

# BULLYING IN ILLINOIS SCHOOLS: UNDERSTANDING THE LAW AND ITS IMPLICATIONS

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Practitioners in the area of school law understand the significant impact bullying and harassment of students has on school policy, school discipline, and the types of liability potentially faced by Illinois' school districts. While bullying and harassment have always been present in the schoolyard, the law has continued to evolve to create very specific requirements for policy, procedures, documentation, and response. At the same time, the law has been slow to create liability for school districts' response to individual cases of bullying.

Without question, bullying can and does impact a student's ability to succeed and achieve. Within its findings in the *Illinois School Code*, the General Assembly has noted that bullying causes "physical, psychological, and emotional harm to students and interferes with students' ability to learn and participate in school activities."<sup>1</sup> For that reason, understanding the legal requirements, and the implications of the legal requirements for both students and parents, as well as school officials, is essential to navigating frequently litigated issues in Illinois school law.

## I. STATUTORY REQUIREMENTS IN THE ILLINOIS SCHOOL CODE

The *Illinois School Code* requires that each school district in Illinois, including both charter schools and non-public, non-sectarian schools, adopt a policy which both prohibits bullying and creates systems for responding to reports of bullying.<sup>2</sup> Section 27-23.7 of the *Illinois School Code*, 105 ILCS 5/27-23.7, sets the framework for each school's policy. While the statute does not prescribe how each school must respond to specific instances of

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<sup>1</sup> 105 ILL. COMP. STAT. 5/27-27.23.7(a) (2016).

<sup>2</sup> *Id.* § 5/27-23.7.

bullying, it requires minimal procedures for identifying, reporting, and the responding to allegations that a student was subject to bullying.<sup>3</sup>

Specifically, Section 27-23.7(a) prohibits bullying “on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic.” Furthermore, the statute includes prohibitions in a number of contexts, including:

- (1) during any school-sponsored education program or activity;
- (2) while in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
- (3) through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
- (4) through the transmission of information from a computer that is accessed at a nonschool-related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school. This item (4) applies only in cases in which a school administrator or teacher receives a report that bullying through this means has occurred and does not require a district or school to staff or monitor any nonschool-related activity, function, or program.<sup>4</sup>

In addition, the statute includes a broad definition of the types of conduct which may be considered bullying, leaving to the discretion of school personnel to make fact-based determinations when specific allegations of bullying arise.<sup>5</sup> The statute defines bullying to include:

any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:

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

<sup>4</sup> *Id.* § 5/27-23.7(a).

<sup>5</sup> *Id.* § 5/27-23.7(b) (2016).

- (1) placing the student or students in reasonable fear of harm to the student's or students' person or property;
- (2) causing a substantially detrimental effect on the student's or students' physical or mental health;
- (3) substantially interfering with the student's or students' academic performance; or
- (4) substantially interfering with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school.

Bullying, as defined in this subsection (b), may take various forms, including without limitation one or more of the following: harassment, threats, intimidation, stalking, physical violence, sexual harassment, sexual violence, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying. This list is meant to be illustrative and non-exhaustive.<sup>6</sup>

The definition also includes “cyber-bullying”, which is addressed more specifically herein below.

Not surprisingly, such a broad definition of bullying creates dispute over exactly which type of conduct should be covered under the required policy and should be dealt with as “bullying.”<sup>7</sup> For example, as discussed below, the federal guidance on bullying and harassment has slightly different definitions and policy preferences.<sup>8</sup> Increasingly, the colloquial usage causes school personnel, parents, and students to stray from the legal definitions to a more expansive idea of what should be covered by policy and what schools should be doing about such conduct.<sup>9</sup>

The Illinois School Code requires that each school district create a policy that meets the specific criteria outlined within Section 27-23.7.<sup>10</sup> Specifically, the bullying policy must include the bullying definition

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<sup>6</sup> *Id.*

<sup>7</sup> See generally Steve Inskip, *Why Vaguely Defining Bullying Can Be a Problem*, NPR (Apr. 17, 2013, 2:42 AM), <https://www.npr.org/2013/04/17/177558210/why-vaguely-defining-bullying-can-be-a-problem>.

<sup>8</sup> See generally *Federal Laws*, STOPBULLYING.GOV (last reviewed Sept. 26, 2017), <https://www.stopbullying.gov/laws/federal/index.html>.

<sup>9</sup> See Alexis Fitzpatrick, *Report and Wait: Parents Question Washington County Public Schools Bullying Follow Through*, HERALD MAIL MEDIA (Feb. 24, 2019), [https://www.heraldmillmedia.com/news/local/report-and-wait-parents-question-washington-county-public-schools-bullying/article\\_baf7fc5f-7505-54a8-af41-740e589a9d76.html](https://www.heraldmillmedia.com/news/local/report-and-wait-parents-question-washington-county-public-schools-bullying/article_baf7fc5f-7505-54a8-af41-740e589a9d76.html). (noting that incidents of bullying often come down to a “disagreement [with a parent] over the definition of what bullying really is” or parents not accepting their child’s part in an incident”).

<sup>10</sup> 105 ILL. COMP. STAT. 5/27-23.7 (2016).

provided in the Code and state that “bullying is contrary to State law and the policy of the school district.”<sup>11</sup> The policy must also outline procedures for “promptly reporting bullying” – including “identifying the contact information for the person(s) responsible for receiving [bullying] reports and a procedure for anonymous reporting” – and the procedures for “promptly informing the parents or guardians of all students involved in the alleged incident.”<sup>12</sup> The Board must forbid retaliation “against any person who reports an act of bullying” and identify “the consequences and appropriate remedial actions for a person who engages in reprisal or retaliation.”<sup>13</sup> The policy shall identify the interventions available for those impacted by bullying, which may include: “school social work services, restorative measures, social-emotional skill building, counseling, school psychological services, and community-based services.”<sup>14</sup> The bullying policy must be published on the District’s website and “distributed annually” to students, parents, “and school personnel.”<sup>15</sup>

The Illinois School Code also dictates the specific procedures that must be undertaken when investigating a bullying claim.<sup>16</sup> The District is required to identify these procedures in the Board policy and its handbook.<sup>17</sup> As a threshold issue, the investigation must involve appropriate school support personnel with “knowledge, experience, and training on bullying prevention,” and the principal or school administrator must be notified of the bullying report “as soon as possible after the report is received.”<sup>18</sup> Subject to the privacy rights outlined in federal and state law, the “parents . . . of the students” involved are entitled to “information about the investigation, and an opportunity to meet with the principal or . . . designee to discuss the investigation, the findings,” and remedial measures.<sup>19</sup> The District shall “mak[e] all reasonable efforts to complete the investigation within 10 school days after the date the report of the incident of bullying was received . . . .”<sup>20</sup>

Once the School Board creates the bullying policy, it must “assess the outcomes and effectiveness of the policy . . . .”<sup>21</sup> The Illinois School Code suggests that the District assess “the frequency of victimization; student, staff, and family observations of safety at a school; identification of areas of a school where bullying occurs; the types of bullying utilized; and bystander

