eventually filing a Title IX complaint under the school's harassment policy.<sup>50</sup> Alma testified that the more she complained to the principals, even though they spoke to her harassers, the bullying got worse.<sup>51</sup>

The Sixth Circuit upheld the jury's finding of deliberate indifference, reasoning that the school district had failed to provide evidence that it had ever disciplined the offending students, informed law enforcement about the assault that occurred in Alma's science class, investigated the Title IX complaint, or done anything more than talk with the offending students.<sup>52</sup> Moreover, the district continued to use the same ineffective method of "talking to the offenders," even though it did nothing to curb the harassment and, ultimately, caused the harassment to increase.<sup>53</sup> The court expressly rejected the defendant's argument that a school district is not deliberately indifferent "as long as a school district does something in response to harassment."<sup>54</sup> The court held that, to avoid liability, the district "was required to take further reasonable action in light of the circumstances."<sup>55</sup>

Other courts have endorsed the Sixth Circuit's approach in *Vance*, suggesting that plaintiffs can satisfy the deliberate indifference standard when schools fail to respond appropriately to severe and pervasive bullying.<sup>56</sup> Two Title IX cases involving gender-based stereotyping demonstrate this point: the Sixth Circuit's more recent decision in *Patterson v. Hudson Area Schools*<sup>57</sup> and a Kansas federal district court decision, *Theno v. Tonganoxie Unified School District No. 464*.<sup>58</sup>

In *Patterson*, the plaintiffs alleged that their son, DP, had suffered three years of harassment over a four-year period from sixth through ninth grades.<sup>59</sup> In sixth grade, various classmates taunted him on a daily basis, pushing and shoving him, and calling him names such as "queer," "faggot," and "pig."<sup>60</sup> DP reported some of the incidents and was told that "kids will be kids, it's middle school."<sup>61</sup> The harassment escalated in the seventh grade, when DP was called names such as "fag," "faggot," "gay," "queer," "fat pig," and "man boobs," on a daily basis.<sup>62</sup> In addition, DP was called "Mr. Clean" by his peers—a derogatory reference to his supposed lack of pubic hair.<sup>63</sup> On one occasion, a teacher made fun of DP in front of the class after he was slapped by a girl.<sup>64</sup> These incidents led DP to eat lunch alone in the band room to avoid his tormentors.<sup>65</sup> DP's parents repeatedly reported various incidents of harassment to teachers and the principal.<sup>66</sup>

DP enjoyed a reprieve in eighth grade after his mother and guidance counselor had him placed in special education due to emotional impairment.<sup>67</sup> In ninth grade, however, DP was placed back in general education, and was again subjected to the daily torment he had faced in sixth and seventh grades.<sup>68</sup> He was also subjected to new types of harassment. Students stole his planner and defaced it with sexually derogatory slurs and sexually explicit pictures.<sup>69</sup> Students broke into DP's gym locker, urinated on his clothes, and threw his tennis shoes in the toilet.<sup>70</sup> Words such as "gay," "fag," and "you suck penis," and images of a penis inserted into a rectum were inscribed on DP's hallway locker in permanent marker.<sup>71</sup> His gym locker was repeatedly covered with sexually oriented words spelled out in shaving cream.<sup>72</sup> Administrators were frequently unable to determine who committed these acts.<sup>73</sup>

The school district's responded to DP's harassment over the years largely by giving verbal reprimands to the known perpetrators.<sup>74</sup> Though the reprimands generally stopped harassment by the reprimanded student, they did not stop other students from harassing DP.<sup>75</sup>

DP stopped attending the district school after an incident of harassment where he was sexually assaulted by a fellow baseball teammate.<sup>76</sup> In the locker room after baseball practice, a naked student shoved his penis and testicles against DP's face, while a second student blocked the exit.<sup>77</sup> Later, after DP had informed school administrators of the sexual assault, the coach announced at a team meeting that, "players should only joke with men who can take it."<sup>78</sup>

The trial court granted summary judgment for the school district, finding that plaintiffs had established that the district knew of the harassment and that the harassment was "severe, pervasive, and objectively offensive," but had failed to establish that the district was deliberately indifferent to the harassment.<sup>79</sup> The Sixth Circuit reversed, concluding that there were genuine issues of material fact as to whether the district acted with deliberate indifference.<sup>80</sup> Relying on *Vance*, the *Patterson* court reasoned that:

even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable. *We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student.* Such a situation raises a genuine issue of material fact for a jury to decide.<sup>81</sup>

The court rejected the district's argument that it could not be liable as a matter of law because it had dealt successfully with each identified perpetrator.<sup>82</sup> The court explained that the district's success with individual students did not prevent the overall and continuing harassment of DP, a fact of which the district was fully aware.<sup>83</sup> Because the district knew that its methods for dealing with the overall peer harassment of DP were ineffective, but continued to employ only those methods, the plaintiffs had demonstrated that there was a genuine issue of material fact as to whether the district's responses to the reported harassment were "clearly unreasonable in light of the known circumstances."<sup>84</sup>

The *Patterson* court's view of the deliberate indifference standard was based in part on *Theno v. Tonganoxie Unified School District*, a federal district court decision in a Title IX peer harassment case that *Patterson* describes at great length.<sup>85</sup> As mentioned above, *Theno* also shows that plaintiffs can satisfy the deliberate indifference standard when schools fail to respond appropriately to severe and pervasive bullying. In *Theno*, the plaintiff was repeatedly harassed for four years, beginning in his seventh-grade year and ending only when he left school during his eleventh-grade year.<sup>86</sup> The harassment consisted of name calling ("faggot," "queer," "pussy," "jack-off boy," etc.), persistent joking regarding plaintiff being caught masturbating in the school bathroom (which was untrue), and some physical altercations (pushing, shoving, tripping, fistfights).<sup>87</sup> Most of his student harassers were merely given verbal warnings or reprimanded by the school; however, a few of the more serious offenders were more severely



disciplined.<sup>88</sup> With limited exceptions, whenever the school disciplined a known harasser, that particular harasser stopped bullying the plaintiff.<sup>89</sup> The school also began to speak proactively with students and teachers regarding harassment during the plaintiff's tenth-grade year.<sup>90</sup>

The school district argued that, as a matter of law, its responses could not be deemed clearly unreasonable.<sup>91</sup> The district court disagreed, stressing that

this is not a case that involved a few discrete incidents of harassment. It involved severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped, and the school rarely took any disciplinary measures above and beyond merely talking to and warning the harassers.<sup>92</sup>

Though the school took more aggressive measures in the later years of the harassment, the district court noted that

[b]y that time, the harassment had been going on for a number of years without the school handing out any meaningful disciplinary measures to deter other students from perpetuating the cycle of harassment. While the court recognizes that the school was not legally obligated to put an end to the harassment, a reasonable jury certainly could conclude that at some point during the four-year period of harassment the school district's standard and ineffective response to the known harassment became clearly unreasonable.<sup>93</sup>

The district court, relying on *Vance*, denied the district's motion for summary judgment, concluding that the plaintiff had raised genuine issues of material fact as to whether the district was deliberately indifferent to his harassment.<sup>94</sup>

As noted above, the interpretation of "deliberate indifference" articulated in *Vance*, *Patterson*, and *Theno* shows that plaintiffs can meet this liability standard. The courts in those cases evaluated the school districts' response to peer harassment based on whether it was reasonably calculated to end the victim's harassment, regardless of whether the identities of all the perpetrators are known or unknown.

In contrast, some courts interpret the deliberate indifference standard more narrowly, focusing on whether a school district's response to peer harassment was reasonably calculated to stop known harassers from continuing the harassment. For example, in *Doe ex rel. Doe v. Bellefonte School District*,<sup>95</sup> the Third Circuit found (in an unpublished decision) that, where a school district effectively stops each reported source of harassment, it cannot be deliberately indifferent—even if the victim continues to be bullied by additional students.<sup>96</sup> This narrow interpretation of deliberate indifference can be more difficult for plaintiffs to satisfy.

The plaintiff in *Doe v. Bellefonte School District* alleged that the district was deliberately indifferent to three years of reported peer harassment that he suffered based on his "effeminate characteristics."<sup>97</sup> Between tenth and twelfth grade, the plaintiff reported ongoing harassment, mostly verbal, which included being called names such as "gay," "faggot," "queer boy," and

“peter-eater,” and being ridiculed in the hallway by students who threw paper at him while calling him a “fag.”<sup>98</sup> Though there was evidence of at least one physical assault, much of the bullying involved ongoing name-calling and ridicule about the way he dressed.<sup>99</sup>

A Pennsylvania federal district court found that the plaintiff presented sufficient evidence that his harassment was “severe, pervasive, and objectively offensive,” but it granted the school district’s motion for summary judgment, holding that the plaintiff could not show that the district had been deliberately indifferent.<sup>100</sup> The court focused on the fact that “every time” the plaintiff reported an incident of harassment, the school took action that was “one hundred percent effective” to eliminate a repeat offense by the perpetrator of that incident.<sup>101</sup> The Third Circuit affirmed.<sup>102</sup>

## 2) Severe, Pervasive, and Objectively Offensive Conduct

Under *Davis*, for peer sexual harassment to be actionable, it must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>103</sup> Although *Davis* does not require a plaintiff to show incidents of physical or sexual assault, the Court made clear that “simple acts of teasing and name-calling among school children” are not actionable, “even where these comments target differences in gender.”<sup>104</sup> This is because “schools are unlike adult workplaces and . . . children may regularly interact in a manner that would be unacceptable among adults.”<sup>105</sup> As the Court noted, students are learning how to interact appropriately with their peers and “often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.”<sup>106</sup> It is, therefore, not surprising that successful peer harassment cases typically involve unrelenting harassment for long periods of time that include more than verbal taunting, and often include physical and/or sexual assaults.<sup>107</sup>

