

BULLYING AND THE INDIVIDUALS WITH
DISABILITIES EDUCATION ACT (IDEA): A
FRAMEWORK FOR PROVIDING RELIEF TO STUDENTS
WITH DISABILITIES

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“Each of us deserves the freedom to pursue our own version of happiness. No one deserves to be bullied.”¹

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¹ Barack Obama (@BarackObama), TWITTER (Oct. 22, 2010, 6:47 AM), <https://twitter.com/barackobama/status/28405996120>.

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INTRODUCTION

Bullying among school children is not a new phenomenon.² Instances of what would now be considered bullying have been chronicled throughout history³ and across cultures.⁴ In contemporary American society, bullying remains engrained in the national ethos.⁵ Cultural notions accepting bullying as an unfortunate, but ultimately unavoidable, part of growing up have led to what some consider to be a crisis of epidemic proportions.⁶ A report released by the National Center for Education Statistics found that as many as thirty percent of students ages twelve through eighteen had experienced some form of bullying during the 2010–2011 school year.⁷ While bullying can have

² See, e.g., Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor: Bullying and Students with Disabilities*, 21 INT'L J. SPECIAL EDUC. 11, 11 (2006) (“Bullying is not a new phenomenon. Indeed, it is chronicled in both classic literature and modern film.”); Hyojin Koo, *A Time Line of the Evolution of School Bullying in Differing Social Contexts*, 8 ASIA PAC. EDUC. REV. 107, 107 (2007) (“[T]he phenomenon of bullying is not a new concept. The fact that some people are frequently and systematically harassed or attacked by others is described in literary works and it also has been found most realistically in schools.”).

³ See, e.g., Koo, *supra* note 2, at 107 (“[C]onsiderable examples of bullying incidents among young people in earlier times have been found . . . In earlier times, according to descriptions in old documents from the 18th to early 20th centuries, bullying was generally described as physical harassment that usually related to a death, strong isolation, or extortion in school children.”).

⁴ See Hogan Sherrow, *The Origins of Bullying*, SCI. AM.: GUEST BLOG (Dec. 15, 2011), <http://blogs.scientificamerican.com/guest-blog/the-origins-of-bullying> (“Bullying is, in fact, widespread and not restricted to American society, but instead is found across the globe. From hunter/gatherer groups to post-industrial Japan, bullying is ubiquitous across human cultures.” (citations omitted)).

⁵ See, e.g., Scott Neumyer, *10 of Film History’s Meanest Bullies*, ATLANTIC (Apr. 3, 2012), <http://www.theatlantic.com/entertainment/archive/2012/04/10-of-film-historys-meanest-bullies/255394>; Amy Weber, *How Our Society Has Manifested the Bullying Epidemic*, HUFFINGTON POST (July 27, 2012), http://www.huffingtonpost.com/amy-weber/how-our-society-has-manif_b_1548368.html.

⁶ See Paul M. Secunda, *At the Crossroads of Title IX and a New “IDEA”: Why Bullying Need Not Be “A Normal Part of Growing Up” for Special Education Children*, 12 DUKE J. GENDER L. & POL’Y 1, 1 (2005) (“In 21st century America, bullying of children by other children at school continues at epidemic levels.”); see also Official Trailer, BULLY (Studio Canal 2001), <https://vimeo.com/73792284>.

⁷ NAT’L CTR. FOR EDUC. STATISTICS, STUDENT REPORTS OF BULLYING AND CYBER-BULLYING: RESULTS FROM THE 2011 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME

devastating, long-term effects on victims,⁸ it may also harm perpetrators, by-standers, and the entire school community.⁹

Although bullying is a critical concern for all children, students with disabilities are particularly vulnerable.¹⁰ One national study found that 24.5% of elementary students, 34.1% of middle school students, and 26.6% of high school students with disabilities were victims of bullying.¹¹ A survey of 400 families conducted by Massachusetts Advocates for Children in 2009 found that eighty-eight percent of children with autism spectrum disorder¹² had been bullied in school.¹³ Not only are students with disabilities more likely to be targets of bullying, but they may also be more susceptible to the harm bullying causes.¹⁴

