2015

Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students

Paul M. Secunda
Marquette University Law School, paul.secunda@marquette.edu

Publication Information
Paul M. Secunda, Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students, 2015 U. Ill. L. Rev. 175

OVERCOMING DELIBERATE INDIFFERENCE: RECONSIDERING EFFECTIVE LEGAL PROTECTIONS FOR BULLIED SPECIAL EDUCATION STUDENTS

*Paul M. Secunda**

Ten years ago, in response to an epidemic of bullying and harassment of special education students in our nation's schools, I put forward two new legal proposals based on legal protections that these students uniquely have under the Individuals with Disabilities in Education Act ("IDEA"). Although these proposals have gained some traction in the ensuing time period, most courts continue to analyze these cases under the same series of largely ineffectual constitutional and statutory laws. What many of these laws have in common with my previous proposals is reliance on a deliberate indifference standard, which requires schools and responsible school officials to essentially ignore the bullying behavior before being held legally accountable for their actions. Not surprisingly, there has been a remarkable lack of case success in even the most severe instances of special education student bullying.

To provide meaningful legal protections for bullied special education children, this Article seeks to overcome the deliberate indifference standard by relying on a combination of reasonable accommodation principles under federal disability law and legal protections that children with disabilities already have under the IDEA. More specifically, this Article argues for adoption of the gross mismanagement standard under section 504 of the Rehabilitation Act and an expansion of existing state anti-bullying laws to provide special educa-

* Professor of Law, Marquette University Law School. A previous version of this Article was presented at both the Section on Disability Law Panel at the Association of American Law Schools (AALS) 2014 Annual Meeting in New York City and at a faculty workshop at Loyola University New Orleans College of Law. I thank all the participants at those events for their helpful comments and feedback. I wish to particularly thank Allison Markoski, Rob Garda, and Mark Weber for their comments on earlier drafts of this Article. I especially wish to express my gratitude to Myriem Bennani, Marquette University Law School Class of 2014, for her excellent research and writing assistance on this Article. All opinions in this Article, however, are mine alone. The Article is dedicated to the many courageous children with disabilities who endure bullying at school with remarkable resilience and grace.

tion children with various forms of private rights of action to combat the most severe forms of bullying. These new legal proposals will add to the arsenal that bullied special education children have at their disposal to fight back against both their tormentors and their institutional and individual enablers.

TABLE OF CONTENTS

I. INTRODUCTION 177
II. THE UNSATISFACTORY STATE OF THE LAW FOR BULLIED SPECIAL EDUCATION CHILDREN 184
A. Estate of Lance v. Kyer*: Lack of Constitutional Due Process and Disability Discrimination Protections under Current Law* 185
B. Rost v. Steamboat Springs RE-2 School District*: Lack of Equal Protection and Title IX Protections Under Current Law* 189
III. FIGHTING BACK AGAINST SPECIAL EDUCATION STUDENT BULLYING THROUGH UTILIZATION OF THE IDEA 193
A. The Impact of IDEA on the Special Education Bullying Analysis Generally 193
B. T.K. v. New York City Department of Education*: Incorporating Title IX Principles into IDEA to Address Special Education Bullying* 195
C. The Advantages and Disadvantages of the T.K. Approach ... 198
IV. REASONABLE ACCOMMODATION ANALYSIS OF SPECIAL EDUCATION BULLYING CLAIMS 200
A. Stewart v. Waco Independent School District*: The Gross Mismanagement Standard and Reasonable Accommodations* 201
B. Criticisms of Stewart*'s Reasonable Accommodation Approach to Special Education Bullying and the Failure to Exhaust Administrative Remedies Winning Argument* 207
V. EXPANDING STATE ANTI-BULLYING STATUTES TO ADDRESS SPECIAL EDUCATION STUDENT BULLYING 210
A. Massachusetts' IEP Approach 211
B. Maryland's Disability Discrimination Approach 211
C. Various Approaches to Adding Private Causes of Action to State Anti-Bullying Legislation for Bullied Special Education Students 212
VI. CONCLUSION 215

The harm that "bullying" has caused to innocent children has seemingly reached an epidemic level. While bullying is not a new development, the harshness and vitriol associated with bullying has seemingly exploded in the digital age. Despite the plaintiff's desire to

> hold an overburdened public educational system accountable, the facts and law do not demonstrate an appropriate cause of action for a denial of rights afforded by the IDEA, and therefore Count 1 of the plaintiff's complaint will be dismissed. Finding that the plaintiff has failed to sufficiently plead violations of Title IX or the Rehabilitation Act, Counts 2 and 3 of the complaint will be dismissed.[1]

I. INTRODUCTION

The epidemic of bullying in United States schools continues apace,[2] especially among children with disabilities.[3] Yet, cases like *Butler v. Mountain View School District*[4] show that courts are either legally unequipped or unprepared to address the significant bullying problems involving special education students.[5] Not that advocates have not tried to find winning legal theories in the past.[6] Parents, educators, public health officials, and other advocates are no longer satisfied with accepting such

1. Butler v. Mountain View Sch. Dist., C.A. No. 3:12–CV–2038, 2013 WL 4520839, at *9 (M.D. Pa. Aug. 26, 2013) (Mannion, J.).

2. *See* Joaquin Phoenix & Michael Honda, *Column: Our Children Face a Bullying Epidemic*, USA TODAY, Aug. 28, 2012, http://usatoday30.usatoday.com/news/opinion/forum/story/2012-08-28/joaquin-phoenix-bullying-epidemic/57379318/1 ("It is estimated that 13 million American children are teased, taunted and physically assaulted by their peers, making bullying the most common form of violence our nation's youth experience in 2012."). Unfortunately, the prevalence of bullying has also led to a growing number of student suicides. *See, e.g.*, John Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 3, 2010, http://www.nytimes.com/2010/10/03/weekinreview/03schwartz.html.

3. A series of studies have shown that "children with disabilities were two to three times more likely to be bullied than their nondisabled peers." *Bullying and Harassment of Students with Disabilities: Top 10 Facts Parents, Educators, and Students Need to Know*, PACER CENTER ACTION INFORMATION SHEETS 1 (2012), *available at* http://www.pacer.org/publications/Bullypdf/BP-18.pdf (last visited Sept. 10, 2014). "One study shows that 60 percent of students with disabilities report being bullied regularly compared with 25 percent of all students." *Id.*

4. 2013 WL 4520839. In *Butler*, the district court dismissed all claims brought by the parents of a ninth grade bullied special education child, where the child committed suicide after school officials failed to respond to her complaints that she was being bullied by another student. *Id.* at *1.

5. Although special education students can both be bullied and be the bully, the focus of this Article is on bullied special education children. Nonetheless, it should be stressed that when special education students themselves engage in bullying, equally serious issues may arise. *See* News Release, Nat'l Inst. of Child Health and Human Dev., Nat'l Inst. of Health, Bullying Widespread in U.S. Schools, Survey Finds (Apr. 24, 2001), *available at* http://www.nichd.nih.gov/news/releases/Pages/bullying.aspx ("[B]ullies . . . were more likely to have difficulty adjusting to their environment both socially and psychologically."). For a comprehensive discussion of issues surrounding the discipline of special education children, see generally Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1 (2000) (analyzing the effect of the IDEA amendments on school discipline); Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77 (2000) (discussing the current regulatory scheme for disciplining disabled children).

6. *See, e.g.*, Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "A Normal Part of Growing Up" For Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1 (2005) (proposing two new legal approaches to bullying claims by special education children); *see also, e.g.*, Kathleen Conn, *Bullying and Harassment: Can IDEA Protect Special Students?*, 239 EDUC. L. REP. 789 (2009) (exploring legal remedies available to students with disabilities in K–12 public schools); David Ellis Ferster, Note, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals With Disabilities Education Act*, 43 GA. L. REV. 191 (2008) (examining claims of special education bullying as a denial of FAPE).

bullying behavior as a "normal part of growing up."[7] Indeed, just this past August 2013, a mere six days before *Butler* was decided, the U.S. Department of Education's Office of Special Education Rehabilitative Services ("OSERS") put out an important Dear Colleague Letter addressing the bullying of special education students.[8]

The letter makes three important points:

1. "Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time."[9]
2. "Students with disabilities are disproportionately affected by bullying," especially "students with learning disabilities, attention deficit or hyperactivity disorder, and autism."[10]
3. "[B]ullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the [Individuals with Disabilities Education Act] IDEA that must be remedied."[11]

The Dear Colleague Letter does not focus on litigation, but rather on steps school districts should take to prevent and correct bullying of students with disabilities so that the bullying behavior does not jeopardize their individual education plans ("IEPs").[12] Indeed, the letter attaches

7. Letter from U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs. 1 (Aug. 20, 2013) [hereinafter Aug. 20, 2013 Dear Collegue Letter], *available at* http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf ("Bullying is no longer dismissed as an ordinary part of growing up, and every effort should be made to structure environments and provide supports to students and staff so that bullying does not occur."); *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, 147–48 (2009) ("The consensus among physicians and social scientists, educators and youth development organizations, civil rights advocates, and law enforcement is that bullying is neither inevitable nor normal . . . ."); *Bullying and Harassment of Students*, *supra* note 3, at 1 ("Bullying is not a harmless rite of childhood that everyone experiences.").

8. Aug. 20, 2013 Dear Colleague Letter, *supra* note 7.

9. *Id.* at 2. Importantly, whether the child was bullied because of disability is irrelevant to the analysis. *Id.* at 2–3 ("Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied."). As will be discussed, this is a favorable legal development because it has been quite difficult for bullied special education children to prove that the harassment they suffered was *because of* their disability. *See infra* Parts II, III.

10. Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 2 (citing S.M. Swearer et al., *Understanding the Bullying Dynamic Among Students in Special and General Education*, 50 J. OF SCH. PSYCHOL. 503–520 (2012)); *see also* Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor: Bullying and Students With Disabilities*, 21 INT'L J. OF SPECIAL EDUC. 11, 12 (2006) ("[S]tudents with learning disabilities, emotional disorders, attention deficit hyperactivity disorder, and physical disabilities often demonstrate a lack of social awareness which may make them more vulnerable to victimization."). A study completed in Massachusetts concluded that eighty-eight percent of children along the autism spectrum were harassed while at school. TARGETED, TAUNTED, TORMENTED: THE BULLYING OF CHILDREN WITH AUTISM SPECTRUM DISORDER, MASSACHUSETTS ADVOCATES FOR CHILDREN 2 (2009), *available at* http://www.massadvocates.org/wp-content/uploads/2014/02/bullying-report1.pdf.

11. Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 1.

12. Once a student has been deemed eligible for special education services, the school must, in consultation with the parents and other service providers, develop an individualized education plan

a document entitled, *Effective Evidence-Based Practices for Preventing and Addressing Bullying*,[13] which highlights specific strategies that school districts can take to alleviate special education student bullying, including: teaching appropriate behaviors and how to respond, providing active adult supervision, and training and providing ongoing support for staff and students.[14] If such prophylactic, in-school steps fail to remedy ongoing bullying of special education students, or if schools turn a blind eye to such behavior, litigation may be the only alternative to provide effective relief to these special education students and their families.

Indeed, for more than a decade now, parents and their advocates have been utilizing theories of same-sex gender and disability harassment as the basis for filing legal claims against schools and school officials that allow special education bullying.[15] Additionally, the U.S. Department of Education issued a prior Dear Colleague Letter in 2010 that stated that

> bullying of students with disabilities may also constitute discriminatory harassment and trigger additional responsibilities under the civil rights laws that [the Department of Education's Office of Civil Rights] OCR enforces, including § 504 [of the Rehabilitation Act], Title II of the ADA [American with Disabilities Act], Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.[16]

Unfortunately, the current legal framework adopted for peer sexual and disability harassment in schools under these civil rights laws also fails to provide meaningful legal remedies for these bullied special education children.

In particular, the legal analysis required under Title IX gender harassment cases that the U.S. Supreme Court initiated in *Gebser v. Lago Vista Independent School District*[17] poses substantial hurdles. In that case, involving a teacher-on-student harassment scenario, the Court required that the sexual harassment be reported to an "appropriate person" who has had "actual knowledge" of the harassment, but nevertheless acts with "deliberate indifference."[18] This "deliberate indifference" standard,

("IEP") reasonably calculated to provide a meaningful educational benefit to the student. *See* 20 U.S.C. § 1401(14) (2012); *id.* § 1414(d) (outlining the specific requirements the IEP must satisfy).

13. Enclosure to Letter from U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., (Aug. 20, 2013), *available at* http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf.

14. *Id.* at 3.

15. *See, e.g.*, Moore v. Chilton Cnty. Bd. of Educ., 936 F. Supp. 2d 1300 (M.D. Ala. 2013) (regarding ADA and section 504 disability claims); D.A. v. Meridian Joint Sch. Dist. No. 2, 289 F.R.D. 614 (D. Idaho 2013) (concerning section 504 disability claim); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729 (W.D. Ark. 2012) (relating to Title IX gender and section 504 disability claims); Doe v. Big Walnut Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742 (S.D. Ohio 2011) (regarding ADA disability claims).

16. *See* Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 1 n.2 (citing U.S. Dep't of Educ., Office of Civil Rights, Dear Colleague Letter on Harassment and Bullying (Oct. 26, 2010), *available at* http://www.ed.gov/ocr/letters/colleague-201010.html).

17. 524 U.S. 274 (1998).

