




2022

This Aggression Will Not Stand, Schools: The Need for Federal Legislation Protecting Bullied Students with Disabilities

Russell A. Vogel
Touro Law Center

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), [Education Law Commons](#), [Fourteenth Amendment Commons](#), and the [Torts Commons](#)

Recommended Citation

Vogel, Russell A. (2022) "This Aggression Will Not Stand, Schools: The Need for Federal Legislation Protecting Bullied Students with Disabilities," *Touro Law Review*. Vol. 38: No. 3, Article 10.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol38/iss3/10>

This Note is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

**THIS AGGRESSION WILL NOT STAND, SCHOOLS: THE
NEED FOR FEDERAL LEGISLATION PROTECTING BULLIED
STUDENTS WITH DISABILITIES**

*Russell A. Vogel**

ABSTRACT

A boy with Autism comes home from school, visibly upset. His parents ask him why, and he responds that nobody in his class likes him. To his parents' horror, they learn that their son's teacher encouraged a class discussion about why they dislike their son. When the boy's parents complain to the school about this issue, school administrators brush it aside. The next day, students sitting near the boy move their desks away from him and taunt him for the way he acts every time he tries to socialize with them. The boy then refuses to go to school each morning, and his grades plummet. Students continue to tease the boy, feeling as if their teacher gave them permission to do so. When the boy's parents go back to the principal looking for a solution, they are again dismissed. With no remedy in sight and unable to afford a private school, the boy's parents feel that they have no other choice but to keep the child in the school, where his grades and mental health continue to take a toll.

* J.D. Candidate 2022, Touro University Jacob D. Fuchsberg Law Center; B.A. in Psychology, Hofstra University, 2016; M.S. in Neuroscience, Stony Brook University, 2019. I want to thank my Faculty Advisor, Professor Melina A. Healey, for her guidance in the creation of this Note, and for helping me further my interest in Special Education Law. I want to thank my Note Editors, Hayley Valla, Taylor Bialek and Michele Abatangelo, for their wonderful feedback throughout the writing process. I want to thank the entire Touro Law Review staff, including Professor Rena C. Sepowitz, for all their assistance and for tolerating my cheesy jokes. I want to thank my parents and brothers for their never-ending support, especially my mom Debra M.L. Vogel, Esq. for inspiring me to go to law school. Finally, I want to thank my late grandparents, Phyllis B. Levitt and Leon I. Levitt, Esq., for watching over me and always believing in me. I miss you both tremendously.

The aforementioned vignette illustrates aspects of real-life scenarios faced by students with disabilities who experience bullying. While current legal remedies are available to mitigate the effects of bullying, they fall short of protecting students with disabilities. A cohesive piece of legislation is needed to provide students with disabilities uniform protections and rights when they experience bullying.

I. INTRODUCTION

Bullying interferes with a student's ability to learn and compounds the challenges faced by students with physical, developmental, intellectual, emotional, and sensory disabilities.¹ One in five U.S. students ages twelve to eighteen report that they have experienced bullying,² and students with disabilities are up to one-and-a-half times more likely to experience bullying than their nondisabled peers.³ Because students with disabilities stand out from other students, they are likely more susceptible to bullying and are at a high risk of being repeatedly bullied once they become a victim.⁴ Developmental disabilities and learning disabilities often affect how an individual behaves and appears, making it more challenging to interact with peers. Thus, students with disabilities are prone to social isolation, rejection, and bullying from other classmates, which can lead to poorer academic performance and decreased motivation to attend school.⁵ In addition to peer bullying, teachers and school faculty also may bully vulnerable students.⁶

Across the nation, bullied students with disabilities face inconsistencies in due process and remedies. The Individuals with Disabilities Education Act (IDEA)⁷ requires that schools provide a

¹ COMM. ON THE BIOLOGICAL & PSYCHOSOCIAL EFFECTS OF PEER VICTIMIZATION: LESSONS FOR BULLYING PREVENTION ET AL., PREVENTING BULLYING THROUGH SCIENCE, POLICY, AND PRACTICE (Frederick Rivara & Suzanne Le Menestrel eds., 2016) [hereinafter PREVENTING BULLYING]; U.S. Dep't of Health & Hum. Servs., *Bullying and Youth with Disabilities and Special Health Needs*, STOPBULLYING.GOV, <https://www.stopbullying.gov/bullying/special-needs> (last updated July 21, 2020).

² Nat'l Ctr. for Educ. Stat., *Student Reports of Bullying: Results From the 2017 School Crime Supplement to the National Crime Victimization Survey*, NAT'L CTR. FOR EDUC. STAT. (July 2019), <https://nces.ed.gov/pubs2019/2019054.pdf>.

³ Jamilia J. Blake et al., *National Prevalence Rates of Bully Victimization Among Students with Disabilities in the U.S.*, 27 SCH. PSYCH. Q. 210, 210 (2012).

⁴ See U.S. Dep't of Health & Hum. Servs., *supra* note 1.

⁵ Blake et al., *supra* note 3; PREVENTING BULLYING, *supra* note 1, at 93.

⁶ See Mark C. Weber, *Disability Harassment in the Public Schools*, 13 WM. & MARY L. REV. 1079 (2002).

⁷ Pub. L. No. 101-476, codified as 20 U.S.C. §§ 1400-1482. In 1975, President Gerald Ford signed into law the Education for All Handicapped Children Act (Public Law 94-142), which became known as the IDEA in 1990 when it was reauthorized. The IDEA was last reauthorized in 2004. U.S. Dep't of Educ., *A History of the Individuals With Disabilities Education Act*, IDEA: INDIVIDUALS WITH DISABILITIES EDUC. ACT, <https://sites.ed.gov/idea/IDEA-History> (last updated Mar. 18, 2022).