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<sup>11</sup> *Id.* § 5/27-23.7(b).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

intervention or participation.”<sup>22</sup> Once the District completes its assessment of the bullying policy, it is required to publish the information developed pursuant to the assessment on its website.<sup>23</sup>

## II. RELEVANT CASE LAW IN ILLINOIS

A number of families have brought legal complaints against Illinois school districts in recent years, asserting that the school districts’ failure to implement their bullying policies caused their students tremendous harms.<sup>24</sup> While courts have been sympathetic to the families’ claims, school districts have successfully caused the dismissal of the complaints by arguing that their actions are entitled to immunity under the Local Governmental and Governmental Employees Tort Immunity Act.<sup>25 26</sup>

In *Hascall v. Williams*, the Fourth District Appellate Court of Illinois held that the school district’s response to a claim of bullying was entitled to discretionary immunity under the Local Governmental and Governmental Employees Tort Immunity Act.<sup>27</sup> The plaintiffs, Vilma Hascall and her mother, alleged that they had notified the school district multiple times about the bullying that Vila had experienced, but the District failed to take appropriate action.<sup>28</sup> Despite the administrators’ claims that they take reports of bullying “very seriously,” would notify the parents involved, and would take “appropriate disciplinary action,” the bullying continued and the parents of the students engaged in bullying reported that they had never been contacted by the administrators.<sup>29</sup> The District filed a motion to dismiss the plaintiffs’ complaint, alleging in part that it was entitled to immunity from liability under the Illinois Tort Immunity Act.<sup>30</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See e.g., *Illinois Parents Take Legal Action Against Alleged Bullying*, ABC NEWS (June 19, 2014, 4:33 PM), <https://abcnews.go.com/US/illinois-parents-sue-sons-alleged-bully/story?id=24212484>; Megan Braa, *Highland School Board Authorizes \$23,000 Settlement in Bullying Lawsuit*, BELLEVILLE NEWS-DEMOCRAT (Apr. 7, 2017, 8:23 AM), <https://www.bnd.com/news/local/community/highland-news-leader/article142875034.html>; Dan Sewell, *Parents Test School Liability in Bullying and Child Suicide*, HERALD-NEWS (Aug. 12, 2017), <https://www.theherald-news.com/2017/08/12/parents-test-school-liability-in-bullying-and-child-suicide/a35flpz/>; Clifford Ward, *Lawsuit Claims School Failed to Protect Young Student from Bullies*, CHI. TRIB. (Jan. 7, 2015, 4:59 PM), <https://www.chicagotribune.com/suburbs/downers-grove/ct-downers-grove-bullying-suit-met-0108-20150107-story.html>.

<sup>25</sup> 745 ILL. COMP. STAT. 10/2-201 (2016) [hereinafter *The Illinois Tort Immunity Act*].

<sup>26</sup> See e.g., *Kuhner v. Highland Cmty. Unit Sch. Dist. No. 5*, No. 15-cv-00107-JPG-DGW, 2016 U.S. Dist. LEXIS 77188 (S.D. Ill. 2016); *Malinski v. Grayslake Cmty. High Sch. Dist. 127*, 2014 IL App (2d) 130685; *Mulvey v. Carl Sandburg High Sch.*, 2016 IL App (1st) 151615.

<sup>27</sup> *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶¶ 37-38.

<sup>28</sup> *Id.* ¶ 1.

<sup>29</sup> *Id.* ¶¶ 4-8.

<sup>30</sup> *Id.* ¶ 11.

The court explained in its decision that the Illinois Tort Immunity Act adopted the general principle “that local governmental units are liable in tort but limited this [liability] with an extensive list of immunities based on specific government functions.”<sup>31</sup> Section 2-201 of the Illinois Tort Immunity Act, one of the sections cited by the District in its motion to dismiss, provides: “Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.”<sup>32</sup> “In section 2-201, the legislature immunized ‘liability for both negligence and willful and wanton misconduct.’”<sup>33</sup>

The *Hascall* court noted that employees may be granted immunity under section 2-201 of the Illinois Tort Immunity Act if: 1) he or she “holds either a position involving the determination of policy or a position involving the exercise of discretion”; and 2) if the employee “engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which the plaintiff’s injury resulted.”<sup>34</sup> Public policy decisions are “those that require the governmental entity or employee to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests.”<sup>35</sup> “Discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official’s discretion as to the propriety of the act.”<sup>36</sup> Under section 2-109 of the Illinois Tort Immunity Act, “[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.”<sup>37</sup> In *Hascall*, the plaintiffs did not dispute that the District and its administrators were in a position involving the determination of policy, but argued whether the implementation of the bullying policy was discretionary.<sup>38</sup>

Upon a review of the school district’s bullying policy and the Illinois School Code, the court determined that the school district’s implementation of its bullying policy was discretionary pursuant to the Illinois Tort Immunity

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<sup>31</sup> *Id.* ¶ 19 (citations omitted).

<sup>32</sup> 745 ILL. COMP. STAT. 10/2-201 (2016); see also *Hascall*, 2013 IL App (4th) 121131, ¶ 21.

<sup>33</sup> *Hascall*, 2013 IL App (4th) 121131, ¶ 22 (citing *In re Chi. Flood Litig.*, 176 Ill. 2d 179, 194, 680 N.E.2d 265, 273 (1997)).

<sup>34</sup> *Hascall*, 2013 IL App (4th) 121131, ¶ 23 (citing *Harinek v. 161 North Clark St. Ltd. P’ship*, 181 Ill. 2d 335, 341, 692 N.E.2d 1177 (1998)).

<sup>35</sup> *Hascall*, 2013 IL App (4th) 121131, ¶ 25 (citing *Harrison v. Hardin Cty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 472, 758 N.E.2d 848, 852 (2001)).

<sup>36</sup> *Hascall*, 2013 IL App (4th) 121131, ¶ 25 (citing *Snyder v. Curran Twp.*, 167 Ill. 2d 466, 474, 657 N.E.2d 988, 993 (1995)).

<sup>37</sup> 745 ILL. COMP. STAT. 10/2-109 (2016).

<sup>38</sup> *Hascall*, 2013 IL App (4th) 121131, ¶ 24-25.