Under *Davis*, it is not sufficient for the harassment to be severe and unrelenting. It must also deny the victim equal access to educational opportunities.<sup>108</sup> This means that victims must present concrete evidence that the harassment had negative effects on their education.<sup>109</sup> For example, in *Vance*, the severe and pervasive harassment suffered by the plaintiff effectively denied her an education, as her grades dropped, she suffered from depression and contemplated suicide, and she withdrew from school and completed her studies at home.<sup>110</sup> In *Theno*, the court found that a trier of fact could conclude that the plaintiff was deprived of educational opportunities where the harassment likely caused him to suffer post-traumatic stress disorder, anxiety disorder and avoidant personality disorder, and was so humiliating that he eventually left school.<sup>111</sup> In the absence of concrete evidence that the harassment adversely impacted the plaintiff’s educational opportunities, the case will likely be dismissed—even when the harassment is severe and pervasive.<sup>112</sup>

## 3) Remedies

*Davis* makes clear that plaintiffs suing for peer harassment under Title IX may seek compensatory damages.<sup>113</sup> Although the Supreme Court has not directly addressed whether punitive damages are available under Title IX, based on the Court’s decision in *Barnes v. Gorman*,<sup>114</sup> there is a strong argument that punitive damages are unavailable. In *Barnes*, the Court held that punitive damages may not be awarded in suits brought under Section 202 of the

Americans with Disabilities Act (ADA)<sup>115</sup> and Section 504 of the Rehabilitation Act,<sup>116</sup> because they may not be awarded in suits brought under Title VI.<sup>117</sup> In reaching this conclusion, the Court relied heavily on its earlier decisions under Title IX and the fact that Title IX, Section 202 of the ADA, and Section 504 of the Rehabilitation Act are Spending Clause legislation modeled on Title VI, with “coextensive remedies.”<sup>118</sup>

Plaintiffs who are still attending a school within the district being sued for deliberate indifference to peer harassment should seek injunctive relief, in addition to compensatory damages, if they are interested in making systemic change within the district.<sup>119</sup> The injunctive relief may include, among other things, implementation of anti-bullying training and education programs for school administrators, teachers, and students alike; adoption of policies and guidelines to address the type of bullying suffered by the plaintiff; assignment of a staff member to monitor and address bullying incidents; and maintenance of statistical data on complaints and investigations of bullying incidents.<sup>120</sup>

Plaintiffs who are successful in their peer harassment claims may also recover attorneys’ fees, pursuant to 42 U.S.C. § 1988(b).<sup>121</sup>

## **B. Title VI Claims for Bullying Based on Race, Color, or National Origin**

The legal standards and remedies for Title VI<sup>122</sup> peer harassment cases are the same as under Title IX, except that Title VI prohibits discrimination based on race, color, or national origin, not sex discrimination.<sup>123</sup> The Supreme Court has not addressed whether a school district’s failure to respond appropriately to peer harassment based on race, color, or national origin constitutes intentional discrimination—which is the only private right of action permitted under Title VI<sup>124</sup>—but lower courts have relied on *Davis* in holding that plaintiffs can prove intentional discrimination claims under Title VI by showing that a school district has been “deliberately indifferent” to peer harassment of a student.<sup>125</sup>

The Second Circuit recently decided a Title VI peer harassment case, *Zeno v. Pine Plains Central School District*,<sup>126</sup> that elaborates on the deliberate indifference standard and offers guidance on evaluating the potential compensatory damages awards in peer harassment cases.

Anthony Zeno, a bi-racial high school student, was harassed by his peers for three-and-a-half years.<sup>127</sup> A jury found that the school district had acted with deliberate indifference to his harassment, in violation of Title VI, and awarded Anthony \$1.25 million.<sup>128</sup> The district court denied the school district’s motion for judgment as a matter of law, but reduced the jury award to \$1 million.<sup>129</sup> The Second Circuit affirmed, holding that there was sufficient evidence to support both the jury’s finding that the district had acted with deliberate indifference to Anthony’s harassment and a damages award of \$1 million.<sup>130</sup>

To determine whether there was sufficient evidence to uphold the jury’s finding that the school district had violated Title VI, the Second Circuit first examined whether Anthony was subjected to actionable harassment. The court held that reasonable jurors could have found that the harassment Anthony suffered was “severe, pervasive, and objectively offensive” and deprived him of educational benefits.<sup>131</sup>

For three-and-a-half years, fellow high school students taunted, harassed, menaced, and physically assaulted Anthony.<sup>132</sup> His peers made frequent pejorative references to his skin tone, calling him a “nigger” nearly every day.<sup>133</sup> They also referred to him as “homey” and “gangster,” while making references to his “hood” and “fake rapper bling bling.”<sup>134</sup> He received explicit threats as well as implied threats, such as references to lynching.<sup>135</sup> The court found that such conduct went beyond name-calling and teasing, particularly because of the “use of the reviled epithet ‘nigger.’”<sup>136</sup> In addition, Anthony suffered more than mere verbal harassment; he endured threats on his life (graffiti warning that “Zeno will die”) and physical attacks (some so violent that the high school called the police).<sup>137</sup>

The Second Circuit found that a reasonable jury could have concluded that Anthony was deprived of three educational benefits as a result of the harassment: (1) a supportive, scholastic environment free of racism and harassment; (2) a regular “Regents diploma” that was more likely to be accepted by four-year colleges or employers than the type of diploma he received; and (3) the ability to complete his education at the high school, instead being driven to leave.<sup>138</sup>

The school district argued that, as a matter of law, it was not deliberately indifferent to Anthony’s peer harassment because it responded reasonably to each reported incident, was under no obligation to implement reforms requested by Anthony’s attorney, and never knew that its responses were ineffective or inadequate.<sup>139</sup> The court rejected each of these arguments.<sup>140</sup>

The school district had suspended nearly every student identified as harassing Anthony, contacted the harassers’ parents, withdrew harassers’ privileges (such as participation in extracurricular activities), and eventually implemented anti-bullying training for students, parents and teachers.<sup>141</sup> Nonetheless, considering the district’s response “in light of the known circumstances”—including the district’s knowledge that disciplining Anthony’s harassers did not deter others from engaging in serious racial harassment and that the harassment grew increasingly severe—the Second Circuit found there was sufficient evidence to support the jury’s finding that the district’s remedial response was inadequate.<sup>142</sup>

Like the Sixth Circuit in *Vance*, the court in *Zeno* evaluated the adequacy of the district’s response in terms of whether it was reasonably calculated to end the harassment.<sup>143</sup> The Second Circuit described three ways in which the district’s response was inadequate and, therefore, deliberately indifferent. First, although the district disciplined many of Anthony’s harassers, it dragged its feet for a year or more before implementing any non-disciplinary remedial action.<sup>144</sup> Once a school is aware that its response is ineffective, “a delay before implementing further remedial action is . . . problematic.”<sup>145</sup> Second, a reasonable jury could have found that the district’s additional remedial actions “were little more than half-hearted measures.”<sup>146</sup> For example, the district coordinated mediation with the harassers and their parents, but failed to inform Anthony’s mother when or where it would be held.<sup>147</sup> In addition, its anti-bullying training programs were for only one day, focused on bullying generally rather than on race discrimination in particular, and made attendance optional.<sup>148</sup> Third, a reasonable jury could have found that the district “ignored many signals that greater, more directed action was needed.”<sup>149</sup>

Because the Second Circuit upheld a jury’s finding of deliberate indifference where a school district had taken numerous steps in response to reported peer harassment, *Zeno* shows that

plaintiffs can satisfy this high standard of liability when schools fail to respond adequately to severe and pervasive bullying. Relying on language in *Davis* that “courts should refrain from second-guessing” school administrators’ disciplinary decisions,<sup>150</sup> school districts defending peer harassment cases often play the “deference card,” arguing that they have broad discretion to decide how to respond to peer harassment. *Zeno* offers a great counter-argument, showing that courts should not—and will not—defer to administrators’ inadequate responses to egregious harassment.<sup>151</sup>

*Zeno* will also help plaintiffs’ attorneys evaluate the worth of a peer harassment case. In addition to upholding a \$1 million verdict for an individual student’s psychological and emotional harm, it offers a brief review of verdicts for students harassed by peers or teachers.<sup>152</sup> The court notes that verdicts range from the low six figures to as much as \$1 million.<sup>153</sup>

### **C. Claims for Disability-Based Bullying under Title II, Section 504, and the IDEA**

A growing number of courts are recognizing disability-based peer harassment claims under two federal civil rights statutes: Section 504 of the Rehabilitation Act and Title II of the ADA. Section 504 prohibits recipients of federal funds from discriminating against an individual “solely by reason of his or her disability.”<sup>154</sup> Title II prohibits all public entities, regardless of whether they receive federal funds, from discriminating against an individual with a qualifying disability “by reason of such disability.”<sup>155</sup> The U.S. Department of Education, which enforces these statutes, has made clear that both Section 504 and Title II prohibit disability-based peer harassment in schools.<sup>156</sup>

The Department of Education defines disability harassment as “intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities in the institution’s program.”<sup>157</sup> The Department includes the following as examples of peer harassment that may create a hostile environment for disabled students:

- Several students continually remark out loud to other students during class that a student with dyslexia is “retarded” or “deaf and dumb” and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.
- A student repeatedly places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates’ ability to enter the classroom.
- Students continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.<sup>158</sup>

The legal standards and remedies for disability-based peer harassment under Section 504 and Title II are discussed in subsection 1 below.

Where peer harassment “adversely affects an elementary or secondary student’s education” it may also violate the Individuals with Disabilities Education Act (IDEA)<sup>159</sup> by denying disabled

students a “free appropriate education” (FAPE).<sup>160</sup> The IDEA’s primary objective is to ensure that states receiving IDEA funds provide disabled children with a FAPE—namely, the appropriate special education and related services they need to access and benefit from public education.”<sup>161</sup> Subsection 2 below briefly addresses the legal standards and remedies under the IDEA for disability-based peer harassment.