Free Appropriate Public Education (FAPE) to students with disabilities.⁸ However, only five federal circuits, specifically the Second, Third, Seventh, Eighth, and Ninth Circuits, have recognized a cause of action due to a school district's failure to provide a FAPE to a disabled student based on experiences of bullying.⁹ Section 504 of the Rehabilitation Act¹⁰ and Title II of the Americans with Disabilities Act (ADA)¹¹ also provide safeguards against bullying for students with disabilities, albeit to a lesser extent than the IDEA.¹²

Students with disabilities can also seek remedies to bullying via tort law and state statutes. School districts can be held liable under tort law if such bullying occurred due to the negligence of the school staff or district administrators.¹³ State statutes, such as New York's Dignity for All Students Act (DASA), seek to provide additional protections to students with disabilities by aiming to prevent bullying and harassment in schools.¹⁴ However, such legislation has shortcomings in protecting students with disabilities.¹⁵

While there are a variety of legal avenues open for bullied students with disabilities, the policies currently in place are insufficient to protect all American students with disabilities from bullying. Not every child with a disability is entitled to make a claim under the

⁸ The IDEA does not give specific definitions as to what constitutes a "free and appropriate public education" or a "denial of a free and appropriate public education." Such definitions of each are subject to judicial interpretation. *See infra* Part II. The Supreme Court of the United States gave an approximate definition for a "free appropriate public education" under IDEA in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017), holding that the IDEA requires schools to provide an education that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

⁹ Sarah H. Ganley, Note, *Bullying and the Individuals with Disabilities Education Act (IDEA): A Framework for Providing Relief to Students with Disabilities*, 38 CARDOZO L. REV. 305 (2016).

¹⁰ 29 U.S.C. § 794.

¹¹ 42 U.S.C. §§ 12131-12165.

¹² *See infra* Part IV.

¹³ *See infra* Part III.

¹⁴ 2010 N.Y. Laws 482 (codified at N.Y. EDUC. LAW §§ 10-18 (McKinney 2012)).

¹⁵ OFF. OF THE NEW YORK STATE COMPTROLLER, IMPLEMENTATION OF THE DIGNITY FOR ALL STUDENTS ACT (FOLLOW-UP), 2019-F-32, at 2 (2019) ("[C]ertain schools may not accurately report some DASA incidents or may not report them at all, and incident records often were not adequate to clearly demonstrate whether or not the incidents were reportable.").

IDEA.¹⁶ Furthermore, a student who is covered under the IDEA might not reside within a circuit that recognizes bullying as a violation of FAPE under the IDEA. State anti-bullying statutes also vary in the means and amount of protection that they offer for students with disabilities.¹⁷

This Note argues that there should be a federal anti-bullying statute for disabled students that would protect all students with disabilities. This Note also assesses the liability of school districts for bullied students with disabilities under federal law, tort law, and state anti-bullying statutes, and proposes federal legislation that would specifically prevent and remedy bullying experienced by disabled students. This proposed piece of federal legislation¹⁸ provides students access to anti-bullying remedies at the federal level, regardless of that student's disability classification, in an attempt to even the playing field for all disabled students who are bullying victims.

II. IDEA CAN PROVIDE COMPENSATORY EDUCATION TO BULLIED STUDENTS WITH DISABILITIES, YET STILL HAS LIMITATIONS BASED ON JURISDICTION

The IDEA requires every school district to provide a FAPE to students with classified disabilities.¹⁹ Section 300.8 of the IDEA Part B Regulations²⁰ defines a child with a disability as:

[A] child evaluated in accordance with §§300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-

¹⁶ To be covered under the IDEA, a student must have a disability that falls into one of the listed categories and that disability has to be deemed severe enough that the child is in need of special education services. *See infra* Part II.

¹⁷ *See* U.S. Dep't of Health & Hum. Servs., *Laws, Policies & Regulations*, STOPBULLYING.GOV, <https://www.stopbullying.gov/resources/laws> (last updated Sept. 9, 2021).

¹⁸ *See infra* Section VI.

¹⁹ *See supra* note 10.

²⁰ 34 C.F.R. § 300.

blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.²¹

Suppose a school district finds a student to be classified under the IDEA. In that case, the district's Committee on Special Education (CSE) develops an individualized education program (IEP) to provide a FAPE for that child.²² Before filing a suit based on an alleged violation of the IDEA, an exhaustion of administrative remedies is typically required, where the parent or guardian of a student must challenge the IEP at a CSE meeting, and then go to an impartial hearing if unsatisfied with the CSE's opinion.²³ A parent or guardian who is unsatisfied with the impartial hearing officer's decision can appeal the decision to the state educational agency.²⁴ Notably, whether an exhaustion of administrative remedies is required for an IDEA claim varies among circuits. For example, the Third Circuit has held that a person bringing a claim under the IDEA for denial of FAPE can be exempt from exhaustion of remedies "where: (1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant relief; [or] (4) exhaustion would cause severe or irreparable harm."²⁵

The IDEA's role in protecting students against bullying is heterogeneous, as federal circuits have varying opinions over whether bullying is a denial of FAPE and what scenarios a complaint under the IDEA can be made. If a student has been denied a FAPE under the IDEA, the remedy commonly provided is compensatory education, in which the district pays for programs that help the child whose academic achievement was deemed to be at-risk.²⁶ Such services can constitute different services within a school to placements within an

²¹ *Id.* § 300.8. Each subsection of the IDEA Part B Regulations provides information regarding the evaluation process. Such information covered by these subsections are evaluation procedures (§ 300.304), requirements for evaluations and reevaluations (§ 300.305), determination of eligibility (§ 300.306), specific learning disabilities (§ 300.307), the individuals involved (§ 300.308), determination of the existence of a specific learning disability (§ 300.309), observation procedure (§ 300.310), and specific documentation for eligibility determination (§ 300.311).

²² 20 U.S.C. § 1401.

²³ *Id.* § 1415.

²⁴ *Id.*

²⁵ *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 275 (3d Cir. 2014) (citing *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d at 778).

²⁶ *See Brandywine Heights Area Sch. Dist. v. B.M. by & through B.M.*, 248 F. Supp. 3d 618, 621 (E.D. Pa. 2017).

entirely different school district. Federal circuit courts of appeals have varying opinions as to what constitutes a denial of FAPE and when compensatory education and/or other forms of equitable relief should be granted to bullied students with disabilities.²⁷ The dissimilarity between the federal circuits makes it difficult for widespread reforms regarding the protection of students with disabilities, and the lack of uniformity for administrative exhaustion complicates the ability to create a single, nationwide process to provide relief from bullying. Still, it does give an insight into the need for a centralized piece of legislation that addresses this issue for all disabled students in schools across America.

