

# 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

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## I. INTRODUCTION

In 21st century America, bullying<sup>1</sup> of children by other children at school continues at epidemic levels.<sup>2</sup> Organizations as diverse as the Department of Health and Human Services (through the National Institutes of Health and Health Resources and Services Administration (HRSA)),<sup>3</sup> the National Crime Prevention Council,<sup>4</sup> the National Youth Violence Prevention Resource Center,<sup>5</sup>

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1. "Bullying may be physical, involving hitting or otherwise attacking the other person; verbal, involving name-calling or threats; or psychological, involving spreading rumors or excluding a person." News Release, National Institute of Child Health and Human Development, National Institutes of Health (NIH), *Bullying Widespread in U.S. Schools, Survey Finds* (Apr. 24, 2001), available at <http://www.nichd.nih.gov/new/releases/bullying.cfm> [hereinafter NIH News Release]; see also NATIONAL YOUTH VIOLENCE PREVENTION RESOURCE CENTER, *TEEN FACTS, BULLYING*, at <http://www.safeyouth.org/scripts/teens/docs/bullying.pdf> (2002) (noting that bullying involves a wide range of behavior having in common trying to harm someone who is weaker or more vulnerable) [hereinafter TEEN FACTS].

2. See James Snyder et al., *Observed Peer Victimization During Early Elementary School: Continuity, Growth, and Relation to Risk for Child Antisocial and Depressive Behavior*, 74 CHILD DEV. 1881, 1885 (2003) (showing children age 5 to 7 may be bullied as often as once every three to six minutes); AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, *AACAP FACTS FOR FAMILIES #80: BULLYING* (Mar. 2001) (citing surveys that indicate as many as half of all children are bullied at some time during their school years and 10% are bullied on a regular basis), <http://www.aacap.org/publications/factsfam/80.htm>; John A. Calhoun, *Editorial: New Survey Reveals Bullying Biggest Threat Seen by U.S. Teens*, CATALYST (Nat'l Crime Prevention Council, Washington, D.C.), Feb. 2003 ("Six out of ten American teenagers witness bullying in school once a day."), <http://www.ncpc.org/ncpc/ncpc/?pg=2088-8200-8206>; NIH NEWS RELEASE, *supra* note 1 ("Bullying is widespread in American schools, with more than 16 percent of U.S. school children saying they have been bullied by other students during the current term . . . ." (reporting findings of Tonja R. Nansel et al., *Bullying Behaviors among U.S. Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094 (2001)).

3. See NIH News Release, *supra* note 1.

4. See Calhoun, *supra* note 2.

5. See TEEN FACTS, *supra* note 1.

and the National Education Association,<sup>6</sup> have all targeted school bullying and its consequences in various initiatives and campaigns over the last several years.<sup>7</sup> These organizations argue that if schools and parents do not properly intervene to prevent bullying, the long-term ramifications for both the bully and the bullied could be disastrous.<sup>8</sup> In fact, there appears to be a new momentum among parents and educators to take the problem of bullying more seriously.<sup>9</sup> Recent violence at schools across the country, including the now-infamous Columbine school shooting,<sup>10</sup> has made educators, parents, and children more reluctant to accept that bullying is just a "normal part of growing up."<sup>11</sup>

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6. See NAT'L EDUC. ASS'N, NATIONAL BULLYING AWARENESS CAMPAIGN (NBAC), at <http://www.nea.org/schoolsafety/bullying.html> (last updated Aug. 12, 2002) [hereinafter NAT'L EDUC. ASS'N].

7. For instance, HRSA established the "Take a Stand. Lend a Hand. Stop Bullying Now!" campaign in February 2004 to address issues surrounding bullying. See HEALTH RES. AND SERVICES ADMIN., U.S. DEPT' OF HEALTH AND HUMAN SERVICES, STOP BULLYING NOW, at <http://www.stopbullyingnow.hrsa.gov> (last visited June 2, 2004). The National Crime Prevention Council, famous for McGruff the Crime Dog, launched the "Be Safe & Sound" campaign to "engage parents in a comprehensive approach to school safety and security." Calhoun, *supra* note 2. The National Education Association has launched the "National Bullying Awareness Campaign (NBAC)" to "assist communities in developing solutions that will eradicate bullying from America's public schools." NAT'L EDUC. ASS'N, *supra* note 6. Last, a recent survey found that 32 states and the District of Columbia have enacted some kind of bullying/harassment prevention program or legislation. See EDITORIAL PROJECTS IN EDUCATION, VIOLENCE AND SAFETY, at <http://www.edweek.org/context/topics/issuespage.cfm?id=39> (last visited Nov. 5, 2004) (registration required).

8. See, e.g., Ian Janssen, et al., *Associations Between Overweight and Obesity with Bullying Behavior in School-Aged Children*, 113 PEDIATRICS 1187, 1187 ("The social and psychological ramifications induced by the bullying-victimization process may hinder the social development of overweight and obese youth, because adolescents are extremely reliant on peers for social support, identity, and self-esteem."); AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, *supra* note 2 ("Children who are bullied experience real suffering that can interfere with their social and emotional development . . . . Some victims of bullying have even attempted suicide . . . ."); TEEN FACTS, *supra* note 1 (noting some bullied teens may seek violent retaliation against their tormentors or suicide); NIH News Release, *supra* note 1 (observing that both bullies and those bullied face social isolation, do poorly in school, and are more likely to suffer from depression and low self-esteem).

9. See *supra* note 7; Jane Gross, *Hot Topic at Summer Camps: Ending the Rule of the Bullies*, N.Y. TIMES, June 28, 2004, at A1 (noting that, in the summer camp context, bullying is "this summer's hot topic" and providing examples of camps hiring experts to help prevent potential bullying problems); Kellie Patrick, *Anti-Bully Policy Pairs Parents, Teachers*, PHILA. INQUIRER, at <http://www.philly.com/mld/philly/living/education/9036441.htm> (posted June 29, 2004) (describing school district's expected passage of a new anti-bullying policy on July 27, 2004).

10. On April 20, 1999, in Littleton, Colorado, two disaffected Columbine High School students went on a shooting rampage at their school, killing twelve students and one teacher, and wounding dozens of others. See *Investigators: 2 shooting suspects may have had help*, CNN.COM, Apr. 22, 1999, at <http://www.cnn.com/US/9904/21/school.shooting.05/>. For a comprehensive discussion of the legal issues surrounding violence in school, see generally Jeff Horner & Wade Norman, *Student Violence & Harassment*, 182 EDUC. L. REP. 371 (2004).

11. See TEEN FACTS, *supra* note 1 ("[B]ullying among children and teenagers has often been dismissed as a normal part of growing up."); NIH News Release, *supra* note 1 ("Being bullied is not just an unpleasant rite of passage through childhood . . . . It's a public health problem that merits attention."); see also *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at \*2, \*6 (D.N.H. Mar. 21, 2001) (principal's "response and lack of action was clearly unreasonable and demonstrated deliberate indifference," when he allegedly told harassed high school student that "peers can be mean in high school, which is a part of growing up," and that he should accept his offensive nickname and "move on"); Gross, *supra* note 9, at A15 ("In our culture, there used to be a

Even so, legal remedies for victims of bullying continue to be woefully inadequate.<sup>12</sup> Although victims of student-on-student sexual harassment have a claim for compensatory damages<sup>13</sup> under the federal gender discrimination in education law, Title IX of the Education Amendments of 1972,<sup>14</sup> the Supreme Court of the United States has yet to endorse the idea of a same-sex harassment cause of action for more common forms of bullying under Title IX (i.e., boys bullying boys or girls bullying girls).<sup>15</sup> That being said, there is some hope that same-sex harassment causes of action for bullying behavior may become more common under Title IX as an increasing number of courts<sup>16</sup> and the United States Department of Education<sup>17</sup> have adopted the reasoning of the Supreme Court's Title VII decision in *Oncale v. Sundowner Offshore Services, Inc.*<sup>18</sup> In these instances, decisions have embraced *Oncale's* central teaching that same-sex harassment need not depend upon sexual attraction or desire, but may also derive from nonsexual animus based on the failure of the harassed individual to live up to stereotypical gender norms.<sup>19</sup>

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belief that this was just the way it is,' said Larry Dieringer, executive director of Educators for Social Responsibility, a group devoted to social and emotional education for children. 'Columbine changed all that.'").

12. See *infra* Parts II and V. For instance, a bullied student could generally not sue a school district for tort damages because of sovereign immunity issues. See KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 632 (6th ed. 2004). Similarly, a tort action may be unavailable against responsible school officials because of these same principles. See, e.g., *Lentz v. Morris*, 372 S.E.2d 608, 610-611 (Va. 1988) (finding the doctrine of sovereign immunity protected a high school physical education teacher from negligence claim). 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.

13. Compensatory damages may include "pain and suffering, humiliation, and other physical and psychic harms." See Mark Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83, 83 (2002) [hereinafter Weber, *Damages Liability*].

14. 20 U.S.C. §§ 1681-1688 (2000). As discussed below, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), is the Supreme Court case which first recognized a peer sexual harassment claim under Title IX. See *infra* Part II.D.

15. Although bullying also occurs between the sexes, as case illustrations develop below, most nonsexual gender animus occurs in same-sex situations in which the stereotypical masculinity or femininity of a student is at the center of the bullying. See *infra* Part II. D. As between male and female same-sex bullying, males have been shown to be more likely to bully one another and more likely to be the victim of bullying. See Snyder et al., *supra* note 2, at 1883 ("Boys are consistently more aggressive and dominance oriented than girls, and most peer interaction during childhood occurs in same-gender groups.") (citing E.E. MACCOBY, *THE TWO SEXES: GROWING UP APART, COMING TOGETHER* (1998)). Moreover, males were more likely to say they had been bullied physically, whereas females were more likely to say they had been bullied verbally or psychologically. See NIH News Release, *supra* note 1.

16. See *infra* note 74 and accompanying text.

17. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., *TITLE IX, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES* 3 (January 2001) [hereinafter *REVISED SEXUAL HARASSMENT GUIDANCE*].

18. 523 U.S. 75 (1998). In *Oncale*, the Supreme Court recognized a same-sex harassment cause of action in the employment context under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2003). *Id.* at 79-80.

19. See *Oncale*, 523 U.S. at 80 ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such

Indeed, research studies and anecdotal evidence suggest that those victimized by bullying are typically students who do not fit stereotypical notions of what it is to be masculine or feminine, athletic, cool, or "in" at school.<sup>20</sup> Classic examples include not only children who are smaller,<sup>21</sup> younger,<sup>22</sup> gay or effeminate,<sup>23</sup> obese,<sup>24</sup> or from different countries,<sup>25</sup> but also children who look and/or act differently from other children as a result of physical and/or mental impairments (i.e., special education children).<sup>26</sup> It is the legal ramifications for verbally and physically abused special education

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discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

20. See NIH News Release, *supra* note 1 ("[B]ullies were less likely to make derogatory statements about other students' religion and race," and more likely to belittle their appearance or behavior).

21. See, e.g., *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at \*1 (D.N.H. Mar. 21, 2001) (noting that a male high school student "small for his age" was subjected to physical and verbal same-sex peer harassment).

22. See AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, *supra* note 2.

23. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (noting that harassers appeared motivated not by sexual desire, but rather by hostility based upon harassed student's perceived sexual orientation); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (noting that middle school student was subjected to same-sex harassment due to perceived homosexuality). There has been much written on the bullying and abuse of children who are, or perceived to be, homosexual. See, e.g., Katie Feiock, *The State to the Rescue: Using State Statutes to Protect Children from Peer Harassment in School*, 35 COLUM. J. L. & SOC. PROBS. 317 (2002); Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 FORDHAM URB. L. J. 641 (2001); Jeffrey I. Bedell, Note, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829 (2003); Lynn Mostoller, Note and Comment, *Freedom of Speech and Freedom from Student on Student Sexual Harassment in Public Schools: The Nexus Between Tinker v. Des Moines Independent Community School District and Davis v. Monroe County Board of Education*, 33 N.M. L. REV. 533 (2003). This article does not deal with same-sex harassment issues surrounding gay and lesbian children, but instead focuses on nonsexual, gender animus directed toward children with special education needs who do not meet stereotypical notions of masculinity or femininity.