Act.<sup>39</sup> The court reasoned, “Although the policy imposes general duties on the superintendent, or his designee, in the development and maintenance of a program, the policy does not mandate a particular response to a specific set of circumstances.”<sup>40</sup> The court continued, “The determination of whether bullying has occurred and the appropriate consequences and remedial action are discretionary acts under the facts.”<sup>41</sup> Accordingly, the court dismissed Hascall’s claim pursuant to the Illinois Tort Immunity Act.<sup>42</sup>

In *Malinski v. Grayslake Community High School District 127*, the Second District Appellate Court of Illinois upheld the reasoning in *Hascall*, finding that the school district’s implementation of its bullying policy was entitled to immunity pursuant to the Illinois Tort Immunity Act.<sup>43</sup> The plaintiff, Carlos Malinski, alleged that other students subjected him to bullying and that the school district “failed to provide a safe environment, proximately causing [his] injuries.”<sup>44</sup> Malinski was verbally and physically abused during school hours and on school property, despite informing school officials on “‘numerous occasions’ about being bullied by other students.”<sup>45</sup> The District asserted that it had immunity against Malinski’s claims, because “‘dealing with student bullying [was] exactly the type of discretionary decision for which . . . the Tort Immunity Act provides absolute immunity.’”<sup>46</sup> Malinski argued that the Tort Immunity Act was “inapplicable because . . . carrying out the bullying policy” – the implementation of which was required by Illinois law – “was a ‘ministerial act’ that was not immunized.”<sup>47</sup>

Finding the reasoning in *Hascall* persuasive, the court “reject[ed] [Malinski’s] argument that the act of ‘carrying out’ an anti-bullying policy is a ministerial act because the School Code left [the school district] with ‘no discretion regarding whether to allow bullying in [its] school.’”<sup>48</sup> The court reasoned:

We recognize that section 27-23.7(d) of the School Code mandates that each school district “create and maintain a policy on bullying.” However, as the court in *Hascall* observed, an anti-bullying policy is not required to mandate a particular response to a specific set of circumstances. Instead, a policy may afford a school district with the discretion to determine whether bullying has occurred, what consequences will result, and any appropriate

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<sup>39</sup> *Id.* ¶ 25-26.

<sup>40</sup> *Id.* ¶ 28.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ¶ 38.

<sup>43</sup> *Malinski v. Grayslake Cmty. High Sch. Dist. 127*, 2014 IL App (2d) 130685, ¶ 12-13.

<sup>44</sup> *Id.* ¶ 1.

<sup>45</sup> *Id.* ¶ 2.

<sup>46</sup> *Id.* ¶ 4.

<sup>47</sup> *Id.* ¶ 5.

<sup>48</sup> *Id.* ¶ 13.

remedial actions. Therefore, the implementation of an anti-bullying policy under section 27-23.7(d) does not necessary render [the school district's] actions ministerial.<sup>49</sup>

As the court determined that the school district's implementation of the bullying policy was discretionary, it dismissed Malinksi's complaint pursuant to the Illinois Tort Immunity Act.<sup>50</sup>

In *Mulvey v. Carl Sandburg High School*, the First District Appellate Court dismissed a family's argument that the school district's alleged failure to enforce the anti-bullying policies in its handbooks amounted to a breach of contract.<sup>51</sup> The Mulvey family asserted that Kathleen and Meghan Mulvey were "ignored, harassed, humiliated, physically assaulted, injured, and intimidated by their teammates during the high school tenure."<sup>52</sup> The family further alleged that Kathleen and Meghan had "performed all of the duties and obligations required of them by the student and athletic handbooks, but that the defendants failed to understand and rectify the conditions that fostered bullying, intimidation, and harassment."<sup>53</sup> The family argued that the District's alleged breach of conduct resulted in the girls experiencing "physical injury, emotional pain and distress, depression, post traumatic stress disorder, surgery, and having to change schools prior to graduation."<sup>54</sup>

The court dismissed the Mulveys' argument that a student handbook was a legal contract, finding the analogy "particularly inapt in the public school context."<sup>55</sup> The court reasoned that "the language in the student handbook does not include any specific *promise* to prevent or eliminate bullying."<sup>56</sup> "Instead, [the handbook] state[d] that 'preventing students from engaging in [such] . . . behaviors [was] *an important District goal.*'" The court concluded that "the handbooks do not create an offer sufficient to support a valid contract between the parties," as the handbooks failed to promise a "complete absence of bullying conduct" or even a specific response to bullying.<sup>57</sup>

The court also determined that the Illinois Tort Immunity Act provided immunity against the plaintiffs' claim for willful and wanton conduct.<sup>58</sup> Finding the reasoning in *Hascall* and *Malinksi* "persuasive," the court determined that the District's actions in implementing its bullying policy

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<sup>49</sup> *Id.* ¶ 13 (citations omitted).

<sup>50</sup> *Id.* ¶ 16.

<sup>51</sup> *Mulvey v. Carl Sandburg High Sch.*, 2016 IL App (1st) 151615, ¶ 39.

<sup>52</sup> *Id.* ¶ 11.

<sup>53</sup> *Id.* ¶ 12.

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

<sup>55</sup> *Id.* ¶ 32.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* ¶¶ 32-33.

<sup>58</sup> *Id.* ¶¶ 48, 51.



were “discretionary in nature.”<sup>59</sup> The court reasoned, “[T]he policy outlining the disciplinary point system ... requires a discretionary determination of whether a particular violation occurred and the appropriate consequences and remedial action to be applied under the facts.”<sup>60</sup> Accordingly, the court dismissed the plaintiffs’ argument that the implementation of the disciplinary policy involved a ministerial task, and it held that the District’s implementation of said policy was entitled to immunity under the Illinois Tort Immunity Act.<sup>61</sup>

In *Castillo v. Board of Education of the City of Chicago*, the First District Appellate Court similarly held that the school board was entitled to discretionary immunity pursuant to the Illinois Tort Immunity Act when implementing its bullying policy.<sup>62</sup> Elizabeth Castillo, a high school student, and her family alleged that the Chicago Board of Education “failed to protect her from” harassment committed by another student (hereinafter “Martinez” or “the other student”) on school property and “failing to warn Castillo of Martinez’s planned[,] [off-campus] attack.”<sup>63</sup> “In the two years before the off-campus attack, Castillo’s mother had spoken several times to school officials about [the bullying that]” Castillo was experiencing and to complain about the other student’s conduct.<sup>64</sup> Castillo further alleged that the Board’s “failure to discipline [the other student] for her on-campus harassment violated the” Illinois School Code<sup>65</sup> and the Board’s anti-bullying policy.<sup>66</sup>

Both the trial court and the appellate court held that the Board of Education was immune from Castillo’s claims pursuant to the Illinois Tort Immunity Act.<sup>67</sup> In examining the Board’s anti-bullying policy, the First District Appellate Court reasoned:

The policy directs school employees to intervene in bullying incidents “in a manner that is appropriate to the context,” and after investigation, to assign consequences “in a manner tailored to the individual incident, considering the nature of the behavior, the developmental age of the student, and the student’s history of problem behaviors and performance.” While the policy directs school employees to deal with bullying incidents, it assumes, and indeed mandates, discretionary decisions by its employees . . . For the Board to promulgate a policy that would inhibit individual school officials from making their own determinations as to what constitutes bullying and

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<sup>59</sup> *Id.* ¶ 48.

<sup>60</sup> *Id.* ¶ 49.

<sup>61</sup> *Id.* ¶¶ 49, 51.

<sup>62</sup> *Castillo v. Bd. of Educ. of the City of Chi.*, 2018 IL App (1st) 171053, ¶¶ 2, 19.

<sup>63</sup> *Id.* ¶¶ 2, 5.

<sup>64</sup> *Id.* ¶ 4.

<sup>65</sup> 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West 2016).

<sup>66</sup> *Castillo*, 2018 IL App (1st) 171053, ¶ 14.