A. Second Circuit

The Second Circuit suggested that bullying might constitute a violation of FAPE under the IDEA in *T.K. v. New York City Department of Education*.²⁸ In *T.K.*, the parents of a twelve-year-old girl with a learning disability, sued the Department of Education (DOE), claiming that their district's failure to prevent bullying deprived their daughter of FAPE under the IDEA.²⁹ Due to the bullying their child endured, L.K.'s parents withdrew L.K. from public school, enrolled L.K. in a private school, and then sought reimbursement from the DOE for one year's tuition in the private school.³⁰ On appeal by the DOE, the United States Court of Appeals for the Second Circuit noted that "[s]tates have an affirmative obligation to provide a basic floor of opportunity for all children with disabilities or, as we recently described it, an education 'likely to produce progress, not regression,' and one that 'afford[s] the student with an opportunity greater than mere trivial advancement.'"³¹ The Second Circuit affirmed the ruling of the District Court for the Eastern District of New York, holding that the district's refusal to discuss the bullying of L.K. during the process of developing L.K.'s IEP violated the IDEA.³²

²⁷ See *infra* Section IIA – IIE.

²⁸ 810 F.3d 869 (2d Cir. 2016).

²⁹ *Id.*

³⁰ *Id.* at 873-74.

³¹ *Id.* at 875 (quoting *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236, 239 (2d Cir. 2015)).

³² *Id.* at 872.

While the Second Circuit held in *T.K.* that bullying may constitute a denial of a FAPE under the IDEA, the court ruled on the basis of the procedural violations by the DOE.³³ The court did not address the issue of whether the bullying L.K. experienced was so severe that the failure to address it in L.K.'s IEP constituted a substantive denial of a FAPE.³⁴ Because *T.K.* only addressed the district's procedural violations, the Second Circuit "express[ed] no opinion as to whether the District Court's four-part test for determining when bullying results in the substantive denial of a FAPE correctly states the law."³⁵

B. Third Circuit

In *Shore Regional High School Board of Education v. P.S. ex rel. P.S.*,³⁶ the court held that a high school student classified with a disability was denied a FAPE under the IDEA due to the bullying the student experienced.³⁷ However, the court based its holding on the district court's failure to rely on preliminary evaluations of witness credibility, as well as the existence of conflicting expert testimony.³⁸ The ruling of the Circuit Court of Appeals is distinct from that of other Circuits, as the court's holding was based predominantly on the trial court's disregard of the weakness of the school district's witnesses. *Shore Regional* implies the existence of an elevated standard in the Third Circuit for future cases, where the court might place an emphasis on determining the reliability of the sources that a district used to classify a student.

³³ *Id.* at 877.

³⁴ *T.K.*, 810 F.3d at 876 n.3.

³⁵ *Id.* (citing *T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 314 (E.D.N.Y. 2011)) ("This . . . test requires an inquiry into whether: 1) the plaintiff is an individual with a disability who was harassed because of that disability; 2) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive environment; 3) the defendant knew about the harassment; and 4) the defendant was deliberately indifferent to the harassment.").

³⁶ 381 F.3d 194 (3d Cir. 2004).

³⁷ *Id.*

³⁸ *Id.* at 200; see Ganley, *supra* note 9, at 321.

C. Seventh Circuit

The Seventh Circuit's IDEA bullying case is unique in that its holding was overruled by a subsequent Supreme Court decision.³⁹ The case, *Charlie F. by Neil F. v. Board of Education of Skokie School District 68*,⁴⁰ involved a fourth grade boy named Charlie whose disabilities drew the attention of classmates.⁴¹ After his teacher encouraged the class to vent their feelings about him, Charlie was subject to harassment from his peers.⁴² Charlie's parents sued the district, teacher, and superintendent for violation of a FAPE under 42 U.S.C. § 1983, the Rehabilitation Act, ADA, and state tort law.⁴³

The court held that the harassment Charlie endured could be a basis for finding a violation of the IDEA, but did not elaborate on what type of harassment constituted a violation.⁴⁴ Additionally, the court held that "any pupil who wants 'relief that is available under' the IDEA must use the IDEA's administrative system, even if he invokes a different statute."⁴⁵ Although Charlie sought monetary compensation, which is not a remedy available under the IDEA, the court still held that an exhaustion of administrative remedies was necessary prior to filing a suit.⁴⁶ The court's reasoning behind its decision was that the IDEA would have provided relief for the issue at the heart of the complaint and that Charlie's parents should have pursued such measures before filing suit.⁴⁷

While *Charlie F.* serves as an example of the Seventh Circuit's viewpoint on the remedies available for bullied students with disabilities, its precedent was abrogated twenty-one years later with the Supreme Court case of *Fry v. Napoleon Community Schools*.⁴⁸ Interestingly, *Fry* did not involve the issue of bullying and did not directly address a violation of a FAPE under the IDEA.⁴⁹ In *Fry*, the parents of an eight-year-old girl with cerebral palsy sued the school

³⁹ See *infra* notes 40-47.

⁴⁰ 98 F.3d 989 (7th Cir. 1996).

⁴¹ *Id.*

⁴² *Id.* at 990.

⁴³ *Id.*

⁴⁴ Ganley, *supra* note 9, at 319.

⁴⁵ *Charlie F.*, 98 F.3d at 991.

⁴⁶ *Id.* at 992.

⁴⁷ *Id.*

⁴⁸ 580 U.S. 154 (2017).

⁴⁹ *Id.*

district and claimed that the school violated Title II of the ADA and Section 504 of the Rehabilitation Act after it denied the girl the right to bring her service dog to school.⁵⁰ The District Court for the Eastern District of Michigan granted the school district's motion to dismiss the suit and held that the plaintiffs had to exhaust all administrative remedies prior to commencing a civil suit, and the Sixth Circuit affirmed.⁵¹ The Supreme Court, vacating the dismissal and remanding the case, held that:

[I]f a suit brought under . . . a law [other than the IDEA] “seek[s] relief that is also available under” the IDEA, the plaintiff must first exhaust the IDEA's administrative procedures. In this case, we consider the scope of that exhaustion requirement. We hold that exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee what the Act calls a “free appropriate public education.”⁵²

The holding in *Fry* overruled the Seventh Circuit's requirement for the exhaustion of remedies, even when a complaint does not allege the denial of a FAPE under the IDEA, but it does not appear to have affected the Seventh Circuit's viewpoint that bullying can be considered a denial of a FAPE under the IDEA. *Fry* may have made it easier for students with disabilities in the Seventh Circuit to succeed on a claim of a denial of FAPE because an exhaustion of remedies is no longer required if the claim is not under the IDEA.