24. See Janssen, et al., *supra* note 8, at 1187.

25. See, e.g., Catherine Gewertz, N.Y.C. *School to Address Complaints of Harassment*, EDWEEK.ORG June 9, 2004, at <http://www.edweek.org/ew/ewstory.cfm?slug=39Harass.h23&keywords=gewertz> (registration required) (describing physical and verbal abuse of Asian-American immigrant children at a Brooklyn, New York high school).

26. See *Johnson v. Indep. Sch. Dist. No. 47*, 194 F. Supp. 2d 939, 941-43 (D. Minn. 2002) (noting that female special needs student was verbally sexually harassed by both male and female fellow students in connection with a year book prank directed at her); see also Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1090 (2002) [hereinafter, Weber, *Disability Harassment*] ("Anyone who spent childhood in a public school in which special education students attend with other students knows that the children who are different are subjected to verbal abuse and physical intimidation everyday."); Gross, *supra* note 9, at A15 (describing typical victims of bullying to include those who are disabled). This is not to say that children with physical or mental impairments are all "special education" children; only those children with disabilities who have impairments, which require the provision of special education and related services, are covered under the federal special education law. See *infra* Part III.

children, mostly by members of their own gender, upon which this article focuses.<sup>27</sup>

Presently, most observers, and even the Supreme Court in its seminal student-on-student sexual harassment decision, *Davis v. Monroe County Board of Education*,<sup>28</sup> have yet to undertake a sufficient evaluation of the complex legal issues surrounding the bullying of special education children.<sup>29</sup> To date, commentators and lower courts have primarily focused on the Title IX implications for students subject to same-sex harassment by other students and then, mostly in the context of harassment based on the actual, or perceived, sexual orientation of the student.<sup>30</sup> Yet, when another student bullies a special education child based on that child's appearance, behavior, or failure to live up to stereotyped notions of gender, it is necessary to consider the intersection between Title IX and the primary federal special education law, the Individuals with Disabilities in Education Act (IDEA).<sup>31</sup>

27. There is also evidence that special education children bully and assault regular and other special education children at school. See, e.g., *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999) (finding that special education female student was raped, sexually abused, and harassed by fellow male special education students); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238 (10th Cir. 1999) (finding that male special education student sexually assaulted and harassed female special education student). The topic of bullying by special education children presents separate, complicated legal issues that are beyond the scope of this article. 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); Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77 (2000); Perry A. Zirkel, *The IDEA's Suspension/Expulsion Requirements: A Practical Picture*, 134 EDUC. L. REP. 19 (1999).

28. 526 U.S. 629 (1999).

29. *But cf. Davis*, 526 U.S. at 665-666 (Kennedy, J., dissenting) (questioning how federal special education law interacts with a peer sexual harassment theory under Title IX in cases in which the special education child is the bully subjected to discipline). The lack of judicial notice given to the predicament of bullied or harassed special education children is especially troubling as there are an estimated 6.7 million special education students, which constitutes about 14% of the total American public school population. See NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL STUDENT, STAFF, AND GRADUATE COUNTS BY STATE: SCHOOL YEAR 2000-2001 (April 2002), at <http://nces.ed.gov/pubs2002/2002348.pdf> (reporting the overall public school population in America in 2000-2001 as 47.2 million); Michelle R. Davis, *Senate Approves Bill to Reauthorize IDEA*, EDWEEK.ORG May 19, 2004, at <http://www.edweek.org/ew/ewstory.cfm?slug=37IDEA.h23&keywords=IDEA> (registration required).

30. See, e.g., *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1077-78 (D. Nev. 2001) (alleging violation of Title IX rights when school officials ignored gay high school student's complaints about sexual orientation harassment); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (noting that harassers appeared motivated not by sexual desire, but rather by hostility based on the harassed student's perceived sexual orientation); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (finding that middle school student was subjected to same-sex harassment because of perceived homosexuality).

31. 20 U.S.C. §§1400-1487 (2000). Two other federal disabilities laws are also potentially applicable to the bullying of special education children. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1999), makes it unlawful for programs receiving federal financial assistance, including schools, to discriminate or harass on the basis of disability. See *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001); *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022, 1032-33 (9th Cir. 1998). Similarly, Title II of the American with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12150 (2000), prevents state and local government entities, including public schools, from discriminating on the basis of disability in the providing of services and programs. These statutes are

Under IDEA, children with disabilities are entitled to a free and appropriate education (FAPE) in the least restrictive environment practicable.<sup>32</sup> In turn, a FAPE includes special education and related services which are reasonably calculated to permit a child with a disability to benefit educationally.<sup>33</sup> Consequently, actions taken by school districts to alleviate an unpleasant bullying situation for a special education child in order to comply with Title IX's dictates concerning peer sexual harassment may inadvertently also violate a child's right to a FAPE by altering that child's placement and/or programs.<sup>34</sup> To prevent placing school officials in this legal Catch-22, a legal model needs to be developed which ties the overlapping statutory frameworks of Title IX and IDEA together in one hybrid legal cause of action. Alternatively, if Title IX's stringent legal standards for peer sexual harassment cannot be met in a given bullying case even after incorporating IDEA concepts, IDEA may also provide legal bases for special education children to obtain monetary damages against school officials who have failed to protect them from bullying, which, in turn, has violated that child's right to a FAPE under IDEA.

With these issues at the forefront, this article advocates two IDEA-based legal models to increase the legal protections available for special education children who are the subject of same-sex harassment/bullying at school. The first proposal attempts to provide this additional protection by strengthening the *Davis* Title IX framework for peer sexual harassment at school by incorporating IDEA concepts directly into that framework. Under this hybrid model, a school is liable for the same-sex harassment of a special education child where (1) the school had actual notice of the harassment; (2) the character of the harassment was severe, pervasive, and objectively offensive; (3) the school's response to the known harassment was clearly unreasonable in light of its obligations under Title IX and IDEA; and (4) the student was denied a free and appropriate education in the least restrictive environment practicable or otherwise denied access to appropriate educational opportunities and benefits as a result of the harassment.<sup>35</sup> Next, after addressing the lack of effective legal theories of recovery outside the Title IX context because of various procedural and substantive limitations on such claims,<sup>36</sup> this article sets forth a second legal model. The second legal model involves an IDEA-based § 1983 action for money damages,<sup>37</sup> while at the same time recognizing that special education

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not discussed in greater detail in this article, as the focus of this article is not on the bullying of special education children because these children have a disability, but rather because their disability leads other students of the same gender to regard them as not conforming to stereotypical notions of masculinity and femininity. For an excellent discussion of disability harassment by teachers and other students in the school context, including claims under section 504 of the Rehabilitation Act and Title II of the ADA, see Weber, *Disability Harassment*, *supra* note 26, at 1093-1134.

32. See *infra* Part III.

33. See *id.*

34. Just as a school's attempts to stop bullying can violate the special education rights of a child under IDEA, so can the actual bullying acts interfere with the provision of a FAPE to a special education student. See *infra* Part III.

35. See *infra* Part IV.A.

36. See *infra* Part V.

37. See *infra* Part VI.

plaintiffs should normally have to first exhaust their administrative remedies under IDEA before bringing such a claim.<sup>38</sup>

This article proceeds in the following manner: Part II sets forth the current state of same-sex harassment law under Title IX and argues that the current framework provides little effective relief for either regular or special education children who are the subject of unlawful bullying. Part III outlines pertinent IDEA provisions and their potential implications for bullied special education children. Part IV advances a legal model that seeks to enhance the protections for bullied special education children by strengthening the Title IX peer harassment framework by directing courts to consider special education students’ rights under IDEA when applying that framework. Part V examines various procedural and substantive limitations on advancing a § 1983 action for money damages in this context. Part VI advocates a second legal model, which seeks the expanded use of an IDEA-based § 1983 action against school officials for money damages for permitting bullying that subsequently interferes with a special education child’s rights under IDEA.

## II. TITLE IX, SAME-SEX HARASSMENT, AND BULLYING

As consideration of same-sex harassment in the K-12 environment is an inherently complex topic, this Part moves through a progression of subsections to consider the issues piecemeal. In the first subsection, a general overview of Title IX of the Education Amendments of 1972 is presented. Next, this article considers how the dictates of Title IX have been applied in the peer (student-on-student) harassment area. In the third subsection, the article examines the parallel employment discrimination federal statute, Title VII of the Civil Rights Act of 1964, in the same-sex harassment context to determine whether similar principles should apply to the educational arena. Next, the lack of recognition of Title IX same-sex claims, absent the presence of an assault, is considered. Finally, this Part concludes by exploring whether additional legal protections may exist for bullied special education students under IDEA.

### A. Title IX Primer

Title IX of the Education Amendments of 1972<sup>39</sup> prohibits sex discrimination in schools which receive federal education funding.<sup>40</sup> Although, as initially drafted, Title IX was limited to administrative enforcement actions brought by the federal government,<sup>41</sup> by 1979 the United States Supreme Court recognized that Title IX was enforceable by aggrieved individuals through an implied right

38. See *infra* Part V.B.2.

39. 20 U.S.C. §§ 1681-1688 (2000).

40. Title IX provides in relevant part: “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any education programs or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

41. 20 U.S.C. § 1682. The administrative mechanism requires the Office of Civil Rights within the Department of Education to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at iii-iv.

of action.<sup>42</sup> In 1992, the Supreme Court took two further important steps when it recognized that sexual harassment was a type of sex discrimination under Title IX and that consequently, monetary damages were available for private litigants in such cases.<sup>43</sup>

Although prior to 1992 it was clear that students alleging sexual discrimination and harassment at school could bring private damage suits under Title IX, the standard for holding schools vicariously liable for the harassing acts of their teachers and students was still unclear.<sup>44</sup> It was not until 1998, in the seminal *Gebser v. Lago Vista Independent School District* decision,<sup>45</sup> that the Supreme Court considered the question of teacher-on-student harassment and significantly limited the circumstances under which students could obtain money damages for sexually harassing or abusive conduct by their teachers.<sup>46</sup> Relying on the Spending Clause authority upon which Title IX was enacted,<sup>47</sup> as well as the fact that Title IX was modeled on Title VI of the Civil Rights Act of 1964,<sup>48</sup> the Court held that Title IX was in the nature of a contract between the federal government and school funding recipient.<sup>49</sup> As a result, in order for a school district to be liable for the sexually harassing acts of its teachers, the Court found that damages would have to arise from the misconduct of the school itself in handling problems of sexual harassment or abuse by teachers.<sup>50</sup> To establish such

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42. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 728 (1979). Since *Cannon*, Congress has amended Title IX twice and the fact that the implied private right of action remains intact has been construed by the Supreme Court as a validation of *Cannon's* holding. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992).

43. See *Franklin*, 503 U.S. at 74-75; see also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). The concept of sexual harassment originated from the Title VII case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 71 (1986), in which the Supreme Court recognized for the first time that sexual harassment is a form of sex discrimination in the employment context. *Id.* at 67.

44. Title IX actions must be brought against the school district, as individual liability is not available against school personnel. See *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

45. 524 U.S. 274 (1998).

46. *Id.* at 277. See David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 311 (2004) (stating that the Supreme Court set an "exacting standard" for liability under Title IX for teacher-on-student sexual harassment).

47. The Spending Clause of the United States Constitution states: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1. Title IX operates by conditioning federal assistance to schools based on their promise not to permit sex discrimination in any of their activities or programs. See *Gebser*, 524 U.S. at 286.

48. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1999).