### 1) Section 504 and Title II Claims

Section 504 and Title II have incorporated all of the rights and remedies available under Title VI, except that they prohibit discrimination based on disability, rather than race or ethnicity.<sup>162</sup> Just as plaintiffs asserting peer harassment cases under Title VI must show that the harassment was based on their race or ethnicity, plaintiffs asserting peer harassment under Section 504 or Title II must show that the harassment was based on their disability; however, the latter plaintiffs must also make a *prima facie* showing that they have a “disability” within the meaning of Section 504 or Title II.<sup>163</sup> The full definition of a “disability” under these statutes is beyond the scope of this primer. In essence, it covers individuals who suffer from physical or mental impairments, and individuals who are perceived as having such impairments.<sup>164</sup>

Although peer harassment claims under both Section 504 and Title II<sup>165</sup> are similar to peer harassment claims under both Title VI and Title IX, there is one key difference. Disabled students subjected to peer harassment may have two different claims—one based on the school district’s failure to respond adequately to the bullying, which is analyzed under a *Davis*-type deliberate indifference standard,<sup>166</sup> and another based on the district’s refusal to make reasonable accommodations for the disabled student to address the bullying, which is analyzed under a “bad faith” or “gross misjudgment” standard.<sup>167</sup> Thus, when representing a disabled child in a peer bullying case, it is important to consider whether the evidence supports one or both of these claims.

To prove disability-based peer harassment under Section 504 or Title II, a plaintiff must show that “(1) [he or she] is an individual with a disability, (2) he or she was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive *that it altered the condition of his or her education and created an abusive educational environment*, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment.”<sup>168</sup> In essence, this is the *Davis* test. Despite the modification to the “severe and pervasive” prong of the *Davis* standard, lower courts assess the severity and pervasiveness of the harassment under Section 504 and Title II in the same way that they would assess this for Title IX or Title VI harassment claims.<sup>169</sup>

To prove that a school district discriminated against a disabled student subjected to peer harassment, the plaintiff must show that the district acted in “bad faith” or with “gross misconduct” in refusing to make reasonable accommodations to account for the effects of the bullying on the student.<sup>170</sup>

Although there are two distinct legal theories available to disabled students subjected to peer harassment, courts have sometimes conflated these theories and their respective legal standards. For example, in *M.P. v. Independent School District No. 721*,<sup>171</sup> a student with schizophrenia sued the school district under Section 504 after suffering disability-based peer harassment that

began when the school nurse publicly disclosed that the plaintiff was schizophrenic.<sup>172</sup> The plaintiff argued that the school district discriminated against him based on his disability by, among other things, failing “to provide him with accommodations in the educational environment” after he reported the harassment.<sup>173</sup> The district court granted summary judgment on the ground that the plaintiff failed to present evidence that the school district had acted with deliberate indifference.<sup>174</sup> On appeal, the Eighth Circuit remanded the case to the district court to determine whether the school district “had acted in bad faith or with gross misjudgment when it failed to take appropriate action to protect [the plaintiff’s] academic and safety interest after the disclosure.”<sup>175</sup>

The Eighth Circuit elaborated on the “bad faith or gross misjudgment” standard in a second appeal, holding that there was evidence of gross misjudgment in the record.<sup>176</sup> Specifically, the school district had failed to: provide the plaintiff with a reasonable educational accommodation of his disability after the disability was disclosed; investigate the plaintiff’s allegations of disability discrimination, peer harassment, hostile educational environment and disclosure of personal information; and provide any remedial measures once the district was on notice of the harassment.<sup>177</sup>

More recently, in *Stewart v. Waco Independent School District*,<sup>178</sup> the Fifth Circuit explained the difference between the deliberate indifference and gross misjudgment standards, and the distinct legal theories to which each standard applies. The plaintiff in that case was a female high school student who suffers from mental retardation, speech impairment, and hearing impairment.<sup>179</sup> After an incident involving sexual contact with male students, the school modified her “individualized education program” (IEP)<sup>180</sup> to ensure that she was separated from male students and under close supervision while at school.<sup>181</sup> The plaintiff alleged that, over the next two years, she was sexually abused at school three times, including when she went to the restroom unattended by school staff.<sup>182</sup> The school district failed to modify her IEP or prevent future abuse after any of these three incidents.<sup>183</sup>

Stewart sued the school district under Section 504 and Title II, but the district court dismissed the action in its entirety for failure to state a claim.<sup>184</sup> On appeal, the plaintiff argued that she had stated a claim under Section 504 for the school district’s deliberate indifference to known incidents of disability-based peer harassment, in addition to “gross mismanagement” of her IEP.<sup>185</sup> The Fifth Circuit found that it did not have to decide whether a *Davis*-style deliberate indifference claim was available under Section 504, because the plaintiff had failed to state a claim for deliberate indifference.<sup>186</sup> However, the court held that Stewart had stated a gross misjudgment claim under Section 504, which is just another way of saying that the school district refused to provide a reasonable accommodation of her disability.<sup>187</sup>

The court explained the difference between the deliberate indifference and gross misjudgment tests as follows:

[T]he two theories are distinct. Deliberate indifference applies here only with respect to the District’s alleged liability for student-on-student harassment under a Title IX-like theory of disability discrimination. . . . On the other hand, “gross misjudgment”—a species of negligence—applies to the District’s refusal to make

reasonable accommodations by further modifying Stewart’s IEP . . . Thus, although the inquiries have much in common, whether the District’s actions were “clearly unreasonable” with respect to peer-occasioned disability harassment remains analytically separate from whether it acted with gross misjudgment as measured by professional standards of educational practice.<sup>188</sup>

The Fifth Circuit also elaborated on what constitutes a refusal to provide a reasonable accommodation of a student’s disability. The refusal can take the form of exercising poor professional judgment or failing to take appropriate and effective remedial measures when a school district knows of disability-based harassment.<sup>189</sup> It can also be a failure to respond to changing circumstances or new information, even if the district had already provided an accommodation in response to its initial understanding of a disabled student’s needs.<sup>190</sup>

The court then found that Stewart had pleaded sufficient facts to state a gross misjudgment claim under Section 504:

however appropriate the District’s initial response, it had an ongoing responsibility to calibrate Stewart’s IEP to effectively address the behaviors it intended to prevent by keeping her separated from males and under close supervision. Under § 504, it is not enough that the District might have discharged its duty under a deliberate-indifference standard by taking remedial—but inadequate—action . . . . At this early stage, we conclude that even if the District provided Stewart with reasonable accommodations when it initially modified her IEP, the three subsequent instances of alleged sexual abuse could plausibly support a finding that the modifications were actionably ineffective.<sup>191</sup>

Given that the gross misjudgment standard for a refusal to provide a reasonable accommodation is easier to satisfy than the deliberate indifference standard for a peer harassment claim, victims of disability-based peer harassment should include the former claim in their complaints when there is sufficient evidence to support it.

## **2) IDEA Claims**

As mentioned above, peer harassment may also violate the IDEA by denying a disabled student a FAPE. Schools provide a FAPE for a disabled student by developing an IEP.<sup>192</sup> The IEP process requires a school district to conduct an individualized evaluation, identify a child’s disabilities,<sup>193</sup> and then develop an educational placement that meets the child’s unique needs in the least restrictive environment.<sup>194</sup>

If a school district fails to provide a disabled child with a FAPE for any reason—whether or not peer harassment is involved—the IDEA provides parents with a wealth of administrative and equitable remedies.<sup>195</sup> Parents also have an option to seek judicial review, generally after exhausting administrative procedures such as mediation and a due process hearing conducted by state or local education agencies;<sup>196</sup> otherwise, courts will lack jurisdiction to hear the claim.<sup>197</sup>



The IDEA also allows parents who prevail in their claims to recover attorneys' fees,<sup>198</sup> but, unlike Section 504 and Title II, damage awards typically are not available.<sup>199</sup>

Courts are beginning to recognize IDEA claims when a school district fails to respond meaningfully to peer harassment of a disabled child, but the legal standard for analyzing these claims is evolving.<sup>200</sup> In *T.K. v. New York City Department of Education*,<sup>201</sup> the federal district court for the Eastern District of New York held that a school district is liable under the IDEA where "school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities."<sup>202</sup> The court acknowledged that "[t]he principles behind [the *Davis*] test are applicable" to peer harassment claims under the IDEA, but also relied on "expert guidance" previously provided by the U.S. Department of Education.<sup>203</sup> The court explained:

When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.<sup>204</sup>

The court further explained that "[i]t is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability."<sup>205</sup> The district court denied the defendant's motion for summary judgment, finding ample evidence in the record to support each element of this test.<sup>206</sup>

The test articulated in *T.K.* for disability-based harassment is easier to satisfy than the *Davis* standard for several reasons. First, it requires school districts to address bullying "regardless of whether the [disabled] student has complained, asked the school to take action, or identified the harassment as a form of discrimination."<sup>207</sup> Second, it does not require the bullying to be "a reaction to or related to" a child's disability.<sup>208</sup> Third, it does not require a plaintiff to prove that the bullying was "severe and pervasive"; it is sufficient if the bullying "substantially restricts" a disabled child in her educational opportunities.<sup>209</sup> Fourth, it does not require the plaintiff to show that the bullying barred "the victim's access to an educational opportunity or benefit;" it is sufficient to show that the bullying "is likely to affect the opportunity of the student for an appropriate education."<sup>210</sup>

In contrast to the federal district court in New York, the Ninth Circuit has applied a *Davis*-type standard to IDEA claims for peer harassment: "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE."<sup>211</sup> In *M.L. v. Federal Way School District*, the Ninth Circuit found no evidence of deliberate indifference because the school district was not afforded a reasonable opportunity to address the

harassment after the parents removed the child from school.<sup>212</sup> The court also found that the plaintiff could not show any loss of an educational benefit, because there was no evidence that the teasing affected or interfered with the student's education.<sup>213</sup>

While some commentators have suggested that challenging peer harassment through the IDEA could be a way around the hard-to-prove *Davis* standard, it has some limitations.<sup>214</sup> For one, the standard is not clearly articulated. In addition, though district courts review a due process hearing officer's findings and decisions *de novo*, the "due weight" standard they apply on appeal is often more deferential than typical *de novo* review of federal district court decisions, making it more likely that a hearing officer's adverse decision will be affirmed.<sup>215</sup> Finally, because IDEA remedies are tailored to the needs of each particular disabled child, there is little opportunity for making systemic change that would benefit other disabled students.