<sup>67</sup> *Id.* ¶¶ 14-18.

the appropriate disciplinary response would be difficult, if not impossible to establish.<sup>68</sup>

As the implementation of the Board's anti-bullying policy required "both discretion and decision-making by school officials, at every level," the court determined that the Board was immune from Castillo's claims pursuant to Section 2-201 of the Tort Immunity Act.<sup>69</sup> The court further found that the Board retained immunity from Castillo's claim that the Board had failed to prevent Martinez's off-campus attack.<sup>70</sup> Based on reasoning adopted in *Green v. Chicago Board of Education*<sup>71</sup> and *Albert v. Board of Education*,<sup>72</sup> the court adopted the board's argument that "a public entity is not liable for failure to 'provide police protection service.'"<sup>73</sup>

### III. CYBER-BULLYING UNDER ILLINOIS LAW

As noted above, "cyber-bullying" falls within the *Illinois School Code*'s definition of bullying which is covered by the policy requirements of Section 27-23.7:

"Cyber-bullying" means bullying through the use of technology or any electronic communication, including without limitation any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, including without limitation electronic mail, Internet communications, instant messages, or facsimile communications. "Cyber-bullying" includes the creation of a webpage or weblog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages if the creation or impersonation creates any of the effects enumerated in the definition of bullying in this Section. "Cyber-bullying" also includes the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons if the

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<sup>68</sup> *Id.* ¶ 17.

<sup>69</sup> *Id.* ¶¶ 15-16, 19.

<sup>70</sup> *Id.* ¶¶ 21, 25 (citing 745 ILL. COMP. STAT. ANN. 10/4-102 (West 2016)).

<sup>71</sup> *Green v. Chi. Bd. of Educ.*, 407 Ill. App. 3d 721, 728, 944 N.E.2d 459, 465 (1st Dist. 2011) (rejecting plaintiff's argument because "the facts . . . focus on security and policing measures around the school, not supervising an activity").

<sup>72</sup> *Albert v. Bd. of Educ.*, 2014 IL App (1st) 123544, ¶ 56 ("Plaintiff's allegations clearly seek police-type protection, and under section 4-102, the Board simply has no duty to provide these types of police protection.").

<sup>73</sup> *Id.* ¶¶ 21, 25 (citing 745 ILL. COMP. STAT. ANN. 10/4-102 (West 2016)).

distribution or posting creates any of the effects enumerated in the definition of bullying in this Section.<sup>74</sup>

Beyond the definition, the statute limits the jurisdiction of the school to the boundaries of the First Amendment:

Nothing in this Section is intended to infringe upon any right to exercise free expression or the free exercise of religion or religiously based views protected under the First Amendment to the United States Constitution or under Section 3 of Article I of the Illinois Constitution.<sup>75</sup>

Not infrequently, students and parents have attempted to use the First Amendment to avoid disciplinary consequences for bullying and cyberbullying of classmates.<sup>76</sup> A case which has been routinely examined by courts faced with these constitutional claims is *Kowalski v. Berkeley County Schools*<sup>77</sup> where the Fourth Circuit held that the school district did not violate the student's free speech rights by disciplining her for creating and posting a webpage that ridiculed a fellow student.<sup>78</sup>

More recently, the Ninth Circuit has held that, even when school districts discipline students for off-campus conduct, school districts are operating within the limits of the First Amendment when such off-campus conduct has at-school effects.<sup>79</sup> In *C.R. v. Eugene School District 4J*, parents of a seventh-grade student, who was suspended for harassing two disabled sixth-grade students in a public park shortly after school let out, sued the school district.<sup>80</sup> The parents alleged that the suspension violated the student's First Amendment free speech and Fourteenth Amendment Due Process rights.<sup>81</sup> The district court entered summary judgment in the school district's favor.<sup>82</sup> As a matter of first impression, the Ninth Circuit held, in part, that the school district had authority to discipline the seventh-grade

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<sup>74</sup> 105 ILL. COMP. STAT. 5/27-23.7(b) (2018).

<sup>75</sup> *Id.* § 5/27-23.7(a-5).

<sup>76</sup> See generally *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011); *A.N. v. Upper Perkiomen Sch. Dist.*, 228 F. Supp. 3d 391 (E.D. Pa. 2017); *Dunkley v. Bd. of Educ.*, 216 F. Supp. 3d 485 (D.N.J. 2016); see also *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142 (9th Cir. 2016); *People v. Khan*, 2018 IL App (2d) 160724; *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (2010).

<sup>77</sup> *Kowalski*, 652 F.3d 565.

<sup>78</sup> *Id.* at 573-74 (noting that, even though the alleged conduct occurred away from school and using non-school technology, the webpage nevertheless was reasonably viewed to have materially and substantially interrupted the operation of the school as required by *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 513 (1969)).

<sup>79</sup> See generally *McNeil v. Sherwood Sch. Dist.* 88J, No. 17-35500, 2019 U.S. App. LEXIS 7653 (9th Cir. Mar. 14, 2019); *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1145 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013);

<sup>80</sup> *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d at 1145-47.

<sup>81</sup> *Id.* at 1147.

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

student for his off-campus, sexually harassing speech.<sup>83</sup> Citing *Kowalski*, the Ninth Circuit noted that, because the harassment happened in such close proximity to the school:

[The] administrators could reasonably expect the harassment's effects to spill over into the school environment. Simply seeing their harassers in the hallway could well be disruptive for affected students. Similarly, a student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment. A student's ability to focus during the day could be impaired by intrusive worries about whether she or he would once again face uncomfortable and sexually intimidating comments immediately after school lets out.<sup>84</sup>

A federal district court in California took that analysis to the next level in *Shen v. Albany Unified School District*.<sup>85</sup> *Shen* “arise[s] out of disciplinary actions taken by Albany Unified School District (‘AUSD’ or ‘the District’) in response to racist and derogatory content posted on an Instagram account by several students at Albany High School (‘AHS’).”<sup>86</sup> Upon discovery of the account, “AUSD expelled the account’s creator and suspended the other students involved.” “Plaintiffs, who [were] the disciplined students, alleged violations of free speech and due process under the federal constitution and California state law, . . . among other relief.”<sup>87</sup>

While the court in *Shen* overturned the school discipline and suspensions of some of the minimally-involved students,<sup>88</sup> the court found no First Amendment violation in the discipline of the account’s creator and other students who “meaningfully” contributed to the comments and content.<sup>89</sup> Looking both to *Kowalski* and *C.R.*, the court held that “these cases establish that students have the right to be free of online posts that denigrate their race, ethnicity or physical appearance, or threaten violence. They have an equivalent right to enjoy an education in a civil, secure, and safe school environment. [The Plaintiffs] impermissibly interfered with those rights.”<sup>90</sup>

What stands out from these cases is a clear direction that courts are willing to allow school districts to impose disciplinary consequences for bullying and cyberbullying, to the extent it spills over and affects the school

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<sup>83</sup> *Id.* at 1150-51 (“Under either the nexus test or the reasonable foreseeability test, the School District could take reasonable disciplinary action against C.R.’s off-campus speech.”).