49. Legislation enacted under the Spending Clause permits Congress to place conditions on the grant of federal funds. See *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002). Consequently, the *Gebser* Court observed that Spending Clause legislation like Title IX is "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Gebser*, 524 U.S. at 286 (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

50. See *Doe v. Green*, 298 F. Supp. 2d 1025, 1032 (D. Nev. 2004) (citing *Davis*, 526 U.S. at 641). The Supreme Court rejected a direct liability or negligence standard for imputing liability against a school district for the acts of its teachers because of the Spending Clause and the contractual nature of the statute. See *Gebser*, 524 U.S. at 284-286.

actionable misconduct, the Court required a sexually harassed student to prove three elements: (1) that there was an "appropriate person"<sup>51</sup> with the ability to take corrective action; (2) who had actual knowledge of the harassment,<sup>52</sup> and (3) who responded with deliberate indifference<sup>53</sup> to that knowledge.<sup>54</sup> This standard has since been widely criticized for unfairly establishing difficult hurdles for students to overcome and "unnecessarily thwart[ing] Title IX's purpose."<sup>55</sup>

## B. Peer Harassment Under Title IX

One year later in 1999, the Supreme Court considered the appropriate legal test for instances of student-on-student (or peer) sexual harassment at school. In *Davis v. Monroe County Board of Education*,<sup>56</sup> the Supreme Court found that, "student harassment of another student may constitute discrimination under Title IX when the funding recipient engages in harassment directly or when the funding recipient's deliberate indifference subjects its students to harassment."<sup>57</sup> Based on *Gebser*-like reasoning, not only did the Supreme Court apply the three required elements discussed in *Gebser*, but also further required that (1) the school exercise substantial control over both the harasser and the context in which the known harassment occurs;<sup>58</sup> and (2) that the sexual harassment in question be so severe, pervasive,<sup>59</sup> and objectively offensive<sup>60</sup> that it deprives

51. *Gebser* did not discuss who might be an "appropriate person" to institute corrective measures for purposes of Title IX liability for the school district. See *Baynard v. Lawson*, 112 F. Supp. 2d 524, 532 (E.D. Va. 2000); see also *Warren v. Reading Sch. Dist.*, 278 F.3d 163, 174 (3d Cir. 2002) (finding that although a principal is an "appropriate person" in a teacher on student sexual abuse case, a guidance counselor, on the facts before the *Warren* court, was not).

52. "Actual knowledge" is based on the proposition that it would not make sense to take away a school's federal funding if the school district did not know about the discrimination, and therefore, did not have the opportunity to cure it. See *Gebser*, 524 U.S. at 287.

53. "Deliberate indifference" occurs "only where the [school district]'s response to the harassment . . . is *clearly unreasonable* in light of the known circumstances." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 645, 648-49 (1999) (emphasis added). A school district need not remedy sexual harassment with a student's particular remedial demand or assure that students conform their conduct to school rules, but only to establish that it responded to the "known peer harassment in a manner that is not clearly unreasonable." See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (quoting in part *Davis*, 526 U.S. at 648-49); see also *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 825 (7th Cir. 2003). In taking an appropriate response, a school district may consider administrative burdens or the disruption of other students' or their teachers' schedules. See *Gabrielle M.*, 315 F.3d at 825.

54. See *Green*, 298 F. Supp. at 1032 (outlining three factors) (citing *Gebser*, 524 U.S. at 277).

55. See *Cohen*, *supra* note 46, at 315.

56. 526 U.S. 629 (1999).

57. *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at \*4 (D.N.H. Mar. 21, 2001) (citing *Davis*, 526 U.S. at 644-45).

58. *Davis*, 526 U.S. at 651-52. Misconduct that occurs during school hours and on school grounds satisfies this prong. See *id.* at 652.

59. *Davis*, and most subsequent case law suggest that a single act of harassment, no matter how severe, cannot meet this standard. See *id.* at 652-53; *Wilson v. Beaumont Indep. Sch. Dist.*, 144 F. Supp. 2d 690, 692 (E.D. Tex. 2001); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 450 (S.D.N.Y. 2000). But see *Doe v. Dallas Indep. Sch. Dist.*, No. CIV. A 3:01-CV-1092-R, 2002 WL 1592694, at \*6 (N.D. Tex. July 16, 2002) (finding that one instance of forced manual invasion of student's vagina by another student qualifies as sufficiently severe peer sexual harassment under Title IX).

victims of access to the educational opportunities or benefits provided by the school.<sup>61</sup> The Court emphasized, moreover, that “[d]amages are not available for simple acts of teasing and name-calling among school children, even where these comments target differences in gender.”<sup>62</sup> Thus, an arguably even higher bar was set for holding a school liable for money damages under Title IX for instances of peer sexual harassment.<sup>63</sup>

### C. A Statutory Precursor?: Same-Sex Harassment Under Title VII

Around this same time, the Supreme Court decided a same-sex harassment case in the employment context under Title VII of the Civil Rights Act of 1964.<sup>64</sup>

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60. Whether conduct is severe, pervasive, and objectively offensive turns on at least eight factors including: (1) the degree to which the conduct affected one or more students' education; (2) the type, frequency, and duration of the conduct; (3) the identity of and relationship between the alleged harasser and the subject or subjects of harassment; (4) the number of individuals involved; (5) the age and sex of the alleged harasser and the subject or subjects of harassment; (6) the size of the school, location of the incidents, and context in which they occurred; (7) other incidents at school; and (8) incidents of gender-based, but nonsexual harassment. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 5-7.

61. *Davis*, 526 U.S. at 651. “[D]epriving victims of access to educational opportunities,” does not mean that physical exclusion needs to be established, but such language does limit private damages to “cases having a systemic effect on educational programs or activities.” *Id.* at 651, 653. Other courts seem to have further limited this type of liability under Title IX to instances where harassed students have dropped grades, become homebound or hospitalized, or suffered physical violence. See *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.*, 163, 315 F.3d 817, 823 (7th Cir. 2003) (collecting cases); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000) (documenting severe physical and verbal abuse of German female student); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (physical violence against perceived homosexual student). *But see Gabrielle M.*, 315 F.3d at 828-29 (Rovner, J., concurring in part) (arguing that psychological trauma can equally deny a student access to educational opportunities and that future victims of harassment should not be punished just because they seem resilient); *see also Ray*, 107 F. Supp. 2d at 1171 (although physical violence deprived victim of access to education opportunities, court also found causing severe emotional trauma to a student could deny them access to an education).

62. *Davis*, 526 U.S. at 652. It also appears that courts are less likely to find actionable harassment if the harassing conduct is merely verbal, *see Burwell v. Pekin Cmty. High Sch. Dist.*, 303, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002) (collecting cases), or where the harassing conduct is between young children who are not aware of the sexual nature of their actions. *See Gabrielle M.*, 315 F.3d at 821-22. *But see Gabrielle M.*, 315 F.3d at 826 (Rovner, J., concurring in part) (“Harassing conduct need not be motivated by sexual desire, nor must it be overtly sexual in nature, in order to support a claim of sex discrimination.”); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1098 n.4 (D. Minn. 2000) (“[W]hile ordinary teasing is insufficiently severe to state a claim under [Title IX], the kind of sexually-oriented physical touching that plaintiff experienced is.”).

63. According to the Supreme Court, this higher standard was necessary “to eliminate any risk that [the funding] recipient would be liable in damages not for its own official decision” but instead for another’s “independent actions.” *See Davis*, 526 U.S. at 642-43; *see also Snelling v. Fall Mountain Reg’l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at \*5 (D.N.H. Mar. 21, 2001); *Horner & Norman*, *supra* note 10, at 379. Nevertheless, one element of the test—the “appropriate person” prong—may be easier to meet in the peer harassment environment than the teacher harassment context. This is because “a principal’s authority in the context of student on student harassment is much greater than her authority in the context of teacher on student harassment.” *See Baynard v. Lawson*, 112 F. Supp. 2d 524, 534 (E.D. Va. 2000) (citing *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1248 (10th Cir. 1999)).

64. 42 U.S.C. § 2000e-2000e-17 (2003). Title VII prohibits, *inter alia*, discrimination “because of sex” in employment. *See id.* § 2000e-2(a)(1).

In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>65</sup> the Supreme Court found, "that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person acting on behalf of the defendant) are of the same-sex."<sup>66</sup> More specifically, the Supreme Court indicated that one way that a Title VII claimant could establish harassment "because of sex" in the employment arena was to show that he or she was harassed in such sex-specific terms as to raise an inference of hostility toward his or her sex.<sup>67</sup> Moreover, in a previous Title VII sexual harassment case, *Price Waterhouse v. Hopkins*,<sup>68</sup> the Court had made clear that discrimination or harassment based on a failure to meet stereotypical gender expectations is actionable under Title VII.<sup>69</sup> Significantly, the Court recognized that these types of same-sex harassment claims were not based on any sexual desire or attraction toward the harassed individual, but rather on hostility based upon the failure of the victim to conform to stereotypical notions of masculinity or femininity.<sup>70</sup>

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65. 523 U.S. 75 (1998).

66. *Id.* at 79. The *Oncale* Court went on to say that, "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' . . . depends on a constellation of surrounding circumstances, expectations, and relationships." *Id.* at 82. Indeed, in any sexual harassment case, the crucial question is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80.

67. *Id.* at 81.

68. 490 U.S. 228 (1989).

69. See *id.* at 251 ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)); see also *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (same-sex harassment claim based on a failure to conform to gender stereotypes found actionable under Title VII); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090, 1092 (D. Minn. 2000) (although Title IX does not cover sexual orientation discrimination, a same-sex harassment claim may be brought based on sexual stereotyping); REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at v ("[I]t can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity or femininity.").

70. See *Nichols*, 256 F.3d at 874 ("At its essence, the systematic abuse directed at [plaintiff] reflected a belief that [plaintiff] did not act as a man should act."); REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at v ("[G]ender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program."). That being said, offensive behavior must be based on sex, rather than personal animus or other reasons. See *Burwell v. Pekin Cmty. High Sch. Dist.* 303, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002). If male students direct offensive behavior at both female and male students, the court is less likely to consider such "equal opportunity" harassing behavior gender-based sexual harassment. See *id.* at 931. For a more in-depth discussion about the distinction between "desire" sexual harassment and "animus" sexual harassment, see generally Marianne C. DelPo, *The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1 (1999); Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101 (2004); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

## D. The Present Status of Same-Sex Harassment Claims Under Title IX

Although the Supreme Court in the Title IX context has not addressed same-sex harassment claims,<sup>71</sup> there is every reason to believe that the teachings of *Oncale* will be incorporated into the educational setting.<sup>72</sup> First, with the exception of vicarious liability discussed above, the Supreme Court and other federal courts have generally incorporated Title VII sexual harassment legal standards into Title IX cases.<sup>73</sup> Second, the lower federal courts, state courts, and United States Department of Education have all considered the question of same-sex harassment under Title IX and have unanimously concluded that such claims are equally viable under Title IX as they are under Title VII.<sup>74</sup>

Nonetheless, most current same-sex harassment cases appear to involve sexual abuse or assaults rather than the more everyday, traditional bullying behavior with which most people are familiar, i.e., verbal taunting and/or less severe physical harassment or abuse based on the failure of a student to live up to stereotypical gender expectations.<sup>75</sup> For instance, although there are Title IX cases in which male students were sexually molested by male teachers,<sup>76</sup> in which male and female students were sexually abused by other students of their

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71. On the other hand, there is a general consensus among commentators that Title IX clearly does not cover claims of sexual orientation discrimination. See, e.g., Feiock, *supra* note 23, at 322; Nancy Hogshead-Makar & Sheldon Elliott Steinbach, *Intercollegiate Athletics' Unique Environment for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173, 183 n.53 (2003).

72. *Accord* Mayes, *supra* note 23, at 642, 650-51.

73. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992) (holding that Title VII jurisprudence provides guidance for interpretation of Title IX); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (Title VII may be used by analogy in the context of Title IX claims); *Montgomery*, 109 F. Supp. 2d at 1091 ("[N]o logical rationale appears to exist for distinguishing Title VII and Title IX in connection with . . . the circumstances under which abusive or offensive conduct amounts to harassment 'based on sex.'").