18. *Id.* at 290.

which requires that the school's actions be clearly unreasonable in light of all the circumstances,[19] has meant in practice that a school literally has to ignore bullying behavior brought to its attention (which, surprisingly, still does occur on occasion).[20] What happens in most cases, though, is that a dispute exists over whether the school took actions that were "clearly unreasonable" in light of the circumstances.[21] This standard provides schools with tremendous deference when it comes to how they investigate and respond to bullying allegations.[22]

Moreover, claims concerning student-on-student sexual harassment (under which bullying causes of action would be based in most cases)[23] come more specifically under *Davis v. Monroe County Board of Education*.[24] In addition to the three *Gebser* factors, *Davis* requires that the sexual harassment in question be "so severe, pervasive and objectively offensive" that it deprives victims of access to educational opportunities and that the perpetrator of the harassment be "under the control" of the school.[25] Whereas this first additional element means that only the most egregious and severe forms of bullying behavior are subjected to potential legal claims, the second additional element requires that the harassment take place at school, at school events, or on school buses where the bully is "under the control" of the school.[26] Needless to say, much cyber-

19. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999) (providing that Title IX's deliberate indifference standard is not met as long as the recipient school district "merely respond[s] to known peer harassment in a manner that is not clearly unreasonable"). Not all states interpret their own anti-discrimination laws to require deliberate indifference as Title IX does. Under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to 10:5-49, something more akin to negligence is all that is required. *See* L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 540 (N.J. 2007) ("[T]he LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment. We also hold that a school district is liable for such harassment when the school district knew or should have known of the harassment but failed to take actions reasonably calculated to end the mistreatment and offensive conduct.").

20. *See, e.g.*, Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 261–62 (6th Cir. 2000); Estate of Brown v. Ogletree, No. 11-cv-1491, 2012 WL 591190, at *18–19 (S.D. Tex. Feb. 21, 2012).

21. *See, e.g.*, Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1122 (10th Cir. 2008) ("Perhaps the district should have independently interviewed the boys involved instead of relying on Officer Patrick's investigation and periodic reports, but such an allegation would sound in negligence, not deliberate indifference."); *see also, e.g.*, Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 522 (5th Cir. 2013) ("[A]lthough the District's responses may leave something to be desired, the complaint provides insufficient facts to plausibly state that the District's responses were so clearly unreasonable as to rise to the level of deliberate indifference to actionable student-on-student harassment under Davis."), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam); Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 174 (1st Cir. 2007) (noting that, "[i]n hindsight, there may be other and better avenues that the [district] could have explored . . . [b]ut Title IX does not require . . . flawless investigations [or] perfect solutions.").

22. "[S]chool districts have no obligation to accede to 'particular remedial demands,' and 'courts should refrain from second-guessing the disciplinary decisions made by school administrators.'" *Stewart*, 711 F.3d at 521 (citing *Davis*, 526 U.S. at 648).

23. This is not to say that teachers and other staff at schools cannot be responsible for some of the harassment and bullying of special education students, but few reported cases deal with this type of teacher-on-student harassment in the special education context. *See infra* notes 43–45.

24. 526 U.S. 629 (1999).

25. *Id.* at 629–30.

26. *Id.* at 646.

bullying on social media does not readily fit into this "under the control" analysis, and schools should be able to avoid liability by maintaining that cyberbullying occurred without their knowledge from computers outside of school.[27] This is particularly problematic because cyberbullying has made it easier for bullies to relentlessly harass their victims, disabled and non-disabled alike, starting at very young ages.[28]

All told, satisfying the five combined elements of the *Gebser*/*Davis* Title IX test is exceedingly difficult, and there are few plaintiff victories under Title IX for student bullying scenarios.[29] To compound the legal challenges that student with disabilities face when subject to bullying, many courts now also apply the Title IX framework to disability harassment claims under Title II of the Americans with Disabilities Act ("ADA")[30] and § 504 of the Rehabilitation Act ("RA").[31] Indeed, short of physical (many times sexual) assaults, coupled with near or complete indifference by school districts, bullied students are largely unsuccessful under these disability statutes as well.[32]

So where may a bullied special education student and his or her parents turn for meaningful legal relief? In this regard, almost a decade ago, I advanced two proposed causes of action in an article entitled *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "A Normal Part of Growing Up" For Special Education Children.*[33] In

27. *See* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1095–96 (2008) ("[A] plaintiff would have great difficulty satisfying the requirement that the school has 'substantial control over both the harasser and the context in which the known harassment occurs.'" (citing *Davis*, 526 U.S. at 644–50)). Cyberbullying also leads to additional challenges not presented by traditional bullying in that: (1) a cyberbully can attack anonymously; (2) the bullying can go viral, with many people harassing the same target at once; (3) the bully does not see the emotional toll his or her bullying creates, allowing the bully to push further than he or she might in a face-to-face relationship where the adverse effects are clearly perceived; and (4) many parents and teachers do not have the technological know-how to monitor these actions. *See* Sameer Hinduja & Justin W. Patchin, *Overview of Cyberbullying*, *in* WHITE HOUSE CONFERENCE ON BULLYING PREVENTION, 22–23 (2011), *available at* http://www.stopbullying.gov/resources-files/white-house-conference-2011-materials.pdf.

28. *See* Hinduja & Patchin, *supra* note 27, at 21.

29. *See* Domino v. Tex. Dep't of Crim. Just., 239 F.3d 752, 756 (5th Cir. 2001) ("Deliberate indifference is an extremely high standard to meet.").

30. 42 U.S.C. §§ 12131–50 (2012).

31. 29 U.S.C. § 794 (2012); *see* Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 241–42 (W.D.N.Y. 2012) (citing S.S. v. E. Ky. Univ., 532 F.3d 445, 454 (6th Cir. 2008) (applying the *Davis* "deliberate indifference" requirement to peer-on-peer harassment claims under the ADA and section 504); K.M. *ex rel.* D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 359 (S.D.N.Y. 2005) (same). Whereas Title II of the ADA applies to disability discrimination in the provision of all state and local services, section 504 of the RA applies to disability discrimination among federal aid recipients. They do overlap often, but not always in their coverage of disability discrimination claims in the school district context. *See* Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1096 (2002) ("Although there are some technical distinctions between the two laws, the only difference for purposes of the current discussion is that title II extends section 504 coverage to any public educational agency that somehow does not receive federal money.").

32. *See, e.g.*, *S.S.*, 532 F.3d at 449; Wright v. Carroll Cnty. Bd. of Educ., No. 11–CV–3103, 2013 WL 4525309, at *18 (D. Md. Aug. 26, 2013); Long v. Murray Cnty. Sch. Dist., No. 4:10–CV–00015-HLM, 2012 WL 2277836 (N.D. Ga. May 21, 2012).

33. *See* Secunda, *supra* note 6.

that article, I sought to take advantage of the additional protections special education children receive under the Individuals with Disabilities in Education Act ("IDEA"),[34] including notions of free appropriate public education ("FAPE")[35] and education in the least restrictive environment ("LRE"),[36] to bolster the legal protection available to bullied special education children. The first model incorporates Title IX and IDEA legal requirements, and would hold schools liable for same-sex harassment of special education children when four conditions exist: (1) the school had actual notice of the harassment; (2) the character of harassment was severe, pervasive, and objectively offensive; (3) the school's response was deliberately indifferent to the known harassment or was clearly unreasonable in light of its obligations under Title IX and IDEA; and (4) the student was denied a free and appropriate public education in the least restrictive environment practicable or otherwise denied access to appropriate educational opportunities and benefits as a result of the harassment.[37]

The second legal construct I proposed utilized the § 1983 civil rights device.[38] Although § 1983 claims based on equal protection and due process have largely proven unavailing in the bullying context because of the substantial legal hurdles student plaintiffs must meet in these cases,[39] a § 1983 claim based on federal statutory rights under the IDEA would appear to be more promising.[40] My proposed § 1983 claim based on the IDEA would permit courts to assess money damages against individual school officials, as long as qualified immunity did not apply.[41] Section 1983 actions would therefore provide at least a partial remedy and create

34. 20 U.S.C. §§ 1400–87 (2012).

35. *See* § 1412(a) (establishing minimum substantive standard that states must meet by providing free appropriate public education ("FAPE")). FAPE consists of special education and related services designed to address the unique needs of each eligible child. *Id.* § 1400(d)(1)(a); 34 C.F.R. § 300.17 (2014).

36. *See* 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114–117 (requiring that children with disabilities be educated, within a broad continuum of placements, with nondisabled children to the maximum extent appropriate).

37. Secunda, *supra* note 6, at 17–19.

38. 42 U.S.C. § 1983 (2012) ("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, suit in equity, or other proper proceeding for redress . . . .").

39. *See infra* Parts II.A–B; *see also* Broaders *ex rel.* B.B. v. Polk Cnty. Sch. Bd., No. 8:10–CV–2411–T–27EAJ, 2011 WL 2610185, at *5 (M.D. Fla. Apr. 19, 2011) (concerning equal protection and due process claims); C.L. *ex rel.* R.L. v. Leander Indep. Sch. Dist., No. A–12–CA–589 LY, 2013 WL 3822100, at *4 (W.D. Tex. July 23, 2013) (same).

40. That being said, some federal circuits do not permit such claims. *See* A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 806 (3d Cir. 2007) (en banc) (holding IDEA claims may not be asserted under Section 1983); *see also* D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 456–57 (5th Cir. 2010) (finding IDEA unenforceable under Section 1983). Yet, other courts limit remedies for such claims to only injunctive relief. *See* Marie O. v. Edgar, 131 F.3d 610, 621–22 (7th Cir. 1997) (affirming the district court's judgment providing declaratory and injunctive judgment).

41. Secunda, *supra* note 6, at 29–31.

a sense of urgency among school administrators and teachers who are responsible for directly responding to bullying.[42]

In this Article, I seek to reassess the state of the law in order to address this vital education and public health issue. By and large, special education students are still enduring too many egregious instances of bullying, harassment, and abusive conduct from fellow students, without being able to obtain effective legal relief. This Article therefore redoubles the effort started many years ago and puts forward two new proposals. Both of these proposals derive from the belief that the application of the *deliberate indifference* standard in current Title IX, ADA, and section 504 case law is the primary impediment to the success of legal claims being brought by bullied special education students.

Consequently, the two new proposals do not center on a school's deliberate indifference to bullying, but rather focus on whether the school has refused to make reasonable accommodations to the disability of the student or has failed to take effective remedial measures to address known instances of bullying. These types of claims could either be brought under section 504 and the ADA, or, alternatively, could be added as a private cause of action to existing state anti-bullying legislation that deals with bullying prevention and correction in the school context. Although there are significant criticisms to both approaches that need to be addressed, at the end of the day, this Article maintains that these legal approaches provide the best chance for bullied special education students to have access to appropriate legal relief.

The Article proceeds in five additional Parts. Part II begins with two recent cases that highlight the ineffectual nature of the current law in dealing with bullied special education student scenarios. Part III then considers whether past proposals that I have made in this area of law can still provide legal relief to bullied special education children. In this vein, a decision written by Judge Jack Weinstein is discussed in detail, as it not only cites to my previous article on this topic, but also provides insights into both the advantages and disadvantages of a hybrid IDEA/Title IX approach.[43] Having determined that the deliberate indifference standard still provides too great a legal hurdle, Part IV then examines a recent case that provides a possible gross mismanagement/reasonable accommodation-based solution and some criticisms of that approach. Finally, Part V turns to state school bullying statutes and asks whether those statutes can be expanded, in conjunction with existing state special education laws, to provide a private cause of action that asks whether the educational needs of the disabled child have been reasonably accommodated in light of the bullying being experienced, or whether the school

42. *Id.* at 30–31. No court as of this writing has fully adopted my Section 1983/IDEA proposal, though some courts do recognize such claims in limited circumstances. *See Marie O.*, 131 F.3d at 618–22.

43. T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 313 (E.D.N.Y. 2011).

has acted appropriately to end known special education student bullying. In all, this arsenal of new legal weaponry will provide bullied special education students with the wherewithal to fight back against their tormentors, as well as against their individual and institutional enablers. Part VI concludes.

II. THE UNSATISFACTORY STATE OF THE LAW FOR BULLIED SPECIAL EDUCATION CHILDREN

In preparation for this Article, I reviewed forty-three cases decided between 2004 and 2013 involving special education students seeking relief for bullying behavior directed against them. Of those forty-three cases, plaintiffs lost twenty-one completely,[44] had partial success in nineteen cases (in the sense that at least one claim survived some type of motion to dismiss or the case was settled on favorable terms to the plaintiff),[45]

44. S.S. v. E. Ky. Univ., 532 F.3d 445, 460 (6th Cir. 2008); Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1126 (10th Cir. 2008); M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 651 (9th Cir. 2005); Butler v. Mountain View Sch. Dist., No. 3:12-CV-2038, 2013 WL 4520839, at *9 (M.D. Pa. Aug. 26, 2013); Wright v. Carroll Cnty. Bd. of Educ., No. 11-CV-3103, 2013 WL 4525309, at *23 (D. Md. Aug. 26, 2013); D.V. v. Pennsauken Sch. Dist., No. 12-7646 JEI, 2013 WL 4039022, at *11 (D.N.J. Aug. 7, 2013); Turner v. Hous. Indep. Sch. Dist., No. H–13–0867, 2013 WL 3353956, at *4 (S.D. Tex. July 3, 2013); Vidovic v. Mentor City Sch. Dist., 921 F. Supp. 2d 775, 799 (N.D. Ohio 2013); Estate of Lance *ex rel.* Lance v. Kyer, No. 4:11-CV-32, 2012 WL 5384200, at *5 (E.D. Tex. Sept. 11, 2012), *aff'd sub nom.* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014); Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805, at *16 (E.D. Mich. June 27, 2012); Long v. Murray Cnty. Sch. Dist., No. 4:10-CV-00015-HLM, 2012 WL 2277836, at *40 (N.D. Ga. May 21, 2012); Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742, 758 (S.D. Ohio 2011); *Broaders*, 2011 WL 2610185, at *5; J.B. *ex rel.* Bell v. Mead Sch. Dist. No. 354, No. CV–08–223–EFS, 2010 WL 5173164, at *11 (E.D. Wash. Dec. 10, 2010); P.R. *ex rel.* Rawl v. Metro. Sch. Dist. of Wash. Twp., No. 1:08–cv–1562–WTL–DML, 2010 WL 4457417, at *10 (S.D. Ind. Nov. 1, 2010); Morgan *ex rel.* Morgan v. Bend-La Pine Sch. Dist., No. CV-07-173-ST, 2009 WL 312423, at *26 (D. Or. Feb. 6, 2009); J.N. v. Pittsburgh City Sch. Dist., 536 F. Supp. 2d 564, 579 (W.D. Pa. 2008); Smith v. Port Hope Sch. Dist., No. 05–10267, 2007 WL 2261419, at *12 (E.D. Mich. Aug. 6, 2007); Emily Z. v. Mt Lebanon Sch. Dist., No. 06-442, 2007 WL 3174027, at *5 (W.D. Pa. Oct. 29, 2007); Werth v. Bd. of the Dirs. of Pub. Sch. of Milwaukee, 472 F. Supp. 2d 1113, 1131 (E.D. Wis. 2007); Silano v. Bd. of Educ. of Bridgeport, 21 A.3d 899, 901 (Conn. App. Ct. 2011).