D. Eighth Circuit

The Eighth Circuit's IDEA bullying case provides some guidance for how the Circuit might rule on cases involving a denial of a FAPE under the IDEA, despite the court not expressly stating so in its opinion.⁵³ In *Sneitzer v. Iowa Department of Education*,⁵⁴ the court affirmed the District Court's decision that the mother of a high schooler with Autism was not entitled to tuition reimbursement for

⁵⁰ *Id.*

⁵¹ *Id.* at 155.

⁵² *Id.* at 158 (quoting 20 U.S.C. § 1412(a)(1)(A)).

⁵³ *Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942 (8th Cir. 2015).

⁵⁴ *Id.*

private school placement of her daughter under the IDEA.⁵⁵ However, this ruling has been interpreted to mean that a court can potentially find bullying to be the basis of a denial of a FAPE “when a student with a disability is subjected to ‘ongoing’ bullying or harassment, and the school fails to ‘promptly’ investigate and resolve reports of bullying.”⁵⁶

E. Ninth Circuit

The Ninth Circuit is unique in that the appellate court developed a test to determine whether the bullying experienced by a student with a disability resulted in a denial of FAPE. In *M.L. v. Federal Way School District*,⁵⁷ a boy with Autism Spectrum Disorder, intellectual disability and macrocephaly was teased by his classmates in his kindergarten class.⁵⁸ M.L.’s parents subsequently withdrew him from the school after attending for only five days and filed suit against the district alleging a denial of a FAPE under the IDEA.⁵⁹ The court, in determining whether M.L. was denied a FAPE, noted that “a student with a disability is denied a FAPE where: 1) a teacher is deliberately indifferent to the bullying, and 2) the bullying is so severe that the child derives no benefit from the special education and related services provided by the school district.”⁶⁰ By applying this test, the court determined that the bullying had not denied M.L. a FAPE because his parents: (a) failed to provide the school district with a “reasonable opportunity” to find a means to prevent the bullying; and (b) failed to demonstrate that the bullying resulted in the loss of an educational benefit.⁶¹

The differing opinions amongst the federal judicial circuits on what constitutes a violation of FAPE indicates the need for legislation that would govern all IDEA cases, regardless of where in the country the student goes to school.

⁵⁵ *Id.*

⁵⁶ Ganley, *supra* note 9, at 325.

⁵⁷ 394 F.3d. 634 (9th Cir. 2004).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Ganley, *supra* note 9, at 322-23.

⁶¹ *Id.* at 323.

III. TORT LIABILITY OF SCHOOLS AND TEACHERS UNDER IDEA

Under certain circumstances, the bullying experienced by students with disabilities can also be litigated based on tort claims. Teachers and school administrators who are aware, or reasonably could have been aware, of a student being bullied, as well as the school district, can be held liable via negligence suits. A school owes a duty to provide a FAPE to its students with disabilities, which is set forth in each student's IEP. The IEP serves as a contract between the parent of the child and the school, indicating the school's awareness of a student's disability/disabilities, long and short-term goals, the specific services that were negotiated for the child and is reviewed at least on an annual basis between parents and school personnel.⁶² However, while failure to comply with a requirement of the IDEA can constitute a violation of a FAPE under the IDEA, it will not result in tort liability as long as the elements of the standard of care have been addressed in some other manner.⁶³

Claims that a school violated a student's constitutional or statutory rights may be brought under 42 U.S.C.A. § 1983, provided that certain conditions are met.⁶⁴ Such an action may be brought in situations where the violation of a statute, which gives rise to a private right, can be proven to be the result of deliberate indifference of the public entity.⁶⁵ A suit brought under § 1983 is therefore adequate to use in a claim alleging the denial of a FAPE under IDEA when a student is effectively forced to withdraw from school due to severe bullying.⁶⁶ The greatest difficulty a student encounters on a § 1983 claim is proving that the school district's conduct, with respect to the student, created a state-related danger "which was so egregious as to shock the conscience, in that the conduct was brutal and offensive to human dignity, so as to violate the student's right to substantive due process."⁶⁷ In determining whether such a right for a student exists, a

⁶² Ralph D. Mawdsley, J.D., Ph.D., *Standard of Care for Students with Disabilities: The Intersection of Liability Under the Idea and Tort Theories*, 252 EDUC. L. REP. 527, 530 (2010).

⁶³ *Id.* (citing *Mitchell v. Special Educ. Joint Agreement Sch. Dist. No. 208*, 386 Ill. App. 3d 106, 897 N.E.2d 352 (2008)).

⁶⁴ § 45:4. Theories of liability, 4 Pattern Discovery Tort Actions § 45:4.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

“deliberate indifference” standard is used to assess the actions of the school district.⁶⁸

Another tort theory that can be pursued is intentional infliction of emotional distress (IIED).⁶⁹ The elements for such claims vary from state to state, but typically involve the use of four elements: (1) extreme or outrageous conduct; (2) an intention of causing or recklessly disregarding the likelihood of causing severe emotional distress; (3) actual suffering experienced by the person subjected to the extreme or outrageous conduct; and (4) a causal connection between the conduct and the suffering.⁷⁰ Verbal harassment or bullying can constitute outrageous conduct for the purposes of an IIED claim, so long as the proof establishes that the speaker intended to harass the victim by provoking a widespread audience to react with hostility toward the victim of humiliating or demeaning comments.⁷¹ While an IIED claim can be brought under the IDEA, this is not possible under Section 504.⁷²

Plaintiffs can use injunctive relief as a last resort, likely through the implementation of a restraining order. However, such uses are limited:

[I]njunctive relief in connection with bullying of a student victim by a student bully does not extend to include: 1. An order providing the parents of the student victim with vouchers for the child to attend school outside the district; 2. An order to compel the school district's board of education to comply with a statutory mandate to develop a policy to address the existence of

⁶⁸ *Id.*; *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907 (6th Cir. 1995) (deliberate indifference requires more “than a failure to recognize [a] high risk of harm.”).