74. See, e.g., *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 220 (5th Cir. 1998) (same-sex harassment claim recognized under Title IX where third grade male teacher molested several male students); *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at \*4 (D.N.H. Mar. 21, 2001) (recognizing that peer harassment arising from the student perpetrators' stereotypes of masculinity is actionable under Title IX); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1077-78 (D. Nev. 2001) (assuming availability of same-sex peer harassment suit under Title IX while discussing punitive damages in such an action); *Vaird v. Sch. Dist. of Phila.*, No. CIV. A. 99-2727, 2000 WL 576441, at \*2 (E.D. Pa. May 12, 2000) (recognizing same-sex harassment claim between two second grade female students); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000) (finding that same-sex harassment is a form of harassment actionable under Title IX in peer harassment context); *Montgomery*, 109 F. Supp. 2d at 1092 (recognizing peer same-sex harassment based on perceived homosexuality of victim); *H.M. and M.M. v. Jefferson County Bd. of Educ.*, 719 So. 2d 793, 795 (Ala. 1998) ("We believe that the Supreme Court's *Oncale* definition of 'discrimination on the basis of sex' demonstrates that same-sex harassment may constitute discrimination on the basis of sex and that such discrimination is, therefore, actionable under Title IX, provided, of course, a plaintiff proves the remaining statutory factors."); REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 3 (citing as an example of illegal same-sex harassment a campaign of sexually explicit graffiti directed at a particular girl by other girls).

75. See Michele Goodwin, Symposium, *Sex, Theory, & Practice: Reconciling Davis v. Monroe & The Harms Caused By Children*, 51 DEPAUL L. REV. 805, 822 (2002) (suggesting that bullying is more often interpreted as a more aggressive or larger young male dominating the weaker male).

76. See *H.M. and M.M.*, 719 So. 2d at 794.

own gender,<sup>77</sup> or in which male or female students were sexually abused by other students based on their perceived, or actual, sexual orientation,<sup>78</sup> there is but one case which could be located based on a bullying scenario that did not involve sexual abuse or sexual assault.<sup>79</sup> In the special education context, only one case was located that involved same-sex harassment and that case involved a sexual assault.<sup>80</sup>

#### E. Are Bullied Special Education Children Any Better Off Than Their Regular Education Classmates?

In short, and problematically, few courts have actually found actionable same-sex harassment in cases under Title IX in which either a regular education or special education child is subject to severe, pervasive, or objectively offensive bullying without some form of sexually-oriented assault being alleged.<sup>81</sup> This current situation suggests that potential plaintiffs have analyzed the high threshold requirements for a peer sexual harassment claim, and contrary to Justice Kennedy's prediction in *Davis* of an "avalanche of liability" from this type of litigation,<sup>82</sup> have hesitated to bring Title IX peer sexual harassment cases that do not involve some form of severe, and usually criminal, sexual abuse.<sup>83</sup> This is certainly an unjust state of affairs, as a student should not have to await a crimi-

77. See *KF's Father v. Marriott*, No. CA 00-0215-C, 2001 WL 228353, at \*2-3, \*8 (S.D. Ala. Feb. 23, 2001) (same-sex sexual assault between two elementary school females); *Vaird*, 2000 WL 576441, at \*1 n.2 (female second grade student sexually assaulted another second grade female student).

78. See *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 879-880 (N.D. Ohio 2003) (Title IX claim survived summary judgment in case in which male student who advocated gay rights was physically and verbally abused by fellow male classmates based on perceived homosexuality); *Ray*, 107 F. Supp. 2d at 1170 (Title IX suit allowed to proceed where verbal same-sex harassment against middle school student based on perceived homosexuality escalated into assault and battery by fellow male student).

79. See *Snelling*, 2001 WL 276975, at \*2 (small male high school student taunted regularly by male classmates and subject to physical abuse when repeatedly hit in the head by a basketball until he was treated at a hospital for dizziness, blurred vision, and headache).

80. See *Wilson v. Beaumont Indep. Sch. Dist.*, 144 F. Supp. 2d 690, 691 (E.D. Tex. 2001). Citing *Davis*, the *Wilson* Court concluded that "[d]amages are not available for simple acts of teasing and name-calling among school children . . . even when such comments target differences in gender." *Id.* at 694 (quoting *Davis*, 526 U.S. at 651-52). The *Wilson* case thus seems to suggest that bullying, teasing, and name-calling alone, no matter how severe, pervasive, and objectively offensive, cannot lead to damages under Title IX. Not only is such a view unsupported by current Supreme Court case law and by the Department of Education, see *supra* note 74 and accompanying text, but the court's language gives further evidence of the need for an alternative damage action for harassed and bullied special education child utilizing IDEA-based remedies. See *infra* Parts IV and VI.

81. See Gigi Rollini, Notes & Comments, *Davis v. Monroe County Board of Education: A Hollow Victory for Student Victims of Peer Sexual Harassment*, 30 FLA. ST. U. L. REV. 987, 995 (2003) (observing that the only victims of peer sexual harassment who succeed under *Davis* are students "utterly debilitated by the harassment.").

82. See *Davis*, 526 U.S. at 657 (Kennedy, J., dissenting); see also Cohen, *supra* note 46, at 317 (arguing that the unsubstantiated fear of the *Gebser* and *Davis* Courts that federal courts would be deluged with Title IX sexual harassment lawsuits motivated the Supreme Court to deviate from common principles of statutory interpretation).

83. See *supra* Part II. D; see also Rollini, *supra* note 81, at 988 n. 1 (noting that, as of 2003, there have only been two successful peer sexual harassment cases under Title IX since *Davis* and this fact shows how severe the harassing conduct must be for one to be entitled to relief under Title IX).

nal attack on his or her person at school before being entitled to some form of civil relief.<sup>84</sup> In short, the current Title IX peer sexual harassment framework is so narrow that it is entirely ineffective in addressing the very serious and real issue of bullying of children at school based on their failure to conform to stereotypical notions of gender.<sup>85</sup>

Although the situation remains bleak for regular education children who are bullied at school, it is unnecessary for bullied special education children to suffer the same "normal part of growing up." The remaining sections of this article consider the added civil rights afforded to special education children under the IDEA special education law, and then subsequently explore two separate IDEA-based approaches for increasing the legal protection afforded to special education children who are bullied.

### III. IDEA AND THE BULLYING OF SPECIAL EDUCATION CHILDREN

The Individuals with Disabilities in Education Act (IDEA)<sup>86</sup> guarantees a free and appropriate education (FAPE)<sup>87</sup> to all children with disabilities.<sup>88</sup> To

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84. The Supreme Court itself noted as much in the Title VII context when it said that a sexually harassed female at work should not have to suffer a nervous breakdown before she is eligible for relief under Title VII. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). Accord *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 828-29 (7th Cir. 2003) (Rovner, J., concurring) (applying the teachings of *Harris* to the Title IX peer harassment context and arguing that "a hostile environment [at school] should be actionable before it results in consequences so dramatic as hospitalization or leaving school.").

85. Some members of Congress have seemed to recognize as much by recently introducing legislation that would overturn the *Gebser* and *Davis* decisions. See Cohen, *supra* note 46, at 315 n.21 (citing H.R. 3809, 108th Cong. §§ 111-14 (2004)); see also Horner & Norman, *supra* note 10, at 381 (arguing that some commentators believe that the current state of school violence law, including Title IX, gives little incentive to school districts to protect their students from violence); Mayes, *supra* note 23, at 646-647 (arguing that the *Davis* standard for peer sexual harassment cases has effectively limited successful suits); Meghan E. Cherner-Ranf, Comments, *The Empty Promises of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891, 1895 (2003) (arguing that Title IX does not provide meaningful relief for sexually harassed female students).

86. 20 U.S.C. §§ 1400-1487 (2000). The enactment of IDEA led to sweeping changes in the education of special needs children. It brought into the public schools more than one million children with disabilities who had been previously excluded or had received only limited educational services. See EDITORIAL PROJECTS IN EDUCATION, SPECIAL EDUCATION, at <http://www.edweek.org/context/topics/issuespage.cfm?id=63> (last visited Nov. 5, 2004). IDEA currently is estimated to cover 6.7 million students or about 14% of the public school student population. See *supra* note 29. Recently, Congress reauthorized the IDEA statute. See 20 U.S.C. § 1400 (2005). This reauthorization has been described as intending to "mandate quality standards for special education teachers, streamline disciplinary actions involving students with disabilities, and ... reduce the number of lawsuits stemming from the statute." See Erik W. Robelen & Christina Samuels, *Congress Passes IDEA Reauthorization*, EDWEEK.ORG November 22, 2004, at [http://www.edweek.org/ew/articles/2004/11/22/13idea\\_web.h24.html](http://www.edweek.org/ew/articles/2004/11/22/13idea_web.h24.html) (registration required). None of these statutory changes, however, should change this article's legal analysis.

87. A "free and appropriate education" means special education and related services that "(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(8)(A)-(D). See also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) (holding that an inquiry

ensure that these children have access to a FAPE, IDEA requires states and local school districts that receive federal funding for special education<sup>89</sup> and related services<sup>90</sup> to meet certain procedural safeguards.<sup>91</sup> These procedural safeguards are aimed at providing parents of special education children with meaningful input into decisions that affect their child's education.<sup>92</sup> For example, IDEA requires that a school district provide prior written notice to parents whenever the school district proposes (or refuses) to change a child's placement or program,<sup>93</sup> and that the school place, "to the maximum extent appropriate," a special education child in the least restrictive environment (LRE).<sup>94</sup> IDEA also

into whether a FAPE has been provided depends on whether the school has adequately complied with procedures set forth in IDEA and whether the individual education plan is reasonably calculated to enable the child to receive educational benefits).

88. 20 U.S.C. § 1400(d)(1)(A). A "child with a disability" means a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A)(i)-(ii).

89. "Special education" means "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including - (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." *Id.* § 1401(25)(A)-(B).

90. "Related services" refers to "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." *Id.* § 1401(22). *See also* *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984) (establishing a two part test for determining whether a particular service is considered a related service under IDEA).

91. 20 U.S.C. § 1415(a). Like Title IX, Congress enacted IDEA under its Spending Clause authority and federal funding recipients are bound to conditions that Congress attaches to these grants. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 58 (1st Cir. 2002). Unlike Title IX, a private right of action with specific remedies and exhaustion provisions are expressly written into IDEA. *See* 20 U.S.C. § 1415(l) (exhaustion provision). For a comprehensive discussion of IDEA's exhaustion provision, *see infra* Part V.A.2.

92. *See Frazier*, 276 F.3d at 58 (outlining the various procedural protections that IDEA affords to parents).

93. *See* 20 U.S.C. § 1415(b).

94. *See id.* § 1412(a)(5). "Least restrictive environment" means: "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* § 1412(a)(5)(A). Placing special education children in the regular classroom is also referred to as "mainstreaming," and reduces social stigmatization, while increasing other non-academic benefits for that child. *See Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994); *Hoffman v. East Troy Cmty. Sch. Dist.*, 38 F. Supp. 750, 766 n.5 (E.D. Wis. 1999). Indeed, and probably because of IDEA's impact, most special education students spend the majority of their time in the regular classroom with non-disabled students. *See* EDITORIAL PROJECTS IN EDUCATION, SPECIAL EDUCATION, at <http://www.edweek.org/context/topics/issuespage.cfm?id=63> (last visited Nov. 5, 2004).

requires schools to keep track of a special education student's placement and programs through use of a written individual education plan (IEP).<sup>95</sup>

If a parent of a special education child believes that their child's rights under IDEA have been violated, IDEA permits parents to file formal complaints "with respect to any manner relating to the identification, evaluation, or educational placement of the child, or the provision of a free and appropriate education to such child."<sup>96</sup> A complaint may be presented at a formal due process hearing, presided over by an impartial due process hearing officer appointed by either the state or local educational agency.<sup>97</sup> The due process officer may award various injunctive, declaratory, and monetary relief for violations of IDEA.<sup>98</sup> Such monetary relief may take the form of compensatory education<sup>99</sup> and tuition reimbursement,<sup>100</sup> but generally does not result in money damages.<sup>101</sup> Either the parent of the special education child or the school district may appeal the due process officer's decision to a state or federal court if they are unhappy with the outcome.<sup>102</sup>

Thus, when either a special or regular education child subjects a special education child to bullying, at least two IDEA provisions are potentially implicated and must be considered. First, if a school fails to respond to bullying of a special education child and, as a result, the child's right to a free and appropriate education is violated, the parents of that special education child can bring a claim under IDEA.<sup>103</sup> Second, if a school reacts to the bullying of a special educa-

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95. An "individual education plan" or "IEP" is defined as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." 20 U.S.C. § 1401(11); *see also id.* § 1414(d) (outlining the specific requirements the IEP must satisfy).