45. K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1103 (9th Cir. 2013); Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 531 (5th Cir. 2013), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam); Patterson v. Hudson Area Sch., 551 F.3d 438, 450 (6th Cir. 2009); Mark H. v. Lemahieu, 513 F.3d 922, 939 (9th Cir. 2008); Smith v. Guilford Bd. of Educ., 226 F. App'x 58, 65 (2d Cir. 2007); C.L. *ex rel.* R.L. v. Leander Indep. Sch. Dist., No. A–12–CA–589 LY, 2013 WL 3822100, at *4 (W.D. Tex. July 23, 2013); Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla., 960 F. Supp. 2d 1254, 1270 (N.D. Okla. 2013); M.J. v. Marion Indep. Sch. Dist., No. SA–10–CV–00978–DAE, 2013 WL 1882330, at *13 (W.D. Tex. May 3, 2013); Moore v. Chilton Cnty. Bd. of Educ., 936 F. Supp. 2d 1300, 1316 (N.D. Ala. 2013); D.A. v. Meridian Joint Sch. Dist. No. 2, 289 F.R.D. 614, 636 (D. Idaho 2013); Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ., No. 1:11–cv–850, 2012 WL 5268946, at *11 (S.D. Ohio Oct. 23, 2012); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729, 739 (W.D. Ark. 2012); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 246 (W.D.N.Y. 2012); Estate of Brown v. Ogletree, No. 11–cv–1491, 2012 WL 591190, at *21 (S.D. Tex. Feb. 21, 2012); *T.K.*, 779 F. Supp. 2d at 319; M.Y. *ex rel.* Yorkavitz v. Grand River Acad., No. 1:09 CV 2884, 2010 WL 2195650, at *3 (N.D. Ohio May 28, 2010); Lopez v. Metro. Gov't of Nashville & Davidson Cnty., 646 F. Supp. 2d 891, 922 (M.D. Tenn. 2009); Scruggs v. Meriden Bd. of Educ., No. 3:03–CV–2224 (PCD), 2007 WL 2318851, at *23 (D. Conn. Aug. 10, 2007); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 228 (D. Conn. 2006).

and won on at least one claim in three cases.[46] There is paltry evidence of legal success over this nine-year period for bullied students with disabilities. This Article begins by conducting two studies of recent cases that establish the lack of constitutional and statutory remedies for bullied special education children under current law.[47]

A. Estate of Lance v. Kyer*: Lack of Constitutional Due Process and Disability Discrimination Protections under Current Law*

Estate of Lance v. Kyer,[48] one of the twenty-one cases where the student and his or her family lost all of their claims, is a recent and particularly chilling example of the challenges severely bullied special education students face. The case well illustrates the lack of a meaningful legal remedy for the most severely bullied and harassed special education students under constitutional principles of substantive due process[49] and statutory disability discrimination provisions under section 504 of the Rehabilitation Act.[50]

Montana Lance, an elementary school student, committed suicide just short of his tenth birthday by locking himself in the bathroom in the school nurse's office and hanging himself with his belt.[51] Montana was a special education student who was diagnosed in kindergarten with emotional disturbance, speech impairment, and Attention Deficit-

46. Shore Reg'l High Sch. Bd. of Educ. v. P.S. *ex rel.* P.S., 381 F.3d 194, 201 (3d Cir. 2004); Dawn L. *ex rel.* M.L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 380 (W.D. Pa. 2008); Jennifer C. v. L.A. Unified Sch. Dist., 86 Cal. Rptr. 3d 274, 287 (Cal. Ct. App. 2008).

47. As I have discussed previously elsewhere, the common law of tort does not supply much additional assistance for students in this area of the law:

> [A] bullied student could generally not sue a school district for tort damages because of sovereign immunity issues. Similarly, a tort action may be unavailable against responsible school officials because of sovereign immunity principles. Finally, the problems with merely filing a state law tort claim against the bullying student range from problems of proof, in both the liability and damages arena, to the fact that the bullied student might not be able to receive the injunctive relief that is most important for the child's future in the school.

Secunda, *supra* note 6, at 3 n.12 (internal citations omitted). Some courts have also considered whether free speech rights under the First Amendment protect student bullies under the "substantial disruption" and "collid[es] with the rights of others" standards in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969). *See, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 928 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). Nonetheless, such claims have not played a prominent role in the studied bullied special education cases and, like tort claims, will not be discussed further in this Article. For a comprehensive discussion of these issues, see Jessica K. Boyd, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection Is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215, 1240 (2013).

48. No. 4:11–cv–32, 2012 WL 5384200 (E.D. Tex. Sept. 11, 2012), *aff'd sub. nom.* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014).

49. The due process clause under the Fourteenth Amendment states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The substantive component of the due process clause protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986).

50. Rehabilitation Act (RA) of 1973, § 504, 29 U.S.C. § 794 (2002).

51. *Lance*, 2012 WL 5384200, at *1–2.

Hyperactivity Disorder ("ADHD").[52] While at the elementary school, Montana experienced years of severe bullying, from kindergarten through fourth grade.[53] Students teased him about his speech impairment, called him hurtful names, and physically and psychologically bullied him constantly.[54] Yet, school officials called him a "tattletale" and a "bad child" every time Montana complained to them.[55] In a school journal, Montana wrote that he was having a hard time dealing with the bullying, which was "too difficult to tackle."[56] Montana's parents stressed that school officials were clearly aware of the bullying, but failed to act even though their son made several threats of self-harm and suicide to them.[57]

In December 2009, a few weeks before Montana's suicide, several students threatened to "beat him up," so Montana displayed a small penknife to keep them away.[58] Consequently, Montana was sent to an alternative school for ten days.[59] During the appeal of his alternative school placement, his parents again expressed concern about the ongoing bullying that Montana repeatedly reported to school officials, but in vain.[60] Montana's placement was reduced to eight days at the alternative school as a result of his appeal, even as his tormentors were suspended only for one day.[61] While at the alternative school, Montana expressed despair and told the school counselor that he was suicidal, but the counselor failed to act or report it to his parents, deciding instead that Montana was not "a high risk student."[62]

On the day Montana returned to his regular elementary school, a student shoved him and called him names in the cafeteria.[63] Later in the day, Montana was caught talking in class and was sent to the principal's office where he remained.[64] While there, Montana asked to go to the bathroom and was allowed to use the nurse's bathroom where he locked the door and committed suicide.[65] Mrs. Lance, Montana's mother, sued the school district and several school officials, alleging that Montana's suicide was a result of their failure to investigate the bullying and protect the ten-year old from his bullies.[66] Mrs. Lance argued that the school district and school officials violated Montana's rights under the due process

52. *Id.* at *1.
53. *Id.*
54. *Id.* at *1–2.
55. *Id.* at *1.
56. *Id.*
57. *Id.*
58. *Id.* at *2.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id*
65. *Id.*
66. *Id.* at *3.

clause of the Fourteenth Amendment of the United States Constitution,[67] as well as under section 504 of the Rehabilitation Act.[68]

Relying on the Fifth Circuit's en banc decision in *Doe v. Covington*,[69] the district court in *Estate of Lance* granted summary judgment in favor of the school district on Mrs. Lance's due process claim.[70] *Covington* involved a case where a little girl was abducted from school by a complete male stranger and was sexually molested multiple times after the stranger was able to check the child out of school (even though he listed himself as her "mother" in the school log).[71] The Fifth Circuit concluded that the parents of the child did not have a substantive due process claim against the school based on a two-step analysis.[72]

First, under the U.S. Supreme Court's decision in *DeShaney v. Winnebago*,[73] state actors do not have a constitutional obligation to protect individuals from the violent actions of other individuals, except under limited circumstances.[74] These limited exceptions apply when a special relationship exists between the state actor and the victim or when the state itself created the danger, which caused harm to the individual.[75] Although a special relationship exists between the state and those in prison and those involuntarily committed to mental institutions,[76] no such special relationship has been found to exist between schools and students by any court.[77] Although the schools have control over students during the school day, courts have held that the general custody of the child remains with the parent when the whole day is considered.[78] A lack of a constitutionally cognizable special relationship has even been found to

67. *Id.*; *see also supra* note 48.

68. *Lance*, 2012 WL 5384200, at *1.

69. Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849 (5th Cir. 2012) (en banc).

70. *Lance*, 2012 WL 5384200, at *5.

71. *Covington*, 675 F.3d at 853.

72. *Id.* at 854–55.

73. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

74. *Id.* at 197–98.

75. *Id.* at 200–01.

76. *Id.* at 198–99 (citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (regarding prisoners); Youngberg v. Romeo, 457 U.S. 307, 314–25 (1982) (concerning involuntarily committed mental patient)).

77. *See, e.g.*, Morrow v. Balaski, 719 F.3d 160, 170 (3d Cir. 2013) ("[E]very other Circuit Court of Appeals that has considered this issue in a precedential opinion has rejected the argument that a special relationship generally exists between public schools and their students."); Hasenfus v. LaJeunesse, 175 F.3d 68, 71–74 (1st Cir. 1999) (rejecting due process claim and finding a lack of a constitutional duty to protect); Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 569 (11th Cir. 1997) (relying on *DeShaney* to find that a school had no duty to protect a student in its care).

78. *See Hasenfus*, 175 F.3d at 71; *see also* Patel v. Kent Sch. Dist., 648 F.3d 965, 973 (9th Cir. 2011) (noting that "at least seven circuits have held that compulsory school attendance alone is insufficient to invoke the special-relationship exception"). *But see* T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011) ("It is uncertain whether under the Due Process Clause, a public school has the duty to protect an elementary school student from bullying where truancy laws are in effect.").

exist when young children are the victims (as in *Covington*[79]) or when the child is one with severe disabilities.[80] Similarly, the state-created danger exception has generally been found not to apply in school settings because the school itself must take affirmative actions to place the child in danger; an omission by the school is not considered sufficient.[81] In short, it is next to impossible for bullied special education children to find legal relief under substantive due process. It is therefore not at all surprising that in *Estate of Lance* the court found there existed no constitutional substantive due process claim for the way in which the school handled Montana's bullying.[82]

With regard to the statutory claims brought under section 504 and the ADA, the court even acknowledged that the school district's handling of student-on-student bullying was "inadequate," that school officials' response to widespread bullying at Montana's elementary school was to "bury their collective heads in the sand," and that Montana's suicide "might have been preventable had Defendants chosen to act on the subject of bullying."[83] Nevertheless, the court ruled in favor of the school district and responsible school district personnel on the section 504 and the ADA claims, finding that the district "had a consistent policy of ignoring bullying against *all* students."[84] The school district's bad habit of ignoring all bullying led to the absurd result that all claims for disability discrimination were barred.[85] Just like equal opportunity harassers are immune from liability under employment discrimination law,[86] apparently equal opportunity enablers of student disability discrimination are similarly immune from legal attack.

More recently, the Fifth Circuit affirmed the district court in full in *Estate of Lance* on both the constitutional due process claims and section

79. *See* Doe *ex rel.* Magee v. Covington Cnty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849, 852–53 (5th Cir. 2012) (en banc) (involving a nine-year old elementary school girl).

80. *See* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 731 (8th Cir. 1993) (concerning a mentally disabled high school boy); *see also Patel*, 648 F.3d at 968 (regarding a developmentally disabled high school girl).

81. *See* Ying Jing Gan v. City of New York, 996 F.2d 522, 533 (2d Cir.1993) (holding that creation of danger exists only when "the governmental entity itself has created or increased the danger to the individual"). It should also be pointed out that a number of circuit courts, like the Fifth Circuit, have not even adopted the state-created danger exception to the general *DeShaney* rule. *See Covington*, 675 F.3d at 864 ("Unlike many of our sister circuits, we have never explicitly adopted the state-created danger theory.").

82. Estate of Lance *ex rel.* Lance v. Kyer, No. 4:11–cv–32, 2012 WL 5384200, at *3 (E.D. TX. Sept. 11, 2012), *aff'd sub nom.* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014).

83. *Id.* at *4.

84. *Id.* Interestingly, the district court did not apply the Title IX deliberate indifference standard to the disability claims under section 504 and ADA. If it had, because the school ignored bullying against all students, it might have concluded that Montana's Title IX claim survived dismissal based on the deliberate indifference of the school. *See infra* Part II.B.

85. *Lance*, 2012 WL 5384200, at *4–5.

86. *See, e.g.*, Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) (stating that, when a perpetrator harasses both men and women, harassment is not actionable under Title VII because the perpetrator "is not treating one sex better (or worse) than the other").

504 claims,[87] though the section 504 claim was affirmed on different grounds.[88] *Estate of Lance* therefore, aptly illustrates the continuing inability of constitutional or statutory civil rights law to address the types of bullying behavior that led to Montana's suicide. Especially with regard to the district court's section 504 analysis, the court ends up addressing the wrong legal question (i.e., are other disabled bullied students treated the same way?) and thus arrives at the wrong legal conclusion (i.e., since all bullying is ignored, no legal claim exists for the school's inexcusable response to the bullying).

B. Rost v. Steamboat Springs RE-2 School District*: Lack of Equal Protection and Title IX Protections Under Current Law*

In another one of the cases that a bullied special education student lost between 2004 and 2013, the student was unable to find relief based on violations of constitutional due process and equal protection, or based on the existence of unlawful peer sexual harassment under Title IX.

