Protecting Students Against Bullying and Harassment

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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, sometimes 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. All fifty states now have anti-bullying laws that require schools to take appropriate action to address and prevent bullying. 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 or their own anti-bullying policies require. About half of our country’s school officials and teachers have not received training on how to respond to bullying. And approximately 75% of the time that children get bullied at school, no adult intervenes.

In 2013, Public Justice launched an Anti-Bullying Campaign to change this. Through litigation, we 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.

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.
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 effect change.

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.” 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.” 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. “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

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 traveling to or from school. It can also occur on the Internet.

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 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 constitute harassment that may trigger responsibilities under one or more of the federal anti-discrimination statutes, as well as the U.S. Constitution.

If you have evidence that 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), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination on the basis of disability; and Title II of the Americans with Disability Act of 1990 (Title II), which also prohibits discrimination on the basis of disability. School districts may violate these civil rights statutes and the U.S. Department of Education’s implementing regulations 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.”16

Although these federal civil rights statutes do not prohibit discrimination based on sexual orientation, gender identity, or religion, bullying on these bases may be covered by federal anti-discrimination statutes. As explained below, if the bullying of a student based on actual or perceived sexual orientation or gender identity can properly be characterized as a form of gender-based stereotyping, then Title IX would apply.17 Bullying based on actual or perceived sexual orientation or gender identity may also be covered by Title IX as a form of sex discrimination per se.18 Regarding religion, 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.19

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.20 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, as well as some private schools.21 The statute prohibits all forms of sex discrimination, 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 victim and tormentor 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.22

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.23 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.24

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. 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.

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*. In *Davis*, a student sued her local school board for allowing known sexual harassment by other students to continue against her. 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. The girl and her mother complained to the school’s teachers and principal on numerous occasions, but nothing was done to stop the harassment. The harassment did not end until the offending classmate was charged with, and pleaded guilty to, sexual battery. 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.” The Court also limited a school district’s damages liability under Title IX to circumstances where it exercises “substantial control” over the harasser and the context in which the harassment occurs.

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

1. the school had actual knowledge of the sexual harassment;

2. the school acted with deliberate indifference to the sexual harassment; and

3. the sexual 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.

Lower courts have relied on *Davis* to hold that students may sue school districts for deliberate indifference to known peer harassment based on race, color, and national origin under Title VI, as well as disability under Title II and Section 504.
1) Actual Notice

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. Thus, Title IX does not make a school district liable for the conduct of students who harass their peers based on gender. Nor does it make a school district liable for harassment about which it should have known. Rather, a district is liable only for its own misconduct in responding to harassment about which it actually knows. Pursuant to the Supreme Court’s decision in *Gebser v. Lago Vista Independent School District*, if sex-based harassment is not reported to or observed by an “appropriate person”—which is a school official “with authority to take corrective action to end the discrimination”—then a school district will not be liable.

An “appropriate person” with authority to take corrective action on a school district’s behalf may include:
- the superintendent of the district
- administrators with significant personnel functions
- school principals, and
- others, such as assistant principals, if they are given authority to impose discipline for sexual assault.

Below the level of a school principal, whether a plaintiff may rely on the knowledge of another school official—such as a teacher or a guidance counselor—to establish liability is determined on a case-by-case basis.

2) Deliberate Indifference

For a district to avoid liability for “deliberate indifference,” it need not expel the harassers, engage in any particular disciplinary action, or remedy peer harassment. The district need only respond to known peer harassment in a manner that is not “clearly unreasonable in light of the known circumstances.” “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.” Indeed, *Davis* emphasizes that “courts should refrain from second-guessing the disciplinary decisions made by school administrators.”

As discussed below, since *Davis*, lower courts have had the opportunity to decide what qualifies as deliberate indifference to sex-based harassment. Where evidence shows that a school responded promptly to reported incidents, took affirmative steps to address incidents of harassment beyond merely speaking to the offending students, and escalated efforts in response to continuing harassment, courts have found no deliberate indifference. Where schools are slow to act and investigate, take little to no immediate action, or respond with half-hearted remedial efforts, such as continuing ineffective verbal reprimands, courts have found deliberate indifference. In short, it is a highly fact-specific inquiry, and there will never be a bright-line rule.

So far, three federal circuits have found deliberate indifference where a school persisted in remedial efforts it knew were ineffective. 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.\(^{51}\)

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.\(^{52}\) 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.\(^{53}\) The harassment started with peers verbally abusing her, calling her “the gay girl” and asking her to describe oral sex.\(^{54}\) 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.\(^{55}\) The harassment increased to the point that Alma was propositioned or touched inappropriately in virtually every class.\(^{56}\) 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.\(^{57}\) 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.\(^{58}\) 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.\(^{59}\) Alma testified that the more she complained to the principals, even though they spoke to her harassers, the bullying got worse.\(^{60}\)

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.\(^{61}\) 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.\(^{62}\) 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.”\(^{63}\) The court held that, to avoid liability, the district “was required to take further reasonable action in light of the circumstances.”\(^{64}\)

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.\(^{65}\) Two Title IX cases involving gender-based stereotyping demonstrate this point: the Sixth Circuit’s later decision in *Patterson v. Hudson Area Schools*\(^{66}\) and a Kansas federal district court decision, *Theno v. Tonganoxie Unified School District No. 464*.\(^{57}\)

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.\(^{68}\) 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.”\(^{69}\) DP reported some of the incidents and was told that “kids will be kids, it’s middle school.”\(^{70}\) 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. In addition, DP was called “Mr. Clean” by his peers—a derogatory reference to his supposed lack of pubic hair. On one occasion, a teacher made fun of DP in front of the class after he was slapped by a girl. These incidents led DP to eat lunch alone in the band room to avoid his tormentors. DP’s parents repeatedly reported various incidents of harassment to teachers and the principal.

DP enjoyed a reprieve in eighth grade after his mother and guidance counselor had him placed in special education due to emotional impairment. 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. He was also subjected to new types of harassment. Students stole his planner and defaced it with sexually derogatory slurs and sexually explicit pictures. Students broke into DP’s gym locker, urinated on his clothes, and threw his tennis shoes in the toilet. 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. His gym locker was repeatedly covered with sexually oriented words spelled out in shaving cream. Administrators were frequently unable to determine who committed these acts.

The school district’s responded to DP’s harassment over the years largely by giving verbal reprimands to the known tormentors. Though the reprimands generally stopped harassment by the reprimanded student, they did not stop other students from harassing DP.

DP stopped attending the district school after he was sexually assaulted by a fellow baseball teammate. 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. 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.”

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. The Sixth Circuit reversed, concluding that there were genuine issues of material fact as to whether the district acted with deliberate indifference. 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.

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. 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. 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.”

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. 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. 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). Most of his harassers were merely given verbal warnings or reprimanded by the school; however, a few of the more serious offenders were more severely disciplined. With limited exceptions, whenever the school disciplined a known harasser, that particular harasser stopped bullying the plaintiff. The school also began to speak proactively with students and teachers regarding harassment during the plaintiff’s tenth-grade year.

The school district argued that, as a matter of law, its responses could not be deemed clearly unreasonable. 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.

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.

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.
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 the districts knew their remedial efforts were ineffective in addressing the harassment. Although these courts have interpreted the deliberate indifference standard more broadly than some others, they do not require schools to succeed in ending the harassment.

The Sixth Circuit’s more recent decision in Stiles ex rel. D.S. v. Grainger County, Tenn., somewhat cabins the court’s interpretation of deliberate indifference in Vance and Patterson. In Stiles, plaintiff D.S. was sexually harassed by his peers for one-and-a-half years, which included regular taunting with anti-gay epithets and escalated to physical assaults. The school investigated each complaint by D.S. or his mother, interviewing witnesses and those involved, and reviewing video recordings. The school disciplined students found responsible for wrongdoing by issuing both verbal warnings and in-school suspensions. The school also separated D.S. from his harassers and later decided to hire a substitute teacher to monitor D.S.’s classes. These efforts, however, did not end the harassment. The Sixth Circuit found the school district’s response to D.S.’s harassment distinguishable from the districts’ deliberately indifferent responses in Vance and Patterson because its overall response was “more proactive” and “reasonably tailored” to the findings of its investigations into each reported bullying incident. Unlike in Vance and Patterson, where school officials merely verbally reprimanded the offenders and, in Patterson, even abandoned preventive measures that had been effective, the school in Stiles suspended five offending students and took preventive measures that included separating D.S. from his harassers and hiring a monitor for D.S.’s classes. The court described the school’s responses to D.S.’s reports over the course of a year-and-a-half as “similar but not rote,” but acknowledged that the same conduct “might become [clearly unreasonable] over the course of a longer period of time.” Though the court emphasized that the school varied and increased the punishment to reflect the seriousness of each reported incident, the implication that a student might have to endure a longer period of harassment before a court would find deliberate indifference is troubling.

Some circuits interpret the deliberate indifference standard more narrowly than the Sixth Circuit. For example, in Doe ex rel. Doe v. Bellefonte School District, the Third Circuit found (in an unpublished decision) that, where a school district stops each reported source of harassment, it cannot be deliberately indifferent—even if the victim continues to be bullied by additional students in new circumstances. This narrow interpretation of deliberate indifference is 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.” 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.” 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.

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. 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. The school’s failure to address the pattern of harassment as a systemic problem—which involved other students harassing the plaintiff after some students were disciplined—was irrelevant to the court’s analysis. The Third Circuit affirmed.

The First Circuit imposed a particularly stringent deliberate indifference standard in one case, requiring a plaintiff to prove that the school disregarded a known or obvious consequence of its action. In Porto v. Town of Tewksbury, the court overturned a jury verdict in favor of a student’s family in a case involving inappropriate sexual contact between adolescent special education students. SC’s parents sued the school after SC and another boy, RC, were discovered in a bathroom having engaged in sexual intercourse. The two boys had been in the same special education class from first through fifth grade, and SC’s parents had previously reported various sexually-charged incidents involving the boys. Specifically, SC’s parents informed the school during his fifth grade year that SC and RC had been engaging in oral sex on the school bus. The boys were subsequently placed on different school buses, and teachers were instructed to keep them separated and monitor their interactions.

During the next year, the school placed SC in a self-contained classroom with RC and five other students. In that year, school employees became aware of three incidents involving inappropriate touching between SC and RC, after which the two were separated and a guidance counselor spoke to the boys and instructed aides to monitor them. These measures proved inadequate. On a later occasion, RC was given permission to leave the classroom to go to the bathroom. Several minutes later, but before RC returned, SC was given permission to leave the classroom to go to his locker. When neither boy returned to the classroom, staff went looking for them, and found that the boys had met in the bathroom. SC subsequently disclosed that the boys had engaged in sexual intercourse.

The First Circuit overturned a verdict in favor of SC’s family, holding that a reasonable jury could not have concluded that the school was deliberately indifferent to SC’s harassment. According to the court, “the fact that measures designed to stop harassment prove later to be ineffective does not establish that the steps taken were clearly unreasonable in light of the circumstances.” Despite the boys’ history of inappropriate touching and the three incidents in the classroom, the court found that the school believed its interventions were successful and “had no reason to believe that RC was continuing to sexually harass SC.” To prove deliberate indifference, the family would have to show that the school knew or suspected that when SC asked to go the bathroom, he actually intended to meet RC in the bathroom, and that there was a high degree of risk that SC would be subjected to inappropriate sexual touching. In the court’s view, “[b]ecause continued sexual harassment was not a ‘known or obvious consequence’ of the school’s inaction,” the school did not act with deliberate indifference.

3) 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." 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.” This is because “schools are unlike adult workplaces and . . . children may regularly interact in a manner that would be unacceptable among adults.” 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.” It is, therefore, not surprising that successful peer harassment cases typically involve unremitting harassment for long periods of time that include more than verbal taunting, and often include physical and/or sexual assaults. There are, however, exceptions to this general rule. A hostile environment can arise from one severe incident, such as a rape.

Under *Davis*, it is not sufficient for the harassment to be severe and unremitting. It must also deny the victim equal access to educational opportunities. This means that victims must present concrete evidence that the harassment had negative effects on their education. 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. 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. 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.

### 4) Remedies

*Davis* makes clear that plaintiffs suing for peer harassment under Title IX may seek compensatory damages. 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*, 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) and Section 504 of the Rehabilitation Act, because they may not be awarded in suits brought under Title VI. 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.”

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

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

The legal standards and remedies for Title VI 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. 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—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.  

The Second Circuit recently decided a Title VI peer harassment case, Zeno v. Pine Plains Central School District, 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. 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. The district court denied the school district’s motion for judgment as a matter of law, but reduced the jury award to $1 million. 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.  

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.  

For three-and-a-half years, fellow high school students taunted, harassed, menaced, and physically assaulted Anthony. His peers made frequent pejorative references to his skin tone, calling him a “nigger” nearly every day. They also referred to him as “homey” and “gangster,” while making references to his “hood” and “fake rapper bling bling.” He received explicit threats as well as implied threats, such as references to lynching. The court found that such conduct went beyond name-calling and teasing, particularly because of the “use of the reviled epithet ‘nigger.’” 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).  

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.
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. The court rejected each of these arguments.

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. 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.

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 or the district knew its remedial efforts were ineffective. 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. Once a school is aware that its response is ineffective, “a delay before implementing further remedial action is . . . problematic.” Second, a reasonable jury could have found that the district’s additional remedial actions “were little more than half-hearted measures.” 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. 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. Third, a reasonable jury could have found that the district “ignored many signals that greater, more directed action was needed.”

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, 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.

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. The court notes that verdicts range from the low six figures to as much as $1 million. As part of its Anti-Bullying Campaign, Public Justice tracks bullying verdicts and settlements involving elementary and secondary schools throughout the country and posts a list, updated three times per year, on its website. You can find the list on Public Justice’s Anti-Bullying Campaign web page here.
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.” 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.” 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.

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.” 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.

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) by denying disabled students a “free appropriate education” (FAPE). 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. Subsection 2 below briefly addresses the legal standards and remedies under the IDEA for disability-based peer harassment.

Regardless of whether one intends to bring a Section 504, Title II, or IDEA claim, however, a plaintiff will likely be required to exhaust administrative remedies prior to seeking judicial review. Subsection 3 below briefly addresses when exhaustion is required and what might excuse a failure to exhaust administrative remedies.
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.\(^{200}\) 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.\(^{201}\) 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.\(^{202}\)

Although peer harassment claims under both Section 504 and Title II\(^{203}\) 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 typically analyzed under a \textit{Davis}-type deliberate indifference standard,\(^{204}\) and another based on the district’s refusal to make reasonable accommodations for the disabled student to address the bullying, which is generally analyzed under a “bad faith” or “gross misjudgment” standard.\(^{205}\) 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.

A majority of courts have evaluated disability-based peer harassment claims under Section 504 and Title II using a \textit{Davis}-type standard.\(^{206}\) In these jurisdictions, a school district may be liable for damages in a disability-based peer harassment case under Section 504 or Title II, if a plaintiff shows 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.”\(^{207}\) In essence, this is the \textit{Davis} test. Despite the modification to the “severe and pervasive” prong of the \textit{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.\(^{208}\)

In contrast, to prove that a school district refused to provide a disabled student with reasonable accommodations to address disability-based peer harassment, the plaintiff must show that the district acted in “bad faith” or with “gross misjudgment” in refusing to account for the effects of the harassment on the student’s education.\(^{209}\)

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 \textit{M.P. v. Independent School District No. 721},\(^{210}\) 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.\(^{211}\) 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.\(^{212}\) 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. 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.”

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. 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.

The Fifth Circuit delineated the difference between the deliberate indifference and gross misjudgment standards in *Stewart v. Waco Independent School District*. Although the decision was vacated and remanded to the district court to decide whether the plaintiff’s claim was barred as untimely or for failing to exhaust administrative remedies, the court’s analysis of the two standards is instructive. The plaintiff was a female high school student who suffered from mental retardation, speech impairment, and hearing impairment. After an incident involving sexual contact with male students, the school modified her “individualized education program” (IEP) to ensure that she was separated from male students and under close supervision while at school. 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. The school district failed to modify her IEP or prevent future abuse after any of these three incidents.

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. 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. 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. However, the court held that Stewart had stated a gross misjudgment claim under Section 504, which is another way of saying that the school district refused to provide a reasonable accommodation of her disability.

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.228

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.229 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.230

Although the Fifth Circuit’s decision in Stewart was vacated on other grounds, a subsequent district court decision in that Circuit continued to apply the “gross misjudgment” standard where a school’s response to disability-based harassment allegedly amounted to a refusal to provide a reasonable accommodation.231 As the district court noted, a Fifth Circuit case preceding Stewart—D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist.232—had held that “gross misjudgment” is the proper standard.233 Furthermore, when the Stewart panel vacated and remanded the case, it cited D.A. ex rel. Latasha A. as the precedent the district court should apply on remand if it reached the merits.234

Given that the gross misjudgment standard for refusing 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.235 The IEP process requires a school district to conduct an individualized evaluation, identify a child’s disabilities,236 and then develop an educational placement that meets the child’s unique needs in the least restrictive environment.237

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.238 Parents also have an option to seek judicial review, after exhausting administrative procedures such as mediation and a due process hearing conducted by state or local education agencies;239 otherwise, courts will lack jurisdiction to hear the claim.240 The IDEA also allows parents who prevail in their claims to recover attorneys’ fees,241 but, unlike Section 504 and Title II, damage awards typically are not available.242

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.243 In T.K. v. New York City Department of Education,244 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.\textsuperscript{235} 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.\textsuperscript{246} 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.\textsuperscript{247}

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.”\textsuperscript{248} The district court denied the defendant’s motion for summary judgment, finding ample evidence in the record to support each element of this test.\textsuperscript{249}

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.”\textsuperscript{250} Second, it does not require the bullying to be “a reaction to or related to” a child’s disability.\textsuperscript{251} 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.\textsuperscript{252} 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.”\textsuperscript{253}

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.”\textsuperscript{254} 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.\textsuperscript{255} 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.\textsuperscript{256}

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.\textsuperscript{257} For one, the standard is not clearly articulated. In addition, though district courts review a due process hearing officer’s findings and decisions \textit{de novo}, the “due weight” standard they apply on appeal

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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.\textsuperscript{258} 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.

3) Exhaustion of Administrative Remedies

Plaintiffs asserting Title II or Section 504 claims, or constitutional claims under §1983, may be bound by the IDEA’s administrative exhaustion requirement—even though there is no exhaustion requirement under Title II, Section 504, or §1983.\textsuperscript{259} This is because the IDEA expressly requires exhaustion of claims under “other Federal laws protecting the rights of children with disabilities” when “seeking relief that is also available under [the IDEA].”\textsuperscript{260} As the Supreme Court recently explained in \textit{Fry v. Napoleon Community Schools}, plaintiffs filing suit under the ADA, the Rehabilitation Act, or similar laws must first exhaust the IDEA’s administrative procedures when the gravamen of their suit is the denial of a FAPE.\textsuperscript{261} If, however, a plaintiff can show that the gravamen of the suit is to seek non-discriminatory access to public education, rather than to obtain individually tailored educational services, exhaustion is not required.\textsuperscript{262} This distinction is not always obvious and will involve a fact-based inquiry. In addition, school districts typically seek to dismiss Title II and Section 504 claims for failure to exhaust administrative remedies, so the safer approach is to exhaust administrative remedies before filing these lawsuits.

Even if a plaintiff does not assert an IDEA claim, it is critical to consider whether the gravamen of the complaint involves the denial of accommodations needed to provide a FAPE and whether the suit would satisfy one of the limited exceptions to the IDEA’s exhaustion requirement. \textit{Moore v. Chilton County Board of Education} is illustrative.\textsuperscript{263} In \textit{Moore}, the parents of a high-school-aged girl, A.M., who had growth and eating disorders and who committed suicide after pervasive bullying, sued the Board of Education for violations of Section 504 and Title II.\textsuperscript{264} The complaint alleged that A.M. “was denied ‘educational activit[ies]’ and ‘educational benefits’ and that the Board generally abandoned its role to ‘provide education’ to A.M.”\textsuperscript{265} Although the plaintiffs did not assert claims under the IDEA, “because the gravamen of the Complaint is that A.M. had physical disabilities that qualified her for accommodations necessary to provide her an appropriate and safe educational environment,” the court held that plaintiffs were bound by the IDEA’s exhaustion requirements.\textsuperscript{266}

Plaintiffs need not exhaust their claims, however, if the administrative process would have been futile or inadequate.\textsuperscript{267} The court in \textit{Moore} excused plaintiffs’ failure to exhaust on futility grounds because their daughter’s suicide made IDEA-based relief an impossibility.\textsuperscript{268} In finding that exhaustion would be futile, however, the court distinguished the tragic circumstances of A.M.’s death from a situation where parents might attempt to bypass the exhaustion requirement by moving their child out of the school district, which would not excuse a failure to exhaust.\textsuperscript{269}

Exhaustion has also been found futile or inadequate when a disabled student’s abuse was wholly in the past and there was no risk of recurrence. For example, in \textit{Domingo v. Kowalski},\textsuperscript{270} the court excused plaintiffs’ failure to exhaust administrative remedies as futile because nine years had passed since the alleged abuse, the children had progressed beyond the educational stage.
where the abuse occurred, and the abuse was entirely in the past. “[M]oney damages,” the court explained, “are the only remedy that can make [plaintiffs] whole.”

Courts are split on whether a plaintiff must exhaust claims seeking monetary relief. Some courts have excused a failure to exhaust in these circumstances because monetary damages are not available under the IDEA. Because the principal form of relief under the IDEA is prospective benefits in the form of education accommodations, these courts have found that seeking compensatory or punitive damages in IDEA administrative proceedings would be futile.

Other courts, however, have held that a claim for monetary damages will not excuse a failure to exhaust. These courts have held that even though an IDEA hearing officer is not able to offer monetary relief, a plaintiff raising a claim for monetary damages for an educational injury must nevertheless exhaust if the claim could be redressed to any degree by the IDEA’s non-monetary remedies. In C.O. v. Portland Public Schools, for example, the Ninth Circuit explained that the IDEA’s exhaustion provision applies where a plaintiff seeks monetary relief as the ‘functional equivalent’ of a remedy available under the IDEA. In short, the fact that a plaintiff asserts claims for monetary relief will not necessarily insulate the lawsuit from being dismissed for failure to exhaust administrative remedies.

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. 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.

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. Second, bullying victims may seek punitive damages for constitutional violations by individual school officials and employees (though not against school districts or boards). 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.” 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
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*. Pursuant to *Monell*, a school district is not vicariously liable under § 1983 for the discriminatory actions of its officials and employees. 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. 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. 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.” 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.” The clause does not forbid classifications, but “simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”

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. 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, 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.

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. 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.
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. In Nabozny, the plaintiff was continually harassed by his middle school and high school peers, both verbally and physically, because he was gay. He suffered severe beatings, one of which required hospitalization for internal bleeding. Despite reporting the incidents to school administrators, they turned a deaf ear to his requests for help, and some even mocked his predicament. 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.

The district court granted summary judgment for the defendant school officials on these claims, but the Seventh Circuit reversed. 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. 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 was no “rational basis for permitting one student to assault another based on the victim’s sexual orientation.”

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. 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.

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.” 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 where a school’s response to the harassment “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.” 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.308 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.309 Incarcerated and institutionalized individuals are in such “special relationships” with the state.310 Courts have generally found that the school-student relationship does not satisfy this exception.311 However, this exception may be satisfied when a school imposes significantly more control over a student than is typical, in effect displacing a parent—such as when a school functions as an independent living program.312 A recent Third Circuit case acknowledged that circumstances like this might create a special relationship between a public school and some students, but stated that “any such circumstances must be so significant as to forge a different kind of relationship between a student and a school.”313 Compulsory attendance laws or the discretion afforded school administrators as part of the school’s traditional in loco parentis authority are not sufficient to create that relationship.314

The second exception is where the state created or increased the danger that an individual would be exposed to harm by others.315 The “state-created danger” exception to the DeShaney rule is not clearly defined, because the Supreme Court has not yet addressed it.316 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.317 A mere failure to act does not suffice and the affirmative act must shock the conscience.318

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,319 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.320 In that case, two male high school students with disabilities sexually harassed a seven-year old disabled female on the school bus.321 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.”322 T.P. also pulled up his shorts to show J.W. a paintball scar on his upper thigh which exposed his penis.323 The boys then told the plaintiff to “touch it, lick it, feel it,” and J.W. subsequently pulled her hair.324 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.325 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.326 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.327 Nevertheless, the plaintiff suffered severe educational setbacks after the incident.328
Applying the Third Circuit’s test for the state-created danger doctrine, 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. 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.

Enright is likely an anomaly because most substantive due process claims for peer harassment fail, even in cases with 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. 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.” Substantive due process claims often fail because the harm experienced by plaintiffs is typically the result of a school’s failure to act, rather than a school’s affirmative misconduct. 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, all 50 states have anti-bullying laws that require schools to take appropriate action to address and prevent bullying. There is no private right of action under these laws, 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 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. 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. 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. Even where a plaintiff must prove more than negligence, something short of the deliberate indifference standard may be sufficient.

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, while others require willful and wanton misconduct for a failure to supervise claim. Some states also permit claims for negligent or intentional infliction of emotional distress. 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.

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. 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. Most states, however, do not grant school boards and school officials sued in their individual capacities absolute immunity for their torts. They typically grant “qualified” immunity that applies only to “discretionary” acts or acts performed negligently, rather than with gross negligence or recklessness. 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.” 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.
The Paul D. Coverdell Teacher Protection Act of 2001 ("TPA") also provides an immunity defense to teachers, principals and school administrators in some states.\(^{349}\) Under the TPA, those employees and administrators enjoy immunity for acts "in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school," as long as the acts are done within the scope of their employment or responsibilities.\(^{350}\) Notably, the TPA does not apply to harm that is caused by "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."\(^{351}\) Nor does it apply to harm caused by crimes of violence or sexual offenses for which the perpetrator has been convicted, violations of federal or state civil rights laws, or misconduct occurring while the perpetrator was under the influence of drugs or alcohol.\(^{352}\) Furthermore, at least one court has found that, although individuals may be protected by the TPA, the statute does not provide immunity to school boards, which are entities rather than individuals.\(^{353}\)

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.\(^{354}\) 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.\(^{355}\) 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.\(^{356}\)

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.\(^{357}\) 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."\(^{358}\)
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.

Endnotes

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1 The U.S. Department of Health and Human Services has a website, https://www.stopbullying.gov/index.html, which 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.


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


8 Id.

9 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. Notably, our youth appear to be experiencing cyberbullying and traditional forms of bullying at about the same rate. In a recent national survey of students ages 12-18, approximately 21 percent reported being bullied at school. U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Stat., Fast Facts: Bullying (2015), https://nces.ed.gov/fastfacts/display.asp?id=719. Estimates of the number of youth who experience cyberbullying vary widely (ranging from 10-40% or more), but a study of 10,000 youth ages 11-18 by the Cyberbullying Research Center found that 25 percent reported being cyberbullied. Sameer Hinduja & Justin W. Patchin, Cyberbullying: Identification, Prevention, & Response 3 (Oct. 2014), http://cyberbullying.us/Cyberbullying-Identification-Prevention-Response.pdf.