96. *Id.* § 1415(b)(6).

97. *Id.* § 1415(f)-(g). Many states also provide access to a mediation process through which parents of special education children and school districts can mediate their disputes and come to a mutually acceptable resolution of their dispute without having to participate in the due process hearing. *See Frazier*, 276 F.3d at 58-59.

98. *See Frazier*, 276 F.3d at 59 (collecting cases); THOMAS F. GUERNSEY & KATH KLARE, SPECIAL EDUCATION LAW 203, 207 (2d ed. 2001).

99. *See M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir. 1996) (compensatory education covers the time child was deprived of FAPE).

100. *See Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, 370-71 (1985) (parents are entitled to tuition reimbursement for unilateral private placements when the placement was necessary for child to receive a FAPE); *see also* 34 C.F.R. § 300.403(c) (1999).

101. Absent egregious due process violations or endangerment of a child's health, general monetary damages are unavailable under IDEA. *See GUERNSEY & KLARE, supra* note 98, at 211 (collecting cases); *see also O.F. 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."). As one prominent jurist has observed, this state of affairs is "the norm for social-welfare programs that specify benefits in kind at public expense, whether medical care or housing or, under the IDEA, education." *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996) (Easterbrook, J.). Even so, monetary damages may be available under an IDEA-based § 1983 cause of action. *See infra* Part V.C.

102. *See* 20 U.S.C. § 1415(i)(2). As will be discussed in more detail below in Part V.A.2, an aggrieved party, in most cases, must satisfy the IDEA's exhaustion provisions before bringing their case to state or federal court. *See id.* § 1415(l).

103. *See Weber, Disability Harassment, supra* note 26, at 1110 (noting that an educational environment permeated with harassment is hardly conducive to a special education child receiving a FAPE).

tion child by moving that child out of a mainstream classroom environment, such well-meaning actions may result in a violation of the special education child's right to be educated in the least restrictive environment.

In short, school administrators must consider a special education child's rights under IDEA when that child is subjected to bullying/same-sex harassment at school. In a perfect world, circumspection by school officials about a child's IDEA rights would hopefully lead to a more appropriate response to bullying behavior directed against such a child.<sup>104</sup> Practically speaking, a special education student's IDEA rights will inevitably be trampled upon in bullying scenarios and it is thus important to explore potential IDEA-based legal approaches for remedying these violations.<sup>105</sup>

#### IV. THE FIRST PROPOSED REMEDY: STRENGTHENING TITLE IX PEER SEXUAL HARASSMENT ACTIONS THROUGH A HYBRID TITLE IX-IDEA FRAMEWORK

##### A. The Proposed Framework

As argued in Part II above, the current Title IX framework for peer same-sex harassment provides little effective relief for either regular or special education children who are the subject of intolerable and constant bullying.<sup>106</sup> Nevertheless, as discussed in Part III, special education children may be able to utilize the rights granted to them under IDEA to protect themselves from unwanted harassment.<sup>107</sup> For these reasons, this article proposes, for the first time, that courts increase the legal protections available for special education children whom are the subject of same-sex harassment/bullying at school by adopting a hybrid Title IX-IDEA cause of action.

This hybrid legal model addresses same-sex harassment/bullying involving a special education child by requiring school districts to take into account both Title IX and IDEA so that the child will be provided with a free and appropriate education in a discriminatory-free atmosphere in the least restrictive environment. Indeed, an appropriate legal model in this context must take into account both statutory schemes because the bullying of a special education child might cause the school to violate both Title IX and IDEA.<sup>108</sup> This legal state of affairs exists because the rights granted by Title IX and IDEA set forth an overlapping lattice of statutory obligations. It is therefore easier to conceive of a school district's legal obligations in the special education bullying context by blending the two statutory frameworks together into one coherent hybrid legal cause of action.

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104. See Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 535 (2002) (observing that some commentators believe that the mere threat of damages under IDEA will compel "recalcitrant school systems" to better protect special education children) [hereinafter Seligmann, *A Diller, A Dollar*].

105. See Weber, *Disability Harassment*, *supra* note 26, at 1122-1123 ("Perhaps monetary awards can never make a person whole for humiliation or insult, but in our society damages are the ordinary means for compensating a person for all past wrongs, including those that entail emotional injury.").

106. See *supra* note 85 and accompanying notes.

107. See *supra* note 103 and accompanying notes.

108. See *supra* note 103 and accompanying text.

This synthesis of Title IX and IDEA legal standards is made somewhat easier by the fact that the current Title IX framework contains a number of vague and ambiguous legal standards prone to further elaboration. For instance, the *Davis* test requires that a student establish that a school official who had the authority to take corrective action, had actual knowledge about a case of peer sexual harassment, but nevertheless was deliberately indifferent to such knowledge.<sup>109</sup> Deliberate indifference in the Title IX context has subsequently been defined to mean that the school official has acted in a “clearly unreasonable” manner in light of the known circumstances.<sup>110</sup> Because the “clearly unreasonable” standard is somewhat vague and is susceptible to further definition, IDEA is able to endow Title IX with more substance by consideration of IDEA’s implications for describing what constitutes a “clearly unreasonable” response to bullying in the special education context.

Although under *Davis* students are not entitled to any particular remedial demand,<sup>111</sup> the *Davis* Court was also clear in establishing that when deciding whether a school district’s response to known harassment was clearly unreasonable, a court must consider this question “in the light of the known circumstances.”<sup>112</sup> In the special education context, the “known circumstances” include the school district’s knowledge that special education children must be ensured under federal law a FAPE in the least restrictive environment. Thus, combining this part of the Title IX framework with a child’s recognized rights under IDEA, the hybrid Title IX-IDEA cause of action requires courts to hold schools liable if the school’s response to the known harassment was clearly unreasonable in light of its obligations under Title IX and IDEA.

Another part of the *Davis* test that can be modified under this hybrid legal standard is the requirement that peer harassment at school must be so severe, pervasive, and objectively offensive that it deprives a student of access to the educational opportunities or benefits provided by the school.<sup>113</sup> In determining what constitutes an actionable deprivation of educational opportunities and benefits in the special education context, a court needs to consider what educational opportunities and benefits special education students are entitled to under IDEA. Although courts since *Davis* appear to have restricted this showing to instances where harassed students have dropped grades, become homebound or hospitalized, or suffered physical violence,<sup>114</sup> what constitutes “educational opportunities and benefits” for a regular education child is different than what constitutes such opportunities and benefits for a special education child under IDEA. To reiterate, this is because a special education child under IDEA is entitled to a free and appropriate education, including the provision of special education and related services, in the least restrictive environment.<sup>115</sup> By incorporating these IDEA rights into this part of the *Davis*

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109. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999).

110. See *id.*

111. See *id.*

112. *Id.*

113. *Id.* at 650.

114. See *supra* note 61 and accompanying text.

115. See *supra* notes 87-91 and accompanying text.

framework, courts will know to ask if the bullied special education student is denied a free and appropriate education in the least restrictive environment or otherwise denied access to appropriate educational opportunities and benefits as a result of the bullying/harassment.

## B. Applying the Hybrid Framework to a Recently Decided Case

To be more concrete about how this hybrid test would work in practice, consider the actual case of *Wilson v. Independent School District*.<sup>116</sup> In this case, a mildly mentally disabled middle school student named Ken Wilson alleged that he had been sexually molested and harassed by a fellow male mentally disabled classmate, referred to in the case as “John Doe.”<sup>117</sup> By the time of the summary judgment motion filed by the defendant school district, the evidence established that Doe had repeatedly bullied and picked on Wilson over a number of years and, as a result, their teacher had assigned them separate seats in the classroom and on the school bus.<sup>118</sup> Additionally, on one occasion, an incident occurred in which Doe allegedly sexually molested Wilson while they were alone in the boys’ rest room.<sup>119</sup> There was, however, a factual dispute about whether or not there had actually been sexual contact between the boys during this incident.<sup>120</sup>

Initially, the school neither reacted to the incident,<sup>121</sup> nor notified Wilson’s parents of the incident.<sup>122</sup> Three days later, Wilson told his sister that he had been sexually molested by Doe and, in turn, his sister told their parents.<sup>123</sup> The Wilsons thereafter reported the conduct to state authorities, the police, and the principal, and Doe was subsequently transferred to another school.<sup>124</sup>

The Wilsons later filed a Title IX claim on behalf of their son for peer sexual harassment for the school’s initial lack of action in response to the sexual molestation.<sup>125</sup> Under the *Davis* test, the district court granted summary judgment to the school district, finding that the school was not deliberately indifferent in its initial response to the assault and that, in any event, the alleged

116. 144 F. Supp. 2d 690 (E.D. Tex. 2001). This case was chosen out of necessity as there are only a few cases reported where a special education child has been subject to either bullying or other forms of peer sexual harassment. See, e.g., *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1242-43 (10th Cir. 1999) (finding that special education female high school student had stated a claim upon which relief could be granted when she alleged that she had been sexually molested by a fellow male special education student); *Johnson v. Indep. Sch. Dist. No. 47*, 194 F. Supp. 2d 939, 940 (D. Minn. 2002) (granting summary judgment against special needs female high school student subject to verbal harassment by members of both sexes). This might be because of the current difficulty of bringing successful peer sexual harassment cases since *Davis*, see *supra* note 84, or because special education students and their parents have not fully appreciated the additional protections that IDEA might supply in these circumstances.

117. See *Wilson*, 144 F. Supp. 2d at 690-91.

118. *Id.* at 691.

119. *Id.*

120. *Id.*

121. Nevertheless, the teacher continued to separate the boys in the classroom after the boys’ restroom incident. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 692.

physical sexual conduct was not sufficiently severe to deprive Wilson of access to educational opportunities and benefits.<sup>126</sup> The court based its analysis on the fact that the school district's initial lack of response was based on its belief that there had been no sexual contact and that in light of this belief, their actions were not clearly unreasonable.<sup>127</sup>

Regardless of whether the *Wilson* court was right or wrong in granting summary judgment, a proper consideration of Wilson's IDEA rights under a hybrid Title IX-IDEA legal model would have provided additional legal protections to Wilson under the circumstances. At the very least, with factual disputes much harder to ignore, Wilson would have been able to bring his tale to trial so that a jury of his peers could consider whether the repeated bullying he suffered, in conjunction with the sexual assault, interfered with his receiving a FAPE in the least restrictive environment under the circumstances.<sup>128</sup> Although by no means a "slam dunk" case, the proposed hybrid legal standard would have enhanced Wilson's civil rights protections and increased the likelihood of him being either successful on the merits or gaining a favorable settlement of his claims. Additionally, the mere increased attention to the school's IDEA obligations in such same-sex harassment/bullying scenarios may have given the school district extra incentive to take more aggressive action against Doe's bullying behavior, before his actions escalated into a sexual assault against Wilson.<sup>129</sup>

In sum, when a special education child is the object of same-sex harassment/bullying, the legal rights of that child should be enlarged by the operation of IDEA. Accordingly, this article proposes the following four-prong test for instances of peer sexual harassment/bullying in the special education context: a school is liable for the same-sex harassment<sup>130</sup> of a special education child where: (1) the school had actual notice of the harassment; (2) the character

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126. *Id.* at 693-696.

127. *Id.* In coming to these conclusions, the court appears to make at least two legal errors. First, the court accepted the school's version of events in finding that the school was initially unaware that there had been sexual contact and therefore, their actions were not clearly unreasonable. *Id.* at 693. Under a summary judgment legal posture, however, a court should view all evidence in the light most favorable to the party opposing the motion. *See id.* at 692 (citing *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1272 (5th Cir. 1994)). Second, the court wrongly cited the *Davis* opinion for the proposition that one incident of sexual harassment can never be sufficiently severe. *Id.* at 695. The *Davis* Court merely said in this regard that "it is *unlikely*" for one instance of harassment to meet the standard, but that "in theory, a single instance of sufficiently severe one-on-one peer harassment" could suffice. *Davis*, 526 U.S. at 652-53 (emphasis added).