#### **D. Section 1983 Claims for Constitutional Violations**

In addition to asserting claims under the federal civil rights statutes discussed above, victims of peer harassment may assert constitutional claims alleging violations of the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>216</sup> These claims must be brought pursuant to 42 U.S.C. § 1983, which provides a private right of action for violations of rights secured by the Constitution and federal laws.<sup>217</sup>

There are several significant differences between constitutional and federal statutory claims for peer harassment. First, although the federal civil rights statutes discussed above only permit bullying victims to assert claims against the school district or board (whichever entity is the recipient of federal funds), constitutional claims under § 1983 are not limited in this way. In addition to suing the school district—either directly or by suing school administrators in their official capacities—§ 1983 permits bullying victims to sue school officials and employees in their individual capacities for money damages.<sup>218</sup> Second, bullying victims may seek punitive damages for constitutional violations.<sup>219</sup> Third, as discussed below, the legal standards for establishing constitutional violations differ in some significant respects from the legal standards for establishing violations of the federal civil rights statutes. Fourth, bullying victims asserting constitutional claims will likely have to navigate two significant procedural hurdles that do not arise under the federal civil rights statutes—qualified immunity and municipal immunity.

Typically, when a bullying victim sues school officials in their individual capacities, the officials argue that they have qualified immunity from money damages. Individual school officials will be immune from suit if the performance of their discretionary functions "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>220</sup> In cases of particularly egregious peer harassment, however, courts have tended to take an expansive view of the constitutional rights that are "clearly established," even in the absence of statutes, regulations, or case law that is directly on point.<sup>221</sup> Even so, as a practical matter, dealing with qualified immunity defenses involves the expenditure of additional resources (often involving an interlocutory appeal) and causes delays in discovery and trial.

School districts or administrators sued in their official capacities for peer harassment under § 1983 are also likely to raise municipal immunity arguments under *Monell v. Department of Social Services*.<sup>222</sup> Pursuant to *Monell*, a school district is not vicariously liable under § 1983 for

the discriminatory actions of its officials and employees.<sup>223</sup> To establish the district's liability, the plaintiff must show either that school officials' deliberate indifference to the peer harassment represented the district's policy, custom or practice, or that officials' response to the peer harassment departed from the district's established policy, custom or practice for addressing harassment.<sup>224</sup> In addition, a plaintiff may establish municipal liability by showing that school administrators ignored an obvious need to train and supervise employees on addressing peer harassment, and that the lack of such training and supervision caused the plaintiff's injury and ongoing peer harassment.<sup>225</sup> Again, as a practical matter, dealing with municipal liability defenses involves the expenditure of additional resources and causes delays.

Because of these significant procedural hurdles, if a plaintiff has a good peer harassment claim under one or more of the federal civil rights statutes discussed above, it is worth evaluating whether the costs of also asserting constitutional claims outweigh the benefits of doing so.

### 1) Equal Protection Claims

As mentioned above, bullying victims may have constitutional claims for peer harassment under the Equal Protection Clause, which provides that no state shall "deny to any person within its jurisdiction, the equal protection of the laws."<sup>226</sup> The Supreme Court has interpreted the Equal Protection Clause to grant people "the right to be free from invidious discrimination in statutory classifications and other governmental activity."<sup>227</sup> The clause does not forbid classifications, but "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."<sup>228</sup>

The Supreme Court has never ruled on the standards for establishing equal protection liability for peer harassment, though it has stated that they "may not be wholly congruent" with the standards for establishing liability under Title IX.<sup>229</sup> As a result, federal circuits differ on the standards they apply in analyzing equal protection claims. Though they all seem to recognize that plaintiffs may establish intentional discrimination under the Equal Protection Clause by showing that a school district acted with deliberate indifference to their peer harassment,<sup>230</sup> courts differ on whether plaintiffs must also show that a school district's discriminatory acts or omissions were based on the plaintiffs' membership in an identifiable class—such as race, ethnicity, gender, or sexual orientation.<sup>231</sup>

So far, the Second Circuit is the only one to analyze equal protection claims for peer harassment without addressing whether the defendants would have handled the harassment differently if plaintiffs had not been members of an identifiable class.<sup>232</sup> In *DiStiso v. Cook*, the Second Circuit simply applied the Title IX deliberate indifference standard established in *Davis*—without conclusively deciding whether the *Davis* standard applies—to a race-based peer harassment claim under the Equal Protection Clause.<sup>233</sup>

The more typical approach to equal protection claims for peer harassment stems from the landmark Seventh Circuit decision in *Nabozny v. Podlesny*, the first case to recognize an equal protection claim for anti-gay peer harassment.<sup>234</sup> In *Nabozny*, the plaintiff was continually harassed by his middle school and high school peers, both verbally and physically, because he is gay.<sup>235</sup> He suffered severe beatings, one of which required hospitalization for internal bleeding.<sup>236</sup> Despite reporting the incidents to school administrators, they turned a deaf ear to

his requests for help, and some even mocked his predicament.<sup>237</sup> Jamie Nabozny sued the school district and individual school officials, asserting equal protection claims under § 1983 for discrimination based on his gender and sexual orientation.<sup>238</sup>

The district court granted summary judgment for the defendant school officials on these claims, but the Seventh Circuit reversed.<sup>239</sup> Applying heightened scrutiny to Nabozny's equal protection claim of gender-based harassment, the court held that he could proceed with the claim because the record showed that (1) the defendants treated female victims of male battery and harassment differently than male victims of male battery and harassment, and (2) defendants' departure from its anti-harassment policies and practices may evince discriminatory intent.<sup>240</sup> Applying rational basis review to Nabozny's equal protection claim for harassment based on his sexual orientation, the court held that (1) he had produced sufficient evidence to show that he was treated differently because he was gay and because defendants disapproved of his sexual orientation, and (2) there is no "rational basis for permitting one student to assault another based on the victim's sexual orientation."<sup>241</sup>

Equal protection claims based on discrimination against members of a protected class—such as race, national origin, and gender—are easier to prove because they are reviewed under strict or heightened scrutiny.<sup>242</sup> If a victim of peer harassment does not belong to a protected class and is harassed for some other reason—such as on the basis of sexual orientation, disability, or weight—then courts will review the claim under the harder-to-satisfy rational basis test.<sup>243</sup>

Another obstacle to recovery under an equal protection claim is that many bullying victims are hard pressed to demonstrate that they are a member of an identifiable class. Even when they can show this, it is often difficult to prove that school officials treated them differently because of their membership in an identifiable class. The reality is that many school districts fail to take action because they do not know how to respond appropriately to peer harassment or are indifferent to bullying victims, regardless of their membership in an identifiable class. So, for example, if a school district ignores peer harassment of females as routinely as it ignores peer harassment of males, there will be no equal protection claim for gender-based harassment under the equal protection standard applied by most federal circuits.

## **2) Due Process Claims**

Bullying victims may also have constitutional claims for peer harassment under the Fourteenth Amendment's Due Process Clause, which provides that a state may not "deprive any person of life, liberty, or property, without due process of law."<sup>244</sup> The theory is that, by allowing a student to be bullied by his peers, the school has deprived the victim of his liberty or property interests under the Due Process Clause. Peer harassment may implicate a victim's substantive due process rights<sup>245</sup> where a school's response to the harassment "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty."<sup>246</sup> This is an exceedingly high standard. As explained below, § 1983 claims for violations of substantive due process rights in bullying cases typically fail. As a result, attorneys should think long and hard before asserting a substantive due process claim in a peer harassment case.

Courts are likely to dismiss substantive due process claims because, generally speaking, school districts do not have a constitutional duty to protect students from peer harassment. In *DeShaney*

*v. Winnebago County Department of Social Services*, the Supreme Court held that the Due Process Clause does not require a state to protect an individual from harm committed by private actors, even when it knows of the danger.<sup>247</sup> There are two exceptions to this rule, one recognized in *DeShaney* itself and the other recognized by lower federal courts.

The first exception, established in *DeShaney*, is where the state has a custodial or “special relationship” with an individual—i.e., it holds an individual against his will and the individual can no longer care for himself.<sup>248</sup> Incarcerated and institutionalized individuals are in such “special relationships” with the state.<sup>249</sup> Courts have generally found that the school-student relationship does not satisfy this exception.<sup>250</sup>

The second exception is where the state created or increased the danger that an individual would be exposed to harm by others.<sup>251</sup> The “state-created danger” exception to the *DeShaney* rule is not clearly defined, because the Supreme Court has not yet addressed it.<sup>252</sup> But the general theory is that a school district may violate a student’s substantive due process rights through an affirmative act that created or increased the danger of harassment by other students.<sup>253</sup> A mere failure to act does not suffice and the affirmative act must shock the conscience.<sup>254</sup>

Although substantive due process claims in this area generally fail, at least one court has allowed a bullying victim to recover under this theory. In *Enright v. Springfield School District*,<sup>255</sup> a federal district court in Pennsylvania denied a school district’s motion for a directed verdict and new trial, after a bullying victim won a \$400,000 verdict under the “state-created danger” exception.<sup>256</sup> In that case, two male high school students with disabilities sexually harassed a seven-year old disabled female on the school bus.<sup>257</sup> T.P. rubbed his crotch with the plaintiff’s umbrella, while J.W. laughed and stated something to the effect of “Look, he’s playing with himself.”<sup>258</sup> T.P. also pulled up his shorts to show J.W. a paintball scar on his upper thigh which exposed his penis.<sup>259</sup> The boys then told the plaintiff to “touch it, lick it, feel it,” and J.W. subsequently pulled her hair.<sup>260</sup> The plaintiff refused to pick up her umbrella after the incident, but the boys told her that if she left it on the bus, her mother would be angry with her.<sup>261</sup> They also stated that if she told anyone what they had done to her, nobody would believe her, and J.W. would either hurt or kill her older brother. J.W. had a known history of disruptive and aggressive behavior.<sup>262</sup> After the incident, school officials barred both boys from riding the bus and provided the plaintiff with various accommodations, including placing a female aid on the bus.<sup>263</sup> Nevertheless, the plaintiff suffered severe educational setbacks after the incident.<sup>264</sup>

Applying the Third Circuit’s test for the state-created danger doctrine,<sup>265</sup> the district court entered judgment on the verdict, finding that the plaintiff presented evidence that the school district had affirmatively created a danger by, among other things, transporting the plaintiff with boys whom it knew had histories of violence and socially inappropriate behavior.<sup>266</sup> The court explained its conclusion as follows:

Given that Cassia Enright was only seven years old with a social age of five and that the nature of her disability was such that she has difficulty understanding and interpreting social cues and in view of J.W.’s history and oppositional defiant disorder, we find that the jury could reasonably have concluded that the harm which Cassia sustained as a result of this incident was foreseeable to the

School District. We additionally conclude that this evidence can sustain a jury finding that by deciding to place Cassia on that bus with the adolescent boys, the defendant was deliberately indifferent to both her safety and the risk of harm and that the harm inflicted was a direct result of the School District's actions.<sup>267</sup>

*Enright* is likely an anomaly because most substantive due process claims for peer harassment fail, even in cases with arguably more egregious facts. For example, in *Nabozny*, discussed at length in the equal protection section above, the Seventh Circuit affirmed dismissal of the severely bullied plaintiff's substantive due process claim.<sup>268</sup> Even though the court found that the plaintiff had presented "wrenching" facts, it held that there was insufficient evidence that the school district's conduct either "placed him in danger" or "increased the risk of harm to Nabozny beyond that which he would have faced had the defendants taken no action."<sup>269</sup> Thus, the reality is that plaintiffs' efforts to hold school districts liable for peer harassment are unlikely to succeed under a substantive due process theory.