⁶⁹ *Cf. Cardinale v. La Petite Acad., Inc.*, 207 F. Supp. 2d 1158 (D. Nev. 2002). *Contra* Black as next friend of J. D. v. Littlejohn, No. 19 C 2585, 2020 WL 469303 (N.D. Ill. Jan. 28, 2020); Nader Issa, CHICAGO SUN TIMES, *CPS to Pay \$1.25M to Mom of Bullied Student Who Attempted Suicide in 4th Grade, Later Died* (Oct. 25, 2021, 5:18 pm), <https://chicago.suntimes.com/education/2021/10/25/22745541/jamari-dent-dead-cps-public-school-settlement-suicide-bully-teirra-black>.

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

⁷¹ § 45:6. Remedies and relief; damages, 4 Pattern Discovery Tort Actions § 45:6.

⁷² *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022) (holding that punitive damages cannot be awarded for emotional distress claims made under Section 504).

bullying; or 3. Any additional relief to which equity may pertain.⁷³

The effectiveness of tortious remedies, and the applicability of injunctive relief to incidents of bullying brought upon by school employees, are questionable except in the most extreme circumstances.⁷⁴ Bullying victims might be able to hold both the school district and the teacher liable under a theory of vicarious liability if a teacher/school faculty member's bullying was carried out within the scope of employment. While such remedies are beneficial for students that experienced harm due to the negligence or intentional torts of school employees, they do not directly address how to prevent or stop the bullying experienced by the student.

IV. SECTION 504 AND TITLE II

Unfortunately, not every student with a disability qualifies for services under the IDEA. There are students with disabilities that cannot seek a remedy for bullying under the IDEA, even in Circuits where this claim is recognized. Qualification for an IEP requires a child to have a disability that meets the criteria under the IDEA, but not every student with a disability meets such criteria and are thus not covered by the protections provided by the IDEA. However, Section 504 of the Rehabilitation Act and Title II also provide some anti-bullying safeguards for students with disabilities. Unlike the IDEA, Section 504 does not require a public school to provide an IEP that meets a child's unique needs and provides the child with educational benefits. Under Section 504, fewer procedural safeguards are available to the child with a disability and the child's parents than under the IDEA.⁷⁵ The Office for Civil Rights (OCR) states that:

Under Section 504 and Title II, schools must address bullying and harassment that are based on a student's disability and that interfere with or limit a student's

⁷³ *Id.*

⁷⁴ *See* Wood v. Strickland, 420 U.S. 308 (1975) (holding that school officials are entitled to qualified good faith immunity under § 1983, but are not immune from liability for damages if they knew or reasonably should have known that an action they committed within their sphere of official responsibility violated the civil rights of a student).

⁷⁵ *Section 504 and ADA: Protecting Children with Disabilities from Discrimination*, WRIGHTSLAW, <https://www.wrightslaw.com/info/sec504.index.htm>.

ability to participate in or benefit from the services, activities, or opportunities offered by a school. Further, if any bullying or harassing behavior interferes with the ability of a student with a disability to access educational services, the situation, if uncorrected, may constitute a FAPE violation.⁷⁶

The OCR, a branch of the United States Department of Education, is responsible for the administration of Section 504 and Title II protections.⁷⁷ The OCR can investigate a school's protocols in addressing bullying.⁷⁸ In doing so, the OCR can investigate whether bullying experienced by a student with a disability resulted in a denial of FAPE under Section 504.⁷⁹ Such a process is stated by the OCR:

[W]hen a school knows or should know of bullying conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If a school's investigation reveals that bullying based on disability created a hostile environment—i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school—the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Therefore, OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.⁸⁰

⁷⁶ Off. for Civ. Rts., *Disability: Bullying and Harassment*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/dis-issue08.html>.

⁷⁷ Off. for Civ. Rts., *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>.

⁷⁸ *Id.*; see also *id.* n.6.

⁷⁹ Off. for Civ. Rts., *supra* note 77.

⁸⁰ *Id.*

It should be noted that a bullying-based denial of FAPE under Section 504 is not exclusive to bullying on the basis of that student's disability.⁸¹ Such a policy opens the door for more students with disabilities, as the bullying that they are experiencing does not necessarily have to target the student's disability to constitute a FAPE denial. This process, while distinct from that of bullying on the basis of a disability, is also quite similar. Of note is how "under Section 504, as part of a school's appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team to determine whether, as a result of the effects of the bullying, ...the student is no longer receiving FAPE."⁸² If a school detects that a student's needs have changed, "the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying."⁸³ If the bullying is so severe, an alternative educational placement can serve as one of the potential remedies under Section 504.⁸⁴

It is uncertain, however, as to what relief the OCR can provide for a student. Most of the processes involved in acquiring a 504 and/or IEP require the assistance of attorneys specialized in navigating the methods of obtaining such a classification. OCR also does not just oversee cases of students with disabilities, and it is unlikely that they would be able to monitor all schools subject to 504 and Title II to ensure that all students with disabilities are not being denied FAPE. There are also potential conflicts regarding the remedies available amongst federal law and state anti-bullying laws, and whether OCR would be willing to navigate such conflicts of laws.⁸⁵ Therefore, the

⁸¹ *Id.*

⁸² *Id.* at 5-6 (mentioning how "the effects of bullying include adverse changes in a student's academic performance and behavior").

⁸³ *Id.*

⁸⁴ *Id.* at 5 ("In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.").

⁸⁵ An example of this would be a federal diversity suit filed in New York by an out-of-state student attending a New York boarding school that receives public funding. It is unclear whether DASA allows a private right of action, and a private action suit brought via claims under DASA and § 1983 would only be able to commence with both claims if filed in a U.S. District Court that acknowledges a private right of action under DASA. See Adam I. Kleinberg & Alex Eleftherakis, *I'll See You in Court, but Not Pursuant to DASA*, 35 TOURO L. REV. 367 (2019).

ideal solution to this issue would be implementing federal legislation that would protect all students with disabilities from bullying, regardless of any protections they may receive under the IDEA, 504 or Title II.