128. The *Wilson* Court had inappropriately analyzed the prior bullying episodes separately from the sexual assault, as if the former chain of events was unconnected to the latter. *Wilson*, 144 F. Supp. 2d at 694-95. The key advantage to this hybrid test is that it would force courts to look at the bullying incidents and the sexual assault together to determine its overall impact on the special education student's rights under IDEA.

129. For instance, the bullying and teasing alone could have led the school to transfer the harassing student to another class, suspend him, curtail his school privileges, or provide additional supervision, before the sexual assault ever occurred. *See Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999).

130. This test assumes the Supreme Court will eventually incorporate *Oncale's* same-sex harassment standards from the Title VII context into the Title IX context. In the meantime, lower courts and the Department of Education have been applying *Oncale's* lessons to the Title IX context. *See supra* note 74 and accompanying text.

of the harassment was severe, pervasive, and objectively offensive; (3) the school’s response to the known harassment was clearly unreasonable in light of its obligations under Title IX and IDEA; and (4) the student was denied a free and appropriate education in the least restrictive environment or otherwise denied access to appropriate educational opportunities and benefits as a result of the harassment.<sup>131</sup>

By bolstering the *Davis* Title IX framework in this manner, courts will be taking a significant step in the direction of fulfilling Title IX and IDEA’s dual promise of protecting special education children from the very real and long-term consequences associated with bullying. As a result, schools will be more welcoming places for special education children.

#### V. THE PROCEDURAL AND SUBSTANTIVE LIMITATIONS ON POSSIBLE § 1983 ACTIONS FOR MONEY DAMAGES

Of course, for reasons discussed in Part II, and because a more sympathetic hybrid Title IX-IDEA model like the one proposed in Part IV may not be available, Title IX relief for bullied special education children may be very hard to come by. Additionally, under its Title IX jurisprudence, the Supreme Court has clearly indicated that a sexual harassment claim can only be brought against a school district.<sup>132</sup> It is thus important to consider whether alternative relief for bullying victims may nevertheless be available against other parties. This Part proceeds to examine other possible legal remedies for bullied special education children under § 1983, the primary federal civil rights law. Unfortunately, procedural and substantive limitations render § 1983 claims based on Title IX, equal protection, and due process unlikely to provide much real legal relief. As a result, and as discussed more fully in Part VI, a § 1983 claim based on IDEA seems the most probable § 1983 claim to offer legal hope to bullied special education children.

#### A. An Overview of § 1983

One possible way to hold individual supervisory school officials liable for permitting same-sex harassment/bullying is to pursue a civil rights claim under § 1983.<sup>133</sup> Although § 1983 does not itself supply any substantive rights to a civil rights plaintiff,<sup>134</sup> it does provide a procedural vehicle for bringing federal consti-

131. The factor concerning appropriate control over the harasser and the context in which the harassment takes place is assumed to be met in the in-school bullying scenario with which this article is primarily concerned, and therefore, does not appear as a separate factor in the hybrid Title IX-IDEA proposed standard.

132. See *Davis*, 526 U.S. at 640. This limitation results from the fact that Title IX only imposes obligations on the funding recipient, not individuals working for the recipient or under the recipient’s supervision. *Id.*

133. 42 U.S.C. § 1983 (2000). § 1983 states: “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.” *Id.*

134. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

tutional or statutory claims<sup>135</sup> against an individual acting in an official manner under color of state law.<sup>136</sup> More specifically, a civil rights plaintiff under § 1983 may have a private right of action for equitable and compensatory relief against a state actor<sup>137</sup> who deprives him or her of a constitutional right (e.g., due process or equal protection rights) or other federal right (e.g., Title IX or IDEA rights).<sup>138</sup>

The § 1983 cause of action may be more appealing than a Title IX action because it potentially permits a student plaintiff to seek money damages from supervisory school officials responsible for permitting the bullying in question to continue.<sup>139</sup> Moreover, whereas Title IX requires "actual knowledge" and "deliberate indifference" on the part of a school official with the ability to take corrective action,<sup>140</sup> some courts and commentators believe that § 1983 may require a less burdensome showing.<sup>141</sup>

These advantages aside, there are some important procedural and substantive limitations on § 1983 causes of action that must be more fully discussed before its usefulness to bullying victims can be fully assessed.

## B. Procedural Limitations on § 1983 Actions for Bullying

Section 1983's availability for bullying situations is limited potentially by two procedural doctrines: statutory preemption and administrative exhaustion.

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135. 42 U.S.C. § 1983; *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (permitting a plaintiff to bring a § 1983 action based on an alleged violation of federal statutory law). Although § 1983 claims can also be brought against institutions acting under color of state law or individuals acting in their official capacity, see *Monnell v. Dep't. of Sch. Services*, 436 U.S. 658, 690 (1978), such claims are limited to situations where a plaintiff proves a causal link between the institutional policy or custom of the state entity and the plaintiff's injury. *Id.* at 694. Because it is unlikely that school districts will have an institutional policy or custom of permitting or ignoring peer sexual harassment, this article's analysis of § 1983 is limited to claims against school officials in their individual capacities.

136. In the public school context, an individual acting under color of state law may include officials or employees of a public school system. See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 57-58 (1st Cir. 2002). Private school officials would not qualify as officials acting under color of state law, and therefore, § 1983 claims are not available in the private school context. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-844 (1982).

137. "Under color of state law" in § 1983 has been interpreted to be synonymous with "state actor." See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

138. See *Cherner-Ranft*, *supra* note 85, at 1911.

139. See Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1466 (1998).

140. See *Davis*, 526 U.S. at 650-52.

141. The standard for supervisory liability under § 1983 is quite unsettled. See *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3d Cir. 1989) ("reckless indifference"); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 914 (1st Cir. 1988) ("gross negligence amounting to deliberate indifference"); *but see Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994) ("deliberate indifference"); *Gates v. Unified Sch. Dist.*, 996 F.2d 1035, 1041 (10th Cir. 1993) (same). Although one commentator has suggested that the "gross negligence" standard most accurately reflects the test most courts apply in these types of cases, see *Zwibelman*, *supra* note 139, at 1484, recent case law suggests that the standard is actually closer to the deliberate indifference standard utilized in Title IX sexual harassment cases. See *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003).

## 1. Statutory Preemption Analysis

Following the Supreme Court case of *Middlesex County Sewerage Authority v. National Sea Clammers Association*,<sup>142</sup> when a § 1983 claim is based on a violation of a federal statute, courts refuse to allow a plaintiff to bring a statutory-based § 1983 claim where the statute itself provides a sufficiently comprehensive scheme for relief (the “Sea Clammers” doctrine).<sup>143</sup> In other words, in cases in which a plaintiff alleges simultaneously a cause of action under a comprehensive statutory scheme and a cause of action under § 1983 based solely on that same statute, the statutory scheme in question preempts the § 1983 claim.<sup>144</sup>

Additionally, a different test has been articulated by the Supreme Court for an instance in which a plaintiff brings a § 1983 claim based on a constitutional provision that conflicts with a statutory remedial scheme. Under *Smith v. Robinson*,<sup>145</sup> and unlike the *Sea Clammers* doctrine, the emphasis is on whether the § 1983 constitutional claim is “virtually identical” to the rights contained in the statutory scheme and whether Congress intended the statute to be the “exclusive avenue through which a plaintiff may assert those claims.”<sup>146</sup>

The question, of course, is what statutory remedial schemes fall within these preemption doctrines. The courts that have considered this question with regard to Title IX have split fairly evenly on whether or not Title IX is such a comprehensive statute that it preempts § 1983 constitutional and statutory claims.<sup>147</sup> At least one commentator has argued that the trend is to hold that Title IX preempts both statutory and constitutional claims brought under § 1983.<sup>148</sup> Consequently, a bullied child wishing to hold a principal or teacher responsible for not sufficiently protecting them from same-sex harassment/bullying may

142. 453 U.S. 1 (1981).

143. *Id.* at 20.

144. Title VII of the Civil Rights Act of 1964 is one such example. See *Arrington v. Cobb County*, 139 F.3d 865, 872 (11th Cir. 1998) (“Of course, an allegation of a Title VII violation cannot provide the sole basis for a § 1983 claim.”) (citing *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 982 (10th Cir. 1991); *Hervey v. City of Little Rock*, 787 F.2d 1223, 1233 (8th Cir. 1986)).

145. See *Smith v. Robinson*, 468 U.S. 992 (1984).

146. *Id.* at 1009. Interestingly enough, *Smith* was decided under IDEA’s predecessor statute. As discussed below, however, Congress legislatively overruled *Smith* as part of the 1986 amendments to the predecessor statute. See *infra* notes 149-152 and accompanying text.

147. Compare *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) (Title IX preempts statutory claims for sex discrimination), *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998) (disallowing a § 1983 claim based on Title IX itself or based on constitutional provisions), *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996) (Title IX preempts a § 1983 claim based on constitutional claims), and *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d Cir. 1993) (Title IX preempts § 1983 claim based on equal protection clause), with *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (finding Title IX claim does not preclude § 1983 claim based on constitutional violation), *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (permitting § 1983 constitutional and statutory claim to proceed even in the face of an alleged Title IX claim), *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996) (finding constitutional violation based on § 1983 not barred by Title IX), and *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (finding Title IX does not preempt statutory and constitutionally based § 1983 claims).

148. See *Cherner-Raft*, *supra* note 85, at 1916. Another commentator has argued that lower courts have been sloppy in distinguishing between statutory-based and constitutionally-based § 1983 claims, and even in separately analyzing different types of constitutionally-based § 1983 claims. See *Zwibelman*, *supra* note 139, at 1471-73.

not be able to do so under a Title IX-based § 1983 claim depending upon the circuit law that applies to their circumstances.

With regard to an IDEA-based § 1983 claim, the 1986 amendments to IDEA reinstated plaintiffs' ability to use § 1983 as a vehicle to vindicate a disabled child's constitutional and statutory rights.<sup>149</sup> The Court in *Hiller v. Board of Education*<sup>150</sup> made this clear when it stated that, "section 1415(f) was enacted to overrule the Supreme Court's decision in *Smith v. Robinson* . . . holding that [IDEA's predecessor statute] is the exclusive remedy and § 1983 is not available [except] in very limited circumstances."<sup>151</sup> Consequently, IDEA does not preempt § 1983's ability to ensure the rights of disabled children through a constitutional or statutory tort action.<sup>152</sup>

## 2. Exhaustion of Administrative Remedies Requirement

Even if a federal statute, like Title IX, does not preempt a § 1983 claim, the statute in question may nevertheless require a plaintiff to exhaust available administrative remedies before permitting the plaintiff to bring a statutory claim for money damages under § 1983 in state or federal court. Although there is not an exhaustion requirement under Title IX,<sup>153</sup> one does exist expressly under IDEA. Under these exhaustion provisions, an aggrieved party must first have their IDEA claims heard at an impartial due process hearing.<sup>154</sup> This requisite not only applies for actions directly brought under IDEA, but also has been found to "appl[y] even when the suit is brought pursuant to a different statute," such as § 1983.<sup>155</sup>

Nevertheless, the exhaustion requirement is not absolute. "A plaintiff does not have to exhaust administrative remedies if [he or] she can show . . . that the administrative remedies afforded by the process are inadequate given the relief sought."<sup>156</sup> Importantly, the "relief sought" is not just based on whether the

149. See 20 U.S.C. § 1415(f) (1986). For a comprehensive discussion of the availability of IDEA-based § 1983 claims, see generally Seligmann, *A Diller, A Dollar*, *supra* note 104.

150. 687 F. Supp. 735 (N.D.N.Y. 1988).

151. *Id.* at 744 (citing *Mrs. W v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987)).

152. See *Tirozzi*, 748 F.2d at 755; *but see* Seligmann, *A Diller, A Dollar*, *supra* note 104, at 535-537 (concluding that an IDEA-based § 1983 action for money damages should generally not be permitted).