In the Tenth Circuit case of *Rost v. Steamboat Springs RE-2 School District*,[89] K.C., a special education student who had suffered an early-childhood brain injury and had learning disabilities, was verbally and sexually assaulted by a group of boys over a period covering three years of middle school and high school.[90] According to the court, "[t]he boys persistently and continuously pestered her for oral sex, calling her 'retard' and stupid, threatened to spread rumors to her peers that she frequently engaged in sexual conduct with others, and threatened to distribute naked photographs of her."[91]

Although the special education student's mother eventually became aware of the bullying behavior a number of years after it started, she was unable to get the school district to respond to this conduct until K.C. told a counselor in high school that she was being sexually abused.[92] Rather than undertake their own investigation of the incidents (because they believed most of the incidents occurred in middle school and/or off-campus, and because the incidents involved potential criminal charges),[93] the

87. *See* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 987 (5th Cir. 2014).

88. *See id.* at 994 (finding that plaintiffs could not sustain section 504 gross mismanagement claim because school district had appropriately implemented IEP in accordance with the IDEA); *id.* at 999–1001 (finding that school district response to bullying was not deliberately indifferent based on section 504 claim derived from Title IX harassment law). This first new theory upon which the Fifth Circuit relied, the "gross mismanagement" or "reasonable accommodation" standard under the section 504 FAPE regulations, is discussed in greater detail *infra* Part IV. The second theory, based on an analogy to sexual harassment law under Title IX, is discussed *infra* Part III.B.

89. 511 F.3d 1114 (10th Cir. 2008).

90. *Id.* at 1117–18.

91. *Id.* at 1117.

92. *Id.* at 1117–18. During previous meetings with a counselor in middle school, K.C. revealed that the boys were "bothering" her, but she was not able to express that she had been sexually coerced. *Id.* at 1117.

93. *Id.* at 1118.

school permitted the high school's resource officer, Officer Patrick, to investigate on his own K.C.'s allegations.[94] The school claimed that it stayed in close touch with Officer Patrick during his investigation, helped him set up student interviews, but conceded that it never took any action of its own.[95] The district attorney ended up not prosecuting the boys because of the difficulty of showing that the sexual conduct was not consensual and because of a concern with the trauma such a case would have on K.C.[96] Even after it was decided not to criminally prosecute the perpetrators, the mother pushed for a different educational placement and sought to have the bullies expelled.[97] Not only were the bullies never disciplined by the school, but a new educational placement never occurred as a result of the school and the mother being unable to come up with a mutually-acceptable placement.[98] K.C., through her mother, sued the school district for violations of the Equal Protection and Due Process Clauses and Title IX.[99]

On the Title IX claim, the Tenth Circuit first set forth the prongs of the *Gebser/Davis* test for student-on-student sexual harassment.[100] The court focused on the mother's claim that the school had actual notice of the sexually harassing behavior and was deliberately indifferent to it.[101] On the actual notice issue, the school maintained that it investigated the claim through Officer Patrick once it became aware of the sexually inappropriate behavior.[102] The court first agreed with the district court that earlier complaints by K.C., prior to telling the counselor about the sexual abuse, were too vague to place the school district on actual notice about the type of harassment she was suffering.[103] As far as whether the school was deliberately indifferent after it was made aware of the sexually abusive conduct, the court concluded that the school had not acted in a clearly unreasonable way in allowing Officer Patrick to lead the investigation with it only being consulted during the process.[104]

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1123–24. K.C. eventually moved out of state, but finding her an educational placement was also hindered because K.C. suffered a number of psychotic episodes based on the trauma she suffered as a result of the sexual assaults and bullying behaviors. *Id.* at 1118.
99. *Id.* Tort claims brought against the individual bullies were dismissed without prejudice once the federal claims had been dismissed by the district court on summary judgment. *Id.*
100. *Id.* at 1119 (Title IX liability is established if the school district "(1) has actual knowledge of, and (2) is deliberately indifferent to, (3) harassment that is so severe, pervasive and objectively offensive as to (4) deprive access to the educational benefits or opportunities provided by the school." (citing Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1246 (10th Cir. 1999)).
101. *Id.* at 1119.
102. *Id.* at 1128.
103. *Id.* at 1119–20.
104. Finding that the school district had not been deliberately indifferent, the court stated:
We do not think that the district can be faulted for letting Officer Patrick take the lead in this very serious situation. Officer Patrick and the school reasonably believed that the harassment occurred away from school, and criminal charges were a possibility. The district's response was not

The court even recognized that the school did not follow its own policies in not interviewing the bullies,[105] but the court concluded this was merely negligence and not deliberate indifference that met the Title IX standard.[106] Also, the fact that the school did not discipline the bullies (separate and apart from whether they should have been criminally prosecuted)[107] was not considered evidence of deliberate indifference.[108] In short, the deliberate indifference standard appears to have shielded the school's very questionable judgments concerning how to conduct the investigation and whether to discipline the bullies. Indeed, *Rost* appears to stand for the proposition that as long as the school undertakes *some* action involving outside criminal investigations, even if its action is not reasonably calculated to resolve the bullying issue in question in the school environment, the court will defer to that judgment as long as it is not "clearly unreasonable."[109]

What is truly galling about this case and its conclusion, and as noted by Judge McConnell in his partial concurrence and dissent in the case, is that once the district attorney decided not to press charges, the school did absolutely nothing.[110] Even though the principal of the high school became convinced after reading the report of the school resource officer that K.C. had been sexually harassed, he took no disciplinary action against the bullies.[111] If that series of events does not amount to deliberate indifference, it is hard to imagine exactly what school actions are "clearly unreasonable." The majority's response that perhaps the school did not have authority to discipline the students because the acts occurred off campus, at least in Judge McConnell's mind, put into dispute a

clearly unreasonable as school officials immediately contacted law enforcement officials, cooperated fully in the investigation, and kept informed of the investigation.

Id. at 1121.

105. *Id.* at 1122. Neither the school nor the resource officer could interview K.C. because her mother refused to cooperate with the investigation on advice of legal counsel. *Id.* This also made it easier for the court to find that the school did not act with deliberate indifference. *Id. But see id.* at 1131 (McConnell, J., concurring in part and dissenting in part) ("By the time the family's lawyer shut down communication, K.C. had already talked to Officer Patrick for about two hours and had given him numerous details of what had happened to her. The family's subsequent silence did not prevent the school from taking appropriate measures.").

106. *Id.* at 1122 ("Perhaps the district should have independently interviewed the boys involved instead of relying on Officer Patrick's investigation and periodic reports, but such an allegation would sound in negligence, not deliberate indifference.").

107. *Id.* at 1123.

108. *Id.* ("The standard is not that schools must 'remedy' peer harassment, but that they 'must merely respond to known peer harassment in a manner that is not clearly unreasonable.'"). *But see id.* at 1132 (McConnell, J., concurring in part and dissenting in part) ("If a school's unreasonable inaction in response to sexual harassment makes further harassment reasonably certain, it would make no sense to impose liability only if a student returned for more abuse, but not if she stayed away and was effectively 'excluded from participation' in school.").

109. *Id.* at 1124.

110. *Id.* at 1130 ("[E]ven assuming the boys had committed no prosecutable criminal acts, that does not mean they did not engage in sexual harassment . . . . A great deal of harassment falls short of the criminal; that does not mean a school with actual knowledge of harassing conduct is free to ignore it.").

111. *Id.* at 1128.

material fact as to whether the bullies were under the control of the school district and summary judgment for the school should not have been granted.[112]

With regard to the constitutional claims in *Rost*, the substantive due process claim was dismissed based on the same type of analysis undertaken in *Estate of Lance* and *Covington* discussed above, with the conclusion that the school had not created the danger that caused K.C. her harm.[113] The equal protection claim did not fare well either. As an initial matter, "[t]o succeed on an equal protection claim in the harassment context, a student must show that he was afforded a lower level of protection as opposed to other students, and that this lower level of protection was the result of [some protected characteristic]."[114] Thereafter, even if such a showing can be made, a court must additionally analyze the sexual harassment claim under a municipal liability theory to hold the school district liable.[115] This requires that the school's discriminatory conduct toward the bullied child be representative of an official policy or custom,[116] or be taken by an official with final policymaking authority.[117] A custom can arise from the widespread and persistent practice of sexual harassment.[118]

The mother's equal protection claim was not based on the allegation that the school district had an official policy to permit sexual harassment or that a decision was made by a decisionmaker with final policymaking authority allowing sexual harassment, but rather that the school district had a custom of acquiescing in this type of sexually-abusive bullying behavior by failing to take action to stop it.[119] Under that theory of equal protection, the mother had to prove "(1) a continuing, widespread, and persistent pattern of misconduct by the state; (2) deliberate indifference to or tacit authorization of the conduct by policy-making officials after

112. *Id.* ("Moreover, while the actual sexual assaults in this case did not happen at school, much of the harassment did."). *But see* Davis v. Monroe Cnty. Bd. Of Educ., 526 U.S. at 629, 649 (1999) ("This is not a mere 'reasonableness' standard, as the dissent assumes . . . . In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law.").

113. *Rost*, 511 F.3d at 1126 ("At most, the facts allege that the district may have been negligent in not more appropriately addressing K.C.'s disabilities and in allowing her to remain in the class. However, negligent government conduct is insufficient to prove liability under § 1983.").

114. T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 316 (E.D.N.Y. 2011) (citing Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996)); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 667–72 (2004).

115. *Rost*, 511 F.3d at 1124. *See also T.K.*, 779 F. Supp. 2d at 316 ("A student seeking to succeed on a claim of violation of the Equal Protection Clause against a school district must show that the harassment was the result of a government custom, policy, or practice.") (citing Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257–58 (2009)).

116. *Rost*, 511 F.3d at 1124 (citing Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690–91 (1978)).

117. *Id.* at 1124–25 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 484–85 (1986) (plurality opinion)).

118. *Id.* at 1125 (citing Starrett v. Wadley, 876 F.2d 808, 820 (10th Cir. 1989)).

119. *Id.*

notice of the conduct; and (3) a resulting injury to the plaintiff."[120] The court found that there was neither widespread evidence of this type of sexually harassing behavior in the school nor that the school was deliberately indifferent.[121] On the latter point, the court observed that not only did the school cooperate with its resource officer's investigation, but it had also undertaken a survey to more generally understand the bullying problem at the high school.[122] As a result, K.C.'s equal protection claim also failed.[123] As with a Title IX claim in this context, unless a school does little or nothing and acts deliberately indifferent, the court is likely to defer to the school's educational judgment on how to respond to bullying claims.[124]

III. FIGHTING BACK AGAINST SPECIAL EDUCATION STUDENT BULLYING THROUGH UTILIZATION OF THE IDEA

As disturbing as the outcomes of the *Estate of Lance* and *Rost* cases are, special education students should be able to find additional legal protection under the IDEA[125] in fighting back against bullying. Significantly, neither of those cases involved the potential availability of additional legal protections to special education students under the IDEA.

A. The Impact of IDEA on the Special Education Bullying Analysis Generally

Special education students are entitled to a free appropriate public education[126] in the least restrictive environment.[127] This means school districts are obligated under federal law to develop individual education plans[128] reasonably calculated to permit special education students to receive meaningful educational benefits based on their unique needs.[129] If

120. *Id.* (citing Gates v. Unified Sch. Dist. No. 449 of Leavenworth Cnty., Kan., 996 F.2d 1035, 1041 (10th Cir. 1993); P.H. v. Sch. Dist. of Kan. City, *Mo.*, 265 F.3d 653, 658–59 (8th Cir. 2001)).

121. *Id.* ("At best, the evidence shows that the district was aware of several discrete problems and was working to remedy them—which only raises an issue of the district's negligence, not its deliberate indifference.").

122. *Id.*

123. *Id.*

124. *See* Stewart v. Waco Indep. Sch. Dist., 711 F.3d, 513, 522 (5th Cir. 2013), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam) (observing that "the deliberate-indifference principles at play in a Title IX mode of analysis derive directly from those well-established in the § 1983 [equal protection] context").

125. 20 U.S.C. §§ 1400–87 (2012).

126. *Id.* § 1412(a)(1)(A).

127. LRE represents the IDEA's strong preference for "mainstreaming," or educating children with disabilities "[t]o the maximum extent appropriate" alongside regular education children. *See id.* § 1412(a)(5).

128. An IEP is a written statement that "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *See* Honig v. Doe, 484 U.S. 305, 311 (1988).

129. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

bullying causes a disruption to the services or educational placement to which the student is entitled, the argument is that this constitutes a denial of FAPE and the IEP should be amended to respond to the bullying situation.[130]

Indeed, OSERS counsels in its August 2013 Dear Colleague Letter that, "[t]he school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit."[131] In addition to this in-school response to special education bullying, the child might have legal remedies available through litigation under the IDEA or related statutes. Such remedies might include private school tuition reimbursement or compensatory education and are primarily injunctive or declaratory in nature.[132] Monetary damages under the IDEA are extremely limited and only for situations where there are extensive due process violations or the child's health is put into jeopardy.[133] In order to receive legal relief under the IDEA, special education students must first exhaust their administrative remedies by filing a due process complaint, which is then heard by one or two levels of administrative hearing officers.[134] Only after administrative review has been exhausted may the student file a legal claim in federal or state court.[135]

130. Recall that under the definition of "bullying" in the Aug. 20, 2013 OSERS Dear Colleague Letter, bullying may exist whether or not it is related to the student's disability, as long as the bullying results in the student no longer receiving a meaningful educational benefit. *See* Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 2–3. For examples of courts that have found that permitting the bullying of special education students can lead to a denial of FAPE, see M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634 (9th Cir. 2005); Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194 (3d Cir. 2004); Charlie F. *ex rel.* Neil F. v. Bd. of Educ., 98 F.3d 989, 993 (7th Cir. 1996).

131. See Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 3. At least one state administrative agency has already relied on the Dear Colleague Letter to find a denial of FAPE in bullying circumstances. *See* IND. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC., SPECIAL EDUC. COMPLAINT INVESTIGATION REP. NO. CP-033-2014 (2013), *available at* https://dc.doe.in.gov/doeonline/Legal Search/adjudications.aspx?search=Complaint (finding that a school district failed to provide FAPE to a bullied student, and suggesting that a school could remedy such a violation by training its staff on the subject of bullying and by implementing a system to keep track of, and timely respond to, reports of alleged bullying incidents).