#### **IV. Overview of State Claims to Address Bullying**

As mentioned above, 49 states have anti-bullying laws that require schools to take appropriate action to address and prevent bullying.<sup>270</sup> Typically, there is no private right of action under these laws,<sup>271</sup> but it is nonetheless critical to examine your state's anti-bullying laws and policies—as well as the local school district's policies—when evaluating a potential bullying case. At a minimum, understanding how your state and local school districts define bullying will help you determine whether a potential client is a victim of legally proscribed conduct. In addition, understanding the duties that those laws and policies impose on school administrators and employees—such as duties to report, prevent and respond to bullying—will help you determine whether there has been a breach of a duty that might give rise to tort claims.

When evaluating a potential bullying case, it is important to consider both common-law tort claims and civil rights claims under your state's laws. There are several potential advantages to asserting state law claims for failing to respond appropriately to bullying. For starters, unlike the federal claims discussed above, bullying victims can assert tort claims regardless of whether they are a member of a "protected" or "identifiable" class. This means that, even if the bullying was not based, for example, on the victim's race, sex or disability, he or she may have remedies under state tort law.<sup>272</sup> In addition, state civil rights statutes often cover a wider range of discrimination than federal civil rights statutes. For example, unlike their federal counterparts, some states' civil rights statutes prohibit discrimination based on sexual orientation.<sup>273</sup> Another advantage of asserting state law claims to address bullying is that the standards for establishing liability may be less stringent than the federal standards. In some instances, mere negligence may suffice.<sup>274</sup> Even where a plaintiff must prove more than negligence, something short of the deliberate indifference standard may be sufficient.<sup>275</sup>

Notwithstanding these advantages, there are also some significant obstacles to asserting state law claims related to bullying, including sovereign immunity. It is beyond the scope of this primer to address potential claims and obstacles under every state's tort and civil rights laws. However, a brief overview of these claims and obstacles is provided below.

## A. Tort Claims

Although laws differ from state to state, many states have common-law causes of action that could be used to hold school districts and officials accountable for failing to respond appropriately to student-on-student bullying. Some states recognize claims against school districts or employees for negligent supervision of students,<sup>276</sup> while others require willful and wanton misconduct for a failure to supervise claim.<sup>277</sup> Some states also permit claims for negligent or intentional infliction of emotional distress.<sup>278</sup> The remedies available for these claims may include compensatory damages for physical injuries, post-traumatic stress, other emotional distress, pain and suffering, and wrongful death, as well as punitive damages.<sup>279</sup>

Tort actions against school districts based on bullying are a relatively new phenomenon, but are being filed more frequently since the passage of state anti-bullying laws. Public Justice has begun tracking jury verdicts and settlements in both state and federal peer bullying cases and will be posting this information on the Anti-Bullying Campaign page of its website:

<http://publicjustice.net/what-we-do/anti-bullying-campaign>.

Though some tort claims stemming from bullying have succeeded, there are some significant procedural hurdles that may shield school districts and officials from liability. One major barrier to recovery under tort theories is sovereign immunity. At its most protective, the doctrine of sovereign immunity offers absolute immunity to the state, and governmental entities considered arms of the state, regardless of the level of negligence displayed by its employees. Under the most extreme version of the doctrine, the state entity cannot be sued in tort and cannot be held liable for its employees' acts or omissions.

Some states grant school districts and boards absolute immunity for its employees' torts. For example, Virginia school boards, acting in their governmental capacity, enjoy absolute immunity, even when school officials are grossly negligent.<sup>280</sup> Most states, however, do not grant school boards and school officials sued in their individual capacities absolute immunity for their torts.<sup>281</sup> They typically grant "qualified" immunity that applies only to "discretionary" acts or acts performed negligently, rather than with gross negligence or recklessness.<sup>282</sup> For example, Ohio gives school districts immunity for death or injuries caused by the negligence of their employees in performing their "discretionary functions," but waives immunity if employees exercised their discretion with a "malicious purpose, in bad faith, or in a wanton or reckless manner."<sup>283</sup> Even this more limited immunity can bar tort liability in some cases, because plaintiffs must show that school officials' conduct exceeded ordinary negligence, and courts sometimes afford administrators and teachers broad discretion.

Even when immunity is not a bar, there are other barriers to establishing liability under tort theories. For example, school districts and officials will not be liable if the bullying committed by students is deemed to be a superseding cause that breaks the chain of proximate causation between the district's wrongful conduct and the plaintiff's injuries.<sup>284</sup> Generally speaking, courts will not hold school districts and officials liable for bullying absent prior knowledge of the bullying that would make the plaintiff's injuries foreseeable to school authorities.<sup>285</sup> Essentially, school districts are subject to liability for their and their employees' conduct, not for their student's conduct.

Other potential obstacles to tort liability for school bullying include administrative notice requirements and strict time limitations. Some states require plaintiffs to serve a notice of claim on the school district before filing any tort action, and the time for serving such a notice is often short.<sup>286</sup>

Where plaintiffs are able to satisfy these procedural requirements, and overcome the potential obstacles of immunity and foreseeability, tort claims may bring bullying victims justice and may bring a school district into compliance with state anti-bullying laws and local policies.

## **B. State Civil Rights Claims**

In addition to state tort claims, attorneys should consider filing claims for violations of state civil rights statutes or state constitutional provisions. As noted above, state civil rights statutes may prohibit a wider range of discrimination than federal civil rights statutes and may require something less than “deliberate indifference” to establish a school district’s liability.

For example, the New Jersey Supreme Court held that New Jersey’s Law Against Discrimination (LAD) permits a cause of action for peer harassment based on sexual orientation and that Title IX’s deliberate indifference standard does not apply to such a claim.<sup>287</sup> The court applied a less “burdensome” standard: “a school district may be found liable under the LAD for student-on-student sexual orientation harassment that creates a hostile educational environment when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment.”<sup>288</sup>

In addition to exploring claims under state civil rights statutes, attorneys should consider equal protection and substantive due process claims based on their state’s constitution. Some states may interpret equal protection and substantive due process rights more generously than their federal counterparts, providing a less burdensome path to recovery for peer bullying.

## **V. Conclusion**

We cannot eliminate all bullying among school children, but we can make schools and school districts respond appropriately to it—and help stop and deter a great deal of it—through effective litigation under federal and state laws. Litigation is a critical tool in our arsenal. It can help to change the culture of schools and school districts, so they address bullying appropriately. Despite anti-bullying laws and policies across the country, principals, teachers and other adult leaders often turn a blind eye to bullying. Litigation can motivate them to insist that bullying is confronted, rather than ignored, put teeth into school policies, require anti-bullying training, and teach tolerance to students. It can also compensate bullying victims for the injuries they have suffered.

That is why Public Justice has launched its Anti-Bullying Campaign. In addition to handling and serving as co-counsel in anti-bullying cases, Public Justice stands ready to serve as a resource for bullying victims and the attorneys who represent them. Please do not hesitate to contact us for help in a school bullying case.



## Footnotes

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<sup>1</sup> The U.S. Department of Health and Human Services has a website, [www.stopbullying.gov](http://www.stopbullying.gov), that provides a wealth of information on bullying, including every state’s anti-bullying laws and policies. See also Bullypolice.org, <http://bullypolice.org/>, which reports on and grades each state’s anti-bullying laws.

<sup>2</sup> Kidpower.org, <http://www.kidpower.org/library/article/bullying-facts/> (last visited Apr. 2, 2013).

<sup>3</sup> *Id.*

<sup>4</sup> For more information about Public Justice’s Anti-Bullying Campaign, visit <http://publicjustice.net/what-we-do/anti-bullying-campaign>.

<sup>5</sup> Emily Bazelon, “Defining Bullying Down,” *The New York Times* (Mar. 11, 2013), available at <http://www.nytimes.com/2013/03/12/opinion/defining-bullying-down.html>.

<sup>6</sup> Stopbullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Apr. 2, 2013).

<sup>7</sup> See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 11 Temple L. Rev. 641, 645 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> Bullying that takes place using electronic technology is known as “cyberbullying.” This primer does not address school districts’ potential liability for cyberbullying, which has free speech implications under the First Amendment to the U.S. Constitution.

<sup>10</sup> 42 U.S.C. § 2000d *et seq.*

<sup>11</sup> 20 U.S.C. § 1681 *et seq.*

<sup>12</sup> 29 U.S.C. § 794

<sup>13</sup> 42 U.S.C. § 12131 *et seq.*

<sup>14</sup> For disabled students who are bullied, you should also consider asserting claims under the Individuals with Disabilities Education Act (IDEA) based on a school district’s failure to provide a “free appropriate public education.” See 20 U.S.C § 1412(a). Potential claims under the IDEA are discussed in Section III. C. 2., *infra*.

<sup>15</sup> The Department’s regulations implementing these statutes are in 34 C.F.R. Parts 100, 104, and 106.