153. See *Bowden v. Dever*, No. CIV. A. 00-12308-DPW, 2002 WL 472293, at \*3 (D. Mass. Mar. 20, 2002) ("[C]laims that [are] not related to 'a free, appropriate public education', such as violations of Title IX based on alleged sexual harassment and retaliation, [are] treated separately and [are] not subject to IDEA exhaustion.").

154. See 20 U.S.C. § 1415(l). The pertinent part of IDEA states: "[B]efore the filing of a civil action under [the Constitution, the Americans with Disabilities Act, Rehabilitation Act or other federal laws protecting the rights of children with disabilities] seeking relief that is also unavailable under [IDEA], the [due process hearing] procedures . . . shall be exhausted to the same extent as would be required had the action been brought under [IDEA]."

155. See *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000).

156. *Rose*, 214 F.3d at 210-11; *see also* *Honig v. Doe*, 484 U.S. 305, 327 (1988) (finding under IDEA's predecessor statute that "parents may bypass the administrative process where exhaustion would be futile or inadequate"); *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768, 790 (2d Cir. 2002) ("Hence, if plaintiffs can demonstrate that there is no relief available to them through the administrative process, they may avail themselves of the futility or inadequacy exceptions to the exhaustion requirement . . .").

plaintiff labels his or her relief as monetary or equitable, but whether there is "relief for the events, condition, or consequences of which the person complains, [even if] not necessarily relief of the kind the person prefers."<sup>157</sup> Thus, the critical inquiry into whether exhaustion is futile is not whether a hearing officer has the ability to grant general money damages, which he or she generally does not,<sup>158</sup> but whether there is any type of relief available under the administrative scheme which would redress plaintiff's alleged injuries.<sup>159</sup>

Currently, there is a sharp split among the federal courts of appeals, regarding whether exhaustion of IDEA-based § 1983 claims is necessary.<sup>160</sup> Although all courts apparently agree that the due process hearing officers cannot grant the requested money damages under the powers granted to them under IDEA,<sup>161</sup> the recent trend in case law appears to require exhaustion even when the sole claim is for money damages under § 1983.<sup>162</sup> This approach not only recognizes that the hearing officer has the authority to take action in response to the complaint (even if this remedy is not the one the plaintiff prefers), but also preserves the state or local educational agency's ability to conciliate IDEA disputes short of litigation and further, facilitates the "in-kind delivery of educational services" that IDEA contemplates.<sup>163</sup>

157. *Polera v. Bd. of Educ.*, 288 F.3d 478, 488 (2d Cir. 2002).

158. See *infra* notes 99-100 and accompanying text.

159. See *Polera*, 288 F.3d at 488.

160. Compare *Taylor*, 313 F.3d at 789-90 (recognizing general rule that exhaustion is normally required for IDEA-based § 1983 claims, but finding that plaintiffs did not need to exhaust their administrative remedies because to do so would be futile), *Cudjoe v. Indep. Sch. Dist.*, No. 12, 297 F.3d 1058, 1068 (10th Cir. 2002) (requiring IDEA exhaustion before permitting IDEA-based § 1983 action for money damages), *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002) (finding that § 1983 claim based on violation of IDEA must be preceded by exhaustion of administrative remedies, even if only money damages are sought), *Charlie F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996) (dismissing § 1983 damage claim under IDEA for failure to exhaust administrative remedies), and *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (requiring exhaustion of administrative remedies) (per curiam), with *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000) (permitting § 1983 claim without exhaustion of administrative remedies where student had already graduated), *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1276 (9th Cir. 1999) (not requiring exhaustion of administrative remedies in IDEA suit), and *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995) (not requiring exhaustion of administrative remedies in § 1983 case in which requested relief is not available under IDEA).

161. Because parties in a special education dispute are trying to determine relative responsibilities concerning the provision of a FAPE to a child, the most common remedies are in the nature of injunctive or declaratory relief. See GUERNSEY & KLARE, *supra* note 98, and accompanying text. Nonetheless, hearing officers are authorized to grant damages in the form of tuition reimbursement (when parents unilaterally place their child in a private placement because a FAPE is not available in the public school), compensatory education (when the child needs additional education services because of a lack of a FAPE), and in very limited circumstances, monetary damages (the general rule though is that compensatory damages are not available under IDEA). See *supra* notes 99-100 and accompanying text; see also GUERNSEY & KLARE, *supra* note 98, at 207.

162. See *Robb v. Bethel Sch. Dist.* #403, 308 F.3d 1047, 1049 (9th Cir. 2002) (finding that more common approach recently is to require exhaustion of IDEA-based § 1983 money damage actions); see also *Frazier*, 276 F.3d at 61 ("Exhaustion is beneficial regardless of whether the administrative process offers the specific form of remediation sought by a particular plaintiff."); *Cudjoe*, 297 F.3d at 1068 (same).

163. Even where money damages alone are sought, IDEA's administrative scheme should be exhausted so that state or local educational agencies are able "to develop a factual record, to apply its

In a nutshell, exhaustion of administrative remedies under IDEA is still the general rule, and the burden is on the party seeking to avoid the exhaustion requirement to show the futility of the administrative process.<sup>164</sup> Given this fact and the current split in circuit authority, the safest course presently to take as a plaintiff alleging an IDEA-based § 1983 claim would be to file for a due process hearing consistent with the IDEA statutory scheme and participate to the fullest extent in the administrative proceedings, and only file a § 1983 claim in state or federal court if that process does not resolve the dispute.<sup>165</sup>

### C. Substantive Limitations on § 1983 Actions for Bullying

As previously discussed, same-sex harassment claims for bullying based on Title IX might be difficult to bring as a result of the high threshold set by the court and the lingering issue of preemption in the § 1983 context.<sup>166</sup> Consequently, bullied students have sometimes sought relief under § 1983 against either the individual state actors who have injured them, or state actors who have failed to take action to protect them, under the due process or equal protection clauses of the Fourteenth Amendment of the United States Constitution.<sup>167</sup>

#### 1. Section 1983 Due Process Analysis

Under the federal due process clause, a sexually harassed or abused student could attempt to bring a constitutionally-based § 1983 due process claim.<sup>168</sup> Even so, success on these grounds is highly unlikely.<sup>169</sup> This fact is directly attributable to Supreme Court precedent which holds that there is no affirmative obligation on a state to protect its citizens from the violent acts of private individuals.<sup>170</sup> Nevertheless, two exceptions exist to this general rule: (1)

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expertise to the problem, to exercise its discretion, and to correct its own mistakes . . . ." *Frazier*, 276 F. 3d at 60 (quoting *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989) (discussing IDEA predecessor statute)). *But see* Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 MD. L. REV. 162, 195 (2004) (arguing that the plain meaning of Section 1415(l) should prevail over any administrative law policies and that exhaustion should not be required when money damages are sought under IDEA); Weber, *Disability Harassment*, *supra* note 26, at 1138-39 (same).

164. *See Frazier*, 276 F.3d at 59 (citing *Honig v. Doe*, 484 U.S. 305, 326-27 (1988)).

165. The advantage of this course of action is that the school conduct about which the plaintiff is complaining may be adequately addressed through a due process hearing or other informal interactions with the school district, making resort to a monetary damages action under § 1983 unnecessary.

166. *See supra* Parts II and V. B. 1.

167. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

168. *See Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999); *see also* Weber, *Damages Liability*, *supra* note 13, at 89-90.

169. *But see* Seligmann, *A Diller, A Dollar*, *supra* note 104, at 535 (arguing that the availability of damages for constitutional claims under § 1983 provide sufficient clout to encourage compliance with IDEA by school officials).

170. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989).

where a "special relationship" exists between the state and the person harmed; or (2) where the state is responsible for the "creation of the danger" which caused the person's harm.<sup>171</sup>

Even with these two exceptions, § 1983 due process cases concerning the sexual abuse of children at school have illustrated that these legal theories of recovery are largely illusory.<sup>172</sup> Special relationship claims have generally been limited to instances in which the state has involuntary control over an individual and is responsible for his or her care, such as in the mental health or prison context, but not in the school context (even in light of compulsory education laws).<sup>173</sup> This is true even for special education children who find themselves in residential schools or severely disabled students who are placed in public schools.<sup>174</sup> As far as the creation of danger exception, student plaintiffs have fared only slightly better.<sup>175</sup> Courts in these cases generally find that an affirmative act by the school is essential to this type of case, and school indifference to sexual abuse generally is not sufficient to state a claim.<sup>176</sup>

Of course, if a due process claim based on sexual abuse of a child does not generally lead to § 1983 relief for the victimized child, it would seem to follow that less severe, traditional bullying behavior would have less of a chance to support a "special relationship" or "creation of danger" claim.<sup>177</sup> Thus, constitutionally-based § 1983 claims relying on the due process clause do not substantially fill in the current legal void in protecting children from bullying at school.

## 2. Section 1983 Equal Protection Analysis

Victimized students have only fared slightly better under a constitutionally-based § 1983 claim based on an equal protection analysis. For instance, in *Murrell v. School District No. 1, Denver, Co.*,<sup>178</sup> a female special education student alleged that the school and certain school officials had failed to eradicate a hos-

171. See *Maxwell v. Sch. Dist. of Philadelphia*, 53 F. Supp. 2d 787, 790-92 (E.D. Pa. 1999).

172. See *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732-734 (8th Cir. 1997) (collecting cases).

173. See *Stevenson v. Martin County Bd. of Educ.*, 3 Fed. Appx. 25 (4th Cir. 2001) (per curiam), cert. denied, 534 U.S. 821 (2001); *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir. 1994); *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990); see also *Weber, Disability Harassment*, supra note 26, at 90 & n.45; *Horner & Norman*, supra note 10, at 376 ("[A]ttempts to extend [special relationship] rulings to the educational setting have failed."). As far as compulsory education laws, the Seventh Circuit has held that these laws do "not render . . . schoolchildren so helpless that an affirmative constitutional duty to protect arises." *J.O.*, 909 F.2d at 272.

174. See *Dorothy J.*, 7 F.3d at 732 (rejecting availability of § 1983 due process claim under special relationship test for severely mentally retarded female high school sexually assaulted by fellow male high school student in gym shower); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc) (residential school student).

175. See *Horner & Norman*, supra note 10, at 377-78.

176. See *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1376 (3rd Cir. 1992) (denying recovery under §1983 due process claim for female school children sexually and verbally assaulted by other students because school was just guilty of passivity); but see *Maxwell*, 53 F. Supp. 2d at 793 (finding § 1983 "creation of danger" claim properly stated).

177. As discussed below with regard to equal protection claims, see *infra* Part V. C. 2 and accompanying text, a claim of qualified immunity might also prevent relief against individual supervisory officials.

178. 186 F.3d 1238 (10th Cir. 1999).

tile sexual environment caused by a fellow male special education student.<sup>179</sup> As a result, the female student was repeatedly sexually assaulted over a significant period of time.<sup>180</sup> One of the claims that the victim brought was a constitutionally-based § 1983 action alleging deprivation of her constitutional right to equal protection of the laws under the Fourteenth Amendment.<sup>181</sup>

In analyzing an equal protection claim in this context, the circuit court reasoned that although it was well-established that intentional sexual harassment by a state actor could constitute a violation of the equal protection clause,<sup>182</sup> the student did not have a claim against the school itself because municipal liability under § 1983 requires an official policy or custom to engage in sexual harassment or an action by an official with final policymaking authority.<sup>183</sup> Nevertheless, the court did find that there could be potential individual liability for the principal and teachers for violating the sexually abused student's equal protection rights.<sup>184</sup>

Under an individual liability analysis, a supervisory employee may be held liable for being deliberately indifferent to known sexual harassment.<sup>185</sup> Deliberate indifference, as with Title IX, is a high standard and requires that, "a supervisor . . . participates in or *consciously acquiesces* in sexual harassment by an outside third party or co-[students]." <sup>186</sup> Because the plaintiff had alleged that the principals and teachers knew of this sexually harassing behavior and acquiesced in it, the court concluded that a constitutionally-based § 1983 claim based on the equal protection clause was possible.<sup>187</sup>

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179. *Id.* at 1249.

180. *Id.* at 1243-44.

181. *Id.* at 1249.