Fortunately, attitudes accepting bullying as a normal part of growing up have begun to shift,¹⁵ prompting communities, school

VICTIMIZATION SURVEY, at T-1 (2013) [hereinafter NCES BULLYING REPORT], <http://nces.ed.gov/pubs2013/2013329.pdf>. Other studies also suggest that anywhere from twenty percent to thirty percent of students have been involved in bullying. See, e.g., Gianluca Gini & Tiziana Pozzoli, *Association Between Bullying and Psychosomatic Problems: A Meta-Analysis*, 123 PEDIATRICS 1059, 1059 (2009).

⁸ See Dear Colleague Letter, U.S. Dep't of Educ. Office of Special Educ. and Rehab. Servs. (Aug. 20, 2013) [hereinafter OSERS DCL Aug. 20, 2013], <http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc> ("Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression." (footnote omitted)).

⁹ See *id.* ("Bystanders . . . also may be negatively affected as bullying tends to have harmful effects on overall school climate. Bullying can foster fear and disrespect and negatively affect the school experience, norms, and relationships of all students, families, and school personnel.").

¹⁰ See, e.g., *id.* ("Students with disabilities are disproportionately affected by bullying.").

¹¹ Dorothy L. Espelage, Chad A. Rose & Joshua R. Polanin, *Social-Emotional Learning Program to Reduce Bullying, Fighting, and Victimization Among Middle School Students with Disabilities*, 36 REMEDIAL & SPECIAL EDUC. 299, 299 (2015).

¹² According to the National Institute of Mental Health,

[a]utism spectrum disorder (ASD) is characterized by: [p]ersistent deficits in social communication and social interaction across multiple contexts; [r]estricted, repetitive patterns of behavior, interests, or activities; [s]ymptoms must be present in the early developmental period . . . ; and, [s]ymptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

Autism Spectrum Disorder, NAT'L INSTITUTE OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> (last visited Sept. 13, 2015).

¹³ MASS. ADVOCATES FOR CHILDREN, TARGETED, TAUNTED, TORMENTED: THE BULLYING OF CHILDREN WITH AUTISM SPECTRUM DISORDER 1-2 (2009) [hereinafter MASS. ADVOCATES FOR CHILDREN BULLYING REPORT]. Another study conducted by the Interactive Autism Network (IAN) found that sixty-three percent of students with autism ages six to fifteen had experienced bullying at some point. CONNIE ANDERSON, IAN RESEARCH REPORT: BULLYING AND CHILDREN WITH ASD (2014), https://iancommunity.org/cs/ian_research_reports/ian_research_report_bullying.

¹⁴ See Carter & Spencer, *supra* note 2, at 12.

¹⁵ See Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 147 (2009) ("The

officials, and legislatures to take steps to prevent bullying and curb its harmful effects.¹⁶ However, there remains no federal anti-bullying law, and although forty-nine states have passed anti-bullying legislation,¹⁷ victims are often left without a remedy.¹⁸ Students with disabilities and their families have unsuccessfully brought bullying-related cases under Title IX, substantive due process, equal protection, and state tort law.¹⁹ And while at least five circuit courts have expressly noted that bullying can be a basis for finding a violation of the Individuals with Disabilities Education Act (IDEA),²⁰ no common framework under which to analyze the issue has emerged.²¹

This Note argues that bullying experienced by a student with a disability, whether related to the student's disability or not, can be a basis for finding a violation of the IDEA.²² This Note also argues that the appropriate test for determining whether a school district has violated a student's rights under the IDEA with regard to bullying is the framework set forth by the U.S. Department of Education (USDOE) and the U.S. Department of Justice (DOJ) in an amicus brief submitted in support of the appellees in *T.K. ex rel. L.K. v. New York City Department of Education*,²³ which asks (1) whether the effects of bullying were

consensus among physicians and social scientists, educators and youth development organizations, civil rights advocates, and law enforcement is that bullying is neither inevitable nor normal" (footnotes omitted)).