IV. FEDERAL ANTI-BULLYING LEGISLATION, SPECIFICALLY FOR STUDENTS WITH DISABILITIES: IS IT A PIPE DREAM?

The biggest concern with creating federal anti-bullying legislation specific for students with disabilities is whether there would be a need for it.⁸⁶ There are multiple avenues for students with disabilities to seek relief both through state and federal law. A division of the federal government already exists to make sure that students with disabilities are not being denied a proper education due to bullying. However, not every student with a disability is eligible for all of these protections. A student can have a disability that falls into one of the categories defined as a disability under an IEP. Still, the disability might not be severe enough for that child to get an IEP. Such students still have a disability but are not afforded the privilege of having the robust protections offered under the IDEA. A child's needs might also change throughout the school year, warranting the need for an IEP when the child currently has a 504 plan. If parents are not as knowledgeable about the complex systems of services that are available to their child, they might not be aware of how to advocate for their child or know of all of the rights that their child is entitled to. Unless the OCR is reaching out to each parent of a child with a disability, there are likely students with disabilities that are being bullied in school whose parents are desperate for help but do not know where to turn.

To address this issue, federal legislation is needed that would specifically cover all children with special needs. This type of legislation would be similar to other disability-based statutes that were enacted under the Spending Clause of the Constitution, such as the IDEA,⁸⁷ in which schools receiving federal funding need to comply

⁸⁶ The United States Constitution does not guarantee a right to an education. Under the Tenth Amendment, states and their local municipalities are given the power to regulate public schools. Additionally, discrimination on the basis of disability is not an individual right protected under the Fourteenth Amendment.

⁸⁷ See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

with the legislation in order to continue receiving such funding. This proposed legislation would be comprised of three main areas: (1) the type of disability that the child is classified as having (and what areas of the law that they already served under, such as Section 504 or the IDEA); (2) the nature of the bullying experienced by the student (on the basis of the student's disability or bullying experienced on a basis other than disability); and (3) how the legislation would work in conjunction with state anti-bullying laws.

The feasibility of implementing such legislation might be difficult, but not impossible. Successful enforcement of the legislation would require a group of individuals to periodically monitor schools to ensure that they are properly complying with the anti-bullying laws. To accomplish this, a subdivision of the OCR should establish a task force that would be responsible for observing schools and assessing their compliance with the statutory demands. After determining that a school violated FAPE of a student with a disability on the basis of bullying, the task force would next determine which rights are available to the student. While it might sound counterintuitive for federal legislation to require that districts follow additional protocols, the funding should outweigh any theoretical burdens on a district. A school district's top priorities are the safety, well-being and quality of education for their students. Bullying threatens the integrity of all three of these priorities, especially for students with disabilities. Therefore, complying with the proposed federal legislation would greatly benefit school districts. The compliance with this proposed legislation would likely result in fewer costs involved in the exhaustion of administrative remedies, as the CSE members would likely have fewer impartial hearings to attend. The same can be said for parents of students, as the need for pursuing litigation to receive remedies for their child should decrease. By extending additional avenues for relief to a broader range of students with disabilities, the proposed federal legislation would take strain off both parents and the schools, all while working to stop bullying in its tracks.

V. NEW FEDERAL ANTI-BULLYING LEGISLATION FOR STUDENTS WITH DISABILITIES WOULD BE A MORE EFFECTIVE AND REASONABLE APPROACH THAN ALTERING SECTION 504 AND EXPANDING STATE ANTI-BULLYING LAWS

Proposals to expand the remedies available to bullied students with disabilities are not entirely novel.⁸⁸ Changes in the law have previously been proposed to further protect children with disabilities from bullying, both of which analyze the legal remedies available to children with disabilities under the IDEA, Section 504 of the Rehabilitation Act, federal common law and state anti-bullying statutes.⁸⁹

One proposition involves the adoption of a gross mismanagement standard under Section 504.⁹⁰ The Fifth Circuit Court of Appeals utilized the same standard in the case of *Stewart v. Waco Independent School District*.⁹¹ The *Stewart* court found that the school could be liable under Section 504 due to its deliberate indifference to the bullying and sexual abuse that a disabled female student endured from other students. The court specifically mentioned that a “gross mismanagement claim” is an alternative way of stating that a child’s school refused to make reasonable accommodations for the child’s disabilities.⁹² A benefit of gross mismanagement claims is that they do not require an explicit refusal to accommodate a disabled student, but only professionally unjustifiable conduct.⁹³ Therefore, a student can prevail on such a claim if: (a) the district initially provided effective accommodations to the student, but failed to alter such accommodations when they became aware of the bullying experienced by the student; or (b) the school altered the student’s accommodations

⁸⁸ Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 1 U. ILL. L. REV. 175.

⁸⁹ *Id.*

⁹⁰ *Id.* at 202.

⁹¹ 711 F.3d 513 (5th Cir. 2013), *opinion vacated and superseded on reh’g*, 599 F. App’x 534 (5th Cir. 2013); *see* Secunda, *supra* note 88, at 201 n.180 (explaining how the original opinion in *Stewart* was vacated due to non-merit based reasons, and that a similar framework was adopted by the Fifth Circuit Court of Appeals in a subsequent case).

⁹² Secunda, *supra* note 88, at 202.

⁹³ *Id.*

but cannot adequately justify why such a change was made.⁹⁴ A nationwide adoption of the gross mismanagement standard under Section 504 would open new avenues for students to hold schools accountable for bullying endured due to accommodations. However, it would only assist students after the bullying has occurred and the student has exhausted all administrative remedies and brought suit against their district. To effectively protect children with disabilities from the detrimental effects of bullying, future federal legislation should do more than just point fingers at schools when they do something wrong. While such a proposition can provide closure for parents in heartbreaking scenarios where their child took their own life due to the bullying they endured, it does not directly alleviate the issue at hand for children who are still experiencing bullying.