12 29 U.S.C. § 794

13 42 U.S.C. § 12131 et seq.

14 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.

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


17 Id. at pp.7-8; see also Adele P. Kimmel, Title IX: An Imperfect But Vital Tool To Stop Bullying of LGBT Students, 125 Yale L.J. 2004, 2013 & n.44 (2016).

18 See Kimmel, supra note17, 125 Yale L.J. at 2013 & n.45.

19 Bullying DCL at pp. 5-6.
20 42 U.S.C. § 1983 provides that:

[...every 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 . . . .]

21 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).

22 See, e.g., Smith v. Metro. Sch. Dist.of Perry Twp., 128 F.3d 1014, 1019-21 (7th Cir. 1997) (no individual liability under Title IX).


24 OCR’s Dear Colleague Letter: Harassment and Bullying, supra note 16, at p. 6.

25 Id. at pp. 7-8.

26 Id.


28 Id. at 633.

29 Id.

30 Id. at 633-34.

31 Id. at 634.

32 Id. at 650.

33 Id. at 645-46. This does not mean that schools may ignore online harassment that occurs off campus. Based on the Supreme Court’s decision in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), cyberbullied students may be able to argue that the school district had sufficient authority over the hurtful students to address off-campus harassment that was significantly interfering with the victim’s education. See, e.g., Kowalski v. Berkeley County Schools, 652 F.3d 565, 573-74 (4th Cir. 2011) (upholding school’s authority to discipline student for off-campus, online harassment of another student).

34 Id. at 633, 650; see also Vance, 231 F.3d at 258-59.

35 See, e.g., Bryant v. Indep. Sch. Dist. No. I-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

36 See *Davis*, 526 U.S. at 640-41.


38 See *KB v. Daleville City Bd. of Educ.*, 536 F. App’x 959, 962-63 (11th Cir. 2013) (question of who is an appropriate person with authority to take corrective measures is fact-based, but majority of circuits have concluded that principals have sufficient authority to impute liability to school boards).

39 *Davis*, 526 U.S. at 648.

40 *Id.* at 648-49.

41 *Id.* at 649.

42 *Id.* at 648.


44 *SS. v. Eastern Kentucky Univ.*, 532 F.3d 445, 455 (6th Cir. 2008).


49 *Patterson v. Hudson Area Schs.*, 551 F.3d 438 (6th Cir. 2009).


51 *Vance*, 211 F.3d at 261 (affirming district court’s denial of defendant’s post-trial motion for judgment as a matter of law).

52 *Id.* at 262-63.

53 *Id.* at 256-59.

54 *Id.* at 256.
See, e.g., Zeno, 702 F.3d at 669-71; Patterson, 551 F.3d at 445-48; Theno, 377 F. Supp.2d at 966.

Patterson, 551 F.3d 438.


Patterson, 551 F.3d at 439-43.
80 Id.
81 Id.
82 Id.
83 Id. at 448.
84 Id.
85 Id. at 442-43.
86 Id. at 442.
87 Id. at 443.
88 Id. at 445.
89 Id. at 445-46.
90 Id. at 448 (emphasis added).
91 Id. at 449.
92 Id.
93 Id. at 450.
94 Id. at 446-49 (citing Theno, 377 F. Supp. 2d 952).
95 377 F. Supp. 2d 952 at 954-61.
96 Id.
97 Id.
98 Id. at 965.
99 Id. at 959-60.
100 Id. at 965.
101 Id. at 966.
102 Id.
103 Id.
104 819 F.3d 834 (6th Cir. 2016).
105 Id. at 840-46.
106 Id. at 849.
107 Id.
108 Id.
109 Id.
110 Id. at 849, 851.
111 Id. at 851.
112 Id.
114 106 F. App’x at 800.
115 Id. at 799.
116 2003 WL 23718302 at *2-5.
117 Id.
118 Id. at *10.
119 Id. at *9.
120 106 F. App’x at 800.
122 488 F.3d 67 (1st Cir. 2007).
123 Id. at 71
124 Id. at 70.
125 Id.
126 Id.
127 Id.
128 Id. at 71.
Id. at 73-74.

Id. at 74.

Id. at 75.

Id. at 74.

Id. at 75, quoting Bd. of the County Comm’rs v. Brown, 520 U.S. 397, 410 (1997).

526 U.S. at 650.

Id. at 652.

Id. at 651.

Id. at 651-52.

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).

See, e.g., Vance, 231 F.3d at 259 & n.4; T.Z. v. City of New York, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009) (“Sufficiently serious one-time sexual assault may satisfy the ‘pervasiveness’ requirement of the Davis standard.”); Doe v. University of Tennessee, 183 F. Supp. 3d 788, 808 (M.D. Tenn. 2016) (“Suffering a sexual assault on campus is, in and of itself, a type of harassment severe enough to constitute a deprivation of educational benefits.”).

Davis, 526 U.S. at 652.

Id. at 653-54.

Vance, 231 F.3d at 257, 259.

Theno, 377 F. Supp. 2d at 968.

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).

150 Davis, 526 U.S. at 633, 650.


154 Barnes, 536 U.S. at 189.

155 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).

156 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).


158 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).

159 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.”).

160 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.”).

161 Alexander, 532 U.S. at 281.

162 See, e.g., Zeno, 702 F.3d at 665 n.10; Bryant, 334 F.3d at 934.

163 Zeno, 702 F.3d 655.

164 Id. at 658-59.
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.

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.
187 See, e.g., Davis, 526 U.S. at 648.

188 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.; see also T.E. v. Pine Bush Central Sch. Dist., 58 F. Supp. 3d 332, 362-63 (S.D.N.Y. 2014) (denying summary judgment on Title VI claim where jury could find that school district failed to take reasonable steps to combat anti-Semitic harassment and acted with deliberate indifference).

189 Zeno, 702 F.3d at 673 & n.17.

190 Id.

191 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 . . .”).

192 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.”).


194 Id.

195 Id.

196 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.”).
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.”).

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].”).

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).

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))”).

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).


See, e.g., M.P. v. Indep. Sch. Dist. No. 721 (“MP II”), 439 F.3d 865, 867-68 (8th Cir. 2006); M.P. v. Indep. Sch. Dist. No. 721 (“MP I”), 326 F.3d 975, 982 (8th Cir. 2003); see also S.B. ex rel. A.L. v. Bd. of Ed. of Hartford Cnty., 819 F.3d 69, 75-76 (4th Cir. 2016) (explaining that “gross misjudgment” standard
in § 504 claims is appropriate where plaintiff alleges failure to provide a free appropriate education under IDEA, but pure student-on-student misconduct claim is properly evaluated under Davis standard).

206 See supra note 204.

207 S.S., 532 F.3d at 454 (emphasis added).

208 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)).

209 See, e.g., MP II, 439 F.3d at 867-68.

210 MP I, 326 F.3d 975.

211 326 F.3d at 977-79.

212 Id. at 982.

213 Id. at 979.

214 Id. at 982.

215 MP II, 439 F.3d at 868.

216 Id.

217 711 F.3d 513,524-25 (5th Cir. 2013), vacated on other grounds, 599 F. App’x 534 (5th Cir. 2013).

218 Stewart v. Waco Indep. Sch. Dist., 599 F. App’x at 535.

219 Stewart, 711 F.3d at 516.

220 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].”).

221 Stewart, 711 F.3d at 517.

222 Id.

223 Id.

224 Id. at 518

225 Id. at 519.

226 Id. at 519-20.

227 Id. at 525-26.
228 Id. at 524-25 (citations omitted).

229 Id. at 526.

230 Id.


232 629 F.3d 450, 453 (5th Cir. 2010).


234 Stewart, 599 F. App’x at 535 n.2.

235 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.”).

236 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.”)

237 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.”).

238 It is beyond the scope of this primer to address the details of the administrative and equitable remedies available under the IDEA.

239 See 20 U.S.C. § 1415(e),(f).

240 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.”).


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).

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.

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

Id. at 315.

Id. at 317.

Id.

Id.

Id.

Id.

Id. at 316.


Id. at 651.

Id. at 651.


Shore Reg’l High Sch. Bd. of Educ., 381 F.3d at 199-200.


137 S. Ct. at 752.
262 Id. at 755-56.


264 Id. at 1304-05.

265 Id. at 1306 n.3.

266 Id.

267 Id. at 1306.

268 Id. at 1308.

269 Id. at 1307-08, citing Doe v. Smith, 879 F.2d 1340, 1343 (6th Cir. 1989) (holding parents may not avoid the state administrative process through the “unilateral act of removing their child from a public school”).


271 Id., internal quotations removed.


273 Reid, 60 F. Supp. 3d at 608.

274 Robb v. Bethel School District # 403, 308 F.3d 1047 (9th Cir. 2002) (overruled on other grounds); Covington v. Knox Cnty. Sch. Sys., 205 F.3d 912, 918 (6th Cir. 2000);


276 679 F.3d 1162, 1168 (9th Cir. 2012).

277 U.S. Const. amend. XIV, § 1.

278 42 U.S.C. § 1983 provides that:

> every 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.

See, e.g., In re Selcraig, 705 F.2d 789, 797 (5th Cir. 1983); Quackenbush v. Johnson City School Dist., 716 F.2d 141, 148 (2d Cir. 1983).


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”).


Id. at 691.

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.”)

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”); Doe v. Forest Hills Sch. Dist., No. 1:13-cv-428, 2015 WL 9906260, at *17 (W.D. Mich. Mar. 31, 2015) (denying school district’s motion for summary judgment on § 1983 claim, stating that “[j]ust like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference.”).

U.S. Const. amend. XIV, § 1.

Harris v. McRae, 448 U.S. 297, 322 (1980).


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. I, 186 F.3d 1238, 1250-51 (10th Cir. 1999) (equal protection claims for peer sexual harassment may be established by showing deliberate indifference).

292 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.

293 DiStiso, 691 F.3d 240-41.

294 Id. at 241-43.

295 Nabozny, 92 F.3d at 454-58.

296 Id. at 449.

297 Id. at 452.

298 Id. at 449.

299 Id.

300 Id. at 449, 456, 458.

301 Id. at 454-55.

302 Id. at 457-58.


305 U.S. Const. amend. XIV, § 1.
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).


*Id.* at 200.

*Id.* at 199.


*Id.*

*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.”).

*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).

*Jones*, 438 F.3d at 690.

*See id.* at 691; *Nabozny*, 92 F.3d at 460.

Id. at *2, 8-9

Id. at *1.

Id.

Id.

Id.

Id. at *2.

Id.

Id.

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)).


Id.

Nabozny, 92 F.3d at 460.

Id.

See, e.g., Morrow, 719 F.3d at 178-79; Morgan v. Town of Lexington, MA, 823 F.3d 737, 744 (1st Cir. 2016) (failure of school to stop bullying by other students is not action by state to create or increase danger).

See supra note 1.


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.”)


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.”)


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).

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 Cnty. 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).


Weddle, 11 Temple L. Rev. at 684.
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.

Ohio Rev. Code Ann. § 2744.03(A)(3); § 2744.03(A)(5).

20 U.S.C. §§ 7941-7948. The TPA only applies to states that receive funds under this chapter (which is part of the Elementary and Secondary Education Act) and is a condition of receiving such funds. 20 U.S.C. § 7944.


*Id.* at § 7946(a)(4).

*Id.* at § 7946(d).


See Weddle, *supra* note 7, 11 Temple L. Rev. at 688-89 (citing cases); Sacks & Salem, *supra* note 143, 72 Alb. L. Rev. at 189 (citing cases).

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).

*L.W.*, 915 A.2d at 547, 549.

*Id.* at 549-50.
Jury Verdicts and Settlements in Bullying Cases
(April 2019 edition)

As part of Public Justice’s Anti-Bullying Campaign, we are tracking jury verdicts and settlements in bullying and harassment cases filed against school districts in federal and state courts throughout the country. Each case, organized by state, lists the relief achieved—both monetary and non-monetary—as well as the nature of the harassment, the number of plaintiffs, the basic facts, the causes of action, and the plaintiffs’ attorneys. We hope this resource will be helpful to attorneys representing bullied students.

If you are working on, or know of, a bullying or harassment case that has resulted in a judgment or settlement, please let us know so that we can include the case on this list. Please send your information to Adele Kimmel, Senior Attorney, at akimmel@publicjustice.net. In addition, if you are interested in obtaining co-counsel or other legal assistance from Public Justice on a bullying or harassment case, please contact us. School districts and officials need to comply with the law and respond appropriately to bullying. We want to make sure that they do. For more information, please read our primer, Litigating Bullying Cases: Holding School Districts and Officials Accountable.

ALASKA

- Settlement: $4.5 million.
- Harassment/Injuries: Verbal and physical harassment; attempted suicide.
- Single Plaintiff.
- Basic Facts: Following repeated bullying by other students, T.F., a 14-year-old eighth grade student, attempted to hang himself and suffered irreversible brain damage. T.F.’s classmates regularly harassed him verbally and physically, pushing him in the hallways, knocking textbooks out of his hands, throwing his clarinet in the trash, and assaulting him in the bathroom.
- Causes of Action: Unknown.
- Plaintiff’s Attorney: Dennis Maloney of Anchorage, AK.

CALIFORNIA

Burke v. Brentwood Union School Dist., No. 3:15-cv-00286 (N.D. Cal. 2015)
- Settlement: $2 million.
- Harassment/Injuries: Sexual harassment; sexual assault; cyberbullying.
- Single Plaintiff.
- Basic Facts: Male student pressured middle school girl into sending nude pictures to him, then used the pictures to blackmail her into performing oral sex on him in school bathrooms on numerous occasions. Other students, part of a “sexting ring” discovered by police, posted pictures on Instagram of plaintiff performing oral sex.
**Telshева v. Eugene School District (Lane Cty. Cir. Ct. 2017)**

- **Settlement:** $24,000.
- **Harassment/Injuries:** Physical assault.
- **Single Plaintiff.**
- **Basic Facts:** A high school boy was assaulted twice by a classmate on November 13, 2015, causing the boy to suffer a concussion, chronic headaches, memory loss, and anxiety.
- **Cause of Action:** Negligent supervision.
- **Plaintiff’s Attorney:** Kevin Brague, Portland, OR.

**Pennsylvania**

**Bittenbender v. Bangor Area School District, No. 5:15-cv-06465 (E.D. Pa. 2015).**

- **Settlement:** $45,000.
- **Harassment/Injuries:** Anti-lesbian verbal harassment; physical assault; threats of violence: suicidal ideation.
- **Single Plaintiff.**
- **Basic Facts:** Female student faced increasing harassment between fourth and eighth grade based on her perceived sexuality. A group of classmates and older students persistently verbally harassed and physically abused her until she contemplated suicide and ultimately transferred schools.
- **Cause of Action:** Title IX claim for deliberate indifference to sexual harassment.
- **Plaintiff’s Attorney:** Jason Schiffer, Cohen, Feeley, Altemose & Rambo, P.C., Bethlehem, PA.
  [http://www.theprogressnews.com/news/state/pennsylvania-school-district-settles-bullying-suit-for-k/article_a8ed8ab5-0755-534f-9e00-138170923d63.html](http://www.theprogressnews.com/news/state/pennsylvania-school-district-settles-bullying-suit-for-k/article_a8ed8ab5-0755-534f-9e00-138170923d63.html);


- **Settlement:** $130,000.
- **Harassment/Injuries:** Sexual assault.
- **Basic Facts:** Off-campus sexual assault.
- **Single Plaintiff.**
- **Basic Facts:** A member of the high school football team lured a female student off campus so that another member of the team could sexually assault her. After the sexual assault, the female student experienced bullying at school. The principal failed to take any action to address the resulting hostile sexual environment.
- **Cause of Action:** Title IX claim for deliberate indifference to peer-on-peer harassment, 14th Amendment Equal Protection Claim under 42 U.S.C. § 1983.
Plaintiff’s Attorneys: Benjamin Andreozzi and Heather Verchick of Harrisburg, PA.

- Settlement: $312,000.
- Harassment/Injuries: Anti-gay harassment, including physical assault; attempted suicide.
- Single Plaintiff.
- Basic Facts: Plaintiff experienced verbal and physical harassment from sixth through tenth grade because of his sexual orientation, which caused him to attempt suicide and drop out of school.
- Cause of Action: Title IX claim for deliberate indifference to sexual harassment; claim under 42 U.S.C. § 1983 alleging equal protection and substantive due process violations; claims under Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act.
- Plaintiff’s Attorneys: David C. Long, Oliveburg, PA; Michael L. Rosenfield, Pittsburgh, PA.

**Doe v. Scranton School for Deaf & Hard-of-Hearing Children** (Lackawanna County Court 2017)
- Settlement: Unknown/confidential.
- Harassment/Injuries: Sexual assault.
- Single Plaintiff.
- Basic Facts: An eight-year-old girl who was a residential student at the Scranton School was sexually abused by a thirteen-year-old girl over the course of six months in 2009-2010. The victim told a dormitory counselor that the perpetrator had kissed her and touched her genital area in October of 2009, but the school did not conduct an investigation or report the conduct to police. In April of 2010, the victim went to the doctor for rectal bleeding. There, she notified the doctor that the perpetrator had touched her numerous times at school.
- Causes of Action: Unknown.
- Plaintiff’s Attorney: John M. Elliott, Elliott Greenleaf. Blue Bell, PA.

- Settlement: School system agreed to create two education funds for two sisters, each worth $20,000; $25,000 in attorneys’ fees.
- Harassment/Injuries: Physical and verbal sex-based and color-based harassment.
- Multiple Plaintiffs (two).
- Basic Facts: Two African-American sisters, ages 8 and 11, experienced physical and verbal harassment because of their sex and color. One sister was assaulted by another African-American classmate because of her lighter complexion. The sisters experienced verbal taunts and physical assaults that included having their earrings torn out and their clothes ripped off. The verbal harassment included names such as “blackey,” “crispy,” “nigger,” “black African bush bunny,” “whore,” “bitch,” “cunt,” and “smut.”
- Causes of Action: Claim under Title IX for deliberate indifference to sex-based harassment; claim under Title VI for deliberate indifference to color-based harassment.
- Plaintiffs’ Attorney: Charles Steele, Pittsburgh, PA.

- Jury Verdict: $400,000.
- Harassment/Injuries: Disability harassment, including sexual assault; and a suicide threat.
- Single Plaintiff.
- Basic Facts: A high school student masturbated in front of a seven-year-old disabled student while another student urged the seven-year old to engage in sexual contact with the masturbating student. The child suffered post traumatic stress disorder and threatened to commit suicide.
- Causes of Action: Claims under Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and Americans with Disabilities Act; claim under 42 U.S.C. § 1983 alleging due process violations.
- Plaintiff’s Attorneys: Andrew Erba, Sherri Eyer, Gerald Williams, Philadelphia, PA.

- Settlement: $135,000 ($20,000 to each student and $75,000 in attorneys’ fees), plus injunctive relief.
- Injunctive Relief: School will rescind its discriminatory bathroom policy and update its nondiscrimination policy to include gender identity.
- Multiple Plaintiffs (three).
- Harassment/Injuries: Transgender discrimination.
- Basic Facts: Three transgender high school students sued after the school revised their bathroom policy to require transgender students to use bathrooms associated with their biological sex.
- Causes of Action: Title IX claim for sex discrimination; §1983 claim for discrimination based on sex and transgender status in violation of students’ rights under Equal Protection Clause of Fourteenth Amendment.
- Plaintiffs’ Attorneys: Omar Gonzalez-Pagan, Lambda Legal Defense and Education Fund, Inc., New York, NY; Christopher Clark, Lambda Legal, Chicago, IL; Tracie Palmer and David Williams, Kline and Specter, P.C., Philadelphia, PA.

**MacLean v. Borough of Hellertown, No. 5:17-cv-02085-LKC (E.D. Pa. 2018).**
- Settlement: $96,500, plus injunctive relief and $15,000 in annual costs for three years of private or parochial school tuition for one of the plaintiffs.
- Injunctive Relief: School district must continue anti-bullying program, provide anti-bias training for next three years, and post the Safe Schools report on its website for three years.
- Multiple Plaintiffs (two students plus parents).
Harassment/Injuries: Race discrimination and harassment, including racial slurs and threats of violence; sexual harassment.

Basic Facts: Two African-American brothers experienced pervasive racial harassment and discrimination at Saucon Valley Middle School and High School, including regular verbal abuse and threats of physical violence. The two brothers were called racial epithets like “coon,” “nigger,” and “jungle bunny,” and a group of white students threw a confederate flag around one of the boy’s shoulders and told him to wear it with pride.

Causes of Action: hostile educational environment based on race under Title VI; race discrimination in violation of Equal Protection under 42 U.S.C. § 1983; intentional infliction of emotional distress; violation of right to bodily integrity under Due Process Clause and § 1 of Pennsylvania’s Constitution; willful misconduct constituting intentional & discriminatory failure to provide adequate or equivalent level of protective services, procedures, and policies in violation of the No Child Left Behind Act of 2001 20 U.S.C. § 6301 et seq., and Pennsylvania’s Safe Schools Act, 24 P.S. § 13-1301 et seq.

Plaintiffs’ Attorneys: Gary Schafkopf of Hopkins Schafkopf, LLC in Bala Cynwyd, PA; Matthew B. Weisberg & David A. Berlin of Weisberg Law PC in Morton, PA.


**Mary V. v. Pittsburgh Public Schools, No. 09-cv-1082-DWA (W.D. Pa. 2010)**

- Settlement: $55,000.
- Harassment/Injuries: Harassment based on female student’s weight.
- Single plaintiff
- Basic Facts: A Frick Middle School student claimed that teasing from fellow students about her weight—and the administration’s failure to halt the abuse—led her to develop anorexia. The harassment often occurred at lunch and would cause the girl to throw away her food instead of eating it in front of the boys.
- Causes of Action: Title IX claim for deliberate indifference to sex discrimination; Title IX claim for retaliation; claim under Pennsylvania Fair Educational Opportunities Act.
- Plaintiff’s Attorney: Edward Olds, Pittsburgh, PA.


- Settlement: $97,500.
- Harassment/Injuries: Verbal harassment.
- Single Plaintiff.
- Basic Facts: Middle school student endured sex-based harassment and taunts for scratching her genitals due to a yeast infection. Students called the plaintiff names such as “bitch,” “slut,” “skank,” and “whore.” Teachers were aware of bullying, but took no action.
- Cause of Action: Claims under Title IX for deliberate indifference to peer harassment; 42 U.S.C. § 1983 for violation of substantive due process; and state tort law.
- Plaintiff’s Attorney: Dave Frankel and Joshua Kershenbaum of Bryn Mawr, PA.


- **Settlement:** Injunctive relief only.
- **Injunctive Relief:** Settlement agreement requires school district to retain an expert consultant on harassment and discrimination based on race, color and/or national origin to review the district’s harassment policies and procedures; develop and implement a comprehensive plan for preventing and addressing student-on-student harassment at South Philadelphia High School; conduct training of faculty, staff and students on discrimination and harassment based on race, color and/or national origin and to increase multi-cultural awareness; maintain records of investigations and responses to allegations of harassment; and provide annual compliance reports to the department and the Philadelphia Human Rights Commission, as well as make harassment data publicly available.
- **Harassment/Injuries:** National origin harassment, including assault.
- **Multiple Plaintiffs:** (United States sued based on harassment of approximately 30 students)
- **Basic Facts:** Asian-American students were subjected to constant verbal and physical harassment at South Philadelphia High School. In December 2009, approximately 30 Asian-American students were attacked and 13 were sent to the emergency room. The Asian-American Legal Defense and Education Fund filed an administrative complaint and the U.S. Department of Justice investigated and filed suit.
- **Causes of Action:** Title IV claim for deliberate indifference to discrimination based on race, color and/or national origin; claim under 42 U.S.C. § 1983 alleging equal protection violation.
- **Plaintiffs’ Attorneys:** U.S. Department of Justice (Civil Rights Division).


- **Verdict:** $500,000.
- **Harassment/Injuries:** Physical, verbal, and sexual harassment; homophobic slurs; sex discrimination; physical assault; post-traumatic stress disorder and panic attacks.
- **Single Plaintiff.
- **Basic Facts:** Amanda Wible, a sixteen-year old was bullied and harassed in school for several years due to her gender presentation and for failing to conform to gender stereotypes. She suffered a number of physical assaults, dating back to elementary school, including one in which she was attacked by ten students.
- **Causes of Action:** Sex discrimination claim under the Pennsylvania Human Relations Act, Pa.C.S.A. § 955.
- **Plaintiff’s Attorneys:** David Berney, Jennifer Y. Sang, and Kevin Golembiewski of Berney & Sang in Philadelphia, Pennsylvania.
July 26, 2017

U.S. Department of Education
Office for Civil Rights, Philadelphia Office
100 Penn Square East, Suite 515
Philadelphia, PA 19107-3323

Dear Director Wendella P. Fox:

The Education Law Center-PA (“ELC”) is a non-profit public interest law firm whose mission is to ensure access to quality public education for all children in Pennsylvania. We pursue this mission by advocating on behalf of the most vulnerable students—children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English Language Learners, those experiencing homelessness, and LBGTQ students. Our strategies include advocating for legislative, regulatory, and policy reforms, undertaking impact litigation, and providing individual legal representation. ELC handles over 1,000 calls to its helpline each year from parents, students, and other stakeholders.

ELC files this Complaint on behalf of PARENT1 concerning the education of STUDENT (“XX”), for whom PARENT is legal guardian as well as others similarly situated, including Ms. XX, Ms. XX, and Ms. XX. The Complaint challenges systemic inadequacies with respect to the School District of Philadelphia’s (“District”) response to allegations of bullying of students, particularly where those allegations involve the bullying of students with disabilities. Additionally, this Complaint challenges the District’s discriminatory use of Truancy Court as an intervention for students with disabilities whose truant behavior is related to their disabilities. Accordingly, as detailed herein, this Complaint seeks both individual relief on behalf of STUDENT and other individually named students, as well as systemic relief on behalf of all students similarly situated. We specifically request that the Office for Civil Rights (“OCR”) apply a systemic approach to its investigation of this matter as the complaint allegations themselves warrant an expansive investigation and the development of a commensurate remedy to protect the rights of all students with disabilities educated in the District.

I. BACKGROUND

Individual Allegations on Behalf of STUDENT

STUDENT is an African-American student in the fourth-grade at SCHOOL (“SCHOOL”) in the District. STUDENT is a student with a disability under the Individuals with Disabilities Education Act (“IDEA”) who has been identified as a child with a Specific Learning Disability (“SLD”). He has also been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) by a psychologist at Dunbar Community Counseling Services (“Dunbar”) and Children’s Hospital of Pennsylvania (“CHOP”), and asthma by his primary care physician, for which he takes Albuterol. The Dunbar evaluation, dated December 29, 2016, additionally states that STUDENT exhibits anxious behavior due to peer victimization at school.