¹⁶ See, e.g., *Facts About Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/news/media/facts/#laws> (last visited Sept. 13, 2015); *Policies & Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/index.html> (last visited Sept. 13, 2015).

¹⁷ *Facts About Bullying*, *supra* note 16. See, e.g., N.Y. EDUC. LAW §§ 10–18 (McKinney 2016).

¹⁸ See Sacks & Salem, *supra* note 15, at 149.

¹⁹ See, e.g., *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289, 314 (E.D.N.Y. 2011) ("In recent years, stories of bullying have led to claims under state and federal law with limited success. Students have unsuccessfully brought cases under Title IX, substantive due process, equal protection, and state tort law." (citation omitted)).

²⁰ See, e.g., *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869 (2d Cir. 2016); *Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 950 (8th Cir. 2015); *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005); *Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194 (3d Cir. 2004); *Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996). The IDEA is a federal law that, among other things, ensures that children with disabilities have access to services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400 (2012).

²¹ See *T.K. ex rel. L.K.*, 779 F. Supp. 2d at 312.

²² The United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) has advised that *any* bullying of a student with a disability that results in the student not receiving a meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA. The bullying does not necessarily need to be related to the student's disability. OSERS DCL Aug. 20, 2013, *supra* note 8. The Supreme Court has interpreted the IDEA's FAPE requirement to mean the provision of special education and related services "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

²³ *T.K. ex rel. L.K.*, 810 F.3d 869.

serious enough to deny a student with a disability access to a free appropriate public education (FAPE), as required by the IDEA, and (2) whether the district's actions adequately addressed those effects.²⁴ The USDOE's and DOJ's proposed framework alone, however, is not enough to guarantee that students with disabilities receive access to the education they are entitled to under the IDEA. As such, this Note proposes an assessment and intervention tool for schools to rely on when faced with the bullying of students with disabilities. The assessment and intervention tool will help ensure that schools adequately address the bullying of students with disabilities under the USDOE's and DOJ's proposed framework.

Part I presents an overview of bullying and the IDEA. It begins by defining bullying and discussing the prevalence and effects of bullying on students with disabilities. Part I then addresses the history of the IDEA and its mandates. Part I concludes by providing background on *T.K. ex rel. L.K. v. New York City Department of Education*,²⁵ which is the most recent circuit court case addressing the question of whether bullying can result in denial of a FAPE.

Part II discusses the cases decided by the five circuit courts that have acknowledged that bullying can be a basis for finding a violation of the IDEA.²⁶ This Part also summarizes the various frameworks—or lack thereof—utilized by these courts to analyze the issue. Finally, Part II addresses the USDOE's and DOJ's proposed framework.

Part III argues that bullying can be a basis for finding a violation of the IDEA and that the proper framework under which to analyze the issue is the framework advocated for by the USDOE and the DOJ. In support of this view, Part III analyzes the guidance provided by the USDOE Office of Civil Rights (OCR) and the USDOE Office of Special Education and Rehabilitative Services (OSERS) regarding a state's responsibilities with respect to bullying under the IDEA. This Part concludes by providing additional evidence-based guidance and proposing an assessment and intervention tool for schools to utilize when addressing the bullying of students with disabilities.

Part IV concludes by arguing that the framework advanced by the USDOE and DOJ is the framework that should be adopted by all courts in these matters, and that the proposed assessment and intervention tool will help ensure schools' compliance with the IDEA's mandate to

²⁴ Brief of the United States as Amicus Curiae Supporting Appellees at 12–13, *T.K. ex rel. L.K.*, 810 F.3d 869 (2d Cir. 2016) (No. 14-3078), 2015 WL 1139663. In *T.K. ex rel. L.K.*, the Second Circuit faced the question of whether a school's failure to address the negative effects of bullying in a student's Individual Education Plan (IEP) violated the IDEA. *Id.*

²⁵ *T.K. ex rel. L.K.*, 810 F.3d 869.