The second proposition for bullying remedies involves amending state anti-bullying laws to provide bullied children in special education with private rights of action for the most serious forms of bullying. While all fifty states now have anti-bullying statutes, they do not all contain language regarding bullying on the basis of disability.⁹⁵ Only Massachusetts has an anti-bullying statute that addresses the bullying of special education students, one which requires a child with a disability that impairs social skills or is susceptible to being bullied on the basis of their disability to have their IEP modified to work on improving that child's social interaction skills.⁹⁶ However, unlike under the IDEA, Section 504 and Title II, state anti-bullying legislation does not provide for an express private right of action.⁹⁷ Both federal and state laws disfavor private rights of action, but it has been argued that such rights should be provided under circumstances to students with disabilities who have been subject to bullying.⁹⁸ In particular, one proposal recommends that all states adopt the Massachusetts IEP approach, provide a private right of action once all administrative remedies are exhausted and implement a private right of action framework similar to that utilized by the court in *T.K.*⁹⁹

⁹⁴ 711 F.3d at 523-24.

⁹⁵ *Secunda*, *supra* note 88, at 210.

⁹⁶ *Id.*; *but see* N.Y. EDUC. LAW § 12 (McKinney 2013) (“No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived . . . disability.”).

⁹⁷ *Secunda*, *supra* note 88, at 211.

⁹⁸ *Id.* at 212.

⁹⁹ *Id.*

While both proposed changes sound good on paper, the practicality of implementing each is likely more difficult than creating a new piece of anti-bullying legislation at the federal level. States vary in the degree of protection that they offer students with disabilities. The amount of work that would be required to persuade all fifty states to change their laws to comply with these propositions would likely be more labor-intensive and require a large-scale organization effort by parents and educators not only across the nation, but within every single state.

Antibullying laws protecting students with disabilities not only vary from state-to-state, but also within the states themselves. In New York, for example, courts are divided over whether students are entitled to bring private claims under DASA, the state anti-bullying legislation.¹⁰⁰ The New York Court of Appeals held in *Uhr ex rel. Uhr v. East Greenbush Central School District*¹⁰¹ that “[a] statutory command . . . does not necessarily carry with it a right of private enforcement by means of tort litigation” and that “when a statute is silent . . . courts have had to determine whether a private right of action may be fairly implied.”¹⁰² The court has also held that the most critical component in determining whether to recognize a private right of action, when it is not expressly provided, is whether the action would be consistent with the over-all scheme of the legislature.¹⁰³

While the New York Court of Appeals set out the criteria that must be met for a private right of action to be appropriate, the applicability of a private right of action claim under DASA differs amongst the lower courts. The Second Department of the NYS Supreme Court, Appellate Division has held that there is no implied private right of action under DASA for an alleged failure to enforce policies prohibiting discrimination and harassment, and stated that a private right of action would go against the statutory scheme of DASA.¹⁰⁴ In a similar vein, the Third Department has held that there is no explicit private right to action under DASA and that no such right can be implied from the statute’s language or DASA’s legislative

¹⁰⁰ Kleinberg & Eleftherakis, *supra* note 85.

¹⁰¹ 720 N.E.2d 886 (N.Y. 1999).

¹⁰² *Id.* at 888.

¹⁰³ Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18 (N.Y. 1989).

¹⁰⁴ Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 89 N.Y.S.3d 295 (App. Div. 2d Dep’t 2018).

history.¹⁰⁵ However, one Federal District Court within New York State has a different view of DASA. In *Terrill v. Windham-Ashland-Jewett Central School District*,¹⁰⁶ the United States District Court for the Northern District of New York held that DASA does not prevent a student from bringing any other statutory claims, and that while DASA does not provide for a private right of action, it does not leave students without the ability to have remedies or enforce DASA's compliance.¹⁰⁷ *Terrill's* holding suggests that claims for negligent supervision, as well as violations of federal statutes, may be brought in conjunction with claims alleging a violation of DASA.¹⁰⁸ While the Court of Appeals has yet to hear a case regarding whether DASA entitles a student to a private right of action, the history of DASA cases suggests that a private right of action would contradict its legislative purpose and scheme.¹⁰⁹ However, there is still no clear-cut consensus as to whether a private right of action is prohibited under a DASA claim.

In addition to the foreseeable difficulty of amending each state's antibullying legislation, the creation of new federal legislation would have the benefit of being more streamlined. The OCR already oversees the enforcement of other funding-based legislation, such as Title IX and Title II.¹¹⁰ Federal anti-bullying legislation protecting children with disabilities could allow OCR to serve another group of individuals, and there would not be a need to start from scratch in the creation of an agency. Because the OCR is part of the DOE, the staff that comprise the OCR consists of educators. The educators comprising the OCR subdivision that would oversee compliance with the proposed new federal legislation would be experts in special education and have experience in determining whether a school is complying with policy. Even if there are not enough employees amongst the OCR who have a special education background to fill every position in this new OCR subdivision, those that are experts in the field can be brought in to work hand-in-hand with educators who have an experience in education policy. This would provide a more

¹⁰⁵ *Motta ex rel. Motta v. Eldred Cent. Sch. Dist.*, 141 A.D.3d 819 (App. Div. 3d Dep't 2016).

¹⁰⁶ 176 F. Supp. 3d 101, 109 (N.D.N.Y. 2016).

¹⁰⁷ *Id.*

¹⁰⁸ Kleinberg & Eleftherakis, *supra* note 85, at 376.

¹⁰⁹ *Id.* at 372.

¹¹⁰ Off. for Civ. Rts., *Ensuring Equal Access To High-Quality Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/ensure03_pg2.html (last updated Jan. 10, 2020).

efficient utilization of resources. The enactment of new federal legislation instead of amending Section 504 would provide greater benefits and would likely require the same amount of effort as it would to amend Section 504. Both would require a bill to go through the House and Senate, and the process of receiving congressional approval would likely require the same amount of time, money and energy. If this is the case, the more appealing decision would be to create an entire piece of legislation that is tailor-made for addressing bullying experienced by students with disabilities.

VI. WHAT WOULD AN IDEAL FEDERAL ANTI-BULLYING ACT CONTAIN?

In order for federal anti-bullying legislation to be enacted, the framework for such a law must be created. The following section discusses what would be included in an ideal piece of federal antibullying legislation. A hypothetical piece of legislation, such as the Abolish Bullying of Individuals with Disabilities in the Educational Setting (ABIDES) Act, would help provide education to students with disabilities while providing universal protection from bullying.