<sup>84</sup> *Id.* at 1151.

<sup>85</sup> *Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2017 WL 5890089 (N.D. Cal. 2017).

<sup>86</sup> *Id.* at \*5.

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

<sup>88</sup> *Id.* at \*31-33, 38.

<sup>89</sup> *Id.* at 24, 26-27, 29.

<sup>90</sup> *Id.* at 31.

environment.<sup>91</sup> What also stands out is the increasingly narrow nexus to the school setting, creating not only an extension of authority for school officials to respond to claims of bullying and harassment occurring outside of school (including specifically cyberbullying), but accompanying responsibility to according to school policy in those situations.<sup>92</sup>

#### IV. INTERSECTION WITH FEDERAL REQUIREMENTS

Generally speaking, there is no federal law governing bullying.<sup>93</sup> However, the U.S. Department of Education's Office for Civil Rights (along with the courts) has interpreted harassment or bullying based on a protected class (i.e. race, gender, disability) to constitute discriminatory conduct under federal civil rights laws including Title IX, Title VI, and Section 504 of the Rehabilitation Act.<sup>94</sup>

Assuming that no "special relationship" exists between the child and district, parents may succeed on a constitutional claim brought under 42 U.S.C. §1983 if they can demonstrate that the school district created the danger that led to the bullying of the student and the resulting harm.<sup>95</sup> However, to succeed on the "state-created danger" theory, courts in states recognizing that theory require a showing that the district engaged in an affirmative act.<sup>96</sup> A mere failure to act is not sufficient.<sup>97</sup> For example, in *Morrow v. Balaski*, the Third Circuit ruled that the parents could not show that the district used its authority in a way that "created a danger or rendered the [two students] 'more vulnerable . . .'"<sup>98</sup> The parents contended that the suspension of the alleged bully made her more likely to retaliate when she

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<sup>91</sup> See generally *id.*; *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142 (9th Cir. 2016); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

<sup>92</sup> See generally *Shen*, 2017 WL 5890089; *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142; *Kowalski*, 652 F.3d 565.

<sup>93</sup> *Federal Laws*, *supra* note 8. ("At present, no federal law directly addresses bullying.")

<sup>94</sup> See *id.* (A school that fails to respond appropriately to harassment of students based on a protected class may be violating one or more civil rights laws enforced by the Department of Education and the Department of Justice, including: . . . Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, [and] Section 504 of the Rehabilitation Act of 1973 . . ."); DARCY L. PROCTOR, JOHN FOSKETT & LINDA L. YODER, CIVIL RIGHTS LIABILITY IN THE PUBLIC SCHOOLS – A 19<sup>TH</sup> CENTURY LAW WRESTLES WITH 21<sup>ST</sup> CENTURY PROBLEMS 13 (2016), <https://cdn-files.nsba.org/s3fs-public/09-Proctor-Foskett-Civil-Rights-Liability-in-the-Public-Schools-Paper.pdf>.

<sup>95</sup> *Id.* at 5-7, 9.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 9 (noting that "the passive inaction of school . . . did not satisfy the affirmative act requirement . . .").

<sup>98</sup> *Morrow v. Balaski*, 719 F.3d 160, 178 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 824 (2013).

returned, but the court held that this was not an affirmative act on the district's part.<sup>99</sup>

U.S. Department of Education's Office for Civil Rights ("OCR") has issued non-regulatory guidance on many occasions, noting that school districts must examine carefully the substance of bullying conduct to determine whether it also constitutes disability, race, national origin, or sex discrimination.<sup>100</sup> OCR has noted that if the conduct in fact constitutes discrimination, districts must act in accordance with Section 504, Title II, Title VI, or Title IX by investigating, taking "steps reasonably calculated to end the [harassment], eliminate any hostile environment, [and] prevent the harassment from recurring . . ."<sup>101</sup> Furthermore, districts must satisfy those requirements regardless of whether their own internal anti-bullying policies also come into play.<sup>102</sup>

However, one should note that the U.S. Education Department has proposed new Title IX regulations that would change the way schools must address sexual harassment.<sup>103</sup> The 60-day comment period will end January 28, 2019.<sup>104</sup> The proposed rule requires "schools to 'respond meaningfully'

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<sup>99</sup> *Id.* at 177-78; *see also* *Waters v. Perkins Local Sch. Dist. Bd. of Educ.*, No. 3:12 CV 732, 2014 U.S. Dist. LEXIS 43660, at \*58-59 (N.D. Ohio 2014) (finding that a district's failure to respond to complaints of bullying did not constitute an affirmative act for the purposes of the state-created danger theory); *Spring v. Allegany-Limestone Cent. Sch. Dist.*, 138 F. Supp. 3d 282, 293 (W.D.N.Y. 2015), *aff'd in part, rev'd in part*, 655 F. App'x 25 (2d Cir. 2016) (stating that "passive conduct, such as the failure to punish, does not fall within [the state-created danger] exception" to the 14th Amendment); *Lamberth v. Clark Cnty. Sch. Dist.*, 698 F. App'x 387, 388 (9th Cir. 2017) (holding that a Nevada district and various school officials who purportedly failed to properly report the bullying of a student who later committed suicide could not be held liable for federal civil rights violations).

<sup>100</sup> *See, e.g.*, Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Dear Colleague 1-2 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (also available at 55 IDELR 174).

<sup>101</sup> *See, e.g., id.* at 1; Letter Responding to Bullying of Students with Disabilities from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Dear Colleague 1-4 (Oct. 21, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf> (also available at 64 IDELR 115).

<sup>102</sup> Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101, at 6 ("[I]n addition to addressing the bullying under the school's anti-bullying policies, schools should promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided to a student with a disability who has been bullied and who is experiencing any adverse changes in academic performance or behavior.").

<sup>103</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 15, 2018) (to be codified at 34 C.F.R. pt. 106); David M. Walker, *U.S. Department of Education Releases Proposed Title IX Rule*, BARLEY SNYDER (Nov. 16, 2018), <https://www.barley.com/us-department-of-education-releases-proposed-title-ix-rule>.

<sup>104</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 15, 2018) (to be codified at 34 C.F.R. pt. 106).

to every known report of sexual harassment.”<sup>105</sup> It also seeks to reinstitute the “deliberate indifference” standard.<sup>106</sup> Under this standard, a school violates Title IX only if it knows about the harassment and then responds in a manner that is deliberately indifferent.<sup>107</sup>

Students with disabilities are also often the target of bullying and harassment, and recent guidance and case law at the federal level have noted that schools have an “obligation to ensure that a student with a disability who is the target of bullying continues to receive a [free appropriate public education (“FAPE”)] in accordance with his or her IEP” or Section 504 plan.<sup>108</sup> “The school should, as part of its appropriate response to the bullying, convene the IEP [or Section 504] Team to determine whether, as a result of the effects of the bullying, the student’s needs have changed such that the IEP [or 504 plan] is no longer designed to provide [FAPE].”<sup>109</sup>

In *Dear Colleague Letter*:<sup>110</sup> *Responding to Bullying of Students with Disabilities*, OCR clarified that “any decisions made by the IEP team must be consistent with the IDEA provisions addressing parental participation and should keep the student with a disability in the original placement or setting (e.g., the same school and classroom) unless the student can no longer receive FAPE in that placement or setting.”<sup>111</sup>

Additionally, OCR indicated that the effects of bullying may cause “adverse changes in a student's academic performance or behavior,” which could trigger a district's duty to “convene the IEP team or Section 504 team.”<sup>112</sup> Such changes may include “a sudden decline in grades, the onset

<sup>105</sup> Walker, *supra* note 103; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61497 (to be codified at 34 C.F.R. pt. 106).