132. Because parties in a special education dispute are trying to determine relative responsibilities concerning the provision of a FAPE to a child, most common remedies are in the nature of injunctive or declaratory relief. *See* THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 207 (2d ed. 2001). Nonetheless, hearing officers are authorized to grant damages in the form of (1) tuition reimbursement (when parents unilaterally place their child in a private placement because a FAPE is not available in the public school), *see* Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369–71 (1985)); (2) compensatory education (when because of a lack of a FAPE, the child needs additional education services), *see* M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996); and (3) monetary damages in very limited circumstances (the general rule though is that compensatory damages are not available under the IDEA); *see* O.F. *ex rel.* N.S. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409, 419 n.4 (E.D. Pa. 2002) ("[A]n award of monetary damages to compensate a plaintiff for an IDEA violation is an extraordinary remedy."); *see also* GUERNSEY & KLARE, *supra*, at 211 (collecting cases with monetary damage awards).

133. *See* GUERNSEY & KLARE, *supra* note 132, at 211.

134. 20 U.S.C. § 1415(l) (2012). Some states like Wisconsin have a separate IDEA Complaint Process, which is a dispute resolution option akin to due process hearings. *See IDEA State Complaints*,

It is because of the limited potential monetary remedies available under the IDEA that I previously proposed hybrid approaches utilizing the IDEA in conjunction with Title IX and/or § 1983.[136] Although neither of these hybrid approaches have been adopted *in toto* by any court, Judge Weinstein in *T.K. v. New York City Department of Education*,[137] in an exhaustive decision on the topic of special education bullying, cited to my article and agreed with some of its basic premises in devising a new legal rule under the IDEA for special education bullying.[138]

B. T.K. v. New York City Department of Education*: Incorporating Title IX Principles into IDEA to Address Special Education Bullying*

T.K. involved a twelve-year-old girl, L.K., who was learning disabled, and, as a result, had been provided with a one-on-one teacher aide and other related services to help her benefit from her education.[139] Under a proposed revised IEP plan for the following school year, however, she was to no longer receive a one-on-one aide, even though her parents sought these services.[140] At this same IEP meeting, L.K.'s parents brought up the persistent bullying of their daughter by her classmates, but the principal refused to discuss the issue as part of the IEP process, saying it was not the appropriate time to discuss it.[141] The bullying consisted, among other things, of being ostracized by her classmates, being physically pushed on occasion, and being taunted and teased on a daily basis.[142] Although the parents sought to bring the bullying to the school's attention both during the IEP process and at other times, the school never addressed L.K.'s bullying allegations and never even generated any incident reports based on these bullying episodes.[143] L.K.'s father maintained

WIS. DEP'T. OF PUB. INSTRUCTION, http://sped.dpi.wi.gov/sped_complain (last visited Sept. 8, 2014). In states like Wisconsin, a party can file both a complaint and a due process hearing as part of the first level of administrative relief. *Id.*

135. *See* § 1415(i)(2).

136. *See* Secunda, *supra* note 6, at 6–7.

137. 779 F. Supp. 2d 289 (E.D.N.Y. 2011).

138. *Id.* at 313–15. My article was based on incorporating IDEA rights into a Title IX claim, *see* Secunda, *supra* note 6, at 17–19, whereas Judge Weinstein incorporates Title IX principles into an IDEA claim for failure to provide FAPE. *See T.K.*, 779 F. Supp. 2d at 316.

139. *T.K.*, 779 F. Supp. 2d at 294.

140. *Id.* at 295.

141. *Id.*

142. One of L.K.'s teaching aides described the bullying as consisting of constant teasing and other students' physically backing away from her when she approached. *Id.* at 296. Another one of L.K.'s teaching aides testified, "[s]he would be tripped, where she was walking by and they would stick out their feet just to see what would happen. And then if she fell, well, then the teachers would get upset with her for making a scene." *Id.*

143. In one particularly remarkable occurrence where the parents sought to discuss the bullying of their daughter with the school principal: "After showing [the parents] into her office, the principal asked L.K.'s parents to have the conversation outside of L.K.'s presence. When L.K.'s parents continued to try to discuss the matter, the principal asked them to leave. As the parent's [sic] continued to try to discuss their daughter's problem, the principal opened the door to her office and said she would call security if they did not leave." *Id.* at 297.

that the constant bullying made L.K. "emotionally unavailable to learn."[144]

Because the parents were unhappy with their daughter's new education placement at the public school under the revised IEP and the school's refusal to address the bullying of their daughter, they rejected the IEP, withdrew her from public school, and enrolled her in a private school for learning disabled students.[145] Under the IDEA, they sought tuition reimbursement from the public school on the theory that the public school had failed to provide their daughter FAPE under the revised IEP.[146] Both the local and state administrative hearing officers found that L.K. and her family were not entitled to tuition reimbursement because FAPE had been provided under the circumstances, and the family appealed those administrative decisions to the federal district court.[147] The court's opinion in *T.K.* was issued after the school district moved for summary judgment.[148]

After comprehensively reviewing the relevant legal and sociological literature surrounding bullying behavior in elementary and secondary schools[149] and canvassing the applicability of various laws to the bullied special education student scenario,[150] Judge Weinstein focused on the interplay of the school's obligations to remedy special education bullying under the IDEA and student-on-student harassment claims under Title IX.[151] He started with the premise that the school was only required to pay the private tuition of L.K. if it had failed to provide her with a legally sufficient IEP and the alternative placement was appropriate.[152] The IEP, in turn, was only sufficient if it provided FAPE to L.K.[153] The question then became whether the way the school handled the bullying of L.K. denied her FAPE because she was no longer able to meaningfully benefit from her educational placement.[154] In this vein, although the court noted that a number of courts and commentators had already concluded that bullying of a special education child could lead to the denial of FAPE,

144. *Id.* at 295.

145. *Id.*

146. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 (2009) ("[C]ourts [have] broad authority to grant 'appropriate' relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE."); *see also* Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985) (holding that the IDEA authorizes reimbursement).

147. *T.K.*, 779 F. Supp. 2d at 295. Under the IDEA, students and their families must normally exhaust their administrative remedies before seeking judicial relief. 20 U.S.C. § 1415(f) (2012).

148. *T.K.*, 779 F. Supp. 2d at 293.

149. *Id.* at 297–306.

150. *Id.* at 306–17.

151. *Id.* at 311–12 ("While the general requirements of IDEA are well established, the question of whether bullying can be grounds for finding that a school district deprived a student of a free and appropriate education is an open question in the Second Circuit.").

152. *Id.* at 310 (citing Frank G. v. Bd. of Educ., 459 F.3d 356, 363 (2d Cir. 2006)).

153. *Id.* at 309.

154. *Id.* at 310 ("Educational placement refers to the individualized education plan developed and not a specific location or program." (citing K.L.A. v. Windham Se. Supervisory Union, 371 F. App'x 151, 153–54 (2d Cir. 2010))).

the court also observed that a single workable test had not yet been established.[155]

To delineate a test for such special education scenarios, and even though the parents of L.K. had not brought a claim under Title IX,[156] the court turned to that law to borrow legal principles for use in the IDEA context.[157] Here, the court cited two different cases, as well as my previous article on this topic, to establish that other courts have recognized a Title IX peer harassment claim that was appropriately modified for when a special education child is bullied.[158] This modified framework developed by previous courts has four elements:

> (1) [T]he plaintiff is an individual with a disability who was harassed because of that disability; (2) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive environment; (3) the defendant knew about the harassment; and (4) the defendant was deliberately indifferent to the harassment.[159]

Because L.K. had not brought a Title IX claim, Judge Weinstein, instead, incorporated Title IX principles into the IDEA FAPE inquiry. He stated the appropriate legal test in an IDEA bullying case in this manner: "[U]nder IDEA the question to be asked is whether 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."[160] The court pointed out that this was not a new legal obligation placed on schools, but one that had been advanced by the Department of Education since at least 2000 through its guidance letters in this area of the law.[161] The court further elaborated by saying that this new legal rule should be applied in the following manner:

> 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

155. *Id.* at 312 ("Three other circuit courts of appeals have expressly noted that bullying can be a basis for denial of a FAPE, but a common framework under which to analyze the issue has not emerged.") (citing M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634 (9th Cir. 2005); Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194 (3d Cir. 2004); Charlie F. *ex rel.* Neil F. v. Bd. of Educ., 98 F.3d 989, 993 (7th Cir. 1996); Ferster, *supra* note 6).

156. *See* Complaint at 2, T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289 (2011) (No. 10-CV-00752).

157. *T.K.*, 779 F. Supp. 2d at 315.

158. *Id.* at 314–15 (citing Werth v. Bd. of Dirs. of Pub. Schs., 472 F. Supp. 2d 1113, 1127 (E.D. Wisc. 2007); K.M. v. Hyde Park Cen. Sch. Dist., 381 F. Supp. 2d 343, 358–60 (S.D.N.Y. 2005); Secunda, *supra* note 6, at 14).

159. *Id.* at 314.

160. *Id.* at 316.

161. *Id.* at 316–17 (citing Letter from U.S. Dep't of Educ., Office of Civil Rights, at 2 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague201010.pdf).

> 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.[162]

This rule is strikingly similar to the Aug. 20, 2013 Dear Colleague Letter, except that Judge Weinstein does not mention that an IEP should be revised to take into account the bullying from which the special education student is suffering.

Applying this new legal test to the facts of the case, the *T.K.* Court concluded that the bullying of L.K. met each of the four prongs of the newly promulgated legal test. First, a factfinder could conclude that L.K. had been the victim of bullying based on evidence in the record.[163] Second, there was substantial evidence that the school had notice of the bullying.[164] Third, the school failed to take reasonable steps, and may have even been deliberately indifferent, as far as responding to the allegations of bullying.[165] Fourth, sufficient evidence existed to suggest that L.K.'s ability to educationally benefit was adversely impacted by the bullying behavior.[166] In short, the court concluded that, "an effective and appropriate education may be negated by child bullying," and "[w]hen a school fails to take reasonable steps to prevent such objectionable harassment of a student, it has denied her an educational benefit protected by statute."[167] Consequently, the court denied the school's summary judgment motion and remanded the case back to the local administrative hearing officer "to review evidence of bullying and make a determination of whether harassment deprived L.K. of her educational benefit and any other relevant issues bearing on this issue. This determination shall be made utilizing the articulated test in this court's [decision]."[168]

C. The Advantages and Disadvantages of the T.K. *Approach*

As far as the advantages of Judge Weinstein's new legal test for bullied special education children under the IDEA, there is little doubt from the perspective of a special education student and her family that the legal test established by *T.K.* is a giant step forward from previous legal

162. *Id.* at 317.
163. *Id.* at 318.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 293.
168. *See* Memorandum and Order at 3, T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289 (2011) (No. 10-CV-00752). According to the motion transcript, the Local Hearing Officer who heard the case on remand concluded that although there was evidence of bullying, it was not substantial enough to adversely impact L.K.'s educational placement, and thus, there was still no denial of FAPE. Transcript of Civil Cause for Motion at 5, T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289 (2011) (No. 10-CV-00752). After the State Hearing Officer also denied the requested relief, on appeal Judge Weinstein reversed the administrative decision and ordered tuition reimbursement to T.K.'s family. *See* T.K. v. N.Y.C. Dep't of Educ., No. 10-CV-752, 2014 WL 3687244, at *10–15 (E.D.N.Y. July 23, 2014).

theories under due process, equal protection, Title IX, and section 504/ADA. By incorporating Title IX principles into the IDEA to determine whether the bullying in question has interfered with a child receiving FAPE, the *T.K.* Court has successfully developed an approach that considers the impact of bullying on the ability of a special education student to meaningfully benefit from her education, rather than just asking whether the child is being treated similarly to other children with a disability. In this vein, the *T.K.* Court itself expressed considerable doubt whether L.K. could have survived summary judgment on due process and equal protection grounds.[169]

On the other hand, to at least some extent, *T.K.* adopts a test that continues to rely on the concept of deliberate indifference, and by extension, the idea that the school has to have acted clearly unreasonably under the circumstances.[170] I say to "some extent" because when the court first states the question to be asked in such cases, it says there has to be evidence that the school was deliberately indifferent to the bullying "*or*" that the school failed to take reasonable steps to prevent bullying.[171] In then applying this test to the facts in *T.K.*, the court does not mention deliberate indifference again.[172] This suggests that maybe deliberate indifference is not a *sine qua non* of Judge Weinstein's test, but if it is not, his test is hard to square with the idea that he is incorporating Title IX principles, which require a showing of deliberate indifference.[173]

In any event, there is a possibility then that the *T.K.* test does not require a finding of deliberate indifference and instead only requires a lesser showing of unreasonableness on the school's part in responding to the bullying behavior. It could also be that the court is just defining *deliberate indifference* and *clearly unreasonable* under the circumstances as failing to take reasonable steps to prevent bullying.[174] If this is the case, and as discussed above, a showing of deliberate indifference generally requires that the school mostly ignore the bullying behavior, not a likely scenario in the majority of cases.[175] That is, unlike other standards of remediation in other areas of anti-discrimination law where the standard requires that the response of the institution be reasonably calculated to lead to the cessation of harassment,[176] the standard here could be read as

169. *T.K.*, 779 F. Supp. 2d at 315–16.

170. *Id.* at 316.

171. *Id.*

172. *Id.* at 318 ("L.K. presents evidence that could reasonably be construed as proving the school's failure to take reasonable steps to address the harassment.").

173. *See supra* notes 17–22 and accompanying text.

174. *Accord* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 260 (6th Cir. 2000) (holding that deliberate indifference requires knowledge of and an unreasonable response to "a substantial risk of serious harm" (quoting Farmer v. Brennan, 511 U.S. 825, 847 (1994))).

175. *See supra* note 21.

176. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998) (discussing negligence standard in co-worker sexual harassment cases); *see also* 29 CFR § 1604.11(d) (2014) (stating that an employer is liable for co-worker harassment if it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action").

more deferential to the school's judgment of how to handle bullying complaints.[177]

Nonetheless, there is at least a possibility that the same difficulties that Title IX plaintiffs face with the deliberate indifference standard will also make it hard for IDEA plaintiffs to prevail under the *T.K.* standard. As a result, this Article goes on to discuss non-deliberate indifference liability standards to further ensure that these bullied students have access to meaningful legal relief.[178]

IV. REASONABLE ACCOMMODATION ANALYSIS OF SPECIAL EDUCATION BULLYING CLAIMS

As a result of the inadequate and unsettled state of the law revolving around bullied special education students, this Article puts forward two additional proposals for more robust legal protection for these students. In this Part, I argue that disability laws should be utilized to require "reasonable accommodations," through modification of IEP plans, for special education children when they face bullying behavior by their classmates. If such modification does not occur, the school is liable under section 504 or ADA for gross mismanagement of the student's education. Part V will then discuss how state anti-bullying statutes can incorporate private rights of action with reasonable accommodation concepts to also provide expanded protections for bullied special education students. Both of these approaches have the advantage of side-stepping the difficult-to-meet deliberate indifference standard, at least as far as the liability phase of the case.

This Part is further broken down into two sections. Part IV.A discusses the gross mismanagement/reasonable accommodation approach taken by the majority in a recent Fifth Circuit case involving a bullied and sexually abused special education student. Part IV.B then considers criticisms of this approach by the dissenting judge in that same case and possible rejoinders to those criticisms.

177. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 526 (5th Cir. 2013), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam) ("We emphasize that courts generally should give deference to the judgments of educational professionals in the operation of their schools." (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999))).

178. The reason I say "liability standards" is that some courts find that deliberate indifference is still the operative standard when seeking monetary damages under section 504 reasonable accommodation claims discussed in the next Part. *See infra* notes 220–224 and accompanying text.

A. Stewart v. Waco Independent School District*: The Gross Mismanagement Standard and Reasonable Accommodations*

Stewart v. Waco Independent School District[179] provides an example of a recent case that adopted a reasonable accommodation approach to special education student bullying.[180] In *Stewart*, a female special education high school student, Andricka Stewart, suffered from mental retardation and other disabilities, thus qualifying her as a person with a disability for purposes of section 504 of the Rehabilitation Act.[181] After an incident involving sexual contact between Stewart and another student, the school modified her IEP so that she would be both separated from male students and closely supervised at all times while at school.[182] Nonetheless, Stewart was involved over the next two years in at least three additional instances of sexual abuse and, on at least one occasion, this was because, counter to her IEP, she was permitted to go to the rest room unattended.[183] For two of these sexual encounters, Stewart herself was suspended, but it is unclear whether the male perpetrators also were.[184] The school never took further action to modify Stewart's IEP in light of these additional instances of sexual abuse.[185]

Stewart filed suit alleging numerous constitutional and statutory claims almost three years after the last incident of sexual abuse.[186] On a motion to dismiss for failure to state a claim, the district court dismissed all of her claims.[187] She appealed only her section 504 claim under the

179. 711 F.3d 513 (5th Cir. 2013), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam).

180. The original opinion in *Stewart* has now been withdrawn by the court for non-merit based reasons concerning failure to exhaust the initial IDEA claim, and so no longer stands as precedential authority. *See* Stewart v. Waco Indep. Sch. Dist., No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam). Nevertheless, a more recent Fifth Circuit case, *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 992 (5th Cir. 2014), adopted a similar gross mismanagement (or "failure-to-provide") framework under section 504.

181. *Stewart*, 711 F.3d at 517. To be a person with a disability for purposes of the Rehabilitation Act, an individual must have a physical or mental impairment that substantially limits them in one or more major life activities. 34 C.F.R. § 104.3(j)(1) (2014).

182. *Stewart*, 711 F.3d at 517. In this way, at least initially, the school took action consistent with Stewart's special education needs and wrote that new approach, based on the previous sexually abusive behavior, into her IEP. Thus, the school took action consistent with that recommended by OSERS in its Dear Colleague Letter. *See* Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 3.

183. *Stewart*, 711 F.3d at 517. Stewart also claimed that she was subjected to consistent harassment and bullying by her classmates because of her disabilities, and that the school did not respond to her grandmother's complaints on her behalf. *Id.* at 517 n.2. Nevertheless, her section 504 claim was not based on these separate bullying allegations.

184. *Id.* at 517. Although for one of these incidents it was alleged that "[Stewart] was somewhat complicit" in the sexual encounter, there is no indication as to why she was suspended when a male student exposed himself to her. *Id.*

185. *Id.*

186. *Id.* at 517 & n.4. In addition to her section 504 claim, Stewart brought claims alleging violations of due process, the ADA, and Title IX. Interestingly, she did not bring a separate claim under the IDEA. This might be because she was no longer a student at the high school by the time she filed her claim some years later.

187. *Id.*

Rehabilitation Act,[188] alleging bad faith and gross mismanagement with regard to her IEP, failure on the school's part to reasonably accommodate her disabilities by protecting her from the sexual abusers, and deprivation of educational benefits as a result of being suspended herself for two of the sexual encounters.[189]

Perhaps unsurprisingly, based on previous cases discussed above,[190] Stewart was unable to meet the stringent deliberate indifference standard for her straightforward disability discrimination claim under section 504. Borrowing from Title IX student-on-student harassment standards under *Davis*,[191] Stewart claimed that she suffered actionable disability harassment under section 504.[192] Unfortunately, Stewart did not help herself by failing to allege many crucial facts in her complaint.[193] As a result, even assuming without deciding that such a claim would be viable in the Fifth Circuit,[194] and even though "the District's responses may [have left] something to be desired,"[195] the court was easily able to conclude under the "exceedingly high" deliberate indifference standard that she had not pled enough facts to plausibly show that the school district's response to her sexual abuse allegations was clearly unreasonable under the circumstances.[196]

188. *See* 34 C.F.R. § 104.33(b)(1) (2014) (noting that a FAPE under section 504 requires education and services to "meet individual educational needs of handicapped persons *as adequately* as the needs of nonhandicapped persons are met . . . .") (emphasis added). Section 504 itself provides that "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 . . . ." 29 U.S.C. § 794(a) (2012). The same standards that apply to the ADA also apply to section 504 claims. *See Stewart*, 711 F.3d at 518. To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate:

> (1) that she is a qualified individual within the meaning of the ADA; (2) that she was excluded from participation in, or was denied benefits of, services, programs, or activities for which [the school district] is responsible; and (3) that such exclusion or discrimination is because of her disability.

Id. (citing Greer v. Richardson Indep. Sch. Dist., 472 F. App'x. 287, 292 (5th Cir. 2012)).

189. *Stewart*, 711 F.3d at 517.

190. *See supra* Parts II.A–B.

191. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

192. *Stewart*, 711 F.3d at 519.

193. *Id.* at 520.

194. *Id.* at 519.

195. *Id.* at 522.

196. *Id.* at 519–20. The court elaborated in some detail on all of the allegations that were missing from Stewart's complaint that would have been needed to support a disability harassment claim under section 504 in the educational context:

> The complaint fails to address the harassers' identities and relationship to Stewart, the punishments meted out to the harassers, the nature of the abuse, the names and responsibilities of District personnel with knowledge of the harassment, the time-delay between the abuse and the District's response, the extent of Stewart's harm and exclusion from educational opportunities, the specific reasons why the District's responses were obviously inadequate, or the manner in which such responses likely made Stewart susceptible to further discrimination. Courts have found these factors, among others, relevant in the context of student-on-student harassment under Title IX.

Id. at 520 (internal citations omitted).

On the other hand, the *Stewart* majority recognized another type of potential claim under section 504: gross mismanagement claims.[197] The court started its analysis by pointing out that the gross mismanagement standard is just another way to allege that the school refused to make reasonable accommodations to Stewart's disabilities.[198] Such claims do not require an explicit refusal to accommodate a disabled student, but just professionally unjustifiable conduct.[199] So, for instance, "a district may exercise gross misjudgment in departing from an accommodation shown to be more effective for a particular student in favor of a practice that achieves far less favorable outcomes, but nonetheless persists in the latter approach without adequate justification."[200] This type of claim is possible even if the school initially undertook an effective accommodation but then did not consider further accommodations as the circumstances changed and new information became available.[201] Indeed, a school is under a continuing obligation to engage in an interactive process through which it works with the parents to appropriately modify the student's IEP when circumstances change.[202] Alternatively, gross mismanagement can be established by showing that the school was aware of a student's disabilities, knew that the student was being harassed because of her disabilities, but failed to take any effective action to remediate the issue after they were put on notice.[203]

It is important to note that the legal standards for the provision of FAPE in an IEP under section 504 are not identical to the legal standards for the provision of FAPE under the IDEA. As the Ninth Circuit explained in *Mark H. v. Lemahieu*:[204] "[U]nlike FAPE under the IDEA, FAPE under § 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met,

197. *Id.* at 523.

198. *Id.*

199. A plaintiff must "allege that a school district has *refused* to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program." *Id.* at 519 (citing D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 454 (5th Cir. 2010)). "This may be shown by 'facts creating an inference of professional bad faith or gross misjudgment,'" *id.* (citing *D.A.*, 629 F.3d at 455), which in turn means that educational authorities must "'depart grossly from accepted standards among educational professionals.'" *Id.* (quoting *D.A.*, 629 F.3d at 454–55).

200. *Id.* at 523–24.

201. *Id.* at 525. The court concluded:

> Thus, however appropriate the District's initial response, it had an ongoing responsibility to calibrate Stewart's IEP to effectively address the behaviors it intended to prevent by keeping her separated from males and under close supervision. Under section 504, it is not enough that the District might have discharged its duty under a deliberate-indifference standard by taking remedial—but inadequate—action.

Id.

202. *Id.* at 525 ("The 'obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the [plaintiff] asks for a different accommodation or where the [defendant] is aware that the initial accommodation is failing and further accommodation is needed.'" (quoting Humphrey v. Mem. Hosps. Ass'n., 239 F.3d 1128, 1138 (9th Cir. 2001))).

203. *Id.*

204. 513 F.3d 922 (9th Cir. 2008).

and focuses on the 'design' of a child's educational program."[205] FAPE under the IDEA, on the other hand, focuses on the individual special education child, without making a comparison to non-disabled children, and asks whether that child is receiving an education reasonably calculated to provide her a meaningful benefit.[206] These differences in statutory language mean that the ability to receive injunctive relief under the IDEA for denial of FAPE does not prohibit the ability to receive damages for denial of FAPE under section 504.[207] However, and as discussed in more detail below, the section 504 denial of FAPE claim for money damages may be limited by other considerations.[208] Finally, more recent Fifth Circuit case law stands for the proposition that if a school district did provide FAPE consistent with the IDEA, then no gross mismanagement claim exists for lack of FAPE under the section 504 regulations.[209]

In any event, applying this legal theory to the facts of the *Stewart* case, there was evidence that the school's professional judgment grossly departed from educational norms in responding to the changing circumstances surrounding Stewart's educational situation once it became clear to the school that she continued to suffer sexual abuse even after her IEP had been initially modified.[210] Although the school had updated her IEP in response to previous sexual attacks, the court concluded that a fact-finder could find that the school did not take additional sufficient action once it became clear that the IEP was either not being effectively implemented or that new information had come to light which required a further modification of her IEP.[211] Additionally, according to the court, Stewart had sufficiently alleged gross mismanagement by putting into dispute that even though the school had actual knowledge of her disability and that she was being subjected to sexually inappropriate contact, they failed to take action reasonably calculated to end the harassment.[212]

205. *Id.* at 933; *see also* 34 C.F.R. § 104.33(b)(1) (2014) ("[A] FAPE requires education and services designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.").

206. *See* 20 U.S.C. § 1412(a)(1)(A) (2012); Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982).

207. *See Mark H.*, 513 F.3d at 932; *see also* § 1415(1) (overruling Smith v. Robinson, 468 U.S. 992 (1984), by stating that "[n]othing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities").

208. *See infra* notes 222–28 and accompanying text.

209. *See* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 992 (5th Cir. 2014) ("At a minimum, then, the Lances are required to allege a denial of a FAPE under IDEA to sustain a § 504 claim based on the denial of a § 504 FAPE because '§ 504 regulations distinctly state that adopting a valid IEP is sufficient but not necessary to satisfy the § 504 FAPE requirements.'" (quoting *Mark H.*, 513 F.3d at 933)).

210. *Stewart*, 711 F.3d at 526.

211. *Id.*

212. *Id.* at 525–26 ("[E]ven if the District provided Stewart with reasonable accommodations when it initially modified her IEP, the three subsequent instances of alleged sexual abuse could plausibly support a finding that the modifications were actionably ineffective.").

Indeed, according to her complaint, Stewart was the only one punished.[213] Consequently, the *Stewart* majority concluded that a gross mismanagement claim had been plausibly pled, and this claim survived a motion to dismiss for failure to state a claim.[214]

Now, if you think that this new gross mismanagement does not sound that much more helpful to bullied special education students than the deliberate indifference standard, you are not alone. In fact, the *Stewart* majority anticipated this objection and answered it directly.[215] Although "the gross-misjudgment inquiry borrows from deliberate-indifference doctrine," the court maintained that the two theories are legally dissimilar.[216] Whereas "deliberate indifference applies . . . only with respect to the District's alleged liability for student-on-student harassment under a Title IX-like theory of disability discrimination . . . 'gross misjudgment'—a species of heightened negligence—applies to the District's refusal to make reasonable accommodations by further modifying Stewart's IEP."[217] Put differently, "[u]nder § 504, it is not enough that the District might have discharged its duty under a deliberate-indifference standard by taking remedial—but inadequate—action."[218] This difference between a "heightened degree of negligence" standard and some "lesser form of intent" standard translates into the difference between a reasonable accommodation claim surviving a motion to dismiss and a deliberate indifference claim not surviving.[219]

So how does the gross mismanagement/reasonable accommodation claim under *Stewart* stack up against the IDEA/Title IX claim put forward by Judge Weinstein in *T.K.*? At least initially, one important difference is that the IDEA claim under *T.K.* may require some form of deliberate indifference to the bullying of the special education student,[220] whereas these gross mismanagement/reasonable accommodation claims are based instead on a heightened form of negligence.[221] However, *Stewart* merely discussed the liability standard for a gross mismanage-

213. *Id.* at 535 (Higginbotham, J., dissenting).