²⁶ See cases cited *supra* note 20.

provide special education services tailored to address a student's unique, individual needs.

I. AN OVERVIEW: BULLYING AND THE IDEA

A. *Defining Bullying*

While there is no universally accepted definition of "bullying,"²⁷ bullying is often characterized by: (1) aggression within a relationship, (2) an imbalance of real or perceived power, and (3) potential for the aggression to be repeated.²⁸ Bullying refers to a variety of behaviors including physical, verbal, emotional, or social aggressions, and can range from blatant aggression to more subtle and covert behaviors.²⁹ Bullying continues to be an issue faced by many students in American schools,³⁰ and can have harmful, long-term effects on the entire school community.³¹ Students who are targets of bullying, in particular, tend to experience lower academic achievement, higher truancy rates, feelings of alienation and loneliness, poor relationships, and depression.³²

There are a variety of risk factors contributing to bullying. Some of these factors include being perceived as different from one's peers, being perceived as weak or unable to defend one's self, being depressed or anxious, having low self-esteem, having fewer friends, and having difficulty relating to others.³³ As many of these factors often apply to

²⁷ See Carter & Spencer, *supra* note 2, at 12.

²⁸ See OSERS DCL Aug. 20, 2013, *supra* note 8 ("Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time.").

²⁹ *Id.*

³⁰ See NCES BULLYING REPORT, *supra* note 7, at T-1.

³¹ See OSERS DCL Aug. 20, 2013, *supra* note 8; see also Gini & Pozzoli, *supra* note 7 (quantifying the association between involvement in bullying and psychosomatic problems experienced by victims, bullies, and bully-victims); Lindsey M. O'Brennan et al., *Examining Developmental Differences in the Social-Emotional Problems Among Frequent Bullies, Victims, and Bully/Victims*, 46 PSYCHOL. SCH. 100, 113 (2009) ("[T]he current study provides further evidence that involvement in bullying is associated with social-emotional problems in students across school levels.").

³² See OSERS DCL Aug. 20, 2013, *supra* note 8; see also Sean D. Cleary, *Adolescent Victimization and Associated Suicidal and Violent Behaviors*, 35 ADOLESCENCE 671, 672 (2000) ("Research has indicated that peer victimization may result in a negative self-evaluation, which in turn may lead to internalizing problems, such as depression, dissociation, or suicidal behavior." (citations omitted)); Gini & Pozzoli, *supra* note 7, at 1059 ("Frequent victimization is related with low self-esteem and self-worth, with depression, and with suicidal ideation." (footnotes omitted)).

³³ See Charles J. Russo & Allan G. Osborne, *Bullying and Students with Disabilities: How Can We Keep Them Safe?*, 316 EDUC. L. REP. 1, 6 (2015) (discussing a variety of possible risk factors contributing to the bullying of students with disabilities); see also Kenneth W. Merrell et al., *How Effective Are School Bullying Intervention Programs? A Meta-Analysis of Intervention*

students with disabilities,³⁴ it is no surprise that they are not only more likely to be targets of bullying,³⁵ but may also be more susceptible to its harm.³⁶ In situations where a public school fails to adequately address the harmful effects of bullying experienced by a student with a disability, the IDEA may provide relief.³⁷

B. A Brief History of the IDEA

Prior to 1966, when Congress added a new Title VI to the Elementary and Secondary Education Act,³⁸ the Federal Government had done little to ensure that students with disabilities had access to an education.³⁹ In 1975, Congress passed the IDEA's predecessor statute, the Education for All Handicapped Children Act (EAHCA).⁴⁰ The EAHCA directly addressed the fact that millions of students with disabilities in the United States were receiving inappropriate or, in the worst cases, no educational services.⁴¹ The EAHCA had four main goals: (1) to ensure that children with disabilities had access to a FAPE, (2) to ensure that the rights of students with disabilities and their families were protected, (3) to assist states in the provision of special educational services, and (4) to evaluate and assure the effectiveness of these goals.⁴²

Between 1975 and 2004, several key amendments were made to the original version of the EAHCA. The 1986 amendments,⁴³ for example, required states to provide services to children with disabilities from

Research, 23 SCH. PSYCHOL. Q. 26, 27 (2008) (“[T]here has been consistency in the findings of descriptive research on victims of bullying, who tend to be physically smaller or weaker in some other way than the perpetrators, and are often anxious, fearful, insecure, depressed, and have poor self-esteem.”).