A. Purpose

This section would state how students with disabilities must overcome the obstacles of their condition to have an equivalent education as their nondisabled peers. While bullying impairs all students' abilities to learn, students with disabilities are much more likely to experience bullying, further preventing them from learning on a level playing field. Of note will be how the protection against bullying currently available for students with disabilities is not enough. The IDEA, along with Section 504 of the Rehabilitation Act and state antibullying legislation, all provide protection for students with disabilities, but the degree of protection from bullying that is offered by each differs depending on how a student is classified by the Committee on Special Education (CSE) as well as where in the country the student goes to school. The purpose of the ABIDES Act ("the Act"), therefore, is to provide universal antibullying protections for all students with disabilities in the United States, no matter how they are classified or their school location.

B. Definition of Bullying

The ambiguity of what constitutes bullying will likely be the most difficult part of the Act to create. New York State's DASA defines "bullying" as the same as "harassment," where they are defined as:

the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.¹¹¹

DASA's definition provides a comprehensive overview of what the ABIDES Act hopes to cover. In the twenty-first century, bullying continues outside of school grounds and school hours through cyberbullying, and schools should still have jurisdiction over such matters because the bullying impairs academic performance. This issue of regulating cyberbullying would have to be considered in the light of the recent Supreme Court decision of *Mahanoy Area School District v. B.L.*,¹¹² in which the Court held that a student's First Amendment rights are protected for out-of-school vulgar speech criticizing the school when such speech does not directly target a specific member of the school community.¹¹³ Because cyberbullying typically targets a specific person, the decision in *Mahanoy Area School District* would not prohibit the effectiveness of the Act in penalizing students that are cyberbullying peers with disabilities.

¹¹¹ N.Y. EDUC. LAW § 11 (McKinney 2019).

¹¹² 141 S. Ct. 2038 (2021).

¹¹³ *Id.*

The difficulty comes from determining the threshold of what a hostile environment is. The standard set in place under DASA appears to be appropriate, as it primarily relies on the use of objective factors. This is an important factor to consider, as students with a disability affecting their ability to recognize social cues, such as autism spectrum disorder (ASD), might misconstrue a joking or sarcastic comment as an insult directed towards them. Seeing a student's behavior from the perspective of a reasonable person would allow suits with claims under the Act to distinguish between what constitutes bullying and what does not.

C. Bullying, Whether or Not on the Basis of Disability

An important feature of the Act would be its applicability to bullying that a student with a disability is experiencing regardless of whether it is explicitly occurring on the basis of a disability. The idea of having to prove that a student is being bullied for having a disability might be difficult, as symptoms associated with the disability can make a person the subject of bullying rather than the disability itself. For example, a student with poor social interaction skills due to a neurodevelopmental disorder who is bullied because of their inability to socialize could still be considered a person bullied based on a disability. However, if a student with a disability is being bullied for something other than a disability, the bullying can still affect the student's ability to perform in school. Therefore, the ABIDES Act would take an approach where schools would look at how a student with a disability is affected by bullying.

When a student with a disability is a constant subject of bullying, the school would be obliged to take action to correct the situation by disciplining the bullying students and/or setting up a meeting with the student's parents about creating an alternative education placement if the child is extremely unsatisfied with the school setting. This proposed alternative education placement would be reviewed by the school district's CSE, and would allow a child to be go to a different school even without an IEP if the CSE deems that the student experienced bullying as defined under the Act and that no other reasonable alternative is available or has been successful. The newly devised subcommittee of the OCR would oversee the process, making sure that districts are placing children with disabilities in an educational setting where they are succeeding and feel comfortable.

This can be implemented via reports made by teacher and parent observations, as well as through student self-reports. The new OCR subdivision can also penalize the district, if it is found that the district noticed or should have noticed that the bullying was occurring but did not take proper action to stop it. If such bullying persists amongst students with disabilities within the district, the funding granted by the ABIDES Act could be paused or even revoked entirely from a school district.

For students who are unclassified but are suspected of having a disability, the ABIDES Act can also be a resource. This process, however, would require more input from the parent of a child, as they would have to bring up the child's disability and the educational deprivation caused by the bullying. After contacting the CSE, an investigation into the matter would be conducted, where the student would have an initial education evaluation to identify whether the student has a disability. If determined by the CSE to be a student with a disability, the CSE would look into the bullying experienced by the student, how it has impacted the academic performance of the student and discipline the bullying students. If disciplining the bullying students does not bring about an end to the impaired educational performance of the student, the CSE would be obliged to look into the possibility of an alternative education placement for the student.

While the process sounds redundant compared to the services and protections already provided under Section 504, Title II and IDEA, they provide a way for districts to quickly and effectively address the needs of students with disabilities who are being bullied. The purpose of such legislation would be twofold: to provide extra protection of students with disabilities from bullying and to provide additional funding to schools. The funding for alternative education placements could be provided via the money that is contingent on complying with the ABIDES Act. While the ABIDES Act would not serve as a replacement for any pre-existing legislation, it would instead serve as a scaffolding that might be able to prevent students with disabilities from reaching a point of no return in their academic performance. If a school continuously fails to address bullying experienced by a student with disabilities, the student may experience severe long-term consequences such as hampered academic or occupational success or even lead to suicide.¹¹⁴

¹¹⁴ See *Collazo v. Hicksville Union Free Sch. Dist.*, 108 N.Y.S.3d 708 (N.Y. Sup. Ct. 2019).

VII. CONCLUSION

Congress has previously passed legislation with ambitious titles, such as “No Child Left Behind”¹¹⁵ and “Every Student Succeeds.”¹¹⁶ If the United States government wants every student to be successful and for no child to be left behind, it should turn their attention to students with disabilities. It is important that those who already have difficulty in school have anything that might prevent their success nipped in the bud before it gets out of hand, especially when bullying time and time again becomes an issue for students with disabilities. If a school complies with the ABIDES Act, then there is no reason that students with disabilities will not be able to achieve their full academic potential.

¹¹⁵ Pub. L. No. 107-10 (2001).

¹¹⁶ Pub. L. No. 114-95 (2015).