<sup>16</sup> U.S. Department of Education, Office for Civil Rights (OCR), Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>17</sup> *Id.* at pp.7-8.

<sup>18</sup> *Id.* at pp. 5-6.

<sup>19</sup> 42 U.S.C. § 1983 provides that:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

<sup>20</sup> Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

<sup>21</sup> *Smith v. Metro. Sch. Dist.of Perry Twp.*, 128 F.3d 1014, 1019-21 (7th Cir. 1997) (no individual liability under Title IX).

<sup>22</sup> See OCR’s Revised Sexual Harassment Guidance (Jan. 19, 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

<sup>23</sup> OCR’s Dear Colleague Letter: Harassment and Bullying, *supra* note 16, at p. 6.

<sup>24</sup> *Id.* at pp. 7-8.

<sup>25</sup> *Id.*

<sup>26</sup> 526 U.S. 629 (1999).

<sup>27</sup> *Id.* at 633.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 633-34.

<sup>30</sup> *Id.* at 634.

<sup>31</sup> *Id.* at 650.

<sup>32</sup> *Id.* at 633, 650; see also *Vance*, 231 F.3d at 258-59.

<sup>33</sup> See, e.g., *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 934 (10th Cir. 2003) (Title VI); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012) (Title VI); *S.S. v. E. Ky. Univ.*, 532 F.3d

445, 453 (6th Cir. 2008) (Title II and Section 504); *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 358-59 (S.D.N.Y. 2005) (Title II and Section 504).

<sup>34</sup> *See Davis*, 526 U.S. at 640-41.

<sup>35</sup> *Id.* at 648.

<sup>36</sup> *Id.* at 648-49.

<sup>37</sup> *Id.* at 649.

<sup>38</sup> *Id.* at 648.

<sup>39</sup> *See, e.g., Doe ex rel. Doe v. Bellefonte Sch. Dist.*, No. 4:CV-02-1463, 2003 WL 23718302 (M.D. Pa. Sept 29, 2003), *aff'd*, 106 F. App'x. 798 (3d Cir. 2004).

<sup>40</sup> *See, e.g., Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6<sup>th</sup> Cir. 2009); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005).

<sup>41</sup> *Zeno*, 702 F.3d at 669 (peer harassment case under Title VI, discussed in part III. B., *infra*); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (teacher-on-student harassment case under Title IX); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260-61 (6th Cir. 2000) (peer harassment under Title IX).

<sup>42</sup> *Vance*, 211 F.3d at 261 (affirming district court's denial of defendant's post-trial motion for judgment as a matter of law).

<sup>43</sup> *Id.* at 262-63.

<sup>44</sup> *Id.* at 256-59.

<sup>45</sup> *Id.* at 256.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 257.

<sup>48</sup> *Id.* at 256.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 256-57.

<sup>51</sup> *Id.* at 257.

<sup>52</sup> *Id.* at 262.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 260.

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g., Zeno*, 702 F.3d at 669-71; *Patterson*, 551 F.3d at 445-48; *Theno*, 377 F. Supp.2d at 966.

<sup>57</sup> *Patterson*, 551 F.3d 438.

<sup>58</sup> *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005).

<sup>59</sup> *Patterson*, 551 F.3d at 439-43.

<sup>60</sup> *Id.* at 439.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 440.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 441.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 442.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 448.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 442-43.

<sup>77</sup> *Id.* at 442.

<sup>78</sup> *Id.* at 443.

<sup>79</sup> *Id.* at 445.

<sup>80</sup> *Id.* at 445-46.

<sup>81</sup> *Id.* at 448 (emphasis added).

<sup>82</sup> *Id.* at 449.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 450.

<sup>85</sup> *Id.* at 446-49 (citing *Theno*, 377 F. Supp. 2d 952).

<sup>86</sup> 377 F. Supp. 2d 952 at 954-61.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 965.

<sup>90</sup> *Id.* at 959-60.

<sup>91</sup> *Id.* at 965.

<sup>92</sup> *Id.* at 966.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> No. 4:CV-02-1463, 2003 WL 23718302 (M.D. Pa. Sept 29, 2003), *aff'd*, 106 F. App'x. 798 (3d Cir. 2004).

<sup>96</sup> 106 F. App'x at 800.

<sup>97</sup> *Id.* at 799.

<sup>98</sup> 2003 WL 23718302 at \*2-5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*10.

<sup>101</sup> *Id.* at \*9.

<sup>102</sup> 106 F. App'x at 800.

<sup>103</sup> 526 U.S. at 650.

<sup>104</sup> *Id.* at 652.

<sup>105</sup> *Id.* at 651.

<sup>106</sup> *Id.* at 651-52.

<sup>107</sup> *See, e.g., Vance*, 231 F.3d at 256-57, 259; *Patterson*, 551 F.3d at 439-43; *Theno*, 377 F. Supp. 2d at 954-61, 968; *see also* Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 Alb. L. Rev. 147, 162-63 (2009).

<sup>108</sup> *Davis*, 526 U.S. at 652.

<sup>109</sup> *Id.* at 653-54.

<sup>110</sup> *Vance*, 231 F.3d at 257, 259.

<sup>111</sup> *Theno*, 377 F. Supp. 2d at 968.

<sup>112</sup> *See, e.g., Gabrielle M. ex rel. Theresa M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817, 823 (7th Cir. 2003) (explaining that examples of a negative impact on education may include dropping grades, or becoming homebound or hospitalized due to harassment or physical violence, but finding no evidence that plaintiff was denied access to education where her grades remained steady and her absenteeism did not increase, even though she was diagnosed with some psychological problems).

<sup>113</sup> *Davis*, 526 U.S. at 633, 650.

<sup>114</sup> *Barnes v. Gorman*, 536 U.S. 181 (2002).

<sup>115</sup> 42 U.S.C. § 12132.

<sup>116</sup> 29 U.S.C. § 794(a).

<sup>117</sup> *Barnes*, 536 U.S. at 189.

<sup>118</sup> *Id.* at 185-89; *see also Mercer v. Duke Univ.*, 50 F. App'x. 643, 644 (4th Cir. 2002) (holding that Supreme Court's conclusion in *Barnes* compels the conclusion that punitive damages are not available for Title IX claims).

<sup>119</sup> *See Cannon v. Univ. of Chicago*, 41 U.S. 677 (1979) (recognizing a private right of action for injunctive relief where plaintiff alleged discriminatory denial of admission to medical school); *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (recognizing that plaintiffs may seek injunctive relief and damages in private suits under Title VI).

<sup>120</sup> As an example of the type of injunctive relief a plaintiff with standing may want to request, see the First Amended Complaint filed in *Eccleston v. Pine Bush Central School District*, No. 7:12-cv-2303-KMK-PED (S.D.N.Y. Jan. 7, 2013), *available at* <http://publicjustice.net/sites/default/files/downloads/Eccleston-v-Pine-Bush-First-Amended-Complaint-7Jan2013.pdf>.

<sup>121</sup> The same is true for the other program-specific federal civil rights statutes—Title VI, Title II of the ADA, and Section 504 of the Rehabilitation Act. 42 U.S.C. § 1988(b).

<sup>122</sup> 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

<sup>123</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1988); *Cannon*, 441 U.S. at 694-96 (“Title IX was patterned after Title VI . . . . Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefited class . . . . The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.”).

<sup>124</sup> *Alexander*, 532 U.S. at 281.

<sup>125</sup> See, e.g., *Zeno*, 702 F.3d at 665 n.10; *Bryant*, 334 F.3d at 934.

<sup>126</sup> *Zeno*, 702 F.3d 655.

<sup>127</sup> *Id.* at 658-59.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 671, 673.

<sup>131</sup> *Id.* at 666-67.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 667.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 660, 667.

<sup>138</sup> *Id.* at 667.

<sup>139</sup> *Id.* at 664, 666. There was no question that the district had actual knowledge of the ongoing harassment. The harassment was reported by faculty and staff members, Anthony, his mother (who contacted school administrators between 30 and 50 times), and various third parties (including the police, Anthony’s attorney, and a local N.A.A.C.P. chapter). *Id.* at 668.

<sup>140</sup> *Id.* at 668-71.

<sup>141</sup> *Id.* at 662-63, 668.

<sup>142</sup> *Id.* at 669.

<sup>143</sup> *Id.* at 669 (citing *Vance*, 231 F.3d at 262).

<sup>144</sup> *Id.* at 669.

<sup>145</sup> *Id.* at 670.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* In fact, the district refused the local N.A.A.C.P.'s offer to conduct a more comprehensive racial sensitivity training program and a "shadow" to accompany Anthony at school for free. *Id.* at 660. The jury was entitled to compare these alternatives with the district's programs when evaluating the adequacy of the district's response. *Id.* at 670.

<sup>149</sup> *Id.* at 671.

<sup>150</sup> *See, e.g., Davis*, 526 U.S. at 648.

<sup>151</sup> The Tenth Circuit has also decided a Title VI deliberate indifference case which supports the view that plaintiffs can establish liability when schools fail to respond appropriately to egregious bullying. *Bryant*, *supra*, 334 F.3d 928. In *Bryant*, the Tenth Circuit held that, under Title VI, plaintiffs could prove intentional discrimination by showing that a school district had been deliberately indifferent to "a racially hostile educational environment." *Id.* at 933. The plaintiffs in *Bryant* were high school students who claimed that the district discriminated against them by permitting rampant race-based peer harassment of all African-American students. *Id.* at 931. Despite complaints by students and parents, the district did nothing to stop white male students from using offensive racial slurs and epithets, carving "KKK" and swastikas in school furniture, placing racist notes in African-American students' lockers and notebooks, and wearing t-shirts adorned with confederate flags, nooses, KKK symbols and swastikas. *Id.* at 931-32. Even though the plaintiffs did not allege that they had been specifically harassed by their peers, the Tenth Circuit held that school administrators' choice to sit idly by when they are aware of egregious acts of discrimination by students in their charge may subject a district to a Title VI claim for deliberate indifference to peer harassment. *Id.* at 933-34. Noting that intent is a fact question for a jury, the Tenth Circuit reversed summary judgment for the school district and remanded the case to the district court with instructions to apply the deliberate indifference test in *Davis*. *Id.*

<sup>152</sup> *Zeno*, 702 F.3d at 673 & n.17.