<sup>106</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61497 (to be codified at 34 C.F.R. pt. 106).

<sup>107</sup> *Id.*

<sup>108</sup> Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101, at 5.

<sup>109</sup> *Id.*; Letter from Melody Musgrove, Director for Office of Special Edu. Programs, and Michael K. Yudin, Acting Assistant Sec'y for Office of Special Edu. and Rehabilitative Services, U.S. Dep't of Educ., to Dear Colleague 3 (Aug. 20, 2013), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf> (also available at 61 IDELR 263); *J.M. v. Dep't of Educ.*, 224 F. Supp. 3d 1071 (D. Haw. 2016) (The detailed crisis plan that the Hawaii ED developed for an 11-year-old boy with autism who had left the public school system due to severe bullying by schoolmates convinced the District Court that the district took adequate steps to address actual and perceived peer harassment.).

<sup>110</sup> Dear colleague letters are guidance documents written to educational administrators that explain the OCR's legal positions and enforcement priorities. The letters lack the force of congressionally made law, but courts pay them great attention due to deference prescribed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Matthew R. Triplett, Note, *Sexual Assault On College Campuses: Seeking The Appropriate Balance Between Due Process And Victim Protection*, 62 DUKE L.J. 487, 488 (2012).

<sup>111</sup> Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101, at 5.

<sup>112</sup> *Id.* at 6.

of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of . . . services.”<sup>113</sup>

In *T.K. and S.K. v. New York City Department of Education*, the Second Circuit held that a New York district made a costly mistake when it allegedly informed the parents of a third-grader with LD that peer bullying was not an appropriate topic for discussion at the student's IEP meetings.<sup>114</sup> Holding that the district impeded the parents' participation in the IEP process,<sup>115</sup> the Second Circuit affirmed the district court's decision that the parents could recover the cost of the student's unilateral private placement.<sup>116</sup> The Second Circuit observed that the parents had good reason to believe that peer harassment would interfere with their daughter's ability to make educational progress.<sup>117</sup> “Denying [the] parents the opportunity to discuss bullying during the creation of [the student's] IEP not only potentially impaired the substance of the IEP but also prevented them from assessing the adequacy of their child's IEP,” U.S. Circuit Judge Raymond J. Lohier, Jr. wrote for the three-judge panel.<sup>118</sup> The Second Circuit did not decide whether the failure to address bullying in the student's IEP amounted to a substantive denial of FAPE.<sup>119</sup>

“Section 504 and Title II also require a school with notice of possible disability-based harassment to take prompt and effective steps to determine what occurred and to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from recurring.”<sup>120</sup> Accordingly, OCR would find a disability-based harassment violation under Section 504 and Title II when:

- “[A] student is bullied based on a disability;”<sup>121</sup>
- “[T]he bullying is sufficiently serious to create a hostile environment;”<sup>122</sup>

<sup>113</sup> *Id.*

<sup>114</sup> *T.K. and S.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 872-74, 876 (2d Cir. 2016).

<sup>115</sup> *Id.* at 876-77.

<sup>116</sup> *Id.* at 874.

<sup>117</sup> *Id.* at 876-77.

<sup>118</sup> *Id.* at 877.

<sup>119</sup> *Id.* at 876 n.3 (“Because we hold that the Department denied L.K. a FAPE as a result of its procedural violations, we also need not and do not reach the question whether the bullying at issue here was so severe that the failure to address it in L.K.'s IEP resulted in a substantive denial of a FAPE.”).

<sup>120</sup> *SmartStart: Bullying with Harassment of Students with Disabilities*, SPECIAL ED CONNECTION <https://www.specialedconnection.com/LrpSecStoryTool/printDoc.jsp?docid=10005&chunkid=372104> (citing Westfield (MA) Pub. Schs., 53 IDELR 132 (OCR 2009); and Letter from Russlynn to Dear Colleague, *supra* note 10).

<sup>121</sup> Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101, at 4.

<sup>122</sup> *Id.*



- “[S]chool officials know or should know about the bullying;”<sup>123</sup>  
and
- “[T]he school does not respond appropriately.”<sup>124</sup>

Similarly, courts will find a violation of Section 504 when the district acted in “bad faith or gross misjudgment” and the student at issue “(1) is a qualified individual with a disability; (2) was denied the benefits of a program or activity of a public entity receiving federal funds; and (3) was discriminated against based on her disability.”<sup>125</sup> The school’s failure to respond appropriately is a factor courts may consider to determine the district’s culpability.<sup>126</sup> Thus, under both OCR’s test and the court’s test, whether the district violated Section 504 will frequently turn on whether it investigated the alleged harassment in a timely manner and took appropriate steps to prevent it from recurring.<sup>127</sup>

For example, in *Lewis v. Blue Springs School District* evidence suggested a district did not address persistent peer bullying that exacerbated a student’s depression and led him to take his own life.<sup>128</sup> The district faced charges that it prevented the student from participating in and benefitting from the district’s programs and activities on the basis of disability.<sup>129</sup> Because the student had an IEP that addressed his depression, ADHD, and speech impairment, the judge observed that he was a qualified individual with a disability.<sup>130</sup> She further noted that the parent alleged a denial of benefits, stating that: “[The parent alleges] that the [district’s] actions and inactions prevented [the student] from participating in and benefitting from an education in the [district’s] schools, i.e., he required in-patient treatment due to his experiences with bullying and eventually committed suicide.”<sup>131</sup> As for the third element, the parent maintained that the district was aware of the student’s prior suicide attempt and hospitalization.<sup>132</sup> Nonetheless, the parent alleged, the district treated incidents of peer “bullying as teasing or

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *M.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008); *see also* 29 U.S.C. § 794(a) (2018) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

<sup>126</sup> *Lewis v. Blue Springs Sch. Dist.*, No. 4:17-cv-00538-NKL, 2017 U.S. Dist. LEXIS 181671, at \*29-30 (W.D. Mo. 2017).

<sup>127</sup> *See generally id.*; Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101, at 4-5.

<sup>128</sup> *Lewis*, 2017 U.S. Dist. LEXIS at \*12-13, 37-39.