182. *Id.* (citing *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989)); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) ("To succeed on a § 1983 equal protection claim, the plaintiffs must prove that the defendants acted in a discriminatory matter and that the discrimination was intentional.") (citing *FDIC v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991)); *see also Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-35 (9th Cir. 2003) (noting sexual orientation peer harassment claim was brought under § 1983 equal protection theory).

183. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999) (citing *Randle v. City of Aurora*, 69 F.3d 441, 446-50 (10th Cir. 1995)). Under even the most liberal construction, the court found that acts of sexual harassment directed solely at the plaintiff do not "demonstrate a custom or policy of the School District to be deliberately indifferent to sexual harassment as a general matter." *Id.* at 1250 (citing *Monnell*, 436 U.S. at 691 & n.56; *see also supra* note 135).

184. *See Murrell*, 186 F.3d at 1250.

185. *Id.* At least one court has equated intentional discriminatory action and deliberate indifference in these cases. *See Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

186. *Murrell*, 186 F.3d at 1250 (quoting *Noland v. McAadoo*, 39 F.3d 269, 271 (10th Cir. 1994) (emphasis added)).

187. *Id.* at 1250-51. Courts have also held individual officials liable under a failure to train theory. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 409-11 (1997). Under this theory, an individual school official may be held liable in a § 1983 action if evidence is presented that the official failed to adequately train teachers, students, and others about a school's policies prohibiting harassment. *See, e.g., Flores*, 324 F.3d at 1136 (allowing a jury to decide a failure to train claim based on a school failing to train school personnel on its policy concerning harassment on the basis of sexual orientation). This theory may provide additional protections for bullied special education children under the appropriate circumstances.

Last, the court considered whether these individual defendants would be entitled to qualified immunity from these § 1983 claims.<sup>188</sup> Under § 1983 jurisprudence, individual defendants “are entitled to qualified immunity unless it is demonstrated that their alleged conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known.”<sup>189</sup> To be clearly established, there must be binding precedential authority on point, or “the clearly established weight of authority from other [courts] must have found the law to be as the plaintiff maintains.”<sup>190</sup> Because such sexual harassment claims had been clearly established according to the *Murrell* court by 1999, the principal and teachers were not entitled to qualified immunity and the plaintiff’s § 1983 equal protection claim against them could proceed.<sup>191</sup>

#### VI. A SECOND PROPOSED REMEDY: AN IDEA-BASED § 1983 ACTION FOR MONEY DAMAGES AGAINST INDIVIDUALS

Although the plaintiff in *Murrell* was permitted to use a constitutionally-based § 1983 claim based on the equal protection clause to address a bullying case at school, the ruling in this case probably represents the exception rather than the rule. As the concurring judge in *Murrell* stated with regard to the plaintiff’s § 1983 claim, “I emphasize that the ‘deliberate indifference’ standard provides a high hurdle for plaintiffs.”<sup>192</sup> Indeed, this deliberate indifference standard is very similar to the one that the *Davis* Court adopted for Title IX peer sexual harassment cases.<sup>193</sup> Consequently, it is unlikely that this type of § 1983 equal protection claim will provide sufficient additional legal options for a victim of more traditional bullying. This is especially so given that the allegations in *Murrell* were so egregious that it also represented one of the rare cases in which the plaintiff was equally successful in pursuing her Title IX peer sexual harassment claim.<sup>194</sup>

Unfortunately, it therefore does not appear that § 1983 provides much assistance for children who are subjected to bullying and violence at school under either Title IX or the due process and equal protection clauses of the United States Constitution. Nevertheless, bullied special education children may have a legal advantage in this regard. Although such plaintiffs may have to, as discussed above, exhaust administrative remedies by participating in a due process hearing under IDEA,<sup>195</sup> once this requirement is satisfied, there appears little reason why a § 1983 claim based on IDEA could not be brought

188. See *Murrell*, 186 F.3d at 1251.

189. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

190. *Id.* (quoting *Medina v. City of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)).

191. See *id.* at 1251-52. Accord *Flores*, 324 F.3d at 1138 (sexual orientation harassment case).

192. *Murrell*, 186 F.3d at 1252 (Anderson, J., concurring in part and concurring in the judgment). Judge Anderson explained that this high hurdle is necessary, “given the myriad contacts which occur daily in this country between teachers and students and between students and their peers.” *Id.*

193. In fact, the Ninth Circuit in *Flores* utilized the *Davis* deliberate indifference standard in defining the meaning of deliberate indifference in the context of individual liability under § 1983. See *Flores*, 324 F.3d at 1135.

194. See *Murrell*, 186 F.3d at 1249 (finding that plaintiff had properly stated a claim for which relief could be granted under Title IX).

195. See *supra* Part V. B. 2.

against a school official who has permitted bullying of a special education child which leads to the violation of that child's IDEA rights.<sup>196</sup> Such circumstances may exist, for example, where a special education child is subject to ridicule and taunting by other children based on his or her inability to live up to stereotypical gender norms. If a school official is made aware of this situation and reacts by moving the special education child from his or her mainstream placement for his or her "own protection," that school official may be engaging in behavior which violates that child's right to the least restrictive environment. Similarly, if the bullying violates the child's IEP and causes that child educational harm (thereby interfering with the provision of a FAPE), such monetary relief may be the only appropriate remedy under the circumstances.<sup>197</sup>

Nevertheless, there is a lack of reported cases which have taken this § 1983 approach based on the IDEA statute.<sup>198</sup> Although such claims should be legally cognizable,<sup>199</sup> only one case was located in which a special education student sought money damages under IDEA for such a circumstance.<sup>200</sup> In that case, however, the claim was for frustration of plaintiff's right to a FAPE based on the sexually harassing behavior of a mid-level administrator, rather than based on

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196. See, e.g., *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 58 (1st Cir. 2002) (permitting an IDEA-based § 1983 claim where all the alleged IDEA violations occurred while plaintiff was a student attending her high school). Even Professor Seligmann, who does not generally favor IDEA-based § 1983 suits for money damages, see Seligmann, *A Diller, A Dollar*, *supra* note 104, at 536, recognizes that IDEA cases involving physical and verbal abuse claims represent the "the most appropriate [cases] for monetary relief," because "[t]hey are . . . the most sympathetic cases for the argument that the IDEA should support an award of monetary relief if the alleged acts violated the children's IEPs and inappropriately caused them educational harm that could not be redressed prospectively through educational services and other compensatory relief." *Id.* at 530. Professor Seligmann's point of view is based on the assumption, with which I whole-heartedly agree, that such a plaintiff be first required to exhaust their administrative remedies under IDEA. See *id.* But see Weber, *Disability Harassment*, *supra* note 26, at 1156-1157 (arguing that courts need to excuse exhaustion of administrative remedies under IDEA in cases in which plaintiff seeks a monetary remedy).

197. See Seligmann, *A Diller, A Dollar*, *supra* note 104, at 530. The availability of money damages under an IDEA-based § 1983 claim assumes that the school officials in question are not entitled to qualified immunity. See *supra* Part V. B. 2. Because the right to be free from sexual harassment at school has been found to be clearly established as of 1999, see *Murrell*, 186 F.3d at 1251, qualified immunity in most cases should not pose an obstacle for these § 1983 plaintiffs. Accord Weber, *Disability Harassment*, *supra* note 26, at 1142-1143.

198. See Seligmann, *A Diller, A Dollar*, *supra* note 104, at 534. In fact, in one public school case in which a special education student sued another special education student for physical and verbal abuse, not only did the same-sex harassment in that case not lead to the assessment of damages under Title IX, but there was no discussion by the court concerning the potential applicability of IDEA to that case. See *Wilson*, 144 F. Supp. 2d at 690-91. Of course, this might be because the special education student's attorney never alleged an IDEA action under § 1983. See *id.* (special education plaintiff brought Title IX and "several state-law tort theories" for alleged sexual molestation and same-sex harassment by fellow special education student); see also *Murrell*, 186 F.3d at 1242 & n.1 (noting special education plaintiff in opposite-sex peer harassment suit alleged Title IX, § 1983, American with Disabilities Act, and Rehabilitation Act claims, but not IDEA claims).

199. A majority of courts also seem to permit, at least in some instances, an IDEA-based § 1983 claim for money damages for non-harassment, non-bullying circumstances. See Weber, *Disability Harassment*, *supra* note 26, at 1118 (collecting cases); but see *Sellers v. Sch. Bd. of Manassas, Va.*, 141 F.3d 524, 532 & n.6 (4th Cir. 1998) (dismissing an IDEA-based § 1983 claim for denial of a FAPE).

200. See *Frazier*, 276 F.3d at 57.

the bullying behavior of a fellow student.<sup>201</sup> That being said, there does not appear to be any reason why the holding in that case could not support a claim by a special education child who was bullied in a manner that interfered with his or her IDEA rights.

Yet, there may be many other reasons why bullied special education children, their parents, and their attorneys are not bringing such claims. It may be because of the lack of deep pockets that individual school officials generally possess, making such claims not worth the time and expense.<sup>202</sup> Alternatively, the lack of such claims may point to the fact that the administrative process under IDEA does, in most cases, lead to a mutually satisfactory outcome for both the parents of the special education child and the school district.<sup>203</sup> Finally, it may be because parents are framing these bullying claims as more in the nature of a disability discrimination claim under section 504 of the Rehabilitation Act or Title II of the ADA, rather than as a harassment claim which interferes with a special education child's FAPE.<sup>204</sup>

Whatever the case, the impetus behind this article has been to introduce a couple of innovative and/or neglected legal approaches for helping special education children survive bullying when less drastic, non-legal measures fail. By following either the hybrid Title IX-IDEA peer sexual harassment analysis, or the IDEA-based § 1983 cause of action, the special education student may provide additional incentives to school officials to stop writing off bullying as just a "normal part of growing up."<sup>205</sup>

## VII. CONCLUSION

Given the increased research and anecdotal evidence of the long-term adverse effects that school bullying inflicts on children, the time has come to insist that judges, administrators, teachers, and parents stop ducking this public health crisis and cease summarily dismissing such abusive behaviors as a rite of passage through childhood. Unfortunately for most children, the current Title IX framework for peer sexual harassment claims places an extremely high burden on plaintiffs seeking to recover for bullying. Indeed, whether or not the Supreme Court recognizes a same-sex harassment cause of action under Title IX

201. *See id.*

202. That being said, one commentator has suggested that there is something psychologically fulfilling in being able to directly sue individuals responsible for your predicament, as opposed to a disembodied institution. *See* Beth B. Burke, Note, *To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 WASH. U. L.Q. 1487, 1491-92 (2000).

203. *See* Seligmann, *A Diller, A Dollar*, *supra* note 104, at 534. Indeed, based upon my own personal observations as a special education mediator, a large percentage of disputes between parents of special education children and school districts are amicably resolved short of requiring a due process hearing. *But see* Weber, *Disability Harassment*, *supra* note 26, at 1134 ("The exhaustion requirement poses the single greatest obstacle to damages claims for disability harassment.").

204. *See* Weber, *Disability Harassment*, *supra* note 26, at 1138-1139.

205. *But see* Seligmann, *A Diller, A Dollar*, *supra* note 104, at 535 & n.350 (arguing that constitutional claims for damages under § 1983, and claims for damages under the Rehabilitation Act and the ADA for special education discrimination provides sufficient "clout" to encourage school districts to comply with their special education obligations without requiring a money damage remedy based on IDEA).

as more responsive to traditional bullying conduct, the fact of the matter remains that the *Davis* standard for imposing vicarious liability on school systems is unlikely to change in the near future given the current composition of the Supreme Court and Congress.

As discouraging as the legal situation appears for most bullied children, this article suggests that there should be additional avenues of legal redress available to bullied special education children based on their unique status under federal law. As a result of the protections afforded by IDEA, these children find themselves in a comparatively advantageous position in legally fighting back against the bullies. By utilizing either a hybrid Title IX-IDEA cause of action or an IDEA-based § 1983 cause of action, special education children may be able to receive monetary compensation for the bullying they suffer at school. At the same time, the existence of such remedies will help to encourage a harassment-free education for special education children, and in the long term, potentially help other children receive expanded civil rights protection against bullying at school.