³⁴ See Russo & Osborne, *supra* note 33, at 6.

³⁵ See, e.g., Carter & Spencer, *supra* note 2, at 20 (“Results from the eleven studies indicated students with disabilities . . . experienced bullying more than their general education peers.”); MASS. ADVOCATES FOR CHILDREN BULLYING REPORT, *supra* note 13, at 2.

³⁶ See, e.g., Carter & Spencer, *supra* note 2, at 12.

³⁷ See OSERS DCL Aug. 20, 2013, *supra* note 8.

³⁸ Act of Nov. 3, 1966, Pub. L. No. 89-750, 80 Stat. 1191 (codified as amended at 20 U.S.C. §§ 6301–6304 (2012)).

³⁹ S. REP. NO. 94-168, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1429.

⁴⁰ See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482, 9567–9567b (2012)); U.S. DEP’T OF EDUC. OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 1 (2010) [hereinafter OSERS THIRTY-FIVE YEARS OF PROGRESS].

⁴¹ S. REP. NO. 94-168, at 8 (“1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.”).

⁴² See OSERS THIRTY-FIVE YEARS OF PROGRESS, *supra* note 40, at 5.

⁴³ Education of the Handicapped Act Amendments of 1986, Pub. L. 99-457, 100 Stat. 1145 (codified as amended at 20 U.S.C. §§ 1400–1482, 9567–9567b (2012)).

birth, whereas previously states were only required to provide services from ages three to twenty-one.⁴⁴ A number of other amendments during this time focused on providing transition services from high school to adult living, and ensuring that students with disabilities were educated in the least restrictive environment (LRE).⁴⁵ In 1990, Congress officially changed the Act's name to the Individuals with Disabilities Education Act (IDEA).⁴⁶ The 2004 amendments⁴⁷ focused on increasing state and local accountability for educating students with disabilities, as well as expanding methods to identify students with disabilities.⁴⁸

The United States has come a long way since 1975, where it was estimated by the Bureau of Education for the Handicapped that only 3.9 million children with disabilities were receiving an "appropriate education."⁴⁹ Today, over 6.6 million children and young people receive special education and related services designed to address their specific needs.⁵⁰

Under the current iteration of the IDEA, states that receive federal education funding are required to provide students with disabilities ages three to twenty-one with access to a FAPE⁵¹ in the LRE⁵² in conformity with an IEP.⁵³ An IEP refers to a written statement for a student with a disability.⁵⁴ IEPs are developed and reviewed at least annually⁵⁵ by an IEP team consisting of the student's parent(s), at least one of the student's regular education teachers, at least one of the student's special education teachers, a representative of the local education agency, an individual who can interpret the implications of the student's evaluations, other individuals who may have knowledge or special

⁴⁴ See OSERS THIRTY-FIVE YEARS OF PROGRESS, *supra* note 40, at 6.

⁴⁵ *Id.* at 6–7.

⁴⁶ Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1482, 9567–9567b (2012)).

⁴⁷ Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400–1482, 9567–9567b (2012)). Although the 2004 amendments are referred to as the Individuals with Disabilities Education Improvement Act of 2004, the Act is still commonly referred to as the Individuals with Disabilities Education Act. See 20 U.S.C. § 1400(a) (2012) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

⁴⁸ See OSERS THIRTY-FIVE YEARS OF PROGRESS, *supra* note 40, at 9.

⁴⁹ S. REP. NO. 94-168, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N 1425, 1429.