<sup>129</sup> *Id.* at \*29.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*29-30.

kids being kids . . . .”<sup>133</sup> As Judge Laughrey explained, such allegations, if true, could support a finding that the district discriminated against the student on the basis of his disabilities.<sup>134</sup>

Similarly, in *Krebs v. New Kensington-Arnold School District*, the parents successfully alleged a violation of the Individuals with Disabilities Act’s (“IDEA”) Child Find requirements related to the student’s suicide.<sup>135</sup> The district argued that the parents failed to state a claim for relief under Section 504 and Title II because they did not allege that the student had a disability.<sup>136</sup> The court disagreed, finding the allegations that a Pennsylvania school district failed to evaluate a teenager’s need for special education and related services, despite having knowledge of her bullying-related diagnoses of anxiety, depression, and anorexia nervosa, were sufficient to state claims for relief under Section 504, Title II, and the IDEA.<sup>137</sup>

As the court observed from the complaint, the parents informed district officials that the student had been diagnosed with multiple conditions as a result of the severe and persistent bullying she was experiencing and school.<sup>138</sup> The parents also alleged that the student’s teachers were aware of the impact of the student’s disabilities, as the student “lost thirty pounds” and began getting F’s instead of her usual A’s and B’s.<sup>139</sup> U.S. District Judge Mark A. Kearney explained that such statements indicated the existence of a disability as defined by Section 504 and Title II.<sup>140</sup> Specifically, “[the student’s] disability (her anxiety, depression, and anorexia nervosa) severely impacted a major life activity including, at a minimum, her education.”<sup>141</sup>

Turning to the IDEA claim, Judge Kearney observed that the district’s purported knowledge of the student’s difficulties during the previous school year raised questions as to why it did not evaluate her earlier.<sup>142</sup> As such, the parents adequately alleged a violation of the IDEA’s child find requirement.<sup>143</sup> The court also held that the parents did not have to exhaust their administrative remedies, as the student’s suicide in February 2015 made

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

<sup>134</sup> *Id.* at \*30.

<sup>135</sup> *Krebs v. New Kensington-Arnold Sch. Dist.*, No. 16-610, 2016 U.S. Dist. LEXIS 159059, at \*18-19, 23 (W.D. Pa. 2016).

<sup>136</sup> *Id.* at \*15.

<sup>137</sup> *Id.* at \*14-15, 18-19, 23.

<sup>138</sup> *Id.* at \*15, 17-18.

<sup>139</sup> *Id.* at \*17.

<sup>140</sup> *Id.* at \*15-16.

<sup>141</sup> *Id.* at \*15.

<sup>142</sup> *Id.* at \*18 (“[T]he District knew or should have known [the student] likely suffered from a disability for a much longer period of time, and they should have been been [sic] investigated the possibility sooner . . .”).

<sup>143</sup> *Id.* at \*18-19.

exhaustion futile.<sup>144</sup> Thus, the District Court denied the district's motion to dismiss the parents' child find and discrimination claims.<sup>145</sup>

However, the successes noted in these cases are not as simple as they may appear. While the OCR's test and the court's test may appear similar, a plaintiff suing a school district for damages in court faces a more difficult burden in establishing liability than a complainant initiating a complaint with OCR.<sup>146</sup> The approach taken by the majority of federal courts in determining liability for harassment stems from the standards set down by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*.<sup>147</sup> In *Davis*, the Court held that peer-on-peer harassment cases require a showing of deliberate indifference on the part of the school in order to impose liability.<sup>148</sup> According to the Court, this higher standard means that a district "may not be liable for damages unless . . . the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."<sup>149</sup> A court's finding that the district investigated incidents of bullying and made a reasonable effort to address these incidents may be sufficient to dismiss a petitioner's claim.<sup>150</sup>

## V. CONCLUSION

As students, school personnel, parents, and politicians have made clear in the past several years, issues related to the bullying and harassment of students are having a significant impact on the education of youth in Illinois.<sup>151</sup> Closely connected to issues related to bullying and harassment,

<sup>144</sup> *Id.* at \*19 ("As alleged, [the student] passed in February 2015 before exhausting her administrative remedies. Exhaustion is futile given [the student's] passing, and as a result, this circumstance is one of the narrow exceptions . . .").

<sup>145</sup> *Id.* at \*23.

<sup>146</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999).

<sup>147</sup> See generally *S.B. v. Bd. of Educ.*, 819 F.3d 69, 75 (4th Cir. 2016); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015); *T.K. v. Town of Barnstable*, No. 17-cv-11781-DJC, 2018 U.S. Dist. LEXIS 132251, at \*9 (D. Mass. Aug. 7, 2018); *Francoeur v. D.L.*, No. 3:15cv953 (JBA), 2017 U.S. Dist. LEXIS 157716, at \*8-9 (D. Conn. Sep. 25, 2017); *Butler v. Mt. View Sch. Dist.*, No. 3:12-CV-2038, 2013 U.S. Dist. LEXIS 120867, at \*18-19 (M.D. Pa. Aug. 26, 2013).

<sup>148</sup> *Davis*, 526 U.S. at 642-43 (stating that "recipients [of federal funds] could be liable in damages only where their own deliberate indifference effectively 'caused' the discrimination").

<sup>149</sup> *Id.* at 644-45.

<sup>150</sup> See *id.*; see also 105 ILL. COMP. STAT. 5/27-23.7(a) (2019); *S.B. v. Board of Educ. of Harford County*, 819 F.3d 69 (4th Cir. 2016) (holding that because the district investigated each reported incident of bullying, assigned the student an aide, and disciplined the perpetrators, the district did not act with deliberate indifference to the harassment).

<sup>151</sup> See *Bullying Prevention*, ILL. ST. BD. EDUC., <https://www.isbe.net/Pages/Bullying-Prevention.aspx> (last visited Mar. 30, 2019); Lexy Gross, *State Schools Will Investigate After-Hours Bullying*, CHI. TRIB. (Jan. 30, 2015, 6:57 PM), <https://www.chicagotribune.com/news/ct-cyberbullying-legislation-met-20150130-story.html>; see generally *Bullying and School Climate*, AM. PSYCHOL. ASSOC., <https://www.apa.org/advocacy/interpersonal-violence/bullying-school-climate> (last visited Mar. 30, 2019).

and which are also on the forefront of everyone's mind, are school safety issues.<sup>152</sup> After school shootings like Parkland, Florida, have made safety a front-burner issue, our schools are working to solve this problem on multiple fronts: security protocols, gun legislation, mental health initiatives, and crisis planning.<sup>153</sup> The response and activities have been significant and have likely been a part of almost every school district's planning for the current school year.

As those plans are created and new protocols are put into place, have we properly accounted for the legal requirements to ensure that students can participate in school free from bullying, harassment, and other conduct which may interfere with learning and the orderly operation of the school? Furthermore, are we also confronting these issues with an eye toward the mental health crisis facing America's schools? According to a 2016 report published by NPR, about twenty percent (20%) of students face mental illness during any given year, and the vast majority of those students receive no treatment or mental health services.<sup>154</sup> These students face academic, social, and behavioral difficulties which, in the worse cases, can result in safety concerns for the student and others.<sup>155</sup>

Even with careful planning and awareness, safety issues, threats, and other crises are likely to continue to occur on school campuses.<sup>156</sup> To that end, the Secret Service National Threat Assessment Center ("NTAC") states that creating "a culture of safety, respect, trust, and social and emotional support" is a "crucial component" to "preventing targeted violence [in] schools."<sup>157</sup> NTAC suggests that schools take action to "[h]elp students feel more connected to their classmates and the school" by "encourag[ing]

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<sup>152</sup> See generally Tammy B. Pham, Lana E. Schapiro, Majnu John & Andrew Adesman, *Weapon Carrying Among Victims of Bullying*, 140 PEDIATRICS e20170353 (2017), <https://pediatrics.aappublications.org/content/pediatrics/140/6/e20170353.full.pdf>.