<sup>153</sup> *Id.*

<sup>154</sup> 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .").

<sup>155</sup> 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").



<sup>156</sup> U.S. Department of Education, OCR, Dear Colleague Letter: Reminder of Responsibilities under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (July 25, 2000), available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> 20 U.S.C. § 1412(a)(1)(A) (With some limitations “[a] State is eligible for assistance under this subchapter . . . if the State submits a plan that . . . the State has in effect policies and procedures to ensure that . . . [a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . . including children with disabilities who have been suspended or expelled from school.”).

<sup>160</sup> OCR Dear Colleague Letter: Reminder of Responsibilities under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, *supra* note 156, available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

<sup>161</sup> *Id.*

<sup>162</sup> 29 U.S.C. § 794a(a)(2) (“The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964. . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [Section 504].”); 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II].”).

<sup>163</sup> Plaintiffs alleging discrimination claims under Title II and Section 504 must make out a prima facie case of disability discrimination by proving that they are (1) disabled as defined by the statutes; (2) “otherwise qualified” for a benefit or participation in a program covered by the statutes; and (3) were denied the benefits or subjected to discrimination under the program by reason of their disability. *S.S. v. E. Ky. Univ.*, 532 F.3d at 453; *K.M. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d at 359; 42 U.S.C. § 12111(8).

<sup>164</sup> *See* 42 U.S.C. § 12102(1) (“The term ‘disability’ means, with respect to an individual--(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or(C) being regarded as having such an impairment (as described in paragraph (3))”). To prove disability discrimination in education, plaintiffs must show that the school district refused to provide them with a reasonable accommodation of their disability. *Stewart v. Waco Indep. Sch. Dist.*, F.3d, No. 11-51067, 2013 WL 1091654, at \*3 (5th Cir. Mar. 14, 2013). Plaintiffs must administratively exhaust certain claims under Section 504 and Title II, if they seek relief that is also available under the IDEA. 20 U.S.C. § 1415(l) (“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], . . . the Rehabilitation Act of 1973 . . . or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.”).

<sup>165</sup> There are some differences between Section 504 and Title II, but we are analyzing them together here because courts have “equated” their liability standards. *See D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010) (“Because this court has equated liability standards under § 504 and the ADA, we evaluate D.A.’s claims under the statutes together.”). One key difference between the statutes is that Section 504 prohibits discrimination “solely by reason” of disability, whereas Title II applies even where the “discrimination is not the sole reason for the exclusion or denial of benefits.” *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005).

<sup>166</sup> *See, e.g., S.S.*, 532 F.3d at 452-53; *Moore v. Chilton Cnty. Bd. of Educ.*, *\_F. Supp. 2d\_*, No. 12-cv-424-WKW, 2013 WL 1278525, at \*11-12 (M.D. Ala. Mar. 27, 2013); *Long v. Murray Cnty. Sch. Dist.*, No. 10-cv-00015-HLM, 2012 WL2277836, at \*25-26 (N.D. Ga. May 21, 2012); *Werth v. Bd. of Dirs. of the Pub. Sch. of Milwaukee*, 472 F. Supp. 2d 1113, 1127 (E.D. Wis. 2007); *K.M.*, 381 F. Supp. 2d at 359; *Biggs v. Bd. of Educ. of Cecil Cnty.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

<sup>167</sup> *See, e.g., Stewart*, 2013 WL 1091654, at \*6-7; *M.P. v. Indep. Sch. Dist. No. 721 (“MP II”)*, 439 F.3d 865, 867-68 (8th Cir. 2006).

<sup>168</sup> *S.S.*, 532 F.3d at 454 (emphasis added).

<sup>169</sup> *See, e.g., Long*, 2012 WL 2277836, at \*26-27 (interpreting “severe and pervasive” prong of test according to *Davis*, 526 U.S. at 650-51 and *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1288 (11th Cir. 2003)).

<sup>170</sup> *See, e.g., Stewart*, 2013 WL 1091654, at \*6-9; *MP II*, 439 F.3d at 867-68; *M.P. v. Indep. Sch. Dist. No. 721 (“MP I”)*, 326 F.3d 975, 982 (8th Cir. 2003).

<sup>171</sup> *MP I*, 326 F.3d 975.

<sup>172</sup> 326 F.3d at 977-79.

<sup>173</sup> *Id.* at 982.

<sup>174</sup> *Id.* at 979.

<sup>175</sup> *Id.* at 982.

<sup>176</sup> *MP II*, 439 F.3d at 868.

<sup>177</sup> *Id.*

<sup>178</sup> 2013 WL 1091654, at \*7-8.

<sup>179</sup> *Id.* at \*1.

<sup>180</sup> *See* 20 U.S.C. § 1401(14) (“The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of [the IDEA].”).

<sup>181</sup> *Stewart*, 2013 WL 1091654, at \*1.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at \*2.

<sup>186</sup> *Id.* at \*3.

<sup>187</sup> *Id.* at \*6.

<sup>188</sup> *Id.* at \*7-8 (citations omitted).

<sup>189</sup> *Id.* at \*7.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at \*8.

<sup>192</sup> 20 U.S.C. § 1401(14) (“The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.”).

<sup>193</sup> The definition of “child with a disability” under the IDEA is more restricted than the definition of “disability” under Section 504 and Title II, because it does not cover children with “perceived impairments.” 20 U.S.C. § 1401(3)(A)(i) (“The term ‘child with a disability’ means a child . . . with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”)

<sup>194</sup> *See M.P. II*, 439 F.3d at 868; *Shore Reg’l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194,198 (3d. Cir. 2004) (internal quotations omitted) (The IEP must be “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.”); *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 107 (2d Cir. 2007) (internal quotations omitted) (IEP must be “tailored to meet the unique needs of a particular child.”).

<sup>195</sup> It is beyond the scope of this primer to address the details of the administrative and equitable remedies available under the IDEA.

<sup>196</sup> *See* 20 U.S.C. § 1415(e),(f).

<sup>197</sup> 20 U.S.C. § 1415(i)(2)(A) (“Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.”).

<sup>198</sup> 20 U.S.C. § 1415(i)(3)(B).

<sup>199</sup> See *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir. 2002); *Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321, 1326 (11th Cir. 2005).

<sup>200</sup> See, e.g., *T.K. v. N.Y.C. Dept. of Educ.*, 779 F. Supp. 2d 289, 312 (E.D.N.Y. 2011); see, e.g., *Smith v. Guilford Bd. of Educ.*, 226 F. App'x 58, 63-64 (2d Cir. 2007) (vacating district court's dismissal of a claim that a school district violated the statutory right to a FAPE brought by a student with Attention Deficit and Hyperactivity Disorder who was bullied because of his diminutive stature); *Shore Reg'l High Sch. Bd. of Educ.*, 381 F.3d at 199-200 (district court failed to give "due weight" to an administrative law judge's determination that keeping a student at a high school within the school district, as opposed to a high school outside of the district, would continue to subject the student to the anti-gay bullying that he had experienced during middle school).

<sup>201</sup> *Id.* at 316; see also Ilann M. Maazel, *Bullying and the Individuals with Disabilities Education Act*, N.Y.L.J. July 22, 2011, at 7.

<sup>202</sup> *T.K.*, 779 F. Supp. 2d at 316.

<sup>203</sup> *Id.* at 315.

<sup>204</sup> *Id.* at 317.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 316.

<sup>211</sup> *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2005).

<sup>212</sup> *Id.* at 651.

<sup>213</sup> *Id.* at 651.

<sup>214</sup> David Ellis Ferster, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 Ga. L. Rev. 191, 212 (2008).

<sup>215</sup> *Shore Reg'l High Sch. Bd. of Educ.*, 381 F.3d at 199-200.

<sup>216</sup> U.S. Const. amend. XIV, § 1.

<sup>217</sup> 42 U.S.C. § 1983 provides that:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>218</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978).

<sup>219</sup> *Smith v. Wade*, 461 U.S. 30, 35-36 (1983).

<sup>220</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

<sup>221</sup> See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (although there was no statute or regulation on point, case law was sufficient to render the law “clearly established”); *Nabozny v. Podlesny*, 92 F.3d 446, 456-58 (7th Cir. 1996) (noting that “[u]nder the doctrine of qualified immunity, liability is not predicated upon the existence of a prior case that is directly on point,” and denying administrators a grant of qualified immunity because “reasonable persons in [their] positions in 1988 would have concluded that discrimination . . . based on . . . sexual orientation was unconstitutional.”); *K.M. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d at 363 (holding that, following the Supreme Court’s ruling in *Davis*, “‘competent’ public school teachers and administrators would know they could be held liable for peer disability harassment”).

<sup>222</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>223</sup> *Id.* at 691.

<sup>224</sup> See *id.* at 694; *Flores*, 324 F.3d at 1134-35 (stating that record showed the school district failed to enforce its own anti-harassment policies when the harassment was directed at students’ perceived sexual orientation in violation of victims’ rights to equal protection); *Nabozny*, 92 F.3d at 455 (“The defendants concede that they had a policy and practice of punishing perpetrators of battery and harassment. It is well settled law that departures from established practices may evince discriminatory intent.”)

<sup>225</sup> See, e.g., *Flores*, 324 F.3d at 1136 (based on evidence that administrators failed to train teachers about sexual harassment policies, and failed to disseminate policies to students despite awareness of a sexual harassment problem, “[a] jury may conclude . . . that there was an obvious need for training and that the discrimination the plaintiffs faced was a highly predictable consequence of the defendants not providing that training”).

<sup>226</sup> U.S. Const. amend. XIV, § 1.

<sup>227</sup> *Harris v. McRae*, 448 U.S. 297, 322 (1980).

<sup>228</sup> *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

<sup>229</sup> *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

<sup>230</sup> See, e.g., *DiStiso v. Cook*, 691 F.3d 226, 240-41 (2d Cir. 2012) (equal protection claims for peer harassment based on race may be established by showing deliberate indifference); *Flores*, 324 F.3d at 1134-35 (equal protection claims for peer harassment based on sexual orientation may be established by showing deliberate indifference); *Nabozny*, 92 F.3d at 460 (equal protection claims for peer harassment based on sexual orientation and gender may be established by showing deliberate indifference); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1250-51 (10th Cir. 1999) (equal protection claims for peer sexual harassment may be established by showing deliberate indifference).