⁵⁰ See OSERS THIRTY-FIVE YEARS OF PROGRESS, *supra* note 40, at 11.

⁵¹ 20 U.S.C. § 1412(a)(1)(A) (2012) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.").

⁵² Least Restrictive Environment (LRE) refers to the IDEA's requirement that students with disabilities receive their education, to the maximum extent appropriate, with children who are not disabled. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (2015).

⁵³ § 1412(a)(4).

⁵⁴ § 1414(d)(1)(A)(i).

⁵⁵ § 1414(d)(1)(A)(VIII).

expertise regarding the student, and, when appropriate, the student.⁵⁶ The IEP must identify the student's educational abilities, annual goals, the instruction and related services the school will provide, and the methods by which the school will measure the student's progress.⁵⁷ It is important to note that an IEP may include both academic *and* nonacademic needs.⁵⁸ Failure to write or revise an IEP appropriately can result in denial of a FAPE and may serve as a basis for finding a violation of the IDEA.⁵⁹

In cases where parents believe their student has been denied a FAPE, the IDEA can provide relief. The IDEA provides certain procedural safeguards enabling parents and students to challenge a school district's decisions regarding a student's special education and related services.⁶⁰ A parent may challenge the student's IEP in an administrative hearing conducted by the state educational agency by filing a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child."⁶¹ The IDEA also includes a citizen suit provision, which allows an aggrieved party to bring a civil action in state or federal court provided that all administrative remedies have been exhausted.⁶² Where a school district has failed to provide a student with a disability a FAPE, parents also have the right to unilaterally remove their child from the public school, place her in private school, and seek tuition reimbursement through the IDEA's procedures.⁶³ This

⁵⁶ § 1414(d)(1)(B). There may also be additional state requirements. New York law, for example, mandates that the IEP team include an "additional parent" member. An additional parent member is another parent of a student with a disability residing in the school district or neighboring school district who can provide support and information to the parents of the student for whom the IEP is being developed. *See* N.Y. EDUC. LAW § 4402(1)(b)(1)(a) (McKinney 2016).

⁵⁷ § 1414(d)(1)(A).

⁵⁸ The Office of Special Education Programs (OSEP) has issued guidance indicating that an IEP must address a student's academic, behavioral, and socialization needs. Letter from Alexa Posny, Acting Dir., Office of Special Educ. Programs, to Anonymous (Jan. 13, 2010), http://www.flspedlaw.com/letter_to_anonymous.pdf ("[A] child with Asperger's Syndrome could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate."). The Second Circuit has also recognized that non-academic goals may be included in a student's IEP. *See* M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 248–49 (2d Cir. 2012) (listing certain non-academic goals included in a student's IEP).

⁵⁹ § 1414(d)(4)(A); § 1415(f)(3)(E)(ii).

⁶⁰ § 1415.

⁶¹ § 1415(b)(6)(A). It is important to note that the process for challenging an IEP may vary state-by-state.

⁶² § 1415(i)(2)(A).

⁶³ § 1412(a)(10)(C); *see also* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369–70 (1985).

is what the parents of L.K., a student with a disability who had been the target of persistent bullying, chose to do.⁶⁴

C. T.K. ex rel. L.K. v. New York City Department of Education

During the 2007–2008 school year, L.K. was a third grader receiving special education services in a Collaborative Team Teaching (CTT)⁶⁵ classroom at P.S. 6 in New York City.⁶⁶ In addition to a CTT classroom placement, L.K.'s IEP mandated a one-to-one Special Education Itinerant Teacher, and speech, physical, and occupational therapy.⁶⁷