<sup>153</sup> See generally Isaac Smith, *In Wake of School Shootings, Southern Illinois Educators Weigh Additional Safety Measures with Budget Realities*, SOUTHERN (Mar. 2, 2018), [https://thesouthern.com/news/local/education/in-wake-of-school-shootings-southern-illinois-educators-weigh-additional/article\\_3e9a1c6b-7964-552c-8be3-52f875d54d77.html](https://thesouthern.com/news/local/education/in-wake-of-school-shootings-southern-illinois-educators-weigh-additional/article_3e9a1c6b-7964-552c-8be3-52f875d54d77.html); Donna Vickroy & Susan DeMar Lafferty, *'Safety Is About Being Alert': Drills, Controlled Access Now Part of the School Day Routine*, CHI. TRIB. (Aug. 17, 2018, 5:00 PM), <https://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-school-safety-infrastructure-st-0820-story.html>; Sarah Zimmerman, *Illinois Plan: Replace Armed School Officers With Therapists*, U.S. NEWS (Apr. 20, 2018), <https://www.usnews.com/news/best-states/illinois/articles/2018-04-19/illinois-lawmakers-grapple-with-school-safety-after-parkland>.

<sup>154</sup> Meg Anderson & Kavitha Cardoza, *Mental Health in Schools: A Hidden Crisis Affecting Millions of Students*, NPR (Aug. 31, 2016, 6:00 AM), <https://www.npr.org/sections/ed/2016/08/31/464727159/mental-health-in-schools-a-hidden-crisis-affecting-millions-of-students>.

<sup>155</sup> *Id.*

<sup>156</sup> NAT'L THREAT ASSESSMENT CTR., U.S. SECRET SERV., ENHANCING SCHOOL SAFETY USING A THREAT ASSESSMENT MODEL: AN OPERATIONAL GUIDE FOR PREVENTING TARGETED SCHOOL VIOLENCE 23 (2018), [https://www.secretservice.gov/data/protection/ntac/USSS\\_NTAC\\_Enhancing\\_School\\_Safety\\_Guide\\_7.11.18.pdf](https://www.secretservice.gov/data/protection/ntac/USSS_NTAC_Enhancing_School_Safety_Guide_7.11.18.pdf).

<sup>157</sup> *Id.* at 19.

teachers and staff to build positive, trusting relationships with students,” as well as to break “codes of silence” by helping students feel empowered to come forward and “share concerns” and problems with a trusted adult.<sup>158</sup>

Similarly, the National Association of School Psychologists recommends that educators “[p]romote a positive school climate through school-wide prevention programs,” including –

- “Mak[ing] use of universal social emotional programming that increases students’ problem-solving capacity”;<sup>159</sup>
- “Conducting school wide screenings for mental health concerns”;<sup>160</sup>
- “Improv[ing] school connectedness. Doing so decreases behavioral issues and increases academic achievement, and in turn mitigates the potential for violence. A positive school climate and school connectedness also increases the odds of students reporting concerning peer behavior”;<sup>161</sup> and
- “Train[ing] all school staff members to identify risk factors and warning signs of violence.”<sup>162</sup>

In addition, schools should “[i]dentify community resources that can be activated to support students. Such resources may include community crisis centers, mental health professionals, law enforcement, and child protective services.”<sup>163</sup>

These factors become laser-focused when considering the needs of students who may face other barriers to feeling connected to the school community (whether due to social deficits caused by a disability, mental health concerns, the effects of bullying and harassment, or other factors).<sup>164</sup> When those needs result from peer issues, including bullying and harassment,

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

<sup>159</sup> MELISSA A. LOUVAR REEVES & STEPHNE E. BROCK, NAT’L ASSOC. OF SCH. PSYCHOLOGISTS, RESPONDING TO STUDENTS WHO THREATEN VIOLENCE: HELPING HANDOUT FOR THE SCHOOL. 4 (2018), [https://www.nasponline.org/Documents/Resources%20and%20Publications/Resources/Crisis/Threat\\_Assessment\\_Reeves.Brock\\_2018\\_Rev.pdf](https://www.nasponline.org/Documents/Resources%20and%20Publications/Resources/Crisis/Threat_Assessment_Reeves.Brock_2018_Rev.pdf).

<sup>160</sup> *Id.*

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

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 5.

<sup>164</sup> See generally Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101; Letter from Russlynn Ali to Dear Colleague, *supra* note 39.

the school must make sure that it is carefully addressing the issue consistent with its policies and the law.<sup>165</sup>

Regardless, studies conducted by the Secret Service's NTAC and others have indicated that creating safe school climates increases the likelihood that students will speak up in order to prevent bullying, harassment, and violence at school.<sup>166</sup> It also increases the ability of the school to address the negative or stressful events a student has experienced.<sup>167</sup> Both of these factors – students speaking up and the ability of the school to address the events a student has experienced – are key to the prevention of violence and the success of school safety and crisis planning.<sup>168</sup> This impact may be the most important for our anti-bullying efforts in Illinois' schools.

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<sup>165</sup> Letter from Catherine E. Lhamon to Dear Colleague, *supra* note 101, at 4, 6; Letter from Russlynn Ali to Dear Colleague, *supra* note 39 at 3-4.

<sup>166</sup> See NAT'L THREAT ASSESSMENT CTR., *supra* note 160 at 23; *Bullying and School Climate*, *supra* note 154; Alex Diaz-Granados, *I was Bullied as a Child with Special Needs. Here's How You Can Protect Your Kid*, EDUC. POST (Mar. 2, 2018), <https://educationpost.org/i-was-bullied-as-a-child-with-special-needs-heres-how-you-can-protect-your-kid/>.

<sup>167</sup> See generally NAT'L THREAT ASSESSMENT CTR., *supra* note 160; Kristen E. Darling & Deborah Temkin, *A Positive School Climate Can Mean a Successful School Year*, CHILD TRENDS (Sep. 3, 2014), <https://www.childtrends.org/a-positive-school-climate-can-mean-a-successful-school-year>.

<sup>168</sup> See *Bullying and Harassment of Students with Disabilities*, PACER'S NATIONAL BULLYING PREVENTION CENTER, <https://www.pacer.org/bullying/resources/students-with-disabilities/>; Camilla Benbow, *Positive School Climates Can Reduce Bullying*, VANDERBILT (Nov. 21, 2013), <https://my.vanderbilt.edu/camillabenbow/news/positive-school-climates-can-reduce-bullying/>.