214. *Id.* at 526 ("[W]e conclude that Stewart plausibly states a claim that the District committed gross misjudgment in failing to implement an alternative approach once her IEP modifications' shortcomings became apparent.").

215. *Id.* at 524–25.

216. *Id.* at 524.

217. *Id.* (citing Sellers *ex rel.* Sellers v. Sch. Bd., 141 F.3d 524, 529 (4th Cir. 1998)).

218. *Id.* at 525; *see also* M.P. *ex rel.* K. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 982 (8th Cir. 2003) (explaining that deliberate indifference "is irrelevant if it can be shown that the District acted in bad faith or with gross misjudgment").

219. *See Stewart*, 711 F.3d at 524 n.14 ("Although these terms are sometimes used interchangeably, 'gross negligence' and 'deliberate indifference' involve different degrees of certainty, on the part of an actor, that negative consequences will result from his act or omission. Whereas the former is a 'heightened degree of negligence,' the latter is a 'lesser form of intent.'" (quoting Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 n.7 (5th Cir. 1994) (en banc) (internal citations omitted))).

220. *See supra* notes 170–73 and accompanying text.

221. *See Stewart*, 711 F.3d at 524.

ment claim under section 504, and did not go on to discuss what legal standard would apply if the plaintiff sought money damages.

At least one other court, the Ninth Circuit, has found that in order to receive damages under section 504 for a denial of FAPE, deliberate indifference must be shown.[222] The Ninth Circuit came to this conclusion as a way to avoid the holding of *Alexander v. Sandoval*,[223] which limits implied rights of action based on federal regulations.[224] The Ninth Circuit in *Mark H. v. Lemahieu*[225] responded by finding that such an implied right of action does exist under section 504's FAPE regulations based on the following analysis:

> In sum, the § 504 FAPE regulations are somewhat different from the Title VI disparate impact regulation in *Sandoval*, because the regulations focus on "design" rather than "effect" and establish only a comparative obligation. Further, because the basic statutory prohibition has been understood somewhat differently in Title VI and § 504, to the degree the § 504 FAPE regulations that the H. family invokes can be interpreted as a variety of meaningful access regulation, they will fall within the § 504 implied cause of action. Finally, to obtain damages, the H. family will ultimately have to demonstrate that the Agency was deliberately indifferent to the violation of whatever requirements the family validly seeks to enforce.[226]

Consequently, although *Stewart* provides a way forward for bullied special education students with regard to section 504 liability, an award of damages might still require a showing of deliberate indifference, which, of course, is not ideal given the difficulties that most plaintiffs have with that standard. For the present time, it is necessary to await further legal developments to see if this becomes the standard that is used for damages under section 504 for denial of FAPE to special education students in bullying scenarios.

In any event, although the *Stewart* opinion was vacated to determine whether administrative remedies had been exhausted,[227] and thus is not precedential authority in the Fifth Circuit or anywhere else, a later panel of the Fifth Circuit did adopt its general reasoning with regard to future gross mismanagement/reasonable accommodation claims for bul-

222. *See* Mark H. v. Lemahieu, 513 F.3d 922, 938 (9th Cir. 2008) ("[A] public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.").

223. 532 U.S. 275 (2001).

224. *Id.* at 293 (holding that, in the federal statutory context, private parties may not sue for unintentional Title VI disparate impact national origin discrimination because the language of the provision providing for enforcement of Title VI regulations does not explicitly and unambiguously allow for a private right of action).

225. 513 F.3d at 939.

226. *Id.*

227. *See* Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513 (5th Cir. 2013), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860 (5th Cir. June 3, 2013).

lied special education students.[228] Whether even that claim, at least as far as a damages remedy, will continue to be hindered by the deliberate indifference standard remains to be seen.

B. Criticisms of Stewart*'s Reasonable Accommodation Approach to Special Education Bullying and the Failure to Exhaust Administrative Remedies Winning Argument*

The future viability of this type of reasonable accommodation claim under federal disability law is not free from doubt,[229] as the dissenting opinion in *Stewart* makes clear.[230] There, Judge Higginbotham found that the creation of such remedy was essentially tantamount to introducing tort law into special education law and set "an unacceptably low bar for § 504 liability."[231] Indeed, the majority candidly admitted that the gross mismanagement standard was a type of heightened negligence standard.[232] Higginbotham maintains that there is simply no legal basis under section 504 for the professional misjudgment or gross mismanagement standard.[233] Instead, "when an IEP is in place, its shortcomings must find their answer within the detailed remedial scheme under the IDEA unless those shortcomings are somehow of a meaningfully distinct character."[234] This only occurs when there is a refusal to grant a disabled student's request for a reasonable accommodation, which also now means gross misjudgment or bad faith in not granting the request to modify a special education student's IEP.[235] Judge Higginbotham concludes that, based on the paucity of the allegations in Stewart's complaint, "the majority has in its application of controlling standards created tort liability for money damages, allowing Stewart to proceed on pleadings that, at best, state a plausible claim for oversight or negligence."[236] Instead, he would hold that bad faith and gross mismanagement should essentially apply the same level of culpability as deliberate indifference in order to "approximate the discriminatory animus § 504 was intended to capture."[237]

228. *See* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 992–94 (5th Cir. 2014).

229. The *Stewart* majority itself readily admitted that there was a "dearth of case law directly addressing this issue," and therefore, took time to set out "some considerations relevant to such claims." *See Stewart*, 711 F.3d at 523.

230. *Id.* at 531 (Higginbotham, J., dissenting).

231. *Id.* at 524 n.14 (referencing Judge Higginbotham's dissenting opinion); *see id.* at 531 (Higginbotham, J., dissenting) ("The majority then misapplies § 504 to create tort liability for money damages against the school district.").

232. *See supra* note 217 and accompanying text.

233. *Stewart*, 711 F.3d at 531–32 (Higginbotham, J., dissenting).

234. *Id.* at 534. *But see* K.M. *ex rel.* Bright v. Tustin Unified School Dist., 725 F.3d 1088, 1102 (9th Cir. 2013) (holding that compliance with procedural provisions of the IDEA does not automatically mean that school districts complied with substantive provisions of the ADA).

235. *Stewart*, 711 F.3d at 534–35 (Higginbotham, J., dissenting).

236. *Id.* at 535–36.

237. *Id.* at 536.

In response to Judge Higginbotham's reasonable concerns, which might be characterized as being based on the apprehension that gross mismanagement claims will open the floodgates of litigation, the majority did emphasize that their opinion does not "lower[ ] the high standards plaintiffs must satisfy to impose liability against school districts."[238] In other words, even though reasonable accommodation claims based on gross mismanagement are somewhat easier to win than deliberate indifference claims under the majority's formulation, it is still a heightened form of negligence requiring a *substantial* departure from educational norms.[239] So as long as a school district makes good faith attempts to address a pattern of severe bullying against a special education student through the IEP process, these claims should not be of general concern to school districts.

There are as many as three additional responses to Judge Higginbotham's dissent. First, some of his disagreement stems from the factual allegations in the *Stewart* case itself. To the extent that he is right that Stewart should have gone through the IDEA administrative process first and should have pled more factual allegations to support her gross mismanagement claim, these are case-specific objections. But these objections do not in and of themselves undermine the legal template set up by the majority for future section 504 reasonable accommodation cases. Second, I think that Judge Higginbotham is conflating discrimination and reasonable accommodation claims under section 504. Whereas the former do require a showing of deliberate indifference under the *Gebser*/*Davis* framework,[240] the reasonable accommodation framework is based on a different set of concerns surrounding the ability of the student to have meaningful access to the educational benefit to which she is entitled.[241] As in other areas of anti-discrimination law, the reasonable accommodation inquiry asks different questions concerning exclusion from participation and denial of benefits because of disability.[242] Only if the school's response was "actionably ineffective" or a substantial departure from professional norms, would a claim for refusal to accommodate or

238. *Id.* at 526; *see also id.* ("Isolated mistakes made by harried teachers and random bad acts committed by students and other third-parties generally will not support gross-misjudgment claims.").

239. *Id.* at 524–26.

240. And for that matter under the *T.K.* framework set up by Judge Weinstein where Title IX principles are being incorporated into the IDEA. *See supra* note 159 and accompanying text.

241. *See* Mark H. v. Lemahieu, 513 F.3d 922, 937 (9th Cir. 2008) ("The text of § 504 prohibits not only 'discrimination' against the disabled, but also 'exclu[sion] from . . . participation in' and 'deni[al] [of] the benefits of' state programs solely by reason of a disability." (quoting 29 U.S.C. § 794(a) (2012)).

242. "[T]he focus of the prohibition in § 504 is 'whether disabled persons were denied 'meaningful access' to state-provided services.'" *See id.* at 937 (quoting Crowder v. Kitagawa, 81 F.3d 1480, 1484 (9th Cir. 1996)). Section 504, "like the ADA, does require *reasonable* modifications necessary to correct for instances in which qualified disabled people are prevented from enjoying 'meaningful access' to a benefit because of their disability." *Id.* (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979)) (emphasis added).

gross mismanagement lie.[243] Third, and finally, because the Fifth Circuit has previously and explicitly adopted the gross mismanagement standard in the *D.A.* decision in section 504 reasonable accommodation cases,[244] the *Stewart* Court did not have the discretion to ignore that case as supposedly setting up an unacceptably low bar for section 504 liability.[245] The majority followed the standards established in *D.A.*[246] and applied them to set up the gross mismanagement standard to determine whether a school had grossly departed from professional norms by not modifying a student's IEP in the face of new evidence of bullying.[247]

In any event, as far as the *Stewart* case itself, the dissenting opinion ends up becoming the court's opinion with regard to issues concerning Stewart's failure to exhaust her administrative remedies under IDEA. Judge Higginbotham contends that, "for all the majority's focus on Stewart's IEP, it fails to recognize that the IEP is a creature, not of § 504, but of the IDEA, a quite distinct federal statute,"[248] and that "Stewart's complaint leave[s him] convinced 'that at least in principle[,] relief is available under the IDEA.'"[249] Even though Stewart did not bring any claims under the IDEA, both the majority and dissent in *Stewart* agree that "plaintiffs must administratively exhaust certain non-IDEA claims so long as they 'seek[ ] relief that is also available under' the IDEA."[250] This is true even if Stewart is demanding monetary damages, a remedy not normally available under the IDEA.[251]

The majority initially overcame this objection by maintaining that the school district waived this defense by not arguing it in front of the district court and, even if not waived, that the damages Stewart sought were mostly not available under the IDEA.[252] Ultimately, of course, the

243. *Stewart*, 711 F.3d at 525–26.

244. *See* D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 454–55 (5th Cir. 2010) (en banc) (adopting the gross mismanagement standard from Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982)).

245. *See Stewart*, 711 F.3d at 524 n.14.

246. *See D.A.*, 629 F.3d at 455 ("We concur that facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504 or ADA against a school district predicated on a disagreement over compliance with IDEA."); *see also* Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 992 (5th Cir. 2014) (adopting the *D.A.* standard as well).

247. *See Stewart*, 711 F.3d at 526 ("[A] district's continued use of ineffective or inadequate methods when confronted with multiple instances of a specific type of misconduct becomes less defensible over time. At some point, the failure to act appropriately becomes 'such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.'" (quoting Monahan v. State of Neb. 687 F.2d 1164, 1171 (1982))).

248. *Id.* at 531 (Higginbotham, J., dissenting).

249. *Id.* at 533 (citing Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 993 (7th Cir. 1996)).

250. *Id.* at 527 (citing 20 U.S.C. § 1415(l) (2012).

251. *See supra* note 133 and accompanying text.

252. *Stewart*, 711 F.3d at 527–28; *see also id.* at 530 ("In short, Stewart's gross-misjudgment theory of liability—premised on sexual abuse fostered by the District's alleged disability discrimination—does

opinion was vacated and superseded on rehearing so that the district court could have first crack on these exhaustion issues.[253] Depending on how those issues are decided, it is plausible that the case could still come back for a decision on the merits in front of the Fifth Circuit.[254]

Regardless, more recent Fifth Circuit case law, including *Estate of Lance v. Lewisville Independent School District*,[255] will continue to provide a template for a section 504 gross mismanagement/reasonable accommodation claim, where a school district could have modified a student's IEP to address bullying issues, and instead, grossly departed from standard educational practice.[256] This type of claim, albeit still a difficult one to meet, might provide relief to bullied special education children when other legal theories are unavailing.

V. EXPANDING STATE ANTI-BULLYING STATUTES TO ADDRESS SPECIAL EDUCATION STUDENT BULLYING

In addition to the availability of the reasonable accommodation/gross mismanagement standard under section 504, yet another avenue exists to protect bullied special education students: state anti-bullying statutes. Although forty-six states have passed some sort of legislation that addresses bullying in the school environment,[257] not all have language concerning disability-based bullying, and only one has a provision specifically addressing bullying of special education students.[258] State legislation, such as Massachusetts', is an example of a law that addresses special education bullying specifically,[259] while Maryland's law more generally discusses bullying in schools based on the disability of the victim.[260] Both of these statutes can be expanded to give students in special educa-

not appear to seek damages 'as a substitute for relief under the IDEA.'" (citing Payne v. Peninsula Sch. Dist., 653 F.3d 863, 877 (9th Cir. 2011) (en banc))).

253. Stewart v. Waco Indep. Sch. Dist., No. 11-51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam) ("Stewart's § 504 claim presents difficult questions that, in our view, should not be reached unless necessary. The district court did not address whether Stewart's claim was barred by any alleged failure to exhaust or as untimely, defenses that may be dispositive of the entire matter.").