According to L.K.'s parents, L.K. experienced repeated bullying starting in May 2007, which continued throughout the 2007–2008 school year.⁶⁸ In May 2007, for example, one of L.K.'s classmates pinched her hard enough to cause a bruise, and in November 2007, the same student stomped on L.K.'s toes.⁶⁹ In another incident, several of L.K.'s classmates refused to touch a pencil that L.K. had used.⁷⁰ Instead of reprimanding the students, L.K.'s teacher put a label on the pencil to reflect that it was L.K.'s, thus ensuring that her classmates could avoid it.⁷¹ In April 2008, one of L.K.'s classmates drew a picture of L.K., labeling her “fat” and “ugly.”⁷² Three of L.K.'s special education teachers testified that L.K. was constantly bullied by her classmates.⁷³ They testified that L.K. was pushed, tripped, laughed at, and ostracized.⁷⁴ One of L.K.'s special education teachers even described the classroom as a “hostile environment” for her.⁷⁵

Meanwhile, L.K. complained to her parents daily about being bullied.⁷⁶ L.K. became “emotionally unavailable to learn,” gained weight, started bringing dolls to school for comfort, and was reluctant to attend

⁶⁴ T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ., 32 F. Supp. 3d 405 (E.D.N.Y. 2014), *aff'd*, 810 F.3d 869 (2d Cir. 2016).

⁶⁵ Collaborative Team Teaching (CTT) refers to a system in which a general educator and a special educator deliver special education services in a general education classroom. UNITED FED'N OF TEACHERS, CENTERING ON COLLABORATIVE TEAM TEACHING GRADES K–12, at 1 (2010), http://www.ufttc.org/wp-content/uploads/2013/09/Centering_on_CTT_2010.pdf.

⁶⁶ T.K. ex rel. L.K., 32 F. Supp. 3d at 411.

⁶⁷ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 6.

⁶⁸ T.K. ex rel. L.K., 32 F. Supp. 3d at 412.

⁶⁹ *Id.*

⁷⁰ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 6–7.

⁷¹ *Id.* at 7.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ., 32 F. Supp. 3d 405, 412 (E.D.N.Y. 2014), *aff'd*, 810 F.3d 869 (2d Cir. 2016).

school.⁷⁷ In March 2008, L.K.'s parents met with school officials to discuss creating a behavior intervention plan⁷⁸ to help L.K. manage her behavioral difficulties.⁷⁹ L.K.'s parents requested copies of any incident reports regarding bullying of L.K., but no reports were provided.⁸⁰ At another meeting in May 2008, the principal refused to discuss the bullying issue with L.K.'s parents.⁸¹ And in June 2008, when the IEP team met to review L.K.'s IEP for the 2008–2009 school year, school officials again refused to discuss bullying.⁸²

Despite the persistent bullying and clear signs of social and academic regression, the IEP team recommended that L.K. be placed in the same classroom with the same students for the 2008–2009 school year.⁸³ Concerned that the bullying would persist, and that L.K. would continue to regress as a result, L.K.'s parents objected to the IEP team's recommendations.⁸⁴ No other placement recommendations were offered.⁸⁵

On June 6, 2008, L.K.'s parents notified the New York City Department of Education (NYC DOE) that they were rejecting the 2008–2009 IEP and that they intended to place L.K. in a private school at the NYC DOE's expense.⁸⁶ Later that month, L.K.'s parents filed a due process complaint⁸⁷ seeking tuition reimbursement.⁸⁸ L.K.'s parents

⁷⁷ *Id.* (“Her father stated that bullying made L.K. ‘emotionally unavailable to learn.’ L.K. gained weight, needed to bring her dolls to school for comfort, and accumulated [twenty-four] latenesses, which her parents attributed to bullying and L.K.'s resulting reluctance to attend school.” (citation omitted)).

⁷⁸ In New York, a behavior intervention plan

means a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior.

N.Y. COMP. CODES R. & REGS. tit. 8 § 200.1(mmm) (2016). A functional behavior assessment refers to the process of determining why a student engages in certain negative behaviors and how those behaviors relate to the environment. *Id.* § 200.1(r).

⁷⁹ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 9.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 10.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 32 F. Supp. 3d 405, 413 (E.D.N.Y. 2014), *aff'd*, 810 F.3d 869 (2d Cir. 2016). In cases where the State fails to provide a student with a disability with a FAPE, parents may enroll the child in a private school and seek reimbursement for that placement. *See* 20 U.S.C. § 1412(a)(10)(C)(ii) (2012); *see also* *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369–70 (1985).