<sup>231</sup> Compare, e.g., *DiStiso*, 691 F.3d 240-41 (analyzing equal protection claim under deliberate indifference standard without addressing whether defendants responded to African-American plaintiff's complaints of peer harassment differently than they responded to white students' complaints of peer harassment) with *Nabozny*, 92 F.3d at 453-54, 457 (to establish equal protection violation, plaintiff must show defendants treated his complaints of peer harassment differently than complaints by other students, because of his gender or sexual orientation); *Flores*, 324 F.3d at 1134-35 (to establish equal protection violation, plaintiffs must show defendants treated their complaints of peer harassment differently than complaints by other students, because of plaintiffs' sexual orientation); and *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445, 457-58 (10th Cir. 2008) (to establish equal protection violation, plaintiffs must show defendants treated their complaints of peer harassment differently than complaints by other students, because of plaintiffs' disabilities). Notably, other than *Nabozny*, all of these equal protection cases were decided after *Davis*, when the Supreme Court articulated the deliberate indifference test for peer harassment under Title IX.

<sup>232</sup> *DiStiso*, 691 F.3d 240-41.

<sup>233</sup> *Id.* at 241-43.

<sup>234</sup> *Nabozny*, 92 F.3d at 454-58.

<sup>235</sup> *Id.* at 449.

<sup>236</sup> *Id.* at 452.

<sup>237</sup> *Id.* at 449.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 449, 456, 458.

<sup>240</sup> *Id.* at 454-55.

<sup>241</sup> *Id.* at 457-58.

<sup>242</sup> *Adarand Construction Inc. v. Peña*, 515 U.S. 200, 227 (1995) (categories based on race subject to strict scrutiny); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (gender-based categories subject to heightened scrutiny).

<sup>243</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996) (applying rational basis scrutiny to statute that made distinctions based on sexual orientation); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442

(1985) (applying rational basis scrutiny to distinctions based on disability); *Vance v. United States*, 434 F. Supp 826, 835 (N.D. Tex. 1977) (weight is not a suspect category requiring heightened scrutiny).

<sup>244</sup> U.S. Const. amend. XIV, § 1.

<sup>245</sup> The Due Process Clause gives individuals both substantive and procedural rights against state governments. *United States v. Salerno*, 481 U.S. 739, 746 (1987). Generally speaking, peer harassment cases implicate substantive due process rights. The only circumstance in which peer harassment may implicate procedural due process rights is when the victim can demonstrate that the school's failure to respond appropriately to the harassment by deprived him of a public education. This is because some states treat a student's right to a public education as a property interest protected by the Fourteenth Amendment. See, e.g., *Smith v. Guilford Bd. of Educ.*, 226 F. App'x 58, 62 (2d Cir. 2007); *Handberry v. Thompson*, 436 F.3d 52, 70-71 (2d Cir. 2006). Although a procedural due process claim is theoretically available in these limited circumstances, such claims have yet to be successful. See, e.g., *Smith* 226 F. App'x at 63 (bullying victim's allegation that harassment deprived him of "the ability to enjoy the friendships he established with students" at school failed to state a procedural due process claim).

<sup>246</sup> *United States v. Salerno*, 481 U.S. 739, 746 (1987) (internal quotations omitted).

<sup>247</sup> 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." ).

<sup>248</sup> *Id.* at 200.

<sup>249</sup> *Id.* at 199.

<sup>250</sup> See, e.g., *Hasenfus v. LaJeuunesse*, 175 F.3d 68, 71-74 (1st Cir. 1999); *Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 569 (11th Cir. 1997); *T.K.*, 779 F. Supp. 2d at 307-08.

<sup>251</sup> See, e.g., *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006) ("To bring a 'state created danger' claim, the individual must show: '(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.'").

<sup>252</sup> See *Scruggs v. Meriden Bd. of Educ.*, 3:03-CV-2224 (PCD), 2007 WL 2318851, at \*12 (D. Conn. Aug. 10, 2007) ("The boundaries of the state created danger exception to *DeShaney* are not entirely clear, but the exception does require a government defendant to either be a substantial cause of the danger or at least enhance it in a material way.") (internal quotations omitted).

<sup>253</sup> *Jones*, 438 F.3d at 690.

<sup>254</sup> See *id.* at 691; *Nabozny*, 92 F.3d at 460.

<sup>255</sup> No. 04-cv-1653, 2007 WL 4570970 (E.D. Pa. Dec. 27, 2007).

<sup>256</sup> *Id.* at \*2, 8-9

<sup>257</sup> *Id.* at \*1.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at \*2.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at \*8 (“[A] state-created danger claim may be established where the following four elements are established: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff or with a degree of culpability that shocks the conscience; (3) there existed some relationship between the state and the plaintiff such that the plaintiff was a foreseeable victim of the defendant’s acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions, as opposed to a member of the public in general; and (4) that the state actors affirmatively used their authority to create a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.” (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1208-1209 (3d Cir.1996)).

<sup>266</sup> *Enright*, 2007 WL 4570970 at \*9.

<sup>267</sup> *Id.*

<sup>268</sup> *Nabozny*, 92 F.3d at 460.

<sup>269</sup> *Id.*

<sup>270</sup> *See supra* note 1.

<sup>271</sup> *See, e.g.*, Ohio Rev. Code Ann. § 3313.666 (2010) (making clear that anti-bullying law “does not create a new cause of action of substantive legal right for any person”).

<sup>272</sup> *See, e.g.*, *Smith v. Poughkeepsie City Sch. Dist.*, 41 A.D.3d 579, 580-81 (N.Y. App. Div. 2007) (negligent supervision claim against school district for failing to prevent student’s assault).

<sup>273</sup> *See, e.g.*, N.Y. Civ. Rights Law § 40-d (“No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil rights, or to any harassment . . . in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.”); D.C. Code § 2-1402.41(1) (“It is unlawful discrimination for an educational institution to discriminate based on actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender



identity or expression, familial status, family responsibilities, political affiliation, source of income, or disability.”)

<sup>274</sup> See, e.g., *M.W. v. Panama Buena Union Sch. Dist.*, 110 Cal. App. 4th 508, 521, 525 (Cal. Ct. App. 2003) (judgment entered on negligent failure to supervise claim because school district owed special education student a duty of care to protect from a classmate’s sexual assault); *Phillips ex rel. Gentry v. Robertson Cnty. Bd. of Educ.*, No. M2012-00401-COA-R3-CV, 2012 WL 3984637 at \*6-7 (Tenn. Ct. App. Sept. 11, 2012) (affirming trial court’s judgment of \$300,000 for negligence claim in peer bullying case).

<sup>275</sup> See, e.g., *L.W. v. Toms River Regional Sch. Bd. of Educ.*, 915 A.2d 535, 549-50 (N.J. 2007) (school district may be found liable under New Jersey Law Against Discrimination for peer harassment when “school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment.”)

<sup>276</sup> See, e.g., *Smith v. Poughkeepsie City Sch. Dist.*, 41 A.D.3d 579, 580-81 (N.Y. App. Div. 2d Dept. 2007) (negligent supervision claim based on district’s alleged knowledge of student’s history of bullying); *Ward v. Barnes*, 545 F. Supp. 2d 400, 416 (D.N.J. 2008) (teacher not immune for negligent supervision where he allegedly directed or witnessed assault of student by fellow students).

<sup>277</sup> See, e.g., 745 Ill. Comp. Stat. 10/3-108(b) (no liability for failure to supervise unless public entity or employee has a duty to provide supervision under common law or statute and is guilty of willful and wanton conduct).

<sup>278</sup> See, e.g., *Ward*, 545 F. Supp. 2d at 412-14 (permitting claim for intentional infliction of emotional distress against teacher who witnessed or directed peer bullying); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 957 (S.D. Ind. 2007) (permitting claim for negligent infliction of emotional distress against school district in peer bullying case).

<sup>279</sup> See *Ward*, 545 F. Supp. 2d at 418-19; *Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th at 515-16, 525 (Cal. Ct. App. 2003) (affirming an award of damages for post-traumatic stress); *Ortega v. Pajaro Valley Unified Sch. Dist.*, 64 Cal. App. 4th 1023, 1061 (Cal. App. Ct. 1998) (damages for pain, suffering, and humiliation available against school district); *Angel v. Levittown Union Free Sch. Dist. No. 5*, 171 A.D.2d 770, 773-74 (N.Y. App. Div. 1991) (compensatory and punitive damages available in tort action against school district).

<sup>280</sup> *Kellam v. Sch. Bd. of City of Norfolk*, 117 S.E.2d 96, 97-98 (Va. 1960); *Croghan v. Fairfax Cnty. Sch. Bd.*, No. 202460, 2002 WL 1941177, at \*1-2 (Va. Cir. Ct. May 22, 2002).

<sup>281</sup> Weddle, 11 Temple L. Rev. at 684.

<sup>282</sup> See *id.* Some states, however, permit ordinary negligence claims against school districts or officials. For example, California, holds school districts liable under traditional negligence standards. See, e.g., *Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th at 516-21.

<sup>283</sup> Ohio Rev. Code Ann. § 2744.03(A)(3); § 2744.03(A)(5).

<sup>284</sup> See Weddle, 11 Temple L. Rev. at 687; Sacks & Salem, 72 Alb. L. Rev. at 188-89.

<sup>285</sup> See Weddle, 11 Temple L. Rev. at 688-89 (citing cases); Sacks & Salem, 72 Alb. L. Rev. at 189 (citing cases).

<sup>286</sup> See, e.g., N.Y. Gen. Mun. Law §§ 50-i(a) (no tort action against school district for personal injury unless plaintiff serves notice of claim upon the school district within 90 days after the claim arises); N.Y. Educ. Law § 3813(2) (no tort action against a teacher or administrative staff unless plaintiff serves notice of claim within 90 days after the claim arises).

<sup>287</sup> L.W., 915 A.2d at 547, 549.

<sup>288</sup> *Id.* at 549-50.