1 This is a redacted version of the Complaint filed by ELC with the Office for Civil Rights. The document has been redacted to protect the privacy of the students involved.
In December 2015, STUDENT began to tell PARENT that students were bullying him at school. His allegations of bullying included being pushed down the stairs by two peers, being persistently called derogatory names, being repeatedly pushed and punched, and more. At that time, PARENT notified XX, the school Principal, and made other SCHOOL staff aware of the bullying that STUDENT reported. Throughout the winter of the 2015-16 school year, STUDENT continued to complain to PARENT about being bullied at school and started to show signs of school refusal behavior. PARENT tried to bring STUDENT to school, but he was extremely resistant. In the mornings, PARENT drove STUDENT to school, but when they arrived, STUDENT often refused to get out of the car—he cried and held onto the seat, begging PARENT not to make him go to that school. STUDENT did not have any attendance issues prior to this time, and seemed to enjoy school, as reported by PARENT and reflected in STUDENT’s special education records. On several occasions, Principal XX and other SCHOOL staff witnessed this behavior, but did not intervene or offer support. Despite PARENT’s repeated attempts, over the course of several months, to get SCHOOL officials intervene, they did not. At no point during this entire process did SCHOOL officials ever offer to convene STUDENT’s Individualized Education Program (“IEP”) Team to discuss these alarming and unusual behaviors. Nor did anyone from SCHOOL ever encourage PARENT to complete a formal Bullying & Harassment Reporting & Investigation Complaint Form (“Bullying Complaint”), which is the District’s official complaint form.

Eventually, having gotten nowhere with her direct complaints to SCHOOL officials and Principal XX, PARENT began exhausting the chain of command at the District’s Education Center at 440 North Broad Street. She called the Office of Attendance & Truancy and spoke with Mr. Maurice West regarding STUDENT’s absences. After hearing STUDENT’s story, Mr. West told her not to worry: because STUDENT was being bullied, the District would not refer her to Truancy Court. PARENT also contacted the Office of Student Enrollment & Placement. She spoke with Mr. Darnell Deans and requested that the District laterally transfer STUDENT to another school based on her concerns about ongoing and persistent bullying that he was experiencing, and the related attendance issues that the bullying was causing. PARENT desperately wanted to send STUDENT to school in a safe and supportive learning environment. However, the Office of Student Enrollment & Placement refused to grant PARENT’s request for such a transfer for reasons that were never explained to her. Because the District did not make public or accessible its procedures and policies with respect to school transfers for bullying and safety purposes, PARENT had no way of knowing what the District relied on in denying her request.2

PARENT next attempted to contact Assistant Superintendent, Deborah Carrera, who did not return her several calls. Eventually, PARENT contacted the Superintendent, Dr. William Hite, but again, to no avail.

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2 Upon information and belief, the District revised its internal policy and procedure for granting administrative lateral transfers prior to the 2016-17 school year in order to limit the number of transfers for safety purposes that the District authorizes. A copy of the District’s general “Administrative Transfers” directive is attached to this Complaint as Exhibit A. This document is not available on the District’s website. The directive clearly indicates that the District does not permit parents to request transfers for bullying and/or safety purposes.
On March 3, 2016, after researching the District’s Bullying Complaint procedures online, PARENT returned to the Education Center and filed both a formal Bullying Complaint and completed an Intake Form at the District’s Office of Family & Community Engagement (“FACE”). On both forms, PARENT indicated that STUDENT was being bullied at school and that the effects of the bullying were causing him to miss school. PARENT hoped that someone from the District would investigate her Complaint and provide relief so that STUDENT could attend school in a safe and supportive environment. Unfortunately, like her complaints to SCHOOL and her direct attempts to contact the District’s central office administrators, the District failed to investigate her formal Bullying Complaint, let alone offer a solution to the ongoing school refusal behavior that STUDENT was exhibiting due to his fears associated with the bullying he experienced in school. In fact, PARENT waited nearly three months before the District responded to her Bullying Complaint. In May, Ms. XX, who is a Parent Coordinator in the District’s FACE Office, agreed to convene a meeting to address the concerns PARENT raised in her complaints. By this time, STUDENT had already missed over 90 school days because PARENT feared putting STUDENT in harm’s way.

On May 5, 2016, PARENT met with Principal XX and Ms. XX at SCHOOL to discuss her Complaint. STUDENT was present for this meeting. Unfortunately, but unsurprisingly, given STUDENT’s low working memory functioning and the length of time that had lapsed between the allegations of bullying and the District’s response, STUDENT was unable to articulate with specificity to Ms. XX the bullying he had experienced earlier in the school year. Instead, STUDENT told Ms. XX that he was being bullied by two students—a set of twins. As it turned out, those students had indeed bullied him in the past (during the 2015-16 school year, STUDENT told his teacher, XX, that “the persons bullying him were a set of twin boys”), but no longer attended SCHOOL. Nonetheless, Ms. XX created a Safety Plan at the meeting that was meant to “lessen any interactions that [STUDENT] may have with individuals bullying him, and to lessen [any] discomfort or anxiety [he] may feel during the school day.” However, SCHOOL never implemented the Safety Plan—let alone amended STUDENT’s IEP to include specific interventions and supports with respect to peer victimization—because school officials determined that the identified students who had previously bullied STUDENT were no longer students at SCHOOL. The District did not offer STUDENT any other supports—like counseling—to help him overcome the effects of past bullying or prevent adverse effects of future bullying. STUDENT later told PARENT that he had been confused and that there were other students who bullied him at school in addition to the students he named at the meeting. XX verbally conveyed this information to school officials.

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3 These forms are attached to this Complaint as Exhibit B.
4 According to the District’s most recent evaluation of STUDENT, completed in 2011, his working memory is in the third percentile (3%). Specifically, the evaluation report states that “[XX] experienced difficulty in recalling numbers backwards and this is evidence of weak mental control. This weakness may slow the processing of difficulty information for [XX] and slow novel learning.” Later in the report, the evaluator explains that “[c]hildren with low working memory tend to take much longer to process information. Hence, timed activities and quick presentation of information becomes a difficult task. Working Memory is important in higher-order thinking, learning and achievement. It can tap concentration, planning ability, cognitive flexibility, and sequencing skill, but is sensitive to anxiety too.” This Evaluation Report is attached to this Complaint as Exhibit C.
5 XX’s statement is attached to this Complaint as Exhibit D.
6 This Safety Plan is attached to this Complaint as Exhibit E.
Fearful of ongoing bullying at SCHOOL and the school’s lack of commitment to addressing these concerns in light of STUDENT’s disabilities, PARENT did not want to send STUDENT back to school there for the next school year. During the first few weeks of September 2016, she considered her options—including local charter schools and formal home schooling. Eventually, in mid-September, PARENT decided that it was important that STUDENT have social interactions with his peers, so she decided to send him back to SCHOOL. On September 22, 2016, PRINCIPAL and COUNSELOR, for the very first time, came to STUDENT’s home—unannounced—to discuss the absences from the 2015-16 school year and 2016-17 school year. PARENT was not prepared for this meeting, so did not personally speak with PRINCIPAL and COUNSELOR at this time. The very next day, September 23, 2016, PARENT received a summons from the District to attend Truancy Court. PRINCIPAL and COUNSELOR did not make any further attempts to discuss STUDENT’s absences with PARENT. The summons to appear in Truancy Court explained that PARENT’s failure to comply with Pennsylvania’s Compulsory School Attendance Law may result in a court levying fines against her up to $300, referring her child to Family Court for possible disposition as a dependent child under Pennsylvania’s Juvenile Act, and jailing her.7

PARENT attended Truancy Court without the benefit of counsel on November 11, 2016. The Truancy Court Master8 heard testimony from PARENT about the reasons for STUDENT’s excessive absences—namely, the bullying he experienced at SCHOOL and his serious fears associated with school attendance. No one from SCHOOL was present at the hearing—only a “court representative” from the District who had never met STUDENT nor PARENT. The Truancy Court Master issued an Attendance Improvement Plan (which functions as a Court Order in the Regional Truancy Court system) that stated: “Child is to attend school daily. No lateness, cutting or suspensions. Absences may only be excused with a Physician’s Note.” The Master also ordered “AGENCY” assigned to STUDENT’s case. AGENCY9 is a private, non-profit agency with whom the City of Philadelphia’s Department of Human Services (“DHS”)

7 The consequences of a referral to Truancy Court in Philadelphia are substantial: Under Pennsylvania’s Juvenile Act, judges may adjudicate children dependent for habitual truancy and remove them from their homes into placements like foster care and group homes (see 42 Pa.C.S. § 6351). In ELC’s experience, this is a frequent response to habitual truancy in Philadelphia’s Family Court, even though placing a child out of his or her home for issues related to absenteeism has not been proven to be effective in addressing the root causes of truancy, and is, in fact, harmful to a child’s educational progress. See, e.g., Jessica Gunderson, et al., Rethinking Educational Neglect for Teenagers: New Strategies for New York State, VERA INST. OF JUSTICE, at 10-11 (Nov. 2009), available at http://ocfs.ny.gov/main/reports/Rethinking%20Educational%20Neglect_final.pdf (finding no research indicating that placing a child in foster care improved the child’s attendance, and explaining that the child protective system and the family court are ill-equipped to address barriers to school attendance). In 2015-16, 17.8% of all cases heard in Truancy Court were referred to Family Court, based on data retrieved by ELC through a Right to Know Law request. Thus, it is high stakes for families who are referred to Truancy Court. Significantly, the District disproportionately refers families of color to Truancy Court. In 2015-16, the District referred approximately 5596 families to Truancy Court: 3511 of these families were Black, 1242 were Hispanic, and 297 were identified as “multiracial,” compared with only 451 white families. Thus, of the cases referred to Truancy Court, 62.7% were Black families and an overwhelming 90.2% were families of color. Only 5.3% of families referred to Truancy Court were white. This disparity is not reflective of the District’s enrollment, as approximately 50% of students enrolled in the District are Black and 14% are white.

8 Pa.R.J.C.P. §§ 1182—1192 (relating to Masters). In Philadelphia, there are four Regional Truancy Courts which are overseen by Hearing Officers/Masters appointed by the Administrative Judge of the Philadelphia Family Court.

9 NAME OF AGENCY REDACTED.
contracts to provide truancy prevention and intervention services. There is no mention of the root causes of STUDENT’s absenteeism anywhere in the Attendance Improvement Plan, nor does the Order provide strategies for alleviating the attendance barriers that STUDENT was facing. Similarly, the Order did not address the ongoing and persistent bullying that STUDENT was experiencing, let alone how it might be impacting his access to the free appropriate public education (“FAPE”) to which he is entitled as a student with a disability.10

Soon after the first Truancy Court listing, Mr. AGENCY CASE MANAGER, a AGENCY truancy case manager, conducted a home visit with PARENT and STUDENT, PARENT expressed frustration that the school’s failure to address the bullying of her son that had led to the District’s treatment of her as a neglectful parent, and expressed to Mr. AGENCY CASE MANAGER that she did not want or need his services. Shortly after this home visit, PARENT contacted ELC, seeking legal advice. Prior to the second Truancy Court hearing, ELC met with PARENT and Mr. AGENCY CASE MANAGER at PARENT’s residence. PARENT explained to ELC and Mr. AGENCY CASE MANAGER that the absences were related to STUDENT’s fears about attending school due to bullying, and that he was still being bullied. Mr. Song agreed to advocate for a school transfer to another neighborhood school so that STUDENT could attend school in a safe and supportive learning environment. PARENT explained that she had tried that already, and did not see how AGENCY would be of any assistance, but nonetheless agreed to give it a try.

After the meeting, Mr. AGENCY CASE MANAGER’S supervisor, Ms. SUPERVISOR, wrote to Ms. XX, who is a staff person in the District’s Office of Attendance & Truancy, explaining the circumstances and requesting a school transfer. In response, Ms. XX explained, in bold print, that the District has a policy of not granting school transfers.11 Ms. XX encouraged Ms. SUPERVISOR to assist PARENT in filing a Bullying Complaint. Of course, PARENT had done just that nearly a year prior, which the District did not investigate for over three months, let alone take steps reasonably calculated to alleviate the alleged bullying or its effects on STUDENT.

At the second listing in Truancy Court on January 6, 2017, PARENT explained to the Master again that the absences were due to bullying and that the bullying was still occurring. The Master advised PARENT to continue to file Bullying Complaints each time STUDENT disclosed to her that he was bullied. Acknowledging that the bullying was still unresolved, the Master nonetheless dismissed the matter because STUDENT had not accrued additional absences since returning to school in September.12

After the truancy matter was discharged, STUDENT continued to complain to PARENT that he was being bullied at SCHOOL. He told her that he wanted to go to a different school, and was mad that PARENT had not listened to this request and was still making him go to SCHOOL (in fact, she had tried to effectuate a transfer, but was unsuccessful in securing the result). The very week after the truancy petition was discharged, STUDENT came home from

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10 The November 14, 2016 “Truancy Court Order” is attached to this Complaint as Exhibit F.
11 Ms. XX’s response is attached to this Complaint as Exhibit G.
12 The January 6, 2017 “Truancy Court Order” is attached to this Complaint as Exhibit H.
school crying to PARENT about ongoing and persistent bullying, pleading with her to send him to a different school.

On January 10, 2017, ELC sent Ms. Rachel Holzman, Esq., who is the Deputy Chief of Student Rights & Responsibilities, a copy of the March 2, 2016 Bullying Complaint that PARENT had filed, as well as a list of new bullying incidents from the 2016-17 school year that PARENT had documented, dating from December 8, 2016 through January 4, 2017. The incidents of bullying included: being punched in the back by another student; having another student throw a chair at him; being told by another student to “move, bitch, get out of my way”; being repeatedly pushed in the back during a lineup at recess and told to “shut the f* up” and “get to the back of the line”; being kicked in the leg at recess; being hit with a lunch bag at recess; being told by another student that “he has a disease” and “needs to brush his teeth”; being punched in the stomach; and being repeatedly called derogatory names by other students. ELC requested that the District formally and urgently investigate the incidents of bullying alleged by PARENT in her documentation.

Shortly thereafter, Ms. Holzeman informed ELC that SCHOOL had investigated the Bullying Complaint, and found that it was “unsubstantiated.” It was suggested that PARENT might be fabricating the bullying. It is unclear what motive PARENT would have to lie about bullying, since it was no longer causing STUDENT to miss school and because her truancy court case was already dismissed for substantial compliance. She just wanted STUDENT to be able to attend school in a safe setting. Furthermore, STUDENT disclosed that he was being bullied by both the Dunbar psychologist who evaluated him and his therapist with whom he spoke on a weekly basis, outside the presence of PARENT. In any event, Ms. Holzman denied the request for the safety transfer and closed the District’s investigation into the Bullying Complaint. ELC requested the Bullying Complaint & Investigation Report that SCHOOL was required to complete pursuant to the District’s Bullying & Harassment Procedures (“Procedures”), but the District never furnished this report, nor, for that matter, any documentation supporting SCHOOL’s finding that the bullying was “unsubstantiated.”

Subsequently, PARENT learned from STUDENT how SCHOOL conducted the investigation into the January 10, 2017 Bullying Complaint. SCHOOL officials, including the counselor, XX, pulled STUDENT from his class and walked him around the school building to point out his bullies. When he did, SCHOOL officials made STUDENT confront his bullies face-to-face. In front of STUDENT, SCHOOL staff asked the students whether they had bullied STUDENT. They all responded that they had not. SCHOOL also interviewied STUDENT, but did not inform PARENT of this interview, let alone allow her to participate. Both of these actions—(1) forcing a child to confront his bullies during an investigation and (2) failing to permit a parent to participate in the investigation process—expressly violated the District’s own Procedures. Specifically, the Procedures state that “the complainant shall not be required to meet face-to-face with the accused” and that the complainant may be accompanied by a parent or guardian “during all steps of the complaint procedure.”

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13 A full list of the alleged incidents, recorded contemporaneously by PARENT at the time STUDENT told her of the incidents, is attached to this Complaint as **Exhibit I**.
14 The District’s Procedures are attached to this Complaint as **Exhibit J**.
ELC made Ms. Holzman aware of these procedural flaws in SCHOOL’s investigation. Acknowledging these flaws, Ms. Holzman indicated that SCHOOL would redo the investigation—properly this time, in accordance with District policy. While SCHOOL officials did not make STUDENT confront his bullies face-to-face, they again failed to conduct the “do-over” investigation in conformity with the District’s Procedures. Specifically, SCHOOL officials again failed to inform STUDENT that he may have his guardian present at all times. Unsurprisingly, the District deemed the second investigation—like the first—unsubstantiated, and closed the investigation. Despite repeated requests, the District failed for over a month to furnish the Investigation Report or any documentation regarding SCHOOL’s investigation of PARENT’s January 10 Complaint.

Despite the District’s finding that the bullying was unsubstantiated, STUDENT continued to disclose incidents of bullying to PARENT. During this period, STUDENT repeatedly told his Dunbar therapist, Ms. XX, M.S., that he was being bullied at school, which she recorded in treatment notes.\(^\text{15}\) The treatment notes explain that STUDENT was not coping well with the bullying that he was experiencing, and that he told his therapist that he was planning to respond to his bullies by fighting back. To address this ongoing bullying, on January 30, 2017, PARENT filed a third Bullying Complaint, through a formal letter authored by counsel,\(^\text{16}\) regarding new incidents of bullying that occurred after the District closed its second investigation of the January 10 Complaint. In this Complaint, STUDENT alleged to have experienced the following incidents of bullying: being punched in the stomach; being jumped on by another student and swung around by his hood; being called names; being chased by another student who told him “if I catch you I’m going to kill you”; and more.\(^\text{17}\) PARENT, through counsel, specifically requested that the District’s investigation conform in all respects to the District’s Procedures. The letter asserted that the District’s failure to appropriately address the ongoing bullying was impacting its ability to offer STUDENT a FAPE. Accordingly, through this letter, PARENT reiterated her request that the District immediately transfer STUDENT to a new neighborhood school.

Again, SCHOOL officials conducted an inappropriate investigation. While this time, SCHOOL staff, namely, XX and XX, invited PARENT to be present during SCHOOL’s interview of STUDENT, it also invited two school police officers to the meeting. It is not at all clear why school police were included in the meeting—there is nothing in the District’s Procedures which indicates that school police are to be present. It appears, then, that SCHOOL requested the police to be present, at best, to suggest to PARENT that she needed to be controlled, and, at worst, to intimidate her.\(^\text{18}\) During the interview, PARENT objected to the manner in which SCHOOL officials asked STUDENT questions, citing his low working memory and difficulty understanding abstract questions—facts which are supported by District’s own

\(^\text{15}\) These notes are attached to this Complaint in redacted form as Exhibit K.

\(^\text{16}\) This letter is attached to this Complaint as Exhibit L.

\(^\text{17}\) A full list of the alleged incidents, recorded by PARENT at the time STUDENT told her of the incidents, is attached to this Complaint as Exhibit M.

\(^\text{18}\) This behavior is consistent with how SCHOOL officials have treated PARENT for years—as a liar, neglectful parent, and threat—when all she has ever done is attempted to advocate for the education needs of STUDENT, to whom she is legal guardian.
2011 Evaluation of STUDENT. Specifically, PARENT expressed that STUDENT has a very difficult time answering open-ended questions about incidents that occurred weeks prior. SCHOOL accused PARENT of feeding STUDENT answers and closed the investigation before the interview could be completed. The District never completed the interview of XX, and again failed to promptly furnish any documentation with respect to its investigation of the January 30 Bullying Complaint.

Eventually, at counsel’s urging, the District agreed to convene a multi-disciplinary meeting, which included IEP Team members to address PARENT’s ongoing concerns related to STUDENT’s education and safety. This meeting took place on March 30, 2017, over a year after PARENT had filed her original Bullying Complaint. At this meeting, SCHOOL staff and District administrators continued to deny that STUDENT had been bullied at all. ELC advocated for additional accommodations to be incorporated into STUDENT’s IEP to prevent future bullying, including a check-in, check-out activity, which mandates that STUDENT’s special education teacher ask him a specific set of questions about his day at three critical times: in the morning, after lunch, and at the end of the day. These reports were to be provided to PARENT on a daily basis. Additionally, the IEP Team decided to add thirty minutes of counseling per week. The District agreed to include these specially designed instructions and related services in his IEP. However, SCHOOL never implemented the check-in, check-out intervention, nor provided STUDENT with counseling.

While these modifications to STUDENT’s IEP are important, they do not make up for the District’s utter failure to appropriately address the ongoing and pervasive bullying that STUDENT experienced during the 2015-16 and 2016-17 school years, nor do they compensate for the District’s unfounded treatment of PARENT as a neglectful parent by referring her and STUDENT to Truancy Court, despite PARENT’s repeated attempts to use legitimate channels to ensure that STUDENT received a FAPE in a safe learning environment.

Ultimately, PARENT continued to feel that both she and STUDENT were unsafe at SCHOOL. Since the District refused to approve a lateral transfer to another school, she finally moved her family to another neighborhood in Philadelphia and enrolled STUDENT in the local District school, where he is thriving in a learning environment free from bullying.

**Systemic Allegations**

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19 See note 3, supra. The District’s own evaluation clearly indicates that because of STUDENT’s disability, he struggles to remember and recite information, particularly abstract concepts. It is no surprise then that STUDENT was unable to effectively respond to questions posed to him by school officials during their several investigations.

20 Also in attendance was Ms. Wanda Cummings, who is a Parent Advocate at the Parents Involved Network of the Mental Health Association of Southeastern Pennsylvania.

21 PARENT contemporaneously documented additional mistreatment both she and STUDENT experienced from staff at SCHOOL, including hostile treatment by the school secretary and principal, as well as inappropriate conduct toward STUDENT by his teacher. PARENT’s written documentation of some of these incidents, as well as her correspondence with Principal XX and SCHOOL, are attached to this Complaint as Exhibit N.

22 There are still issues related to STUDENT’s IEP, including the fact that the District never implemented the bullying prevention interventions and counseling; is past due on STUDENT’s three-year re-evaluation; and has failed to correct inaccuracies in STUDENT’s attendance records.
Failure to Promptly and Appropriately Address Bullying of Students with Disabilities

Unfortunately, we know that STUDENT’s experiences are not unique, but rather are emblematic of systemic harm that has impacted many students with disabilities across the District. During the 2016-17 school year, ELC heard from an increasing number of parents about severe and pervasive bullying of students with disabilities at different schools in the District. More so than in past years, parents have repeatedly complained that their attempts to advocate for a resolution to the bullying of their child were unaddressed at all levels—by both local schools and the District. For instance, parents attempted to call the District’s Bullying Hotline, but the District often failed to return their calls. Similarly, parents filed formal Bullying Complaints, but the District rarely investigated their complaints in a timely and appropriate manner, if at all. This systemic failure to appropriately respond to parents’ complaints about bullying means that discriminatory and harmful bullying goes unchecked in schools all across the District.

Many of these stories involved bullying of students with disabilities, and facts suggest that the District’s failure to intervene deprived the student of his or her entitlement to a FAPE. It is well-known that students with disabilities are more likely to be bullied than students without disabilities.23 Bullying or harassment can amount to a denial of FAPE when it adversely affects a student’s ability to participate in or benefit from their educational program.24 Both OCR and the Office of Special Education and Rehabilitative Services (“OSERS”) have provided clear guidance to local educational agencies (“LEAs”), since 2014, that the failure to effectively address bullying of students with disabilities—even when the bullying is not on the basis of a student’s disability—is discriminatory to the extent that it deprives a child of a FAPE.25

The District’s Bullying Complaint form does not seek information about whether the child alleged to have been bullied or harassed is a child with a disability (only whether the alleged bullying or harassment was based on a child’s disability), so even when the District does complete investigations, they are often procedurally and substantively inappropriate in light of the child’s disability. Moreover, there seems to be no commitment from the District to address bullying through the IEP Team or Section 504 Team processes.

Failure to Permit Parents to Request School Transfers When the District Fails to Promptly and Appropriately Address Bullying

23 U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (OCR), Dear Colleague Letter on Bullying of Students with Disabilities under Section 504 and Title II, at 1 n.1 (Oct. 21, 2014), available at, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf (“[Students with disabilities] are bullied or harassed more than their nondisabled peers.”) [hereinafter, “OCR Dear Colleague Letter”].

24 Id. at 5-7.

Relatedly, ELC has heard from many parents who, in response to the District’s failure to timely and appropriately respond to the allegations of bullying, sought to have their child transferred to a new neighborhood school, away from the harmful environment at the local school. In almost all of these cases, the District denied the parent’s request for a school transfer. Unlike other large school districts, the District does not have a formal policy that permits parents to seek “safety” transfers at all. In fact, it has just the opposite.

While parents may file complaints regarding bullying, there is no specific process by which parents or students may formally request and obtain a school transfer based on any objective and knowable criteria. Rather, the District has issued an internal directive with respect to school transfers that strips parents of any right to seek such relief and vests total control with regard to safety transfers with individual school administrators and the District’s administrative officers. This directive states that school transfers will not be effectuated unless and until the building principal (1) documents alleged bullying and harassment or other safety concerns; (2) delivers that information to the District’s administrative offices; (3) the District’s Division of Student Support Services puts interventions for a sufficient—but unspecified—period of time; (4) interventions are proven unsuccessful; and (5) the staff person from Student Support Services (not the parent) submits a formal transfer request to the District’s Office of Student Enrollment & Placement. Thus, parents have no right at all to request a transfer—other than to alert building administrators of the problem and then hope for the best—let alone appeal the District’s denial of a parent’s request for a safety transfer. This policy is particularly flawed because administrators are unlikely to approve transfers, lest they admit to central office administrators that they have failed to foster a positive school climate, free from bullying. Nor is there a clear and transparent policy that stipulates how school safety transfer decisions will be made (i.e. what standards apply), what documentation should be provided, or who makes the decision.

In contrast, many other school districts across the country, and in Pennsylvania, maintain objective, transparent, and accessible safety transfer policies that apprise parents of their rights, applicable standards, and provide a mechanism for relief, including an appeal process. For instance, New York City and Pittsburgh both maintain administrative safety transfer policies that permit parents to request a school transfer and stipulate a formal process for decision-making and appeals. 26 Rather than supporting students to remain in school, the District’s rigid position opposing school transfers and its lack of transparency with respect to the transfer process, coupled with its failure to appropriately respond to allegations of bullying in an appropriate and consistent manner, create the opportunity for unchecked bullying and harassment to flourish in violation of students’ civil rights, particularly since it is well-established that students with disabilities in the District and elsewhere are more likely to be bullied than their peers without disabilities. The District is legally obligated to ensure that students with disabilities receive a FAPE under federal and state laws.

Inappropriate and Discriminatory Referrals to Truancy Court

Finally, instead of proactively and appropriately addressing bullying in a timely manner, including permitting parents to transfer their children to safer schools, the District refers many

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26 The New York City and Pittsburgh transfer policies are attached to this Complaint as Exhibits O and P, respectively.
students with disabilities who have been bullied to Truancy Court, as occurred in XX’s case (as well as XX’s case, discussed below). As a result of unchecked bullying, students with disabilities become fearful of school, and sometimes refuse to go at all. The result is that students with disabilities who have been bullied often miss a substantial amount of instruction. Instead of addressing student truancy through the processes for providing accommodations to students with disabilities set forth in IDEA and Section 504 of the Rehabilitation Act (“Section 504”), schools reflexively refer students and their families to Truancy Court—resulting in additional lost instruction time.

Not only is the referral to Truancy Court discriminatory, but, as evidenced by this case and others, Truancy Court is ineffective in resolving, or even considering, the underlying causes of a child’s truancy when those causes relate to bullying and the denial of FAPE. That is because Truancy Court is simply not designed to identify and address disability-related issues. First and foremost, the District does not screen its referrals to Truancy Court to determine whether the truancy is related to a child’s known or unidentified disability. Pursuant to a recent Right to Know Request, ELC learned that the District does not disaggregate referrals to Truancy Court based on the student’s disability status—under either IDEA or Section 504. Therefore, students with disabilities are funneled into Truancy Court for behavior that may be and often is caused by or related to their disabilities, or the failure of the District to provide accommodations or services with respect to a child’s disability. This appears to be in direct contravention of the requirements of Section 504 and the IDEA. Second, no qualified District staff are present at Truancy Court hearings to address disability-related issues and concerns as they arise in the course of proceedings. Thus, even if the Master presiding over the hearing identifies that the truancy relates to the child’s disability, the Master has no means to resolve it other than to hold the matter open or discharge it without resolution of the underlying barrier to attendance. The result is that students with disabilities are ensnared in a court system that is unable to address their needs with respect to attendance, which leads to prolonged and unaddressed deprivations of FAPE, as occurred here.

Case Vignettes Demonstrating the Widespread Nature of the Foregoing Systemic Allegations

The following case vignettes are included to illustrate that the District’s failure to timely and appropriately address severe and pervasive bullying of students with disabilities is not isolated to STUDENT’s experience at SCHOOL, but rather, is symptomatic of a systemic failure by the District to address bullying of students with disabilities. Specifically, each of these cases

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27 In 2016, for the first time, the U.S. Dep’t of Education publish civil rights data that shows that students with disabilities are 1.5 times more likely to be chronically absent than their non-disabled peers. See U.S. DEP’T OF EDUC., Chronic Absenteeism in the Nation’s Schools, https://www2.ed.gov/datastory/chronicabsenteeism.html#one (last visited July 26, 2017). Thus, the District should expect that students with disabilities will be overrepresented in its “truant” population. However, as discussed below, the District does not have a mechanism for tracking students with disabilities who are referred to Truancy Court, nor a policy to ensure that they are not inappropriately referred to Truancy Court where absences are related to the child’s disability.

28 See OCR Dear Colleague Letter, at 7 n.27 (“If a student suspected of having a disability was missing school to avoid bullying, OCR may consider whether the student’s evaluation was unduly delayed (e.g., if the school knew or should have known of the bullying and failed to act) in determining whether there was a denial of FAPE under the circumstances).
reflect the District’s failure to: (1) adopt, implement and adhere to policies to ensure that schools promptly and appropriately address bullying; (2) train building-level staff to create positive and inclusive school climates that are free from bullying; (3) permit student transfers for safety purposes; and (4) ensure that students with disabilities who have been bullied are not deprived of a FAPE, including that IEP or Section 504 Team meetings are held in a timely manner to address the impact of bullying on a child’s educational program. This Complaint also seeks individual relief for each of the named students to remedy the deprivations of FAPE they experienced due to the District’s failure to timely and appropriately address bullying they experienced in the context of their IEPs/Section 504 Service Agreements.

**Student XX**

STUDENT (DOB 10/17/2007) is a Hispanic third-grade student at the SCHOOL (“SCHOOL”) in the District, which he has attended since the beginning of second grade. STUDENT has been diagnosed with Asperger’s Syndrome and Pervasive Development Disorders (“PDD”) by Northwestern Human Services (“NHS”), a community-based provider of services to individuals with special needs, as well as Post-Traumatic Stress Disorder and Asthma, by a family doctor. In its 2015 Psychoeducational Evaluation Report, the District determined that, despite NHS’s Asperger’s diagnosis, his behavior was neither indicative of Asperger’s nor Autism. Instead, the District determined that STUDENT has a Specific Learning Disability.  

STUDENT has been the victim of chronic bullying over the years, which the District has entirely failed to address. The District has been on notice since 2015 that STUDENT has experienced bullying in school. In fact, in the 2015 Psychoeducational Evaluation Report, the District noted that STUDENT experienced bullying and physical abuse by peers in school. While the Report recommended a Positive Behavior Support Plan (“PBSP”), the evaluator’s recommendations for that PSBP did not include interventions related to bullying and attendance, nor have STUDENT’s subsequent IEPs addressed bullying and attendance in any meaningful way. Over the years, STUDENT’s mother, PARENT, specifically made the principal at SCHOOL, teachers, and other school staff aware of the bullying, but nothing was ever done. As a result, STUDENT continued to be bullied, which culminated in several incidents of intense victimization that occurred during the 2016-17 school year.

On one occasion, during the fall of 2016, after STUDENT’s mother, PARENT, dropped STUDENT off for school, she observed several older students surround her son as he walked through the playground toward the school building. The students demanded that STUDENT give them his sneakers and backpack. Having observed this entire transaction, PARENT rushed to help STUDENT and to intervene in the bullying. She yelled at the older students and told them to leave her son alone. A nearby school police officer saw the incident and told PARENT

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29 There are outstanding concerns related to the District’s evaluation and provision of a FAPE to STUDENT, unrelated to bullying, that are being addressed by PARENT’s attorney, Ms. Franca Palumbo. At the time of filing, PARENT was seeking an Independent Educational Evaluation (“IEE”) at District expense.

30 “He is frequently absent from school because, he “gets bull(ied) and gets hit by other students and complains of kids throwing away his lunch.” Elsewhere in the Report, the evaluation noted that PARENT reported that he was absent “due to being sick and because of his asthma.” This Evaluation Report is attached to this Complaint as Exhibit Q.
that she was “on her side” and that she should speak to the Principal, PRINCIPAL. When
PARENT entered the school building, PRINCIPAL refused to meet with her. Later that day,
PRINCIPAL called PARENT and told her that she was “wrong” to have approached the students
in the playground. PARENT responded that the school should have responded in a better and
more proactive manner because STUDENT “has a disability.” In response, PRINCIPAL told
PARENT that her son “does not have Autism.” PRINCIPAL refused to schedule a meeting with
PARENT and the parents of the other students involved. Other than this phone call, the school
failed to take any steps to prevent future bullying of STUDENT or to remediate the effect this
incident had on him.

A few weeks later, a student in STUDENT’s class kicked him in his genitals. STUDENT
complained to his teacher that he was in extreme pain. In response, however, STUDENT’s
teacher told him to leave it alone and it would be better within an hour. When STUDENT came
home from school, he told his mother what happened, and that he could not breathe after it
happened because it hurt so bad. When PARENT examined the injury, she saw that his penis
was inverted and extremely swollen. PARENT took STUDENT to St. Christopher’s Hospital for
Children (“St. Christopher’s”), where doctors told her that once the swelling went down he
would be fine, but to bring him back to the hospital if it worsened.

The bullying at school persisted, occurring on a regular basis. STUDENT stated that he
used to like school and enjoyed going, but since the bullying began, he no longer wants to attend
and wishes he could stay home. STUDENT explained that students in his class laugh at him and
call him names like “retard,” “dumbass,” and “fat,” and hit, trip, and push him on a regular basis.
STUDENT told his mother that he has informed his teachers when he has been bullied, but that
they did not seem to care. At one point, three girls in STUDENT’s class pushed him onto a table
and held him down. When he tried to defend himself, his teacher threatened to call the cops on
him. As a result of school bullying, STUDENT has expressed a desire to take his own life. His
school phobia and anxiety about school is so severe that he vomits before school and begs his
mother to stay home.

Instead of convening his IEP Team to discuss the growing absences, SCHOOL referred
STUDENT and his mother to Truancy Court. As a result, the IEP Team never met to discuss the
root causes of STUDENT’s absenteeism, which were, namely, the pervasive and severe bullying
that he experienced at school, as well as the school’s failure to offer him a FAPE. In fact,
PARENT explained that, during the 2016-17 school year, the majority of STUDENT’s absences
occurred on days when, due to the bullying, he was terrified of going to school. According to
PARENT, she had to plead with him to get him to go to school—to force him to go, even though
he expressed fear of school. She said that on many days he cried, shook, and complained of
stomach pain when faced with the prospect of attending school.31 SCHOOL passed these

31 In a recently-proposed IEP, SCHOOL special education staff indicated that XX’s attendance had been a problem
last year, not just this year. However, XX—as well as Ms. Ortiz and Ms. Studevan—have repeatedly made
SCHOOL staff aware that the 2016-17 absences were due to XX’s school avoidance behavior, and that the absences
from the prior school year were due to the fact the XX and his mother were in hiding to a difficult domestic violence
dispute. Notably, the proposed IEP, although acknowledging that attendance is a barrier to meaningful education
progress for XX, provides little in the form of services or accommodations—other than quarterly reminders to XX
about the importance of school attendance—to help XX overcome his fears associated with school that are directly
related to the bullying he experienced during the 2016-17 school year and beyond.
problems along to Truancy Court, which was simply unequipped to resolve these complex school-based issues, or issues relating to STUDENT’s qualifying disabilities.

At the first Truancy Court listing on March 7, PARENT explained the nature of the ongoing bullying that STUDENT was experiencing at SCHOOL, as well as his complex disability-related needs. The Master, Mr. George Twardy, ordered a SEAMAAC truancy case manager, Ms. Kathy Ortiz, assigned to the case. The Master also suggested that PARENT file a Bullying Complaint with the District and contact Mr. Maurice West at the District’s Office of Attendance & Truancy.

Upon orders of the Truancy Court, PARENT called the District’s Bullying Hotline. PARENT spoke with someone on the phone who asked questions about the bullying that STUDENT had experienced. PARENT told the District about all of the bullying STUDENT had experienced, the nature of his disabilities, and SCHOOL’s failure to intervene, but, to her knowledge, no one from the District ever followed up with her on her Complaint. Unsurprisingly, the bullying continued.

Not only did the District fail to address alleged bullying through STUDENT’s IEP, but school staff served to exacerbate it. In early-March, STUDENT had a stomach virus, which caused frequent bowel movements. PARENT kept STUDENT home from school on March 9. However, because of concerns about truancy, PARENT sent STUDENT back to school the next day. She wrote a note to his teacher explaining that STUDENT was sick and that if he had an accident, the teacher should call PARENT to pick him up, give him a bath, and bring him back to school. That day, STUDENT had a bowel movement in class and, instead of calling PARENT, his teacher left him to sit in his own feces for the remainder of the school day. The other students made fun of him and his teacher commented that he “smelled like a dead person.” When PARENT picked STUDENT up after school, she noted that the smell was so strong it made her sick. She then realized her son had been sitting in his own feces for the entire day and that he had developed a severe rash. PARENT took pictures of STUDENT after this occurred and it was clear that he had been bleeding from the incident.

On March 13, Ms. Ortiz contacted the school Principal via email on behalf of PARENT to inquire as to why the school had failed to call PARENT about this or any of the previous incidents that had occurred at school. Ms. Ortiz received a “read receipt” indicating that PRINCIPAL viewed the email, but nevertheless failed to respond. PARENT kept STUDENT home from March 15-17 because he was still sick and she did not want him to go through the same humiliation and physical pain as before. When STUDENT returned to school, PARENT sent notes to the school, which she has retained copies of, explaining why she kept him home from school. At the time, the school refused to excuse the absences. Ms. Ortiz emailed the Principal again on April 3 to address these unexcused absences and again received no response. Eventually, after Ms. Ortiz’s persistent advocacy, the school changed these absences from unexcused to excused.

The bullying issues persisted and, on April 26, STUDENT was physically attacked by two students. While he was playing tag on the playground, one student tripped him and another jumped on his back and punched him in the head. STUDENT blacked out from the blow to his
temple and remembers very little of the incident. When PARENT arrived at SCHOOL, the Principal had no idea about the incident. STUDENT’s head was swollen, and had been vomiting. Later that day, PARENT took STUDENT to St. Christopher’s, where he spent hours in the trauma center. St. Christopher’s doctors noted that STUDENT had blacked out and was vomiting; they diagnosed him as the victim of physical bullying and with a concussion.32 PARENT kept STUDENT home for a few days, but again was forced to send him back due to truancy concerns.

When PARENT returned to Truancy Court on May 1, she again explained to the Master, Mr. Michael Delbonifro, that STUDENT was being bullied at school and SCHOOL was failing to provide him with any help. She showed the Master pictures of STUDENT’s rash and school-based injuries. The Master, however, referred the matter to Family Court, apparently due to its complexity. PARENT was satisfied with this outcome, believing that more attention on the matter from a legitimate court would achieve justice for her son.

In mid-May, PARENT, her mother, and Ms. Naomi Studevan, who is a Parent Advocate at Philadelphia HUNE, Inc., went to SCHOOL to discuss the ongoing bullying with PRINCIPAL. Ms. Studevan had sent several emails to the PRINCIPAL to try to resolve ongoing issues and set up a meeting, but PRINCIPAL never responded to her. Upon arriving at the school, the school secretary told PARENT and Ms. Studevan that the Principal was too busy and would not be able to meet with them. Eventually, however, Ms. Studevan demanded that PRINCIPAL meet with them. The meeting included PRINCIPAL, the school counselor, and one of STUDENT’s teachers. Ms. Studevan and PARENT raised concerns about the ongoing bullying, as well as SCHOOL’s denial of STUDENT’s Autism and failure to implement STUDENT’s IEP over the course of the school year. In response to PARENT’s questions to the school officials about her complaints about bullying, PRINCIPAL stated that they handled the matter by suspending the child who gave STUDENT a concussion.

Since the meeting in May, the District has continued to fail to implement STUDENT’s IEP, thereby denying him access to the FAPE to which he is entitled. After weeks of failing to respond to Ms. Studevan’s May 15 email requesting an IEP Team Meeting, SCHOOL sent PARENT a letter informing her of a June 13 IEP Team Meeting. However, given SCHOOL’s past treatment of STUDENT and the utter lack of concern they demonstrated for his safety at school, it appears that this meeting was organized solely due to pressure from PARENT’s attorney, Ms. Franca Palumbo, whom PARENT was referred to by Ms. Studevan, rather than a genuine desire to provide services to address or remediate past and ongoing bullying. SCHOOL officials have been entirely unresponsive to the bullying that they knew STUDENT had experienced, and which caused him to miss many days of school. Instead of addressing this bullying through the IEP Team or appropriate programming and interventions,33 the school simply referred STUDENT and his mother to Truancy Court, which, as is evidenced by the Court’s failure to compel SCHOOL to resolve the bullying, is wholly unequipped to address

32 The St. Christopher’s discharge paperwork is attached to this Complaint as Exhibit R.
33 The recently-proposed IEP states that “[t]here are no school reports of bullying; although, parent has reported that [STUDENT] is being bullied.” The IEP provides no strategies to prevent future bullying, nor remedy the effects that the bullying has had on STUDENT, including, but not limited to, his fears associated with school attendance. This Proposed IEP is attached to this Complaint as Exhibit S.
these complex issues of educational programming for students with disabilities like STUDENT. Notably, throughout this process, the District was repeatedly made aware of the bullying STUDENT experienced, yet failed to undertake any action to remedy the situation. The facts of this case reflect the absence of any viable system for addressing the deprivations of FAPE that result from bullying of students with disabilities and related absenteeism.

**Student XX**

STUDENT is a white, nine-year-old student in third grade at SCHOOL (“SCHOOL”) in the District. She received an IEP in first grade for Other Health Impairment (“OHI”) based on a diagnosis of ADHD. STUDENT’s classmates began bullying her in October of 2016; girls who sat in the same desk cluster as STUDENT grabbed her pencils and called her names like “idiot” and “stupid” and told her they hoped she never came back to school. They said they hated her and made fun of her for attending “special” classes. PARENT, STUDENT’s mother, apprised school officials, including the school counselor, Ms. XX, of this disability-based bullying, but the school failed to address it. SCHOOL did not open an official investigation, nor did they convene STUDENT’s IEP Team to discuss how the bullying might have impacted her and her right to a FAPE.

In December, the bullying worsened, at which point PARENT again contacted COUNSELOR, this time requesting that the school move STUDENT to a different desk cluster, away from the girls who bullied her. COUNSELOR stated that she would look into this, but the school again failed to make the simple, requested change. Despite PARENT’s regular contact via phone and email with the guidance counselor, the school failed to make changes to STUDENT’s educational program or the educational environment to prevent the bullying, so the bullying continued.

During this period, STUDENT often came home from school very upset, complaining of constant bullying by the same two students. PARENT saw her daughter’s mental health deteriorating before her eyes. STUDENT told her mother that she often worried about what the two students would say or do to her, and, as a result, was constantly distracted in class. Additionally, STUDENT’s behavioral problems worsened; regular behavioral reports that the school produced and sent home to PARENT pursuant to requirements in STUDENT’s IEP indicated that redirection was required far more often than before. These changes in STUDENT’s behavior corresponded with the bullying she experienced. PARENT made SCHOOL officials aware of what STUDENT told her, and the changes she witnessed, but SCHOOL failed to take any affirmative or proactive steps to remedy the ongoing bullying.

Worried about changes in her daughter’s mental and emotional health and academic performance, PARENT had STUDENT evaluated by a neuropsychologist at CHOP in late March, who diagnosed her with Autism. During this evaluation, STUDENT told the neuropsychologist that she hated her life, although she was later determined not to be at risk for suicide. STUDENT also told the CHOP evaluator that the bullying distracts her and she is always worried about what might happen at school, even feigning stomach aches to stay home. Accordingly, CHOP acknowledged that STUDENT’s Autism manifested in significant school avoidance and social anxiety.
Immediately after receiving the CHOP report, PARENT made SCHOOL officials aware of its findings. PARENT contacted COUNSELOR and, crying to her on the phone, explained what STUDENT told the CHOP evaluator about hating her life. In response, COUNSELOR removed the student responsible for bullying STUDENT from class to explain to her how serious the situation was based on what STUDENT’s mother told her. After repeated denials, the girl admitted that she was bullying STUDENT and cried, saying that she did not know why she acted the way that she did, and that she just wanted to be STUDENT’s friend. Despite this concerning statement, COUNSELOR seemed to consider the matter settled and pursued no further action, including re-assigning the student who admitted to bullying STUDENT to a different classroom.

PARENT also made school officials aware that the CHOP evaluation diagnosed STUDENT with Autism, which might explain STUDENT’s inability to cope with the bullying and her educational regression during the period of bullying. However, at no time did SCHOOL officials seek to reconvene STUDENT’s IEP Team to discuss the bullying in the context of her disability—for instance, to make amendments to her IEP or to request a re-evaluation to address the identification of Autism by CHOP.

The bullying continued into April. STUDENT told PARENT that that the student who was bullying STUDENT told her classmates that STUDENT better stop telling her mom on her, “or else.” COUNSELOR called STUDENT and the other girl into her office simultaneously to discuss this threat. Once again, the student responsible for the bullying first denied, then admitted, to bullying STUDENT. Other than this meeting, the school took no action to prevent the bullying, or to address the effects of the bullying on STUDENT or any other students, including the bully.

Fed up with ongoing bullying and the school’s failure to respond, and fearful for her daughter’s mental health, PARENT contacted the District’s Bullying Hotline, describing the situation and how it had affected STUDENT: although she had not missed school, she dreaded going and often felt anxious and sick, behaviors consistent with the conclusions of the CHOP evaluation. The representative who answered the District’s Bullying Hotline explained that the District would order SCHOOL to conduct a bullying investigation, but did not inquire as to whether STUDENT was a student with a disability, or whether STUDENT’s IEP Team had met to discuss the impact of the bullying on her right to a FAPE.

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34 This was apparently SCHOOL’s way of addressing all bullying. It is not clear how confronting the student-bully alone would prevent future bullying. Moreover, based on the student-bully’s reaction, it appears as if the reasons why the student was engaging in bullying behavior should have been explored for her own sake, and in accordance with civil rights and disability laws.

35 Apparently, STUDENT was not the only child who was being bullied by the same student. In fact, on April 24, the parent of another child, upset that her own child had been bullied by the same student who bullied STUDENT, hit STUDENT in the face in the school playground while the students were lining up to go inside, mistaking STUDENT for the girl responsible for bullying her daughter. This parent screamed in STUDENT’s face that she had better stop bullying the woman’s daughter, flailing her arms and striking STUDENT in her eye. STUDENT stated that she was fearful of this parent, and her desire to stay home from school worsened. The school informed the parent that she could no longer return to school property, but did not pursue the matter further.
After calling the Bullying Hotline, PARENT emailed the school principal, Mr. XX, to explain that she made a formal complaint. PRINCIPAL responded that he had no idea about the bullying and that he would look into it. After that conversation, SCHOOL officials—for the first time, despite being on notice of bullying for over five months—conducted a formal investigation into the bullying. Neither the District nor SCHOOL provided PARENT with a copy of the Investigation Report, if one was ever created, or otherwise explained its findings.

PARENT met with PRINCIPAL and other school officials on April 26, 2017 to discuss the matter. At this meeting, PRINCIPAL stated that he was unable to disclose anything about the investigation, but that he was “handling it.” He also told PARENT that the bullying was “not as bad” as STUDENT described, and that she was simply “too sensitive”; it was not really that serious or even necessarily considered “bullying.” PRINCIPAL asked PARENT if STUDENT was her first child. She said “yes,” to which PRINCIPAL responded that second and third children usually have “tougher skin.” COUNSELOR was also in attendance at this meeting. Not one school official suggested that perhaps her reaction to the bullying was related to her disability. PRINCIPAL informed PARENT that he would be meeting with the bully’s parents the following day, but refused to reveal anything more about the investigation to PARENT.

According to PARENT, things have been better since the April 26 meeting. Apparently, COUNSELOR checks in with STUDENT once per week to make sure that she has not been bullied. However, this is simply further evidence that timely and appropriate investigations are critical to resolving school bullying and preventing children with disabilities from being denied access to a FAPE due to bullying. Most importantly, at no point during this process did the school convene STUDENT’s IEP Team to discuss the effect of bullying on STUDENT’s education, whether and to what extent it interfered with learning and provision of a FAPE, or attempt to amend the IEP in response to known problems. This caused STUDENT to suffer educational harm for approximately seven months.

**Student XX**

STUDENT (DOB 4/12/2006) is a Black student in fifth grade who currently attends the SCHOOL (“SCHOOL”) in the District. Prior to attending SCHOOL, STUDENT attended SCHOOL (“SCHOOL”), which is also in the District. During STUDENT’s fourth-grade year, STUDENT’s mother, PARENT, inquired about having STUDENT evaluated for special education, but the school told her she would need to “acquire a diagnosis” before they could conduct an evaluation. At times during fourth grade, SCHOOL staff suggested that STUDENT exhibited behaviors related to ADHD and Oppositional Defiant Disorder (“ODD”), but never evaluated him as possibly qualifying for accommodations to ensure that he made educational progress despite these behaviors, which are consistent with qualifying disabilities. One of STUDENT’s teachers stated to PARENT that she believed that STUDENT exhibited signs of Autism. PARENT claims to have signed a Permission to Evaluation form, but the District never completed an evaluation of STUDENT to determine eligibility for an IEP or a Section 504 Service Agreement.

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36 SCHOOL is currently re-evaluating STUDENT based on CHOP’s Autism diagnosis.
In April 2016, during the latter half of fourth grade, STUDENT became the victim of bullying at SCHOOL. On an almost daily basis, other students hit him, harassed him, called him names, and isolated him. The same group of students called STUDENT names like “bitch,” “pussy,” and “dickhead.” They pushed him, smacked him, and punched him. Most of this behavior occurred in STUDENT’s elective courses, in the hallways, and at recess. Each time this occurred, STUDENT came home visibly upset, crying to his mother that he did not want to return to school.

PARENT made SCHOOL officials aware of the bullying by completing numerous (8-10) Parent Concern forms that the school made available in the main office. SCHOOL never formally investigated the bullying incidents that STUDENT claimed had occurred. Instead, SCHOOL officials repeatedly told PARENT that what was occurring was “not bullying,” and that “STUDENT was part of the problem” and was “not innocent.” At one point, PARENT contacted the Assistant Superintendent, who directed her to file a formal Bullying Complaint. When she showed the SCHOOL administration the complaint form, the Principal told her that he had never seen the form before. At no point did the school conduct an evaluation of STUDENT or discuss this as a possibility, even though his mother had previously inquired about his eligibility for special education services. Nor, during this time, did SCHOOL offer STUDENT accommodations through a Section 504 Service Agreement to address the impact the bullying was having on his health and education.

The next year, STUDENT began fifth grade at SCHOOL and, after a few weeks, the bullying continued just as it had in the previous school year. The same students continued to physically and verbally bully STUDENT to the point where he was once again desperate to stay home from school. PARENT informed the new school Principal, Ms. XX, about the bullying, and even showed her the Bullying Complaint she filed last year. PRINCIPAL told PARENT that she would look into it and talk to the kids. In response to being shown the Bullying Complaint, PRINCIPAL similarly expressed that she had never seen it.

PRINCIPAL did not follow up on her promise to look into the bullying that STUDENT had alleged, let alone formally investigate it. As a result, the bullying continued. Students continued to call STUDENT names; they pushed him, and even pulled a chair out from under his seat. Because of this bullying, STUDENT felt isolated in school.

The severity of the physical bullying escalated, and, on September 23, 2016, another student assaulted STUDENT on school property at the end of the school day. PARENT personally witnessed this assault, as it occurred at the end of the day and PARENT was at the school to pick up STUDENT. PARENT, observing that there were no school staff around, intervened to stop the fight and pulled the children apart from each other. STUDENT had some swelling from being punched, but was not bleeding. PARENT went to PRINCIPAL to demand that the school take some sort of action. After being told to wait outside for several minutes, PRINCIPAL informed PARENT that she was not permitted on school property because she had intervened in a student fight.

On October 13, 2016 PARENT filed the first of many Bullying Complaints regarding incidents of bullying that occurred during the 2016-17 school year. She submitted this
Complaint directly to the FACE Office at the District’s Education Center, bypassing SCHOOL, as SCHOOL had failed to investigate the September 23 incident. PARENT did not hear back from the District about her October 13 Complaint.

On October 26, 2016, STUDENT was again assaulted at school. PARENT took her son to the family doctor at Kids First in Chestnut Hill, who instructed her to bring him to the emergency room. At Chestnut Hill Hospital, the E.R. doctor placed STUDENT in a neck collar after taking x-rays and noting significant swelling. The following day, PARENT told the Principal that STUDENT had visited the hospital, and pleaded with her to intervene in the bullying. However, upon examining the medical paperwork, PRINCIPAL stated that the tests looked normal so there was no need to pursue further action. It was at this time that PARENT first requested that STUDENT be transferred to a different school. PRINCIPAL informed her that she would have to speak with District officials at the Education Center about that request.

PARENT again visited the Education Center, where she filed another Bullying Complaint. This time, she conveyed her story to a different staff person in the FACE Office, who was sympathetic to PARENT’s plight and developed a ticket to initiate an investigation. The “ticket” PARENT received from the FACE Office indicates the following:

- Parent was issued an “exclusionary letter” by SCHOOL after she followed proper protocol for requesting meetings with the administration;
- Principal at SCHOOL informed the Parent that “if it wasn’t safe at SCHOOL last year, you should have transferred him”;
- Parent requests: (1) an investigation into the alleged bullying; (2) a plan to address and eliminate the bullying; (3) mediation with parents, children, and school; (4) either an administrative transfer to a new school, or a re-assignment to a different classroom.

The FACE staff person informed PARENT that the District had 72 hours to complete the investigation into her Bullying Complaint (in fact, the District’s policy states 48 hours). PARENT never heard back from anyone about her Complaint, nor did she receive a copy of an Investigation Report.

While at the Education Center, PARENT also spoke with Mr. Darnell Deans in the Office of Student Enrollment & Placement, who told her it was the responsibility of the school principal to seek a transfer, and that parents had “no right to request a transfer” independent of the school Principal. Since PRINCIPAL gave her conflicting information—that, as a principal, she had no authority to authorize a school transfer, and that it was the parent’s responsibility to seek one from the District—STUDENT remained at SCHOOL, in the same dangerous school environment, without any supports, services, or accommodations.

PARENT then began to seek support from both advocacy organizations and the Pennsylvania Department of Education. At one point, PARENT connected with a parent advocate from an organization called Parents United for Better Schools. This advocate contacted PRINCIPAL on PARENT’s behalf and requested information about STUDENT, but PRINCIPAL never responded to the advocate. Next, the advocate contacted the District.
Someone at the District informed the advocate that Ms. Shakia Forman’s unit was looking into STUDENT’s case. PARENT informed the advocate that she had never heard of Shakia Forman, and did not know that the District was looking into STUDENT’s case.

Eventually, in December 2016, PARENT secured a meeting with several officials from the District, including Ms. Bridget Taylor-Brown, who is the Director of the District’s Office of Prevention & Intervention, Ms. Shakia Forman, and Mr. James Adams, who is a Liaison in the District’s Office of Prevention & Intervention. At this meeting, the District officials told PARENT that they would schedule a meeting with XX and PRINCIPAL to put a Safety Plan in place and that a representative from the District would be in attendance. After several attempts to schedule this meeting, the District eventually convened a meeting at SCHOOL to discuss a Safety Plan for STUDENT. In attendance at this meeting were: XX, Ms. Taylor-Brown, Ms. Forman, Mr. Adams, XX, the Dean of Students at SCHOOL, a special education teacher, a school counselor, a school psychologist, and individuals from the STS behavioral health program. Instead of discussing the alleged bullying and how to prevent it, the meeting focused on XX’s behaviors. School officials cited several incidents in which XX exhibited problematic behaviors in school. The District offered XX a Safety Plan and STS services, but did not consider whether either the bullying XX experienced or whether and to what extent his behaviors were related to an unidentified disability which impeded his ability to make meaningful educational progress. The District offered only a Safety Plan and behavioral health services, which were not incorporated into a formal Section 504 Service Agreement. Nor did the District issue a Permission to Evaluate form for XX to determine eligibility under the IDEA or address the delinquent evaluation from 2015-16.

Ultimately, this Safety Plan proved inadequate to prevent the persistent bullying that STUDENT was experiencing at SCHOOL. As a result, PARENT filed additional Bullying Complaints directly to the District on December 12, 2016; December 19, 2016; December 20, 2016; December 22, 2016; January 11, 2017; January 13, 2017; and January 17, 2017. The District failed to formally investigate any of these complaints. During this time, STUDENT became angry and sad. He said that he hated school. He became more argumentative at home, and more withdrawn. He spent a lot of time alone in his room. Shortly after the December meeting, he refused to go to school for a week.

Since the District failed to investigate any of her formal Bullying Complaints in December and January, PARENT directly contacted Mr. Jermall Wright, the Assistant Superintendent assigned to SCHOOL. In late January, she emailed Mr. Wright to inquire as to whether the District planned to do anything to resolve the bullying that STUDENT had experienced for nearly a year at SCHOOL. Mr. Wright responded that he would speak with other school officials and get back to her. Mr. Wright later told PARENT that a meeting would be convened within the next few days to discuss and resolve the situation. However, PARENT was not invited to any meeting and was not told where it would be held.

By this time, PARENT had contacted ELC seeking legal representation. ELC contacted Ms. Rachel Holzman, Esq. and specifically demanded that PARENT be informed of all meetings related to STUDENT and that the District respect PARENT’s request to have STUDENT transferred to a safe school environment. Eventually, Ms. Holzman put PARENT in contact with
Ms. Lori Paster, who is the Deputy Chief of the District’s Office of Prevention & Intervention. Ms. Paster spoke with PARENT and informed her that in fact there was no meeting, but that she would contact the school. Ms. Paster also tried to persuade PARENT to give her a chance to make things better at SCHOOL and thus forego her demand for a school transfer. PARENT declined, citing her months of struggles to resolve the bullying and safety concerns, which proved unsuccessful, as STUDENT continued to experience bullying.

Finally, on January 27, 2017 after significant pressure from PARENT and ELC, the District authorized a transfer of STUDENT from SCHOOL to SCHOOL, where he receives accommodations through a Section 504 Service Agreement and is succeeding in school, free from bullying.37

Despite this positive outcome for STUDENT, it is not at all clear why the District approved a safety transfer for XX but not XX. There are no standards or criteria—at least that are available to the public—that explain the transfer decision-making process, what the District considers or relies on, and what a parent must provide to establish the need for a transfer. In fact, there are few indications that a transfer to another school is even an option. Accordingly, the District’s actions with respect to considering or authorizing school transfers appear to be arbitrary and capricious as applied across the District, which opens the door for bias to impact the District’s decision-making. The lack of a fair, objective and transparent policy and procedure governing school transfers leaves parents with no recourse to address continuing bullying, regardless of its severity and persistence.

II. LEGAL ANALYSIS

a. OCR Has Jurisdiction Over This Complaint

The Office for Civil Rights of the U.S Department of Education has jurisdiction over this Complaint because it alleges that the District discriminated against XX on the basis of his disability and denied him a FAPE, in violation of Section 504, which OCR enforces. This Complaint is timely because many of the alleged discriminatory events occurred within 180 days of the filing of this Complaint. Specifically, the District discriminated against XX in the following ways in the past 180 days:

- Conducting an ineffective and inappropriate investigation into alleged acts of bullying that XX claimed to have experienced in school during the 2016-17 school year, which further exacerbated the effects of bullying on XX and deprived XX of a FAPE;
- Failing to act to remedy bullying that XX alleged to have occurred in school, including by failing to transfer him to a new school, which permitted the bullying against XX to continue and deprived XX of a FAPE; and
- Failing to convene XX’s IEP Team at any time to address the impact of bullying on XX’s access to FAPE; and
- Prosecuting XX for truant behavior that was caused by or related to his disability.

37 Where bullying has occurred at Fitler, the administration has handled it promptly and appropriately.
Additionally, the District discriminated against XX, XX, and XX in the past 180 days by failing to address the deprivation of a FAPE they experienced as a result of severe and pervasive bullying. Thus, this Complaint alleges both individual and systemic violations of Section 504 and Title II occurring within the past 180 days.

b. The District Discriminated Against XX by Failing to Appropriately Address and Remedy Alleged Bullying, Which Deprived XX of His Right to a FAPE under Section 504

Section 504 prohibits discrimination against persons on the basis of their disabilities. School children who are deemed to have a qualifying impairment under Section 504 are entitled to a FAPE. The failure of an LEA to ensure a FAPE to a qualifying student constitutes discrimination under Section 504. Similarly, under Title II of the Americans with Disabilities Act (“ADA”), public institutions, like schools, must not discriminate against qualifying students with disabilities. Bullying on any basis—whether related to student’s disability or not—is discriminatory under Section 504 if it deprives a student with a disability access to the FAPE to which he or she is entitled.

To establish a violation of Section 504, a plaintiff must demonstrate that he or she is: (1) disabled, as defined by the Act; (2) otherwise qualified to participate in school activities; (3) the school or board of education receives federal financial assistance; and (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. C.G. v. Pennsylvania Dep’t of Educ., 888 F. Supp. 2d 534, 573 (M.D. Pa. 2012). XX is a student with a disability as defined by Section 504; he is otherwise qualified to participate in school activities; the District receives federal financial assistance; and XX was excluded from participation in school activities—namely, attending school in a safe, bullying-free environment—and thus discriminated against by the District in violation of Section 504.

i. XX Is a Student with an Impairment that Substantially Limits One or More Major Life Activities

Under both Section 504 and the ADA, a student who has a mental or physical impairment that substantially limits one or more major life activities must not be discriminated against on the basis of that impairment. Section 504 entitles qualifying students to

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38 The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on an individual basis. Section 504’s regulatory provision, 34 C.F.R. § 104.3(j)(2)(i), broadly defines a physical or mental impairment to include any physiological disorder or condition, neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

39 Major life activities, as defined in the Section 504 regulations at 34 C.F.R. § 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. In the amended Americans with Disabilities Act of 2008, Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, reading, concentrating, thinking, and communicating. The list of examples of major life activities in Section 504’s regulatory provision is not exclusive, and an activity or function not specifically listed in the regulation can nonetheless be a major life activity.
accommodations to ensure a FAPE. See 34 C.F.R. § 104.33. In Pennsylvania, accommodations are typically set forth in a Section 504 Service Agreement. 22 Pa. Code § 15.7. Another way to comply with Section 504 is to provide a student with an IEP—the formal educational program required under the federal IDEA. 34 C.F.R. § 104.33(b)(2); Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008).

XX has several impairments that substantially limit his ability to perform the major life activities of learning, concentrating, thinking, and more. First, XX has a Specific Learning Disability, which the District has accommodated through an IEP since first grade. Second, XX has a diagnosis of ADHD. As many courts have expressly held, ADHD is a qualifying impairment under Section 504. North v. Widener University, 869 F. Supp. 2d 630, 635 (E.D. Pa. 2012) (“Plaintiff indisputably meets the first and fourth prongs of the [Section 504] test: he has submitted evidence that he suffers from ADHD, a recognized disability under Section 504 . . . .”); Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 2009); Batchelor v. Rose Tree Media Sch. Dist., 2012 WL 7990542, at *1 (E.D. Pa. 2012); Centennial Sch. Dist. v. Phil C. ex rel. Matthew C., 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011). XX’s ADHD clearly interferes with learning and requires accommodations in school even though the District has not provided these accommodations. XX informed SCHOOL on several occasions of XX’s ADHD—including through several written notes, in addition to conversations with his teachers—but the District never created a plan to address XX’s behaviors that were associated with his ADHD and need for accommodations. Finally, the District has been aware for over a year that XX exhibits anxious behavior, particularly related to school attendance. On multiple occasions, Principal XX and other staff witnessed XX holding onto the car door, shaking, and crying when XX attempted to bring him to school. Furthermore, the Dunbar psychologist and therapist both identified that XX exhibits anxiety related to peer victimization at school based on disclosures that XX made to them during the course of evaluation and treatment, and XX made SCHOOL officials aware of this. It is clear that XX’s anxious behavior substantially impeded his ability to learn, as it resulted in excessive absenteeism and school-related stress. See, e.g., A.W. ex rel. H.W. v. Middletown Area Sch. Dist., 2015 WL 390864, at *16 (M.D. Pa. 2015) (holding that student’s “anxiety . . . substantially limited his ability to learn in physical school environment.”); Krebs v. New Kensington-Arnold Sch. Dist., 2016 WL 6820402, at *5 (W.D. Pa. 2016) (holding that child who suffered from anxiety, depression, and anorexia nervosa had a disability that “severely impacted a major life activity including, at a minimum, her education.”). Based on his SLD, ADHD, and anxiety, XX is a student with a qualifying impairment under Section 504.

ii. The District Discriminated Against XX by Failing to Address and Remedy the Alleged Bullying, Which Impeded XX’s Access to an Appropriate Education under Section 504

1. Failure to Address Alleged Bullying During the 2015-16 and 2016-17 School Years

A FAPE under Section 504 is an education that is “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.” 34 C.F.R. § 104.33(b)(1); see also Mark H., 513 F.3d at 933. Both OCR and OSERS have provided clear guidance to LEAs, since 2014, that the failure to address bullying of students
with disabilities—even when the bullying is not on the basis of a student’s disability—is discriminatory to the extent that it deprives a child of a FAPE. See generally Dear Colleague Letter. Federal courts, including the Third Circuit, have affirmed that a failure to address bullying may deprive a student of a FAPE in the IDEA context. See Shore Regional High Sch. 381 F.3d at199-202 (3d Cir. 2004) (affirming decision of administrative hearing officer that the school could not offer the child a FAPE due to a “legitimate and real fear that the same harassers who had followed [the student] through elementary and middle school would continue to [bully him] [if he attended Share Regional High School]); T.K. v. New York City Dep’t of Educ., 810 F.3d 869, 876 (2d Cir. 2016) (holding that the educational entity denied the student a FAPE “by violating her parents’ procedural right to participate in the development of her IEP, when school officials refused to discuss concerns about bullying raised by the student’s parents, who had reason to believe that the bullying was impacting their daughter’s educational progress).

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 bullying, the student’s needs have changed such that the student is no longer receiving FAPE.” Dear Colleague Letter at 5-6. OCR has stated that “[t]he effects of bullying could include, for example, adverse changes in the student’s academic performance or behavior.” Id. at 6. Once a school “suspects [that, due to bullying,] the 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[,] to 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.” Id.

With respect to how much of a change in academic performance or behavior is necessary to trigger a school’s obligation to convene the IEP team or Section 504 team, OCR has stated that there are “no hard and fast rules,” but that “a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sections of Section 504 services would generally be sufficient.” Id. In fact, a school’s obligation to a student who is entitled to a FAPE and who demonstrates adverse changes to his or her academic performance or behavior may be triggered “regardless of the school’s knowledge of the bullying conduct.” Id. at 6 n.26.

Schools must “address[] . . . bullying [both] under the school’s anti-bullying policies,” and must also “promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided . . . .” Id. at 6-7. To ensure a “student’s ongoing receipt of FAPE,” “unless it is clear from the school’s investigation into the bullying conduct that there is no effect on the student with a disability’s receipt of FAPE, the school should . . . promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: (1) the student’s educational needs have changed; (2) the bullying impacted the student’s receipt of IDEA FAPE services or Section 504 FAPE services; and (3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly.” Id. at 7.

In responding to and investigating complaints that claim a deprivation of FAPE under Section 504 or IDEA due to an educational entity’s failure to appropriately respond to bullying,
OCR has applied the following analysis, which seeks to answer two questions: (1) “Did the school know or should it have known that the effects of bullying may have affected the student’s receipt of IDEA FAPE services or Section 504 FAPE services? For example, did the school know or should it have known about adverse changes in the student’s academic performance or behavior indicating that the student may not be receiving FAPE?” If the answer is “yes,” OCR next asks: (2) Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student’s educational needs were still being met, and if not, making changes, as necessary to his or her IEP or Section 504 plan?” If the answer is “no,” then “OCR would find that the school violated its obligation to provide FAPE.”

With respect to STUDENT, the answer to the first question is clearly “yes,” and the answer to the second question is clearly “no.” Thus, there is no conclusion other than that the District denied STUDENT a FAPE in violation of Section 504.

First, beginning in the 2015-16 school year, STUDENT began to demonstrate “adverse changes” in his academics and behavior. STUDENT’s behaviors were not a mere “one low grade”; rather, STUDENT began to demonstrate severe antisocial and anxious behaviors, especially with respect to fears associated with school attendance. Not only did PARENT make several SCHOOL officials aware of this behavior, but SCHOOL officials, including PRINCIPAL, personally witnessed this behavior when PARENT attempted to bring STUDENT to school. Moreover, STUDENT began to miss significant amounts of school, which alone should have triggered a response from SCHOOL. Clearly, STUDENT’s behavioral changes should have triggered SCHOOL’s obligation to reconvene his IEP Team.

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40 This analysis is set forth in the 2014 Dear Colleague Letter and has been employed by OCR in various cases across the country. See, e.g., Letter from U.S. Dep’t of Educ., OCR to Mr. Rick Fauss, Superintendent, Redding Sch. Dist. (Mar. 7, 2016) (available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151224-a.pdf) (school district violated Section 504 when it failed to convene the student’s Section 504 service team to discuss changes to the child’s education program in light of the district’s knowledge that the bullying had an adverse effect on the child’s anxiety and depression, resulting in frequent absences and hospital admissions for mental health reasons); Letter from U.S. Dep’t of Educ., OCR to Dr. Fred Hayes, Superintendent, Nacogdoches Indep. Sch. Dist. (Mar. 20, 2014) (available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141285-a.pdf) (school district’s failure to “reevaluate the Student’s individual educational needs in light of the alleged bullying/harassment,” even where it could not be determined that the bullying was on the basis of the child’s disability, constituted a violation of Section 504 and Title II); Letter from U.S. Dep’t of Educ., OCR to Dr. Bruce Harter, Superintendent, West Contra Costa Unified Sch. Dist. (Jul. 29, 2014) (available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131251-a.pdf) (school district violated Section 504 where it failed to “initiate its uniform complaint procedure that was specifically identified as the District’s process for resolving complaints of discrimination, or otherwise conduct an inquiry to reliably determine what occurred and take effective remedial action” in response to parent’s repeated complaints about bullying of her daughter; also holding that the district’s investigation procedures, which forced students to confront each, “could exacerbate or create a hostile environment for a student,” and therefore was discriminatory); Letter from U.S. Dep’t of Educ., OCR to Ms. Pam Able, Superintendent, Modesto City Elementary Sch. Dist. (May 12, 2016) (available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151212-a.pdf) (school district deprived the child of a FAPE where school principal failed to keep written record of investigation into alleged harassment; the district violated its own non-discrimination policy and complaint procedures; and failed to evaluate the student for a Section 504 Service Agreement and provide reasonable accommodations).
At no point during this process—let alone promptly—did the District ever seek to convene STUDENT’s IEP Team to discuss these “adverse changes” to STUDENT’s academics and behavior, and make changes to his IEP to better support him in school in light of the bullying. During this period, STUDENT developed severe anxiety with respect to school attendance. Due to the bullying—and the District’s failure to appropriately address it—STUDENT did not make educational progress, and likely regressed, during these school years, which constitutes a deprivation of FAPE under Section 504.

In addition to reconvening the IEP or Section 504 Team, OCR’s expectation is that schools shall address bullying of a student with a disability under a school’s own anti-bullying procedures. Here, the District’s attempts to adhere to its own anti-bullying Procedures at best prolonged the deprivation of FAPE, and, at worst, made it substantially more profound.

First, the District failed to investigate PARENT’s March 2, 2016 within two days, which is the District’s stated policy. In fact, the District never investigated the allegations in the Complaint. Only after over three months of PARENT’s repeated phone calls and visits to the District’s Education Center did the District intervene, by which time STUDENT could not clearly articulate what had happened to him and he had already missed a tremendous amount of school. Second, during the investigation into the January 10, 2017 Complaint, SCHOOL officials made STUDENT confront his bullies face-to-face and did not inform PARENT of her right to be present during any part of the investigation involving STUDENT, in direct contravention to the District’s own Procedures. Lastly, in investigating the January 30, 2017 Complaint, SCHOOL forced STUDENT to answer questions in front of two school police officers, and failed to let PARENT meaningfully participate in the process. SCHOOL’s failure

41 STUDENT’s lack of educational progress is demonstrated, in part, by his grades and reports of progress towards his IEP goals. Importantly, the District has not maintained consistent progress reports, as required by his IEP, so there is no way to determine whether he was progressing towards his IEP goals. The District has provided STUDENT with an IEP since the beginning of first grade; his IEP mandates quarterly progress reporting. The District has failed to provide both counsel and PARENT with any progress reports for first grade. In second grade, the only quarter to include a progress report was the second quarter; there are no reports for the first, third, and fourth quarters. There are no progress reports at all for third grade, when STUDENT began to demonstrate emotional outbursts related to bullying and school attendance. And there are only two progress reports—third and fourth—for fourth grade. Coupled with additional evidence that his emotional health was deteriorating, it is clear that the District was depriving STUDENT of a FAPE, both from an academic and functional standpoint.

42 Courts in the Third Circuit have held that the promise of FAPE under the IDEA is nearly-identical to the concept of FAPE under Section 504, which is an anti-discrimination statute. See, e.g., C.G., 888 F. Supp. 2d at 573 (explaining that “while the IDEA is couched in an affirmative duty to provide a FAPE, Section 504 and the ADA achieve, in essence, the same end by prohibiting entities from denying a FAPE to qualified individuals.”) (citing Andrew M. v. Del. Cnty. Office of Mental Health & Mental Retardation, 490 F.3d 337, 350 (3d Cir.2007) (explaining that “violations of Part B of the IDEA are almost always violations of the [Rehabilitation Act]”); W.B. v. Matula, 67 F.3d 484, 492–93 (3d Cir. 1995) (“There appear to be few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition.”)). As the Supreme Court recently held, the hallmark of a FAPE under the IDEA, is “progress appropriate in light of the child’s circumstances.” Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017). In the most basic of ways, the District deprived XX of a FAPE, as not only did he fail to make progress due to the ongoing, persistent, and unchecked bullying, but he regressed in terms of his academics and emotional well-being.

43 See supra note 2 for Exhibit B, a copy of the District’s Bullying & Harassment Reporting & Investigation Form, which contains the two-day investigation provision. All of the District’s forms and policies relating to bullying can also be found here: http://webgui.phila.k12.pa.us/offices/a/attendance--truancy/bullying-prevention/bullying-prevention-policy-and-procedures.
to adhere to the District’s own anti-bullying Procedures only made matters worse—by subjecting
STUDENT to further bullying and exacerbating the negative impact in light of his disability.

A review of the narratives presented concerning XX, XX, and XX reflect a similar
pattern of discrimination based on disability. In each of these cases, a student with a qualifying
disability experienced bullying that was made known to the District which resulted in
absenteeism, changes in each child’s educational needs, and receipt of FAPE. However, in each
case, the District failed to address the bullying and consequent changes in educational needs
through an IEP Team or Section 504 Team meeting. The failure of the District to promptly
address bullying and implement effective anti-bullying policies and procedures deprived XX,
XX, and XX of programming and accommodations to enable them to make meaningful
educational progress in violation of their right to a FAPE.

2. The District’s Referral of XX to Truancy Court Was
Discriminatory in Violation of Section 504

Ultimately, the District’s only formal response to XX’s school refusal behavior and
complaints of bullying was to prosecute XX and XX for his absences. Student XX and his
parent endured a similar fate. Adverse treatment of a student’s impairment through punitive
action or discipline is discriminatory under Section 504. OCR, Disability Rights Enforcement
(“Under Section 504 and Title II, students with disabilities may not be punished for behavior that
is caused by or is a manifestation of their disabilities.”) (emphasis added). OCR has repeatedly
interpreted Section 504 to require schools to determine whether a student’s behavior is related to
or caused by the student’s disability before taking disciplinary action against him or her. See,
e.g., Sher v. Upper Moreland Sch. Dist., 481 Fed.Appx 762, at *2 (3d Cir. 2012) (unpublished);
(explaining that while nothing in the text of the statute requires a manifestation determination,
Section 504’s mandate of a provision of FAPE has led courts to impose similar safeguards in the
discipline context).

Clearly, XX’s truant behavior was related to the bullying he experienced, which caused
him to be severely anxious about attending school. XX did not have any problems with school
attendance during his three years as a SCHOOL student prior to the onset of the bullying.
However, instead of convening XX’s IEP Team to discuss his school refusal behavior (of which
the District was aware—both because he was truant and because SCHOOL officials personally
witnessed his emotional response to having to attend school at SCHOOL), the District instead
chose to refer XX and XX to Truancy Court. This both embarrassed and humiliated XX and
XX, and caused XX to miss even more school for court appearances. The District’s punishment
of XX for truancy that was related to his emotional disability was discriminatory in violation of
Section 504. Similarly, XX, who has documented disabilities and suffered severe and pervasive
physical and verbal bullying, which debilitated his mental and emotional health, was also
punished by a referral to truancy court.

III. PRAYER FOR RELIEF

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To remedy the violations of Section 504 and the ADA set forth above, we respectfully request that OCR issue the following relief:

- Individual relief to XX and all other students named in this Complaint in the form of compensatory education services to make them whole for the District’s discrimination against them and failure to provide them with a FAPE under Section 504; and

- Systemic relief to ensure that all schools named in this Complaint and the District cease continuous and ongoing violations of Section 504 and ADA that have the effect of discriminating against students with disabilities and depriving them of their right to a FAPE. Specifically, we request the following remedies:
  - Require the District to adopt and make public a school transfer policy that permits students and their parents to request administrative transfers to ensure that all students may access education in a safe, bullying- and harassment-free environment which includes clear standards governing such transfers, advises parents of any documentation to be provided to support a requested transfer, identifies time limits for acting on a request, and establishes an appeal process;
  - Review and revise the District’s Bullying & Harassment Procedures and adoption of a new policy to include special considerations for students with disabilities and specific steps for school-level staff to take action utilizing the IEP and Section 504 process when a student with a disability is being bullied or has alleged to have been bullied. Such policies shall include strict timelines for conducting a bullying investigation and referring a matter to an IEP or Section 504 Team, and a requirement that the District maintain data regarding the number of bullying complaints filed and investigated, the timeliness of investigations completed, and action undertaken by a school, and a prohibition against punishing parents by excluding them from entering schools or participating in bullying investigations;
  - Mandatory and ongoing school-wide training to staff at all schools named in this Complaint and across the District regarding bullying of students with disabilities, including evidence-based practices in prevention, intervention, investigations, and accommodations to support students with disabilities who have experienced bullying;
  - Require the District to establish a mechanism for screening all referrals made by District schools to Truancy Court to ensure that schools do not discriminatorily punish students with disabilities and other students who may have disabilities by referring them to Truancy Court when absences are related to a child’s recognized, perceived or suspected disability, or the fact that the child experienced discriminatory bullying and harassment in school or at school-related activities; and
Require the District to address any deprivations of FAPE caused by their failure to address bullying of students with disabilities during the 2016-2017 school year and beyond.

Sincerely,

Alex M. Dutton, Esq.
Maura McInerney, Esq.
Education Law Center – PA
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
adutton@elc-pa.org
215-800-0349

On behalf of Parents,
Ms. XX
Ms. XX
Ms. XX
Ms. XX

cc:
Judith O’Boyle
Chief Civil Rights Attorney

Miles Shore
General Counsel
School District of Philadelphia
February 11, 2019

Maura McInerney, Esq.
Education Law Center
1315 Walnut St., 4th Floor
Philadelphia, PA 19107

BY EMAIL ONLY

RE: OCR Complaint No. 03-17-1331

Dear Ms. McInerney:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on July 26, 2017 against the School District of Philadelphia (the District). The Complainant, the Education Law Center, alleges:

1. The District discriminated against [redacted] on the basis of disability when he was enrolled at [redacted] Elementary by:
   a. Failing to appropriately address alleged incidents of bullying, including consideration of whether the bullying resulted in the denial of a free appropriate public education (FAPE); and
   b. Referring [redacted]’s guardian for truancy court proceedings for absences that were the result of his disability.

2. The District discriminated against [redacted] on the basis of disability when he was enrolled at [redacted] Elementary by:
   a. Failing to promptly and equitably respond to disability-based harassment directed at [redacted] by other students;
   b. Failing to appropriately address alleged incidents of bullying that were not based on [redacted]’s disability, including consideration of whether the bullying resulted in the denial of a FAPE; and
   c. Referring [redacted]’s mother for truancy court proceedings for absences that were the result of his disability.

3. The District discriminated against [redacted] on the basis of disability when she was enrolled at [redacted] Elementary School by:
   a. Failing to promptly and equitably respond to disability-based harassment directed at [redacted] by other students; and
   b. Failing to appropriately address alleged incidents of bullying that were not based on [redacted]’s disability, including consideration of whether the bullying resulted in the denial of a FAPE.
4. The District discriminated against [Redacted] on the basis of disability when he was enrolled at [Redacted] Elementary School by failing to appropriately address alleged incidents of bullying, including consideration of whether the bullying resulted in the denial of a FAPE.

5. The District discriminated against [Redacted] on the basis of disability when he was a student at [Redacted] Middle School by:
   a. Failing to promptly and equitably respond to disability-based harassment directed at [Redacted] by other students;
   b. Failing to appropriately address alleged incidents of bullying that were not based on [Redacted]'s disability, including consideration of whether the bullying resulted in the denial of a FAPE.

OCR enforces:


As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504 and Title II, and their implementing regulations.

**Dismissal of Allegations Regarding [Redacted] and [Redacted]:**

Pursuant to OCR’s case processing procedures, OCR will dismiss an allegation when it obtains credible information indicating that the allegations raised by the complainant are currently resolved and are therefore no longer appropriate for investigation. During the course of our investigation, the District notified OCR that [Redacted] and [Redacted] previously entered into settlement agreements with the District regarding issues including, but not limited to, the issues raised by the Complainant regarding [Redacted] and [Redacted], in this OCR complaint. OCR reviewed copies of the settlement agreements and confirmed with counsel for [Redacted] and [Redacted] that the settlement agreements include the allegations pertaining to them in this complaint. Accordingly, OCR has dismissed the Allegations 2a-c and 4 insofar as they include [Redacted] and [Redacted].

**Resolution Regarding Remaining Allegations**

Before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

**Legal Standards**


**General**

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient. The Title II implementing regulation at 28 C.F.R. § 35.130(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. §104.33(b)(2). OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

**Harassment Based on Disability/Failure to Provide a FAPE**

A District’s failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A District may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the District had notice of the employee’s behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student’s ability to participate in or benefit from the District’s programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a District must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other
factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a District must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Should, as a result of bullying and/or harassment, a student’s needs change to the extent they suggest a new disability or change in disability status, the Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

**Factual Background**

The Complainant filed this complaint on behalf of the parents/guardians of [Student 1], [Student 2], and [Student 3]. The Complainant maintains that at all relevant times, [Student 1], [Student 2], and [Student 3] were qualified students with disabilities. [Student 1] was enrolled at [School Name] Elementary School, [Student 2] was enrolled at [School Name] Elementary School, and [Student 3] was enrolled at [School Name] Middle School.

**Harassment/Bullying and Denial of FAPE**

The Complainant alleged that that District discriminated against [Student 1] and [Student 2] on the basis of disability by failing to promptly and equitably respond to incidents of disability-based harassment directed at them by other students and failing to consider whether the alleged incidents of disability-based harassment resulted in the denial of FAPE. The Complainant also alleged that the District discriminated against [Student 1], [Student 2], and [Student 3] by failing to consider whether incidents of non-disability related bullying they experienced resulted in the denial of FAPE. The Complainant provided information about, and documentation of, disability-related and non-disability related incidents of harassment and bullying experienced by [Student 1], [Student 2], and [Student 3], and in some instances, documentation of correspondence between the parents/guardians and the District regarding those incidents.

**Truancy Referrals**

The Complainant alleged that the District discriminated against [Student 1] on the basis of disability by referring [Student 1]'s guardian for truancy court proceedings for absences that were the result of one of [Student 1]'s disabilities (anxiety caused by the bullying he experienced at school). The Complaint contends that [Student 1] missed school during the 2015-2016 and the beginning of the 2016-2017 school year due to the effects of the bullying he experienced while at school. On September 23, 2016, [Student 1]'s guardian received a summons from the District to attend Truancy Court. [Student 1]'s guardian attended the truancy court hearing and explained that the Student’s absences were due to the effect the bullying was having on [Student 1], but that the Truancy Court Master issued an Attendance Improvement Plan/Court Order and assigned a truancy case worker to [Student 1]'s guardian. The Complainant explained that the truancy case was later dismissed because [Student 1] did not have any additional absences from school despite the continued bullying.

**Conclusion**
Pursuant to Section 302 of OCR’s Case Processing Manual, the District signed the enclosed Resolution Agreement on December 16, 2018 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR’s investigation, and are consistent with applicable law and regulation. OCR will monitor the District’s implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR’s investigation of the complaint. This letter should not be interpreted to address the District’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, please contact Amy Niedzalkoski, the OCR attorney assigned to this complaint, at

Sincerely,

Lucy Glasson
Acting Team Leader
Philadelphia Office
Office for Civil Rights

Enclosure

cc: Audrey Buglione, Esq.
Resolution Agreement
School District of Philadelphia
OCR Docket Number 03171331

The U.S. Department of Education, Office for Civil Rights (OCR) and the School District of Philadelphia (the District) enter into this agreement to resolve the allegation in the above-referenced complaint. This agreement does not constitute an admission of liability or non-compliance by the District. The District assures OCR that it will take the following actions to comply with the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. Section 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Sections 12131, and its implementing regulation at 28 C.F.R. Part 35, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance and public entities, respectively.

Prior to the completion of OCR’s investigation, the District agreed to resolve the issues of this investigation pursuant to Section 302 of OCR’s Case Processing Manual. Accordingly, to resolve the issues of this investigation, the District agrees to take the following actions.

**ACTION STEPS AND REPORTING REQUIREMENTS**

**Acknowledgments and Memorandum**

1. The District acknowledges that:

   a. Pursuant to the Section 504 regulation, at 34 C.F.R. § 104.4(a) as well as Title II, at 28 C.F.R. §35.130(a), no qualified individual shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

   b. Bullying of a student on the basis of his or her disability may result in a disability-based harassment violation under Section 504 and Title II.

   c. It is obligated to provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual’s disability in accordance with Section 504 at 34 C.F.R. § 104.33.

   d. Harassment and bullying of a student with a disability on any basis may result in a denial of FAPE under Section 504 that must be remedied.

2. December 28, 2018, the District shall distribute an email message to all District educational staff reminding of the items set forth in Action Step 1(a)-(d) above.

**Reporting Requirement:** By January 11, 2019, the District will submit to OCR a copy of the email message issued in accordance with Action Step #2 and documentation showing it was distributed to educational staff at each of the District’s schools and administrative offices.

**Anti-Harassment Statement**

3. Within 45 days of the OCR’s approval of the School District’s policies and/or procedures, pursuant to paragraph 4 of this Agreement the District will issue a statement to all students, parents and staff that will be printed in each school’s and/or District’s newsletter, posted in prominent locations at the District, and published on the District’s website, stating that the District does not tolerate disability harassment. The statement will encourage any student who believes he or she has been subjected to disability harassment to report the harassment to
the District, and will note the District’s commitment to conducting a prompt investigation. The statement will include the appropriate contact information for the designated staff member to whom students and parents may report allegations of harassment pursuant to 28 C.F.R. § 35.107(a) and 34 C.F.R. § 104.7(a). The statement will warn that students found to have engaged in disability harassment will be promptly disciplined in accordance with the IDEA and Student Code of Conduct, and make clear that such discipline may include, if circumstances warrant, suspension or expulsion. The statement will further make clear that District staff and faculty found to have engaged in disability harassment will be promptly disciplined, and that such discipline may include, if circumstances warrant, termination of employment. The statement will encourage students and District staff and faculty to work together to prevent disability harassment.

**Reporting Requirement:** Within 15 days of issuance of the above statement, the District will submit to OCR a copy of the statement issued in accordance with Action Step #3 and documentation showing it printed the anti-harassment statement in each school’s and/or District’s newsletter, posted it in prominent locations at the District schools and published it on the District’s website.

**Policies and Procedures**

4. By January 15, 2019, the District shall review, and revise if necessary, its anti-harassment and bullying policies and procedures to make certain such policies and procedures include disability harassment, including a definition and examples of disability harassment. The District will ensure that the policies and procedures explain the District’s obligation to take immediate and appropriate steps to investigate complaints of harassment which is reported to it or of which it has notice or otherwise determine what occurred, take prompt and effective steps reasonably calculated to end any harassment and prevent harassment from occurring again, and take actions to eliminate a hostile environment, if one has been created. If a disabled student has been harassed or bullied on any basis, including a basis not related to the student’s disability, the student’s IEP team will make a determination of whether, due to the harassment, the Student’s needs have changed such that the Student is no longer receiving a FAPE and must be remedied.

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. 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.

Recognizing that neither Section 504 nor Title II requires a separate disability harassment complaint procedure, the District assures OCR that if it chooses to maintain a separate disability harassment complaint procedure, it will comply with the requirements outlined in the Resolution Agreement of OCR Docket # 03-17-1242.

**Reporting Requirement:** By January 24, 2019, the District will provide OCR with a copy of its current or proposed/revised anti-harassment/bullying procedures for OCR’s review and approval, in accordance with Action Step #4 above.
Reporting Requirement: Within 90 calendar days after OCR's approval of the District's anti-harassment/bullying procedures and any related policies and procedures, the District will provide OCR with documentation that it has implemented the procedures, including a detailed written narrative explaining how students, parents, and employees are made aware of the anti-harassment/bullying procedures and may locate them in District publications or on its website.

5. By January 15, 2019, the District shall review, and revise if necessary, its procedures/guidance on truancy to make certain such procedure/guidance does not penalize students with disabilities or their parents/guardians when absences are the result of disability based harassment and bullying or harassment/bullying on any basis that results in the denial of a FAPE.

Reporting Requirement: By January 24, 2019, the District will provide OCR with a copy of its current or proposed/revised procedure/guidance on truancy for OCR's review and approval, in accordance with Action Step #5 above.

Reporting Requirement: Within 45 calendar days after OCR's approval of the procedures/guidance on truancy, the District will provide OCR with documentation that it has implemented the procedures/guidance, including a detailed written narrative explaining how students, parents, and employees are made aware of the revised procedures/guidance on truancy and may locate them in District publications or on its website.

Training

6. Subsequent to OCR’s approval of the District’s anti-harassment/bullying policy/procedures and procedures/guidance on truancy, the District will provide training to staff and administrators reminding them that Section 504 and Title II prohibit discrimination on the basis of disability, including harassment based on disability. The District will provide the training according to a schedule agreed upon by the OCR and the District. The training will include a discussion of what constitutes harassment on the basis of disability, the impact it has on individual students and the educational environment, the prohibition of all forms of harassment in the educational setting, examples of prohibited conduct, the importance of reporting harassment, how and to whom to report incidents of harassment, the District’s obligation to respond appropriately to notice of harassment, and potential consequences and corrective action if harassment is found. The training will specifically address the responsibility of staff to report incidents of possible disability harassment or complaints of disability harassment of which they become aware and the procedures for doing so, and provide instruction on how to recognize, take steps reasonably designed to prevent and respond appropriately to harassment, including disability harassment. This training could be included as part of another related training. In addition, the training for employees who are or would be members of an IEP team as part of their duties within the Office of Specialized Services will specifically address the need to determine whether harassment or bullying on any basis of a student with a disability resulted in a denial of FAPE, and if so, the steps that must be taken to provide the student with a remedy.

Reporting Requirement: Within 45 days after the completion of each training required in Action Step 6, the District will provide OCR with documentation that it provided the training in accordance with Action Step 6, including the date(s) of the training(s), information/credentials regarding the trainer(s), the agenda for the training as well as the position code for each employee who attended
the training. The District shall make the training materials available for the OCR’s review at the
District, but is not required to provide a copy of the training materials.

**Individual Remedies**

**Review of Alleged Incidents of Harassment and Bullying Based on Disability**

7. For [ ], and [ ], within 45 days of signing this Agreement, the District will re-investigate
the alleged incidents of disability harassment of which it was aware during the 2016-2017 school
year. The District is not required to obtain supplemental information beyond what was
obtained during the original investigation unless necessary to ensure that an adequate and
reliable investigation of those allegations has been conducted. The investigation will focus
on whether the alleged harassment constituted harassment/bullying based on disability. If
the District determines that harassment/bullying based on disability is substantiated, it will
take the appropriate corrective actions as detailed below in Action Steps 9 and 10 below.

8. For [ ], [ ], and [ ], within 45 days of signing this Agreement, the District will investigate
the alleged incidents of non-disability based harassment/bullying of which it was aware
during the 2016-2017 school year. The District is not required to obtain supplemental
information beyond what was obtained during the original investigation unless necessary to
ensure that an adequate and reliable investigation of those allegations has been conducted.
If the District determines that non-disability harassment/bullying is substantiated, the District
will take the appropriate corrective actions as detailed in Action Step 10 below.

9. If the District determines that disability harassment is substantiated for [ ], or [ ], within 5
business days of that determination the District will issue, by certified mail, a written offer to
the parent(s) and/or guardian(s) of [ ], or [ ] of compensatory education hours which may
be used for counseling/academic/therapy services for the assessment and/or treatment of
the lingering effects on [ ], or [ ] from the disability harassment. The District’s letter will
specify that the compensatory education hours may be used to reimburse expenses for any
counseling/academic/therapy services that [ ], or [ ]. have already received in order to
treat the lingering effects from the incident. The District’s letter will inform the parent(s) and/or
guardian(s) of [ ] and/or [ ] that they have ten (10) calendar days from the date of
the letter to accept the offer by providing written notice of acceptance to the District.

10. If the District determines that disability harassment is substantiated for [ ], or [ ], or that
non-disability based harassment/bullying is substantiated for [ ], [ ], or [ ], within 60 days
of signing this Agreement, the District will convene an IEP team meeting with a group of
persons knowledgeable about the students, including, but not limited to, District
administrators/staff and the students’ parent(s) and/or guardian(s), to determine whether the
students’ education was negatively impacted by potential harassment/bullying or if the
students suffered an educational loss during the 2016-2017 school year due to the
harassment/bullying.

The District will conduct the meeting in accordance with the Section 504 procedural
requirements of 34 C.F.R. § 104.35 (evaluation and placement) and § 104.36 (procedural
safeguards). The District will invite the Complainant, in writing via certified mail, to attend the
IEP meeting, at least ten (10) days in advance of the meeting, unless the Complainant agrees
to waive this requirement. The District will ensure that accurate meeting minutes are kept to
document this meeting, including documenting information considered from all sources and
all decisions made by the team.
Within ten (10) calendar days after the meeting, the District will provide the parent(s) and/or guardian(s) with written notice, by certified mail, of the outcome of the meeting, and will inform the Complainant of the applicable procedural safeguards, in accordance with the requirements of 34 C.F.R. § 104.36. If it is determined that educational loss occurred during the 2016-2017 school year and compensatory education or other remedial educational services will be provided, the written notice will provide the amount of compensatory hours. If the team determines that no educational loss occurred, the District will provide an explanation of its decision, including the basis for its decision, along with a notice of the procedural safeguards, including the right to challenge the group’s determination through an impartial due process hearing.

**Reporting Requirements:**

Within 90 days of signing this Agreement, the District will provide OCR a copy of the completed investigative report as well as the notice sent to all parties regarding the resolution and outcome of the investigation, and any corrective actions to be taken, if applicable.

Within 90 days of signing this Agreement, the District will provide OCR with a copy of the letter that it sent to the parent(s) and/or guardian(s) of •, and/or •. offering compensatory education hours for counseling/therapy/academic services for •, and/or •, or compensatory education hours for reimbursement for such services, if applicable, and copies of the parent(s)' and/or guardian(s)' response, in compliance with Action Step 9. If the parent(s) and/or guardian(s) accept the District's offer, the District will provide OCR with documentation substantiating that it provided compensatory education hours for reimbursement for such services, in compliance with Action Step 9.

If applicable, within 15 days of the IEP team meeting(s) required by Action Step 10 and the decision as to whether compensatory and/or remedial services are needed, the District will submit to OCR documents supporting the group's decisions. OCR will, prior to approving the District's decision and plan for providing the proposed services, review the documentation to ensure that the District met the procedural requirements of the regulation implementing Section 504, at 34 C.F.R. §§ 104.34, 104.35 and 104.36, in making these determinations.

The documentation submitted shall include:

a. the written invitation sent to parent(s) and/or guardian(s) of •, •, and/or • for the placement team meeting;

b. a list of meeting participants;

c. the information considered by the placement team;

d. an explanation for all decisions made, including the team’s decision as to whether the •, •, and/or • suffered an educational loss;

e. a description of the types of compensatory education or other remedial service options discussed;

f. a description of and schedule for providing compensatory education for •, •, and/or • for educational loss (if any);

g. the notice of procedural safeguards provided to the parent(s) and/or guardian(s) of •, •, and/or • and

h. a copy of the meeting minutes.

**Review of Truancy Referrals**
11. For ____, within 45 days of signing this Agreement, the District will review the truancy referrals that were made against the parent(s) and/or guardian(s) of ____ to determine if the absences that lead to the referrals were caused by founded instances of disability based harassment and/or the denial of FAPE resulting from founded instances of non-disability based harassment.

12. If the review determines that the absences that truancy referrals that were made against the parent(s) and/or guardian(s) of ____ were the result of founded instances of disability based harassment and/or the denial of FAPE resulting from founded instances of non-disability based harassment, the District will expunge the relevant truancy referrals from the records of ____ and ____'s parent(s) and/or guardian(s).

13. Within 15 days of making its conclusion, the District will notify the parent(s) and/or guardians of ____. of the outcome of the review by certified mail, as well as documentation showing that the truancy referrals have been expunged, if applicable.

**Reporting Requirements:** Within 75 days of signing this Agreement, the District will provide OCR with documentation showing that the review required by Action Step #11 was conducted. The documentation will include at a minimum: the name and title of the individuals who participated in the review, the date the review took place, the information that was considered during the review, the conclusion that was reached, as well as a detailed explanation of the review.

The District understands that by signing the resolution agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of the resolution agreement. Further, the District understands that during the monitoring of the resolution agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as necessary for OCR to determine whether the District has fulfilled the terms and obligations of the resolution agreement. Upon the District's satisfaction of the commitments made under the resolution agreement, OCR will close the case.

The District understands and acknowledges that OCR may initiate proceedings to enforce the specific terms and obligations of the resolution agreement and/or the applicable statute(s) and regulation(s). Before initiating such proceedings, OCR will give the District sixty (60) calendar days to cure the alleged breach.

Superintendent or Designee

Date
January 30, 2019

Submitted via www.regulations.gov

Kenneth L. Marcus
Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington DC, 20202


Dear Mr. Marcus,

The Education Law Center of Pennsylvania ("ELC–PA") writes in response to the Department of Education’s (the Department) Notice of Proposed Rulemaking ("NPRM" or "proposed rules"). We echo the concerns voiced by our partners at the Leadership Conference on Civil and Human Rights and write separately to share our particular concerns regarding students in Pennsylvania’s publicly-funded Pre-Ks, kindergartens, elementary schools, middle schools, and high schools ("Pre-K–12" students).

ELC–PA is a non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. For over 40 years, ELC-PA has worked to promote positive learning environments that are safe, developmentally appropriate, and inclusive for all students.

We are concerned that the proposed changes would make sexual harassment investigations even rarer in the Pre-K–12 context than they already are. ELC–PA has often had to push schools to take any action in the face of a student’s harassment allegations. Lowering schools’ obligations under Title IX will make it harder for advocates to ensure student safety is taken seriously. This would disproportionately impact our most marginalized students, who are more likely to experience sexual harassment. For example, 78% of LGBTQ K–12 students in Pennsylvania are harassed on the basis of their sexual orientation, 58% on the basis of their gender expression, and 52% on the basis of their gender;1 nationally, 60% of Black girls are sexually harassed before the age of 18;2 56% of students ages 14-18 who are pregnant or

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1 GLSEN, 2017 STATE SNAPSHOT: SCHOOL CLIMATE IN PENNSYLVANIA 1 (2019).
parenting are kissed or touched without their consent;³ and students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.⁴

Many of these students—particularly students of color, undocumented students,⁵ LGBTQ students,⁶ and students with disabilities—are already less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. For these students, schools are often their only avenue for relief.

Below, we highlight our specific concerns with the proposed regulations as they relate to Pre-K–12 students. For the reasons articulated below, we strongly oppose the proposed changes, especially in light of the well-documented and often devastating impact that sexual harassment has on the emotional well-being and academic outcomes of children and adolescents.

I. The limited number of employees responsible for reporting harassment under the proposed rules ignores the realities of Pre-K–12 students.

Under the proposed rules, schools would only be responsible for addressing sexual harassment when students file a formal complaint or report being a victim to one of a small subset of school employees who are charged with actual knowledge of the harassment—specifically, (i) a Title IX coordinator, (ii) a K–12 teacher (but only for student-on-student harassment, not employee-on-student harassment); or (iii) an official who has “the authority to institute corrective measures.”⁷ This is a dramatic change, as the Department has long required schools to address student-on-student sexual harassment if almost any school employee⁸ either knows about it or should reasonably have known about it.⁹ This standard takes into account the reality that many students, particularly many Pre-K–12 students, do not have the sophistication or ability to file a formal complaint. Many students simply disclose sexual abuse to the adults they trust the most, assuming that those adults will act on their behalf. Expecting students to know which employees have authority to address the harassment and report exclusively to those

³ NATIONAL WOMEN’S LAW CENTER, LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO ARE PREGNANT OR PARENTING 12 (2017) [hereinafter LET HER LEARN: PREGNANT OR PARENTING STUDENTS], https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting.
⁷ Proposed rule § 106.30.
⁸ This duty applies to “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.” 2001 GUIDANCE, at 13.
⁹ Id. at 14.
adults places an unreasonable burden on young children, including those who may not yet know how to read.

Under the proposed rules, if a Pre-K–12 student told a non-teacher school employee they trust—such as a guidance counselor, teacher aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to help the student. If a student told a teacher that she had been sexually assaulted by another teacher or other school employee, the school would have no obligation to help her.

Sexual assault is already very difficult to talk about. Sections 106.44(a) and 106.30 would mean even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. These proposed provisions would absolve some of the worst Title IX offenders of legal liability and deny students equal access to education.

II. The proposed definition of harassment improperly prevents schools from providing a safe learning environment.

The proposed rule would create the untenable situation where schools would be required to ignore a student’s Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student’s education. Such changes are not merely procedural. They affect the lives of students like N.B., a nine-year-old Black boy, who was taunted by his classmates with sexually-charged slurs in the hallway shortly after beginning fourth grade. Despite his mother’s reports of the harassment to school administrators, his school did nothing to intervene. N.B.’s classmates continued to harass him, escalating their abuse to physical violence, forcing him to watch pornographic videos, and, ultimately, raping him. It took several days, a suicide attempt, and troubling sexual behavior for N.B. to disclose that he was sexually assaulted. Like many survivors, it was easier for him to speak up before the harassment escalated to violence. Since this traumatic experience, N.B.—who did not suffer from any psychological issues prior to the harassment—has been diagnosed with severe anxiety and depression. His depression has gotten so severe that it has culminated in several suicide attempts. It is imperative for students like N.B. that the Department encourage schools to intervene when they are first notified of harassment, not only when it escalates to its most violent and traumatic manifestations.

10 See proposed rule § 106.30 (83 Fed. Reg. 61496) (for K-12, limiting notice to “a teacher in the elementary and secondary context with regard to student-on-student harassment).
11 See id.
13 See id.
14 See id.
15 See id.
16 See id.
Under the Department’s proposed, narrower definition of harassment, students would be forced to endure repeated and escalating levels of abuse, from a student or teacher, before their schools would be required to investigate and stop the harassment.

III. Proposed rules §§ 106.30 and 106.45(b)(3) would require schools to ignore harassment that occurs outside of a school activity, even when it creates a hostile educational environment.

We have assisted several students who were sexually assaulted by a classmate off school property where the incidents are related to and impact the school environment. Our clients are indicative of national trends, as only 8% of all sexual assaults occur on school property. The Department’s proposed rules ignore the reality that sexual harassment which happens online or outside of a school activity can interfere with students’ education just as harassment on school grounds can. Many students we work with cannot concentrate in class if they are sharing a room with their alleged abuser and, when presented with the risk of this interaction, many students avoid school altogether. While schools generally do not have jurisdiction to discipline students for out-of-school behavior, schools should continue to meet their current legal obligation to address sexual harassment that interferes with students’ education through safety plans, the IEP process for students with disabilities, and other appropriate remedies which ensure nondiscriminatory, safe environments in which all students can learn.

IV. Maintaining records of investigations for only three years will disadvantage young students.

Proposed rule § 106.445(b)(7) requires schools to maintain records of sexual harassment investigations for only 3 years, effectively barring many Pre-K–12 students from seeking a civil remedy against their harasser or their school. Records of Title IX investigations may be vital evidence for a student who wishes to file a civil action against their harasser or their school. However, young people are barred from filing such a claim on their own prior to reaching the age of majority. In the case of students who experience sexual harassment at a young age, the school could have ceased maintaining records of the investigation before the student even reaches the age of 18 and has the ability to vindicate their own rights.

Young people who experience sexual harassment or assault are uniquely unequipped to alert others to potential legal claims because their coping mechanisms, such as “denial, repression, and amnesia”, make it more difficult to speak about the harassment or abuse. This is compounded for the students mentioned above who are already less likely than their peers to report sexual harassment due to their increased risk. Even those young people who do have the ability to speak about harassment or abuse may not have the benefit of a guardian who would bring a legal claim on their behalf. Federal and state laws have consistently recognized that it is

inappropriate to punish minors for the failure of a guardian to file a claim on the minor’s behalf, and consequently toll the relevant statute of limitations periods until minors reach the age of majority and have the ability to vindicate their own rights. While children benefit from minority tolling, much of the benefit of these lengthened deadlines would be lost if evidence surrounding the student’s harassment and their schools’ responses to it were unavailable.

V. The proposed rules would allow schools to claim “religious” exemptions for violating Title IX with no warning to students or prior notification to the Department.

The proposed rules permit schools to opt out of Title IX without notice or warning to the Department or students. Some religious schools receive public money through state voucher programs or by designation as an Approved Private School (APS) for children with disabilities. Many of these schools discriminate against students on the basis of their gender nonconformity, including by disciplining students merely for their gender presentation. The proposed rule could result in a parent unwittingly funneling public, taxpayer dollars to a school only to have their child experience discrimination. The proposed rules would allow schools to conceal their intent to discriminate, exposing students to harm, especially women and girls, LGBTQ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion.

VI. The proposed rules requiring schools to dismiss harassment complaints go beyond the Department’s authority to effectuate the nondiscrimination provisions.

Section 106.45(b)(3) of the proposed rules requires schools to dismiss complaints of sexual harassment if they don’t meet specific narrow standards. If it’s determined that harassment doesn’t meet the improperly narrow definition of severe, pervasive, and objectively offensive harassment, it must be dismissed, per the command of the proposed rule. If severe, pervasive, and objectively offensive conduct occurs outside of an educational program or activity, including most off-campus or online harassment, it must be dismissed under the proposed rule. However, the Department lacks the authority to require schools to dismiss complaints of discrimination. Under Title IX, the Department is only authorized to issue rules “to effectuate the [anti-discrimination] provision of [Title IX].” Title IX does not delegate to the

20. See, e.g. Varnell v. Dora Consol. Sch. Dist., 756 F.3d 1208, 1213 (10th Cir. 2014) (applying New Mexico’s minority tolling statute to the plaintiff’s Title IX claim).
21. See Rebecca Klein, These Schools Get Millions of Tax Dollars to Discriminate against LGBTQ Students, HUFFINGTON POST (Dec. 15, 2017, 10:03 AM), https://www.huffingtonpost.com/entry/discrimination-lgbt-private-religious-schools_us_5a32a45de4b00dbcb5ba0be?ez7.
22. See id.
23. Transgender students are especially at risk because this proposed change threatens to compound the harms created by (i) the Department’s decision in February 2017 to rescind Title IX guidance on the rights of transgender students; (ii) the Department’s decision in February 2018 to stop investigating civil rights complaints from transgender students regarding access to sex-segregated facilities; and (iii) HHS’s leaked proposal in October 2018 for the Department and other federal agencies to define “sex” to exclude transgender, non-binary, and intersex students. Erica L. Green et al., ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, NEW YORK TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.
Department the authority to tell schools \textit{when they cannot} protect students against sex discrimination.\textsuperscript{24}


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Instead of effectuating Title IX’s prohibition on sex discrimination in schools, the proposed rules serve only to protect schools from liability when they fail to address complaints of sexual harassment and assault. ELC-PA calls on the Department of Education to immediately withdraw this NPRM and instead focus its energies on vigorously enforcing the Title IX requirements that the Department has relied on for decades, to ensure that schools promptly and effectively respond to sexual harassment.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact us to provide further information.

Sincerely,

Education Law Center Pennsylvania
Maura McInerney, Esq., Legal Director
Lizzy Wingfield, Esq., Stoneleigh Foundation Emerging Leader Fellow
I. Introduction

This Opinion arises from the appeal filed by Defendant-Appellant School District of Philadelphia from the judgment entered against it in the above-captioned matter. Plaintiff-Appellee Amanda Wible and her mother Juanita Jones-Wible brought suit against the School District for violations of the Pennsylvania Human Relations Act (PHRA). Plaintiff asserted the School District violated the PHRA when it was deliberately indifferent to the sexual harassment and bullying Wible’s fellow students imposed on her; harassment and bullying so severe it ultimately drove Wible to leave the School District entirely and suffer severe psychological injuries.

The complaint was filed on April 28, 2015, and the case thereafter followed a tortuous path to trial three years later. During discovery the parties filed nearly 50 motions between them. The School District propounded over 300 interrogatories including subparts. The parties filed

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1 Plaintiff was a minor at the time this suit was initiated but having subsequently attained majority status her mother, who asserted claims on behalf of her daughter, was dismissed from this action.
approximately 20 discovery motions between them. Defendant filed two motions for summary judgment. The first was dismissed as premature and the second was denied. Including exhibits these motions totaled over 1,500 pages.

The case was finally ready for trial on April 4, 2018, with testimony beginning on April 5 and concluding on April 19 after eight trial days. The matter was heard by the Court sitting without a jury. On May 30, 2018, the Court issued its findings of fact and conclusions of law. The Court found in favor of Plaintiff Amanda Wible and against Defendant School District of Philadelphia in the amount of $500,000.00, plus counsel fees and costs.

Defendant filed post-trial motions which consisted of 434 paragraphs. Plaintiff filed her own post-trial motions requesting counsel fees, costs, and delay damages. During argument on the post-trial motions Defendant, for the first time, raised the issue of sovereign immunity under the Tort Claims Act.

The Court denied Defendant’s post-trial motions in full. The Court granted Plaintiff’s motion for counsel fees and costs but denied the request for delay damages. On August 23, 2018, judgment was entered in favor of Plaintiff and against Defendant in the amount of $1,078,000.00. This sum represented a damages award of $500,000.00 plus an additional $578,000.00 for attorneys’ fees and expert witness fees.

The Court heard testimony from Plaintiff, her mother, teachers at the School District, and experts in school bullying, sexual harassment and the mental trauma such conduct inflicts on its victims. As the Court will detail below, this evidence showed that starting from her earliest days in the School District, Amanda Wible was singled out for ridicule, exclusion, and ultimately violence on the basis of her gender presentation. Namely, because Amanda Wible’s sexual appearance and behavior did not conform to societal stereotypes of girls.
At the time this matter was before the Court, no other Pennsylvania Court had decided whether or not a school district can be responsible under the PHRA for failing to adequately address student-on-student sexual harassment. But the avowed purpose and plain language of the statute compels the result in this case.

II. Evidence Presented at Trial

At the time of trial Plaintiff Amanda Wible was 19 years old and attending college in Wales. In 2003 Plaintiff enrolled at the Robert B. Pollock School (Pollock) in the School District. This was the first of four schools Plaintiff attended in the district. In each school she experienced similarly severe and persistent taunting, teasing, bullying, and harassment on the basis of her sex. After ninth grade she withdrew from the school district entirely and enrolled in a cyber charter school to escape the harassment.

Plaintiff’s mother Juanita Jones-Wible testified at first Plaintiff loved school. She was described in an early report card as “happy-go-lucky.” Plaintiff was, by her own description, a “tomboy.” She preferred boys’ clothes, had short hair, mostly male friends, and played sports. Near the end of the first grade Plaintiff began to be teased by her fellow students and by fifth grade it became “really serious.”

Plaintiff was insulted by her classmates, and the nature of the insults reveal a consistent theme—the insults were sexualized and indicative of contempt for Plaintiff’s gender presentation. Classmates pronounced Plaintiff’s name, “Amanda”, as “A-man-duh” with emphasis on “man” and “duh.” Plaintiff was referred to as “dyke” and “bitch.” When the students had to line up, Plaintiff was told she should stand in the boys’ line. Her clothes were
made fun of and she was told she should brush her hair. Plaintiff reported these incidents to teachers but the harassment continued.

It was in fifth grade the harassment of Plaintiff became violent. Plaintiff was pushed and shoved, slapped and punched, in the halls or at recess. One day after school Plaintiff was attacked by a boy in her class. A student named Logan F. threw Plaintiff up against a fence and screamed at her, calling her a “bitch” and shaking her. Plaintiff managed to get away and started running but Logan jumped on her back and smacked her to the ground. Logan began screaming at and shaking Plaintiff again until a crossing guard pulled him away. Plaintiff had scrapes on her elbows and knees and her pants were ripped.

Plaintiff’s mother called the school and reported the incident, but the school did not separate the two students. On the contrary a couple of months later Logan was transferred into Plaintiff’s class. Apart from the attack, Logan was among those who harassed and bullied Plaintiff. He would push her, slide his chair in front of her when she passed out papers so that she could not pass, deliberately bumped her shoulders when she passed in the hallway, called her “stupid” and “bitch” and “A-man-duh.” Plaintiff was subsequently transferred out of her class and into another, a result she was not satisfied with because she was separated from the people she knew. The harassment continued in the new classroom. Her hair was pulled, her chair was pulled out from under her, and her things were stolen. Plaintiff found the environment at Pollock “really stressful” and her grades declined as a result.

For the sixth grade Plaintiff transferred to the Alternative Middle Years at James Martin School (“AMY”). Plaintiff said of the four schools she attended in the School District, AMY “was the worst.”
Within two weeks of the start of school Plaintiff was being harassed and bullied. The teachers at the school knew about it but they “didn’t do anything, ever.” The name-calling at AMY usually occurred multiple times a day. The names used were sexualized and often in reference to Plaintiff’s gender presentation. Plaintiff was called “tranny”, “transgender”, “it”, “lesbo”, “lesbian”, “he/she”, “shemale”, “fag”, “faggot,” “bitch”, “freak”, “weirdo”, “cunt”, “anorexic bitch”, “mop”, “puta”, “slut”, “whore.” Students made fun of Plaintiff’s hair and clothes. She was told she should wear makeup.

Plaintiff was the subject of a damaging rumor. A classmate named Nicolette C. told students Plaintiff “played with herself.” Plaintiff did not know what this meant at first but knew it was negative and students laughed at her about it. Nicolette once “screamed” this accusation while another girl pushed Plaintiff out of line and said “there she is.” Nicolette continued to scream this out-loud in the halls, lunch room, and in class if the teacher was out of the room. This happened almost daily or even multiple times a day.

Plaintiff testified students stole, damaged, or destroyed her property. Books were torn apart in front of her and homework was stolen. Artwork was ruined by being ripped or having water dumped on it. On one occasion a Halloween pumpkin she made for a class project was thrown out a window. Plaintiff’s backpack was once spit on and thrown into a gully that smelled of urine. While students did these things they used the kinds of sexualized epithets mentioned above. These kinds of acts occurred weekly to daily. Plaintiff felt very upset by these things because she never did anything to these students harassing her.

As at Pollock, the abuse was also physical. Plaintiff was punched, shoved into railings and walls, and stepped on. Students deliberately pushed Plaintiff as they walked past her, sometimes elbowing her in the head. Plaintiff was once slapped across the face by a girl. One
boy threw items down her shirt and “offered to get them.” Plaintiff’s head was shoved into her locker, her hair was spit on. Plaintiff testified slapping, shoving, and punching occurred daily to multiple times a day. These blows were sometimes powerful enough to leave bruises or red marks on Plaintiff’s body, on her knee, back, face, ribs, and hip. School records showed Plaintiff frequently went to the nurse’s office at school. Plaintiff testified she sometimes went because she had been hit in the head “a little too hard”, sometimes because she was sick or needed to use an inhaler, and sometimes just because she “didn’t want to be in class or school anymore.”

In the lunch room food was thrown at Plaintiff or shoved in her hair. Water and milk was dumped on her head, and because Plaintiff was unable to change after these incidents she sometimes had to walk around the rest of the day with milk in her hair and clothes. Several shirts were ruined as a result.

These types of physical incidents occurred at AMY from three to four days a week to daily, and sometimes multiple times a day.

Plaintiff’s bus ride to school was 1½ hours each way, and the harassment occurred both on the way to school and on the trip home. Plaintiff’s bag was stolen and “thrown around the bus.” Plaintiff was hit in the back of the head, tripped and pushed. On a couple of occasions she was forcibly dragged out of her seat. Homework and school supplies were stolen. One student stole a spatula that Plaintiff had for a class, shoved it into his underwear and then tried to give it back to Plaintiff. Her backpack and cell phone were thrown out of the window. The harassment on the bus might last a quarter of the trip or the entire ride, depending on the day.

In early November 2010 Plaintiff was attacked by a student named Sam C. Plaintiff was walking to class when Sam, who shared a social studies class with Plaintiff, stormed out of class and started screaming obscenities at Plaintiff (“fuck you, you bitch, I can’t believe you said
that”) and began hitting her. Sam hit Plaintiff in the face and shoulder and knocked Plaintiff’s glasses off her face – which were later found approximately eight feet away under a water fountain. Plaintiff admits she started hitting back when she realized “[Sam] wasn’t going to stop, nobody was doing anything about it...” This attack was observed by a school police officer who was down the hall and by the social studies teacher who followed Sam out of the classroom and helped a student who had intervened to separate the girls. As a result of the attack Plaintiff suffered bruising and had red marks and had a “chunk...of hair” ripped out.

After this attack, Plaintiff and Sam C. were both suspended for “fighting.” Plaintiff’s protests that she was not fighting but had been attacked fell on deaf ears. Sam C. harassed and bullied Plaintiff after the incident.

The School District was on notice of these instances of harassment. Plaintiff reported this behavior to officials in the school, including counselor Dennis Dorfman and Principal Sonia Perez. Plaintiff also made reports to teachers, the librarian, and “Non-Teaching Assistants” (NTAs) who monitored the hallways and lunchrooms. Plaintiff testified during sixth grade she reported incidents to Dorfman, her counselor in the “mentally gifted program” and a person the students had been instructed to report things to, “every day.” She also made reports to Perez. Perez would see Plaintiff sitting outside Dorfman’s office, and when Plaintiff told Perez why she was there Perez would tell her to “ignore them or go back to class.” Sometimes she would accuse Plaintiff of lying. In these instances Plaintiff would be prevented from reporting to Dorfman and would have to return later. Plaintiff wrote down the language being used against her to show Perez. Teachers and NTA themselves witnessed some of the harassment described.

Plaintiff specifically told school officials she was being bullied because of her gender. She was told to ignore the bullies. Perez told Plaintiff if Dorfman was not dealing with the
situation then it could not be serious. Despite these many reports to school authorities, Plaintiff’s harassment only ended when she left AMY.

The school did make one ineffective attempt to resolve the problem through what was called “peer mediation.” One of the peer mediators was Nicolette C., the “main person” who harassed Plaintiff. Plaintiff resisted participating in the mediation for this reason but was pressured to do so by the counselor Caroline Steiger. Plaintiff participated in one session, in which she was alone in the room without the presence of an adult – just herself, Nicolette C., and another student she had a conflict with but whose name Plaintiff could not recall. Nicolette spent most of the session insulting Plaintiff and calling her a “stupid bitch” and telling Plaintiff the other student was in the right. Plaintiff cut the session off halfway through. Plaintiff’s expert Dr. Malcom Smith, whose testimony will be addressed below, testified these kinds of programs are known to be ineffective.

Plaintiff also had a counselor-led mediation on one occasion, with Steiger mediating between Plaintiff and Nicolette C. Nicolette told Steiger Plaintiff was too stupid to be mediated with and generally insulted Plaintiff. When Steiger had to leave the room to take a phone call Nicolette continued to insult Plaintiff. Plaintiff asked to cut the mediation short. Neither mediation session reduced the amount of harassment and bullying.

Plaintiff made reports to school officials “almost every day” in sixth grade and maybe three to four times a week in seventh grade. The reason Plaintiff made fewer reports as time went on was because:

Nobody was doing anything. They… didn’t seem to care at all. I made them aware what was happening. I was told to ignore them. I was told they’d do something and they never did. They just didn’t seem like they cared at all what was happening.
When asked in court why she kept reporting the incidents anyway, Plaintiff responded: “Bad things happen to kids that get bullied.” Plaintiff wanted to make a record of what happened in case “something really bad happened.”

On December 22, 2010, Plaintiff was brutally assaulted in her health classroom. Plaintiff asked for and received permission from the teacher to turn her chair around to speak with another girl about homework. Two eighth grade students entered the room a few minutes later and demanded Plaintiff turn her chair back around. Plaintiff told the students that she had permission to turn her chair around but the students nevertheless “kept screaming” at Plaintiff. Eventually one of the students dragged Plaintiff out of her chair onto the floor. Plaintiff got up and tried to go get the teacher, but a boy dumped the contents of a trash can onto Plaintiff’s head. He then placed the bin on her head and “everybody started laughing.”

Plaintiff removed the trash can from her head and threw it aside. At this point two girls began hitting Plaintiff and others joined in including the boy who had put the trash can on her head. Perez had told Plaintiff after she had been attacked by Sam C. that if Plaintiff were involved in another “incident” she would be expelled, so Plaintiff did not attempt to fight back. Instead she curled up in a ball on the floor, covered her head with her hands, and stayed that way while students kicked her in the head. During the attack Plaintiff was called “bitch” and “slut” and “puta.”

Eventually Plaintiff was able to crawl away. When she got far enough she got to her feet and pushed through the students and ran from the classroom. Plaintiff ran through the hallways and into the library where she hid inside an alcove, where she suffered her first panic attack. Plaintiff was followed into the library by another student who thought Plaintiff was having an
asthma attack and went into Plaintiff's backpack to retrieve her inhaler. This student along with
two others called Plaintiff's mother.

Unlike the attack by Sam C., where Perez had blamed both assailant and victim, in this
case Amanda Wible alone was blamed. Several of the girls who had assaulted Plaintiff were
escorted to the library by Dorfman and then were later taken outside. From the open window
Plaintiff could see Perez hugging one of them and patting another on the shoulder. Perez then
entered the library and began “screaming” at Plaintiff and threatening to expel her. Plaintiff was
told the attack was her fault because she did not comply with the demands of her fellow students.
Plaintiff’s explanations were met with more screams.

Unlike Plaintiff, the assailants were allowed to give official statements to school officials,
although Plaintiff was not allowed to see these statements. Plaintiff was suspended from school
for one day.

After this attack Plaintiff left AMY. She transferred to CCA Baldi Middle School (Baldi)
starting in January of her seventh grade year. Plaintiff and her mother met with administrators at
the school. Plaintiff’s mother made it clear that Plaintiff had transferred to Baldi due to the
health room incident and because of bullying and harassment at AMY. Ms. Jones-Wible did not
inform the teachers at first, but they began demanding that Plaintiff tell them why she had
transferred to Baldi in the middle of the year. At this point Plaintiff’s mother wrote the teachers
a letter explaining the situation.

None of the teachers subsequently informed Plaintiff they would do anything to protect
her from harassment at Baldi. Some told her they did not care what happened to her at her old
school.
Harrassment began in Baldi within the first week. Plaintiff was called names just as she had been at AMY, such as “dyke”, “cunt”, “lesbian”, “faggot”, “trash can”, and “whore.” This name-calling took place anywhere from a couple of times a week to a couple of times a day. Plaintiff was told she should wear “women’s clothes” or “tighter clothes.” Her hair was made fun of and Plaintiff was told to brush her hair or to pull it up. On one occasion a student pushed Plaintiff against a wall, pulled her hair up into a ponytail, and said “maybe now you’ll look more like a girl.” A chunk of hair was pulled out in the process. These comments about Plaintiff’s appearance occurred daily.

A false rumor circulated at Baldi that Plaintiff and a female friend were dating. As a consequence Plaintiff and the girl – Plaintiff’s only friend in the class - stopped speaking to one another. They hoped that by staying apart the harassment would cease, but it did not. Students would push the two together and try to make them hold hands or kiss. Boys in the class urged them to “give them a show.” Plaintiff and her friend were isolated from other female students, who stopped speaking to them.

As a result of this rumor Plaintiff’s classmates told her they did not want to change in the locker room with Plaintiff and her friend. Therefore Plaintiff and her friend were forced to change in the bathroom. If Plaintiff and her friend tried to come out from the bathroom the other girls would yell at them. The two had to wait in the bathroom until the others told them they were finished changing. Sometimes the classmates did not tell them they were finished and the two were left waiting.

As at her previous schools, Plaintiff was subjected to physical harassment at Baldi. She was shoved and punched. When students tried to push Plaintiff and her friend together they would sometimes bang their heads. Plaintiff had objects thrown at her including books, pencils,
and trash. Students threw paper balls and pencil shavings at Plaintiff that would then get stuck in her hair and no one would tell her. One boy stabbed Plaintiff repeatedly with a pencil, calling her “bitch” or “faggot” while doing so. This usually happened once or twice a day. Plaintiff believes several teachers observed this behavior. One teacher told a student to stop throwing things at Plaintiff, but she simply did so when the teacher was not looking.

Plaintiff said she reported these incidents to the principal, the vice principal, and “all the teachers I had...” One email produced in Court from sent from the vice principal to the teachers at the school said: “[Nina P.] is antagonizing Amanda.” Plaintiff testified this was indeed one of her tormenters. Nevertheless the bullying and harassment persisted until Plaintiff graduated and left the school.

The motivation for this behavior was clear. At the end of seventh grade a class trip to a movie theater was planned, and students lobbied the teacher to have Plaintiff excluded from the trip because they did not wish to be seen in public with her. They said she did not represent the school well because of her appearance and attire.

In September of 2011 Plaintiff began attending George Washington High School (GW). Harassment began within the first week. Many of the students from Baldi went with Plaintiff to GW. Plaintiff stated other students called Plaintiff names because Nina P. did. Plaintiff continued to be called “dyke”, “lesbo”, “whore”, and “cunt.” Nina also stole Plaintiff’s musical instrument and sheet music.

As before Plaintiff received comments about her clothes and body. She was told she had broad shoulders like a “linebacker” and that she should wear makeup and pull her hair up. Students made comments about Plaintiff’s breasts.
One boy in Plaintiff's class frequently made sexist remarks to her, saying women should not be allowed to vote or have jobs. Plaintiff was subjected to further physical attacks, such as having a basketball bounced off her head twice. Name calling accompanied the physical harassment.

On May 10, 2013, a student in plaintiff's gym class deliberately kicked a basketball at her and hit her in the head. Plaintiff was sitting out of gym class due to a prior concussion and pursuant to a doctor's note. Plaintiff was "hot" with pain after the blow and her glasses were bent. Her prior concussion was aggravated by the incident. Plaintiff then required several more months of therapy and was unable to participate in school until July.

The harassment of Plaintiff continued all the way until the end of ninth grade, in June of 2013. In that month Plaintiff and the other students attended the 12th grade graduation ceremonies. There she was called insulting names and had food and paper and chewed gum thrown at her.

Plaintiff testified teachers were present during some of these incidents. Plaintiff reported them to teachers, NTAs, the school nurse and GW's disciplinarian. Plaintiff testified when she told school officials she was being called names or having things thrown at her she was told to "ignore it." She was told this "almost every time." Despite making reports "nothing" happened and "nobody did anything." Plaintiff said students made it obvious that name calling and physical harassment was directed to her because of her appearance. "The made it obvious that it was because of how I looked and how I dressed and how my gender was presented."

Plaintiff was not told by school officials there was any kind of complaint procedure for bullying and harassment she could utilize. Plaintiff was not informed of any counseling or
mental health services or access to social skills training. Plaintiff was never told the school was conducting any investigations into these incidents.

Plaintiff described her emotional state while she was in the School District: “I felt horrible. Never wanted to go to school. I was always tired. I – I had so many problems while I was in the School District.” These feelings persisted even after Plaintiff left the School District.

Plaintiff felt she missed out on many things in her school experiences, such as dances and socials and school trips. When she went on school trips Plaintiff always stayed close to a teacher. Plaintiff believed the harassment she experienced in school negatively impacted her ability to get into college.

Plaintiff described the emotional effects of her years of harassment and bullying. Plaintiff suffers from panic attacks, the first of which occurred as a result of the attack in the health class. Plaintiff suffers from insomnia and has trouble in crowds. While at school Plaintiff cut herself. From 2014 to 2016, Plaintiff sought treatment in the form of therapy at the Center for Families and Relations (CFAR). Plaintiff had suicidal thoughts. Plaintiff developed a condition called amplified musculoskeletal pain syndrome, or AMPS. Plaintiff currently receives treatment and medication as a result of this condition. Plaintiff first felt the symptoms of AMPS in seventh grade.

The Court received testimony from Juanita Jones-Wible, who is Plaintiff’s mother. Ms. Jones-Wible testified when Plaintiff was little she loved school and was described by an early report card as “happy-go-lucky.” However at some point she began to be bullied and harassed. Ms. Jones-Wible made reports of these problems all the way back when Plaintiff was in elementary school at Pollock. She specifically told school officials Plaintiff was being picked on because she was wearing the boys’ version of the uniform. School officials seemed responsive,
saying they would “look into it” and “separate the children.” However, the bullying and harassment did not cease and in fact the situation progressed into violence.

Throughout her testimony, Plaintiff’s mother detailed the reports she gave to School District of the bullying and harassment her daughter was suffering. She called the school to report the attack by Logan F. the same day it occurred. After Logan was placed into Plaintiff’s class, Ms. Jones-Wible noticed that Plaintiff’s behavior changed. She was “disheveled”, coming home “upset and worried” and her book bag “in chaos.” On May 28, 2009, she emailed the school to complain about Plaintiff being transferred out of her class as a result of the incident with Logan.

As a result of Plaintiff’s complaints to her mother that she was being bullied, Ms. Jones-Wible sought to transfer Plaintiff to AMY. However Plaintiff continued to report harassment to her, and Ms. Jones-Wible reported this information to Dennis Dorfman and Principal Sonia Perez and to Plaintiff’s teachers. Ms. Jones-Wible reported to Dorfman the names being used about Plaintiff, with their strong emphasis on Plaintiff’s sex, and the incidents of physical harassment and assault in the classroom, schoolyard, and on the bus. She also reported Plaintiff’s property was being stolen. The notice provided to Dorfman included forms, notes, emails, and telephone calls. Dorfman responded that he would look into the matter, speak to the individuals involved, and see what he could do. Ms. Jones-Wible also spoke twice to Perez who sent her to Dorfman because he was “the one in charge of that group of students, of that age group.”

In sixth grade Plaintiff often came home complaining of bullying and harassment. Ms. Jones-Wible observed she frequently looked as if she had been crying, and had torn books, food in her hair, shirts “destroyed”, and bruises and red marks on her body. Plaintiff reported frequent
headaches and stomachaches. Phone calls from the school nurse reporting headaches or injuries like cuts and scrapes were also frequent.

At the end of sixth grade Ms. Jones-Wible considered private school for Plaintiff, but the tuition was not affordable. Plaintiff remained in the School District in seventh grade and Ms. Jones-Wible continued to report bullying and harassment to school officials. The level of physical assault was escalating.

Following the attack in the health classroom, Ms. Jones-Wible contacted the School District and was given the number of John Frangipani, the superintendent of middle schools. Ms. Jones-Wible explained the assaults and name-calling Plaintiff had suffered. As a result of this conversation, Plaintiff was transferred to Baldi. Ms. Jones-Wible met with the principal of Baldi and “went over [Plaintiff’s] complete history” of assaults and insults used against Plaintiff. Ms. Jones-Wible also wrote a letter and had Plaintiff hand a copy to each of her teachers, explaining that Plaintiff had been bullied and assaulted and this was the reason for her transfer to Baldi. No one contacted Ms. Jones-Wible as a result of these letters to discuss ways to keep Plaintiff safe.

Plaintiff reported instances of assault and name-calling at Baldi and Ms. Jones-Wible in turn reported it to Crystal Gary Nelson the vice principal of the school. This occurred within the first two weeks of Plaintiff’s attendance at the school. Nevertheless there was no change in Plaintiff’s situation as a result. At one point Ms. Jones-Wible and Ms. Gary Nelson got into an email exchange concerning the incident where Plaintiff’s classmates were attempting to exclude her from the school trip to the movie theater. Ms. Jones-Wible was told to tell Plaintiff to simply “ignore” her peers when they made inappropriate comments. Ms. Jones-Wible was not satisfied with this because it did nothing to correct the problem of the bullying and harassment. Plaintiff
would continue to complain regularly of harassment but the harassment would not cease until she left Baldi. Plaintiff also made physical complaints. She spoke of stomachaches and headaches and complained about her wrists.

The bullying and harassment of Plaintiff continued at GW. She was subjected to sexist remarks and remarks about her appearance, especially her breasts. There was deliberately hitting in the hallway and the attack in the gym with the basketball. Ms. Jones-Wible made reports to the vice principal of the school because she was told to do so by school security. Plaintiff reported to her mother that nothing changed. Complaints of bullying and harassment continued throughout ninth grade and did not cease until Plaintiff left the school.

Ms. Jones-Wible observed a pattern throughout Plaintiff’s school career which continued at GW: it begins with insults, which increase in intensity and then escalates to a physical assault, in this case the attack with the basketball. Ms. Jones-Wible made the decision to pull Plaintiff out of GW because she was “tired of her being at risk. Basically, her life was at risk.”

Ms. Jones-Wible spoke of all the things that were taken away from Plaintiff when she was at the School District: everything from guitar lessons to friends to her normal routine and the normal class experience of being in school. Her grades suffered. Ms. Jones-Wible concluded her testimony by expressing this hope for Amanda’s future: “That she may have been broken by all of these attacks, but she could still be who she wants to be.”

The Court heard testimony from Dr. Malcolm Smith. Dr. Smith was qualified as an expert in “school bullying, unlawful peer-to-peer harassment and youth violence.” Dr. Smith is the president of two organizations, Courage to Care and Malcolm Smith Consulting, whose work it is to train teachers throughout the United States to teach middle school students empathy and to reduce bullying and victimization in school. Dr. Smith developed the “Courage to Care”
program with a grant from the federal government, and the program is implemented in 14 different states as well as among Native American tribes in Oklahoma. With Malcolm Smith Consulting, Dr. Smith provides training to school administrators and works with individual school districts and state legislators to craft bullying policy and procedure. Dr. Smith has worked in this field for around 35 years and in this capacity has been in thousands of schools.

Dr. Smith testified the scientific literature in his field has clearly established that a school can develop a “culture and climate... that allows bullying and harassment to go on unabated or unnoticed” and this occurs in “schools where students report bullying and nothing happens.” In such schools bullies feel “empowered.” When a climate like this is established it will, if left unabated, become physical. Dr. Smith saw a pattern of escalation in each of the schools that Plaintiff attended.

Dr. Smith examined documents related to Plaintiff’s case and interviewed her mother, and concluded that there was a “sexualized harmful school environment” and that the School District was “put on notice” that such an environment existed in Plaintiff’s case. Dr. Smith was further asked to consider whether the School District was deliberately indifferent to the harassment suffered by Plaintiff. To do this, Dr. Smith examined the policies and procedures around bullying and harassment in place at the defendant School District and how claims of harassment were handled in Plaintiff’s case.

Scientific studies produced by, among others, the United States Department of Education show “that schools who don’t have clear policies and procedures, schools who don’t react to students’ complaints, and schools that don’t follow their own policies and procedures are dangerous places for students.”
Dr. Smith analyzed the written policies in place at Philadelphia School District in place when Plaintiff was at school and found them inadequate under nationally recognized standards. One of the most important elements of a successful anti-bullying policy are “clear policies and procedure.” These were lacking in the School District when Plaintiff attended the schools there. A broad statement of policy is of little worth much without a procedure for implementation. Furthermore, there was no evidence that the policies were actually adhered to in Plaintiff’s case.

The policies were ineffective in, among other things, failing to have procedures for prevention, investigation, parental notification, behavioral interventions for both perpetrator and victim, disciplinary action, and follow-ups with the victim. The records Dr. Smith reviewed show no “paper trail” reflecting investigations of incidents involving harassment of Plaintiff.

Dr. Smith examined P-16, which is the School District of Philadelphia’s official Multiracial-Multicultural Gender Education policy, and which was adopted on August 18, 2004. This document was “not sufficient” in protecting children from harassment or bullying. There is only a small section on procedure and implementation. The policy should have had measures for prevention as well as a timeline for investigations of harassment incidents to take place. Furthermore, even with regards to the policies that were laid out in this otherwise inadequate document Dr. Smith found there was no evidence they were actually adhered to in handling Plaintiff’s case.

Dr. Smith examined P-17, the School district’s unlawful harassment policy, and P-18, its bullying and cyber bulling policy, both dated 2010. Dr. Smith found major problems: no prevention and no timeline for investigation. Dr. Smith testified by 2010 it was standard practice in about 40% of the states for bullying policies to provide for a timeline of two days in which to investigate a severe bullying or harassment claim and to notify the parents of the victim and
perpetrator that there was an investigation. Then within one to two weeks the school should have a written plan to show how the victim would be protected and the perpetrator disciplined. The policies also lacked a clear definition of who should investigate, who they should report to, and what kind of “paper trail” should be established.

Dr. Smith examined P-20, which were the bullying and harassment procedures put in place in Philadelphia School District in 2013. Dr. Smith found these procedures to be much better than what came before. However, Dr. Smith also opined that such procedures could have been implemented in 2010 or even 2004. The 2013 policy contained *inter alia* sections on prevention, on reporting, on investigation, on parental notification, on behavior interventions, on disciplinary action, and on follow up. These are examples of what was in place in most school districts Dr. Smith has seen by 2008 or 2009. The policy contained other things that Dr. Smith opined are important for a good anti-bullying policy. The policy required schools to conduct developmentally appropriate prevention activities, such as incorporating social and emotional learning activities and conducting classroom lessons on inclusion, sensitivity, empathy and diversity. Such social and emotional learning builds the student’s need to be civil in school.

Dr. Smith emphasized strongly the importance of teaching students empathy as a way of preventing harassment in school. He noted that the School District reported that they were utilizing a program called “Second Step” which Dr. Smith was familiar with and contained an element of teaching students empathy. However, Dr. Smith could see no evidence that the program was actually being implemented by the School District.

Dr. Smith opined that peer mediation, which was used by the school in Plaintiff’s situation, is totally ineffective in the case of bullying or sexual harassment because of the inherent imbalance of power between the parties.
Dr. Smith testified in his opinion, to a reasonable degree of professional certainty, the school was deliberately indifferent to Plaintiff's claims. Had the school implemented its own procedures, Plaintiff would not have suffered what she did. The Court found Dr. Smith's testimony to be credible and accepted it.

The Court also heard testimony from Dr. Michael Bradley, a licensed clinical psychologist specializing in children, adolescents, and families. In addition to his clinical practice Dr. Bradley is the author of six books all relating to student harassment and bullying. Dr. Bradley also conducts training for school systems and appears on major media outlets such as CNN, Fox News, and NPR. Dr. Bradley also provides expert testimony in family court proceedings. Prior to becoming a psychologist Dr. Bradley worked as a school counselor.

In his clinical practice, Dr. Bradley has treated an estimated 100 to 300 children who have victimized by harassment and bullying. He also has experience treating children who suffer from psychosomatic illnesses. As a member of the International Association of Trauma Professionals, he has received training in treating children who have been victims of harassment and bullying. The Court qualified him as an expert in child and adolescent psychology with a specialization in treating trauma arising from bullying and harassment.

Dr. Bradley performed a psychological evaluation of Plaintiff regarding her reaction to the bullying and harassment she received while at the School District. This evaluation involved interviews and psychometric testing with Plaintiff and review of documents related to her experience in the School District.

Dr. Bradley has diagnosed Plaintiff as suffering from complex type post-traumatic stress disorder (PTSD). As a secondary diagnosis, Dr. Bradley found anxiety and depression and a "profound sleep disturbance." Plaintiff has had exhaustive medical treatment which has failed to
find an organic explanation for her bodily complaints. Dr. Bradley concluded that the history of bullying and harassment she sustained in school was the cause of her PTSD and secondary diagnoses.

Dr. Bradley noted that there was nothing in Plaintiff’s school or medical records prior to fifth grade that is consistent with PTSD, depression, anxiety, or any psychosomatic disorders (physical manifestations of psychological stress). He noted that Plaintiff’s sleep disturbance went into the “profound” range in middle school, because she was “anticipating a terrible time at school the next day.” Dr. Bradley characterized the health room attack suffered by Plaintiff as a “true trauma experience.” The subsequent response of the school is “profoundly damaging” because the victim is blamed, isolating the victim and making her feel as if she is totally on her own and hopeless.

The scientific literature establishes that even worse than physical assaults are “exclusion, isolation, and ostracizing.” These things “do the real psychological damage contributing to PTSD with kids.” This is so because at this stage of development “it’s all about peers.” A child suffering this kind of abuse is being isolated at the exact age where she requires socialization. Dr. Bradley testified as to the impact of rumors on children – it is further isolating, as bystanders do not want to be associated with the child who is the subject of the rumor because they do not want to be targeted themselves. This increases feelings of hopelessness. Dr. Bradley examined an email, P-42, in which Assistant Vice Principal Crystal Gary Nelson told Plaintiff’s teachers to separate her from student Nina P. This would not mitigate the problem but would exacerbate it. It teaches the victim that she somehow brings the harassment on herself.

Dr. Bradley testified Plaintiff has likely repressed many of the memories associated with the bullying and harassment she experienced. This is typical of those who have had traumatic
experiences. Because certain memories are too painful to deal with, the victim tries to “build walls” around the memories. This does not work, however, and the pain is manifested in other ways, such as in somatic symptoms. Later in life, certain “triggers” can bring these memories back to the victim in a way that causes additional distress. Dr. Bradley also opined that Plaintiff was being truthful in her discussions with him, based upon psychological tests he performed as well as her own candor in admitting to her own wrongdoing where it occurred (e.g. stealing someone’s eraser in elementary school) and in tending to minimize her own experiences.

Dr. Bradley explained the difference between PTSD and complex type PTSD. The former was first observed in returning war veterans and was based upon the experience of a single, terrible event. PTSD concerned re-experiencing the traumatic event, building avoidance behaviors to avoid experiencing the event and having recurrences due to a triggering event. This is called “standard type” PTSD. Complex type PTSD is also found in returning soldiers, including those who had never had a traumatic combat experience, and involves a “chronic state of hypervigilance” as a result of waiting for bad things to happen over the course of a long period of time. This day-to-day anticipation of terrible events does damage to an individual – literally changing his or her brain structure.

Dr. Bradley testified the assaults Plaintiff suffered, as well the daily insults, would contribute to the “negative anticipation” which can lead to cognitive impairment. Dr. Bradley noted Plaintiff, previously identified as a gifted student, started to see a decline in test scores and in overall “executive functioning” – which involves the rational, decision-making part of the brain.
As part of his analysis of Plaintiff Dr. Bradley administered several psychometric tests to Plaintiff. These tests corroborated Dr. Bradley’s diagnosis of PTSD complex type, depression, anxiety, and profound sleep disturbance.

In 2012 Plaintiff was diagnosed with a condition known as amplified musculoskeletal pain disorder, or AMPS. This is a psychosomatic condition involving heightened pain responses. Reviewing Plaintiff’s medical records, Dr. Bradley found many physical complaints with no apparent organic or physiological cause. Dr. Bradley believes the records show that psychological factors were the likely cause of Plaintiff’s AMPS, specifically the bullying and harassment undergone at the School District. This was determined based on a process of elimination – there was no other potential cause. The result is a change in brain structure caused by the harassment now leads Plaintiff’s brain to amplify minor pain signals. Dr. Bradley reviewed records from CFAR which were also consistent with AMPS. These symptoms persist.

Dr. Bradley concluded that Plaintiff’s psychological distress was the result of harassment and bullying. He opined about several “losses” Plaintiff has suffered. First is the “entire experience of education” which was transformed from pleasant to something Dr. Bradley compared to a “war zone.” The second is her damaged relationship with adults. The third is the development of AMPS. The fourth is anxiety and depression, which is ongoing. The fifth is profound sleep disturbance. The sixth is excessive emotional reactivity, which damages relationships. The seventh is treatment costs. He opined future treatment is also necessary, including training in dealing with trauma-based PTSD complex type. This need will likely continue until age 25, the age of the final maturation of the brain.

The Court found the testimony of Dr. Bradley and of Dr. Smith to be credible and accepted it.
The Court must note the School District’s expert witnesses were seriously discredited on cross examination and were unhelpful to the fact finder.

III. Discussion

The School District has filed a 1925(b) statement raising the following errors on appeal:

1. The Court erred in denying the School District’s motion for post-trial relief directing entry of judgment in favor of the School District on the ground that, pursuant to the Political Subdivisions Tort Claims Act, 42 PA. C.S. §§ 8541-8542, the School District is immune from plaintiff’s damages claim under the Pennsylvania Human Relations Act (PHRA).

2. The Court erred in denying the School District’s motion for non-suit and motion for post-trial relief directing entry of judgment in favor of the School District on the ground that a school district cannot be liable under the PHRA for alleged harassment of a student by other students.

3. The Court erred in denying the School District’s motion for non-suit and motion for post-trial relief directing entry of judgment in favor of the School District on the ground that no acts of harassment occurred within 180 days of plaintiff’s filing of a complaint with the Pennsylvania Human Relations Commission (PHRC), as required by 43 P.S. § 959(h), where (a) the Minority Tolling Statute, 42 PA. C.S. § 5533(b), does not apply to claims before an administrative agency, and (b) equitable tolling under the PHRA, 43 P.S. § 962(e), does not include tolling due to minority status.

4. The Court erred in denying the School District’s motion for post-trial relief modifying the Court’s decision or ordering a new trial on the ground that, to the extent that any acts of harassment occurred within 180 days of plaintiff’s filing of a complaint with the PHRC, the Court erred in admitting and considering evidence of acts occurring prior to the 180-day period, because plaintiff’s claims arising from the latter acts are not subject to the continuing violation doctrine.

5. The Court erred in denying the School District’s motion for non-suit and motion for post-trial relief directing entry of judgment in favor of the School District on the ground that the evidence failed to prove that the School District was deliberately indifferent to any alleged harassment.

6. The Court erred to the extent that any of its rulings set forth above were based on the Court’s determination that it was bound by “law of the case” or the coordinate jurisdiction rule to adhere to prior rulings of the Court on the School District’s preliminary objections or motion for summary judgment or other pre-trial motions.
7. The Court erred in awarding plaintiff “expert fees” on the ground that the prevailing party in a PHRA case is not entitled to recover “expert fees” incurred in the prosecution of her claim.

8. The Court erred in awarding plaintiff any attorney’s fees incurred in the prosecution of plaintiff’s petition for fees and costs on the ground that the prevailing party in a PHRA case is not entitled to recover attorneys’ fees and/or costs incurred in the prosecution of her petition for fees and costs.

These issues will be addressed below.

The School District was Liable Under the PHRA for Its Deliberate Indifference to the Student on Student Sexual Harassment of Plaintiff

The General Assembly declared in the “Findings and declaration of policy” section, of the Pennsylvania Human Relations Act (PHRA) that “[t]he practice or policy of discrimination against individuals or groups by reason of their...sex...is a matter of concern of the Commonwealth.” 43 P.S. § 952(a). It is further stated: “It is hereby declared to be the public policy of this Commonwealth...to assure equal opportunities to all individuals and to safeguard their rights to public accommodation...” 43 P.S. § 952(b).

Section 955 of the PHRA provides in pertinent part that it is an “unlawful discriminatory practice” for:

(i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any public accommodation, resort or amusement to:

(1) Refuse, withhold from, or deny to any person because of his race, color, sex, religious creed, ancestry, national origin or handicap or disability, or to any person due to use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation, resort or amusement.  

43 P.S. § 955(i)(1) (emphasis added)
The statute specifically provides that the phrase “public accommodation” includes “kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth.” 43 P.S. § 954(1). See also Chestnut Hill College v. Pennsylvania Human Relations Commission, 158 A.3d 251, 258 n. 5 (Pa. Cmwlth. 2017) (“Public schools are places of public accommodation subject to the Commission's jurisdiction to protect students from racial discrimination.”)

It is therefore unlawful under the PHRA for a public school to deny to a person, either directly or indirectly, any of the accommodations or privileges of the school on the basis of her sex. The Court found that Plaintiff was, as a result of the deliberate indifference of the School District to her harassment at the hands of her fellow students, denied equal access to the “accommodations, advantages, facilities or privileges” of the district's schools on the basis of Plaintiff’s sex.

The evidence recited above demonstrates that during Plaintiff’s time in the School District she was taunted, teased, bullied and harassed because of her gender presentation. Namely, in dress and behavior she deviated from societal expectations for girls. The School District has taken the position that Plaintiff’s gender had nothing to do with the differential treatment she received in school, but the choice of epithets used her tormenters leave no room for doubt.

The evidence also reveals that the severity of the harassment was sufficient to deny Plaintiff the equal accommodation of the district’s schools. She was subjected to continuous verbal abuse and physical attacks every day for years. Plaintiff’s grades and mental wellness declined as a result.
No appellate court in the Commonwealth has yet decided whether the PHRA provides a remedy for students denied the privileges of attendance in school when it results from the deliberate indifference of school administrators to student-on-student harassment. See Saxe v. State College Area School Dist., 240 F.3d 200, 204 n. 4 ("It [the PHRA] has not been construed, however, to create a cause of action for 'hostile environment' harassment of a public school student."). But the plain language and express purpose of the PHRA favor this result.

The PHRA prohibits not only "direct" but also "indirect" discrimination – which is declared to be a matter of concern for the Commonwealth. The deleterious effect of peer harassment is already recognized in the employment context, and it would be grossly inconsistent to find that employee-on-employee harassment may be sufficiently severe to deny the harassed employee equal employment yet find that children, who are more emotionally vulnerable than adults, are immune to such harm.

Courts in other jurisdictions, interpreting statutes very similar to Pennsylvania’s PHRA, have come to the same conclusion. See Doe ex. Rel. Subia v. Kansas City, Missouri School District, 372 S.W.3d 43 (Mo. Ct. App. 2012).

Importantly, the Court did not find that the School District was vicariously responsible for the behavior of its students. Under the PHRA the School District is, however, responsible for its own behavior. In this case it was the failure to take any effective measures whatsoever to protect Plaintiff from harassment and bullying because of her gender. The concept of providing order and discipline among students is not alien to schools in the Commonwealth.

Nor did the Court find that the School District was responsible under the PHRA for failing to prevent bullying and harassment – rather the School District is responsible for its deliberate indifference to the bullying and harassment of which it had actual notice. Despite its
professions of concern about the problem of bullying and harassment in schools, the School
District argues it owed *no duty* Plaintiff to take *any* measures to protect her from student-on-
student harassment. This Court finds otherwise.

**The School District Has No Immunity to this Suit**

As explained above, the PHRA explicitly authorizes suit against a school district for a
violation of the Act. Nevertheless on post-trial motions Defendant argued, for the first time, that
it was immune to suit under the PHRA. This argument is unavailing. 42 Pa.C.S.A. § 8541
provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any
damages on account of any injury to a person or property caused by any act of the local
agency or an employee thereof or any other person.

Exceptions to immunity are provided for in § 8542, but these are not applicable here. However,
the Court found that this statute refers only to common law torts, not to statutorily derived causes
of action. In *Meyer v. Community College of Beaver County* then Justice and now Chief Justice
Saylor remarked in *dicta* that under the Political Subdivision Tort Claims Act “the legislature
centered the immunity there conferred on ‘injury to a person or property’ as a reflection of

Plaintiff’s suit is not a common law tort but a statutorily created cause of action
specifically authorized by the PHRA. The PHRA prohibits “any person” who is the manager of
a public accommodation to discriminate on the basis of a protected category, including sex. 43
P.S. § 955(i)(1). The statute’s definition of “person” includes “the Commonwealth of
Pennsylvania, and all political subdivisions, authorities, boards and commissions thereof.” 43
P.S. § 954(a). The term “political subdivision” means “any county, city, borough, incorporated
town or township of this Commonwealth." 43 P.S. § 954(m). As explained above, the PHRA prohibits discrimination in public accommodations and the definition of the term public accommodation includes schools.

Defendant does not dispute that the PHRA itself has been applied to political subdivisions in the capacities as employers. See City of Philadelphia v. Pennsylvania Human Relations Com'n, 684 A.2d 204 (Pa. Cmwlth. 1996). Defendant argues however that this waiver is “express” because the PHRA’s definition of “employer” includes “the Commonwealth or any political subdivision or board, department, commission, or school district thereof.” 43 P.S. § 954(b) (emphasis added). As explained above, however, school districts are also referred to expressly in the statute.

The Evidence Showed the School District Was Deliberately Indifferent

The School District argues the evidence is insufficient to find it was deliberately indifferent to the bullying and harassment suffered by Plaintiff. The evidence at trial showed otherwise.

The credible testimony recited above shows that the Plaintiff and her mother made persistent and detailed reports about the harassment Plaintiff was receiving at her school and did so for years. In some cases this behavior was witnessed by School District staff members as it occurred. There is no question that the School District had actual notice of what was occurring with Plaintiff.

Plaintiff’s expert Dr. Smith testified, and the Court found this testimony credible, that the School District’s approach to the problem of the ongoing harassment of Plaintiff was clearly unreasonable. It was not simply that the anti-harassment and anti-bullying policies utilized by
the School District were not state of the art. Rather, the School District’s policies were either not followed or contained no mechanisms for enforcement that would allow them to be followed. In the case of the Second Step program, the School District’s own witnesses admitted they had never even heard of the policy they were supposed to be implementing.

The School District points to several incidents where particular students were disciplined as a result of conduct towards Plaintiff or where teachers indicated they intended to keep an eye out for any bullying of Plaintiff. For example, the student Logan F. was suspended after his attack on Plaintiff.

The evidence showed, however, that the school’s primary concern was in preventing fighting or serious acts of violence. Indeed, the School District’s own reports indicate that Plaintiff was sometimes viewed as either the instigator of, or an equal participant in, violent encounters with her harassers. But there was no reasonable attempt made to proactively address the harassment Plaintiff received on a daily basis – harassment that Plaintiff’s expert Dr. Smith testified made serious violence almost inevitable.

All of Plaintiff’s Claims Were Timely Filed

The Court found that Plaintiff was bullied and harassed from 2003, when she enrolled at Pollock, until June, 2013, when she attended graduation ceremonies at George Washington High School. Plaintiff testified to specific instances of bullying and harassment that occurred at graduation and the Court found these acts were motivated by gender discrimination. These acts occurred because of the School District’s ongoing deliberate indifference to the discrimination suffered by Plaintiff.
Under the PHRA, the plaintiff was required to file her complaint with the Pennsylvania Human Relations Commission (PHRC) within 180 days of the last act of discrimination. See 43 P.S. § 959(h). Plaintiff filed her PHRC complaint on October 8, 2013, which was within 180 days of the final act of discrimination. By timely filing her PHRC complaint Plaintiff was entitled under the “continuing violations doctrine” to recover for discriminatory acts outside the limitations period. See Girard Finance Company v. Pennsylvania Human Relations Commission, 52 A.3d 523 (Cmwlth. 2012). So long as one of “the component acts” of the harassment occurred within 180 days of Plaintiffs’ filing their PHRC complaint, the entire time period may be considered by the Court. See Barra v. Rose Tree Media Sch. Dist., 858 A.2d 206, 213–14 (Pa. Commw. Ct. 2004). Therefore Plaintiff’s claims were timely filed and the Court was entitled to consider the discrimination suffered by Plaintiff from 2003 until 2013.2

Defendant has argued that no acts of harassment occurred during the applicable 180 day period and that these incidents are discrete and isolated and do not relate to earlier instances of harassment. This is merely another version of Defendant’s challenge to the sufficiency of the evidence and, as explained above, these acts were the direct result of Plaintiff’s gender and the School District’s deliberate indifference to the sexual harassment and bullying of Plaintiff. Defendant also cites non-binding Federal cases for the proposition that the continuing violations doctrine does not apply if Plaintiff became aware she was being discriminated against more than 180 days prior to the filing of her PHRC complaint. This is not the law of the Commonwealth.

2 The Court’s decision regarding the statute of limitations was not based upon either the coordinate jurisdiction rule or law of the case.
Plaintiff Was Entitled to Attorney and Expert Fees

Pursuant to 43 P.S. § 962:

(c.2) If, after a trial held pursuant to subsection (c), the court of common pleas finds that a defendant engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the court may award attorney fees and costs to the prevailing plaintiff.

Thus “the award of counsel fees and costs under the PHRA is within the sound discretion of the trial court...” Wagner v. Pennsylvania Capitol Police Dept., 132 A.3d 1051 (Pa. Cmwlth. 2016). The Court in its discretion chose to award expert witness fees because it found were absolutely essential to proving Plaintiff’s case.

The fees incurred by Plaintiff were reasonable in light of the scope and novelty of this litigation, and resulted in a thorough presentation of the evidence in a way which was of great benefit to the Court. Defendant School District also pursued an aggressive litigation strategy that necessitated an appropriate response from Plaintiff.

The Court did not, contrary to Defendant’s assertion, consider fees incurred in the prosecution of Plaintiff’s petition for fees and costs incurred in the prosecution of her fee petition itself. The review of fees and decision concerning amount concluded with the last entries before the preparation of the petition.

IV. Conclusion

Amanda Wible is only one victim of what Dr. Malcolm Smith characterized as an “epidemic” of bullying in the United States and her case is proof of its potentially devastating consequences for children in the Commonwealth. Not only are educational opportunities lost but the trauma lingers long after the student has left school.

Plaintiff’s time in the School District was a gauntlet of sexual harassment and violence that would test the mettle of the strongest and most resilient youth. This harassment was endured
for years until it became unbearable and Plaintiff was forced to withdraw from the School District. In this way Plaintiff was literally denied the use of a public accommodation on the basis of her sex. The PHRA forbids this. The School District is not generally liable for all conduct of its students. But it is liable, in its role as proprietor of a public accommodation, if it is deliberately indifferent to harassment and violence that has occurred and inevitably will continue to occur, and this harassment is so severe that it makes it impossible for one of the students entrusted to the School District’s care to enter the building.

The evidence adduced in this case clearly supported the Court’s findings of fact and the law supports its conclusions of law.

BY THE COURT:

December 17, 2018

Gene D. Cohen, J.