⁸⁷ In New York, IDEA due process complaints must first be litigated at the school district level before an impartial hearing officer (IHO). N.Y. EDUC. LAW § 4404(1) (McKinney 2016); N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(i)–(j) (2016). A party may appeal the decision of an IHO to the State Review Officer (SRO). 34 C.F.R. § 300.514(b) (2015); EDUC. § 4404(2); § 200.5(k). Once these administrative remedies have been exhausted, either party may seek

argued that, due to the bullying L.K. had experienced during the 2007–2008 school year, the 2008–2009 IEP was inappropriate and denied their child a FAPE.⁸⁹ In July 2009, an impartial hearing officer (IHO) found that the issue of bullying did not bear on the appropriateness of the special education program and related services and denied the parents' request for relief.⁹⁰ L.K.'s parents appealed the decision to the State Review Officer (SRO).⁹¹ The SRO affirmed the IHO's decision concluding that bullying did not deny L.K. a FAPE.⁹²

Having exhausted their administrative remedies, L.K.'s parents brought their complaint in the Eastern District of New York.⁹³ L.K.'s parents contended that their daughter was denied a FAPE because her assigned public school failed to prevent her from being bullied.⁹⁴ The court ordered utilization of a substantive standard to determine whether the bullying had, indeed, resulted in denial of a FAPE, remanding the case back to the IHO for review.⁹⁵

Following the direction of the district court, a second impartial hearing commenced in June 2011.⁹⁶ L.K.'s parents continued to argue that the NYC DOE denied their daughter a FAPE because: (1) L.K. was a victim of bullying, (2) the NYC DOE staff at P.S. 6 were aware of the bullying, (3) the NYC DOE staff at P.S. 6 failed to address the bullying, and (4) L.K. was significantly restricted in her educational opportunities as a result of the school's failure to address the bullying.⁹⁷ Although the IHO recognized that L.K. had, in fact, been the victim of persistent bullying, the IHO determined that L.K.'s educational opportunities were not significantly impaired.⁹⁸ L.K.'s parents again appealed the IHO's determination to the SRO, which agreed with the IHO's conclusion that L.K.'s educational opportunities had not been significantly impaired by the bullying, and, thus, she had not been denied a FAPE.⁹⁹

Having again exhausted their administrative remedies on remand, L.K.'s parents returned to the Eastern District of New York.¹⁰⁰ The court

independent judicial review of the SRO's decision in state or federal court. 20 U.S.C. § 1415(i)(2)(A) (2012).

⁸⁸ *T.K. ex rel. L.K.*, 32 F. Supp. 3d at 413.

⁸⁹ *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289, 311 (E.D.N.Y. 2011).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 293.

⁹⁴ *Id.*

⁹⁵ *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 32 F. Supp. 3d 405, 413 (E.D.N.Y. 2014), *aff'd*, 810 F.3d 869 (2d Cir. 2016).

⁹⁶ *Id.*

⁹⁷ *Id.* at 413–14.

⁹⁸ *Id.* at 415.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 410.

found, inter alia, that bullying threatened to “severely restrict” L.K.’s educational opportunities,¹⁰¹ that L.K.’s IEP team had improperly refused to address the bullying, and that the 2008–2009 IEP substantively failed to address bullying.¹⁰² As such, the court held that L.K. had been denied a FAPE and granted the parents’ request for tuition reimbursement.¹⁰³

Prior to *T.K. ex rel. L.K. v. New York City Department of Education*,¹⁰⁴ the question of whether bullying could be a basis for finding denial of a FAPE remained unresolved within the Second Circuit.¹⁰⁵ The USDOE and DOJ submitted an amicus brief in support of L.K.’s parents, arguing that bullying can be a basis for finding denial of a FAPE and proposing a framework under which these questions should be analyzed.¹