254. *Id.* at *1 n.2 ("Should the district court ultimately consider the merits, we note that such consideration should be pursued in light of our prior precedents, *see, e.g.*, D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 453 (5th Cir. 2010), albeit the reading of which produced a division in the now-vacated opinion which we do not here resolve."). As of the writing of this Article in February of 2014, the case was still at the district court awaiting judgment on the failure to exhaust issue.

255. 743 F.3d 982, 992–94 (5th Cir. 2014).

256. *Stewart*, 711 F.3d at 526.

257. VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 15 (2011). Of these, thirty-six address cyberbullying. *Id.*

258. That being said, many of these statutes seek to prohibit bullying in schools based on disability. *See, e.g.*, N.Y. EDUC. LAW § 12 (McKinney 2013) ("No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function.").

259. MASS. GEN. LAWS ANN. ch. 71, § 37O (West 2014).

260. MD. CODE ANN., EDUC. § 7-424(a)(2) (West 2014).

tion private causes of action if they are subject to bullying that interferes with their ability to benefit from their education.

A. Massachusetts' IEP Approach

In 2010, Massachusetts passed parallel state legislation to the IDEA with a provision specific to special education students that are subject to bullying.[261] Under this provision, when a special education child suffers from a disability that affects social skills development or when a child is susceptible to disability-based bullying, harassment or teasing, the IEP team must develop an IEP that addresses the skills and proficiencies needed to deal with such bullying.[262] An IEP in these circumstances should discuss strategies to help the special education student avoid and respond to such bullying, harassment, or teasing.[263] In this way, these provisions within the Massachusetts anti-bullying law may be viewed as providing a response consistent with that recommended by the August 2013 OSERS Dear Colleague Letter.[264] Nevertheless, the Massachusetts law does not provide a private right of action if a school fails to follow the law's mandate in special education bullying situations.[265]

B. Maryland's Disability Discrimination Approach

Maryland, like a number of other states, takes a more general approach in its anti-bullying statute to disability harassment in schools. Rather than focusing on the need to modify an IEP when such bullying occurs, Maryland takes an approach that is more similar to that taken against disability discrimination under section 504 or the ADA.[266] In this regard, the Maryland statute defines bullying, harassment, or intimidation in the school environment in pertinent part as "intentional conduct . . . that creates a hostile educational environment . . . and is [m]otivated by an actual or a perceived personal characteristic including . . . physical or mental ability or disability."[267] Maryland's anti-

261. MASS. GEN. LAWS ANN. ch. 71B, § 3 (West 2014).

262. *Id.* (requiring that the IEP "specifically address . . . the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing" for students with disabilities related to social skills and those vulnerable to disability-based bullying, harassment or teasing).

263. *Id.*

264. *See* Aug. 20, 2013 Dear Colleague Letter, *supra* note 7, at 1.

265. *See* MASS. GEN. LAWS ANN. ch. 71, § 37O(i) (West 2014) ("Nothing in this section shall supersede or replace existing rights or remedies under any other general or special law, nor shall this section create a private right of action."); *see also* Parsons v. Town of Tewksbury, No. 091595, 2010 WL 1544470, at *3 (Mass. Super. Ct. Jan. 19, 2010) (requiring a finding of an "affirmative act" by a public employee for tort liability). "The purpose of § 10(j) is to immunize public employees for harm caused by a third person that the public employee failed to prevent . . . . [I]mmunity is only removed where the condition or situation was originally caused by the public employer." *Id.* (internal quotation marks omitted) (citing MASS. GEN. LAWS ANN. ch. 258 § 10(j) (West 2014); Brum v. Dartmouth, 704 N.E.2d 1147, 1153 (Mass. 1999)).

266. *See supra* note 188 and accompanying text.

267. MD. CODE ANN., Educ. § 7-424(a)(2) (West 2014).

bullying legislation contains more general language, but just like its Massachusetts counterpart, it does not contain a private right of action to vindicate a student's right to be free from disability-based bullying or harassment.[268]

C. Various Approaches to Adding Private Causes of Action to State Anti-Bullying Legislation for Bullied Special Education Students

Indeed, a common thread running through all state anti-bullying statutes in the educational context is that they currently do not provide for an express private cause of action.[269] More often, such statutes provide for reporting of bullying incidents to state agencies and/or the development of appropriate conduct codes.[270] Although the general lack of case law under any of these statutes could be based on their recent vintage, it is more likely the result of there not being any private causes of action.[271] Such implied private rights of action are disfavored under both federal and state law.[272] However, one potential approach is to amend these current laws to provide express private rights of action for bullied special education students, thus getting around the thorny issues surrounding having to imply private rights of action under such statutes.

Such private causes of action could take one of two approaches depending upon the language used to protect special education children from bullying in the school environment. The Massachusetts provision, which has modification of IEPs directly incorporated into the statute, could easily take a tack similar to the gross mismanagement/reasonable accommodation approach taken in *Stewart*.[273] This private cause of action

268. *Id.* § 7-424.1(h)(1) ("A school employee who reports an act of bullying, harassment, or intimidation . . . in accordance with the county board's policy established under subsection (c) of this section is not civilly liable for any act or omission in reporting or failing to report an act of bullying, harassment, or intimidation under this section.").

269. *See, e.g.*, Karlen *ex rel.* J.K. v. Westport Bd. of Educ., 638 F. Supp. 2d 293, 302 (D. Conn. 2009) (holding that Connecticut's bullying statute, CONN. GEN. STAT. ANN. § 10-222d (West 2014), which mandates that each regional district develop a policy to address the existence of bullying in its schools, does not provide private cause of action).

270. *See, e.g.*, N.Y. EDUC. LAW §§ 13, 15 (McKinney 2013).

271. *See Karlen*, 638 F. Supp. 2d at 302 (finding no private cause of action under Connecticut's bullying statute).

272. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that private parties may not sue for unintentional Title VI disparate impact national origin discrimination because language of provision providing for enforcement of Title VI regulations does not explicitly and unambiguously allow for private right of action). Indeed, the fact that these statutes have other remedial mechanisms suggests that the state legislatures did not intend to have private rights of action under these laws. *See id.* at 288–89. Similarly, state courts do not look favorably on implied rights of action. *See* Baldonado v. Wynn Las Vegas, LLC, 194 P.3d 96, 101 (Nev. 2008) ("[T]he absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy."). *But see* Mark H. v. Lemahieu, 513 F.3d 922, 939 (9th Cir. 2008) (holding that, "to the degree the § 504 FAPE regulations that the H. family invokes can be interpreted as a variety of meaningful access regulation, they will fall within the § 504 implied cause of action").

273. *See supra* notes 198–204 and accompanying text.

would be available if there was evidence of a school refusing to accommodate a bullied special education student in the face of evidence that the current IEP was no longer working to protect the student from bullying.[274] The question would be whether the school substantially departed from professional norms in refusing to modify the student's IEP in spite of the bullying being suffered by the student.[275] Consistent with the notion that the school should be given a chance to work out any IEP issue internally,[276] such a private cause of action could be written to first require exhaustion of administrative remedies. The advantage of having such provisions built-in state statutory laws, as opposed to relying on section 504 regulations, is that state courts then would be able to develop legislation free from the confusion that currently envelops federal law in this area.

The second approach would be based on statutory language like that found in Maryland's law, which prohibits disability-based bullying more generally. The private cause of action here would use the Title IX/IDEA framework discussed in the *T.K.* decision by Judge Weinstein.[277] Although such claims might suffer from being subject to the deliberate indifference standard as discussed above,[278] there are states that already interpret their own anti-discrimination laws to require merely a form of negligence under similar anti-harassment language. For instance, New Jersey, under its Law Against Discrimination,[279] has set forth the standard with regard to affectional and sexual orientation harassment as the school district being "liable for such harassment when the school district knew or should have known of the harassment but failed to take actions reasonably calculated to end the mistreatment and offensive conduct."[280] This standard is similar to that used in cases of co-worker harassment under Title VII and parallel state anti-discrimination laws.[281] To make the state statutory standard more protective of disabled students, the recommendation would be to adopt New Jersey's Law Against Discrimination for state anti-bullying statutes in the educational context to avoid the insurmountable deliberate indifference standard.

274. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 524–25 (5th Cir. 2013), *vacated and superseded on reh'g*, No. 11–51067, 2013 WL 2398860, at *1 (5th Cir. June 3, 2013) (per curiam).

275. *Id.*

276. *See id.* at 532 (Higginbotham, J., dissenting) ("But at the heart of Ms. Stewart's lawsuit is a dispute over the content and implementation of her IEP, a matter that clearly falls within the purview of the IDEA and is capable of resolution through its administrative processes.").

277. *See supra* notes 160–162 and accompanying text.

278. *See supra* notes 170–173 and accompanying text.

279. New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 49 (West 2014).

280. *See* L.W. *ex rel.* L.G. v. Toms River Reg'l Schs. Bd. of Educ., 915 A.2d 535, 540 (N.J. 2007).

281. *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013) ("If the harassing employee is the victim's co-worker, the employer [under Title VII] is liable only if it was negligent in controlling working conditions."); Brittell v. Dep't of Corr., 717 A.2d 1254, 1264 (Conn. 1998) (stating that, "[i]n defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964.").

Of the two approaches, future state laws should mimic Massachusetts' approach, as it is more directly in tune with the scheme recommended by OSERS for internal modification of IEPs. If the internal response turns out to be insufficient, then a private claim can be brought under the gross mismanagement/reasonable accommodation standard. That being said, either state statutory approach would provide yet another potential option for legal relief for bullied special education children.

It may be objected that such anti-bullying statutes should be expanded by providing private causes of action for all bullied children, special education or not. I confess that, in an ideal world, I would certainly be in favor of such an expansion. Three considerations, however, make me prefer a more incremental approach here. First, all states have special education laws and regulations that adopt the federal IDEA laws.[282] These state special education laws can readily be cross-referenced and/or incorporated into existing state legislation concerning bullying (as Massachusetts has done with its own law) without the need to develop new principles of law. Second, this gradual approach has the added benefit of focusing public attention specifically on the plight of bullied special education children and the higher rates of bullying which they face in school as compared to their non-disabled peers.[283] Not only will singling out special education children for special statutory treatment educate the public about the dire situation facing many of these students in the school bullying context, but such an expansion of the law will likely engender more public sympathy and less political opposition. Third, and finally, the incremental approach has the advantage of permitting policymakers to see how the private right of action works with a fairly discrete population before expanding such protection to all bullied children.

As far as what relief should be available under these states statutes for bullied special education children, it appears that for these laws to have their greatest impact, it is not enough to provide injunctive or declaratory relief requiring the school to update the IEP of the student to take into account the bullying circumstances. This is especially so once the school has already shown an unwillingness or inability to respond appropriately to the bullying conduct. Instead, to deter school officials and schools themselves[284] from ignoring the plight of bullied special education

282. *See* Gregory F. Corbett, *Special Education, Equal Protection and Education Finance: Does the Individuals With Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. REV. 633, 643 (1999) ("Most state special education laws mirror the structure and provisions of the IDEA. The state statutes, however, implement IDEA requirements in greater detail. Currently, all fifty states have enacted special education statutes pursuant to the federal requirements of the IDEA.").

283. *See supra* note 3 and accompanying text.

284. To hold the school liable usually requires that the unlawful action fit within a recognized exception under the state tort immunity statute. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 805–10 (2007) (categorizing the types of immunity exceptions recognized by different states).

students, monetary damages against individual school officials and school districts should also be permitted, at least where the safety of the child has been placed in jeopardy through a lack of an adequate school response to evidence of severe bullying.[285] Although damages against the school district itself will require finding some exception to the applicable tort immunity statute,[286] it would not be necessary to meet a deliberate indifference standard in order to receive damages under the proposed state statutory language as might be the case with section 504 FAPE claims.[287] Instead, a heightened negligence standard would be incorporated into such statutes, requiring a showing that the school district knew or should have known of the bullying but failed to take actions, including modification of the student's IEP, reasonably calculated to end the bullying conduct. Finally, to give attorneys the necessary incentive to vindicate the civil rights of bullied special education students in these types of cases, an attorney-fee shifting mechanism should be added for prevailing plaintiffs, much in the same manner as those that exist under federal civil rights law.[288]

In all, adding these private causes of action types of remedies to state anti-bullying statutes for bullied special education students will provide yet another way for these students and their families to legally fight back against their tormentors, responsible school officials, and the school themselves.

VI. CONCLUSION

Special education students continue to face bullying by fellow students at an alarming level.[289] As the cases discussed in this Article aptly illustrate, current constitutional and statutory responses are woefully inadequate to protect even the most severely bullied and abused special education students. Although my previous proposals advancing the incorporation of Title IX and IDEA legal frameworks still hold out promise to provide additional legal protection to bullied special education students where non-disabled peers are unable to receive protection, such approaches still are hindered too often by the stringent deliberate indifference standard.

285. *See* GUERNSEY & KLARE, *supra* note 132, at 211 (discussing instances where monetary damages are appropriate under the IDEA); *cf.* T.K. *ex rel.* L.K v. N.Y.C. Dep't. of Educ., 779 F. Supp. 2d 289, 316 (N.J. 2007) ("[U]nder IDEA the question to be asked is whether 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.").

286. *See supra* note 284 and accompanying text.

287. *See supra* note 218 and accompanying text.

288. *See, e.g.*, Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (2012) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs. . . .").

289. *See supra* notes 3 and 282 and accompanying text.

The purpose of this Article has been to forward two new potential avenues for providing effective legal relief to bullied special education students, while at the same time avoiding the pitfalls surrounding the deliberate indifference test. In this vein, the Article supports a reasonable accommodation/gross mismanagement theory of law either under current federal disability law or under private causes of action created under state anti-bullying statutes. Such a standard provides an alternative method for special education students to fight back against bullying when the school refuses to modify their IEPs, substantially departing from professional norms and effectively dooming these students to continued bullying, harassment, and abuse. The hope is that the adoption of these legal standards will start the long-overdue process of making severe forms of special education bullying a relic of a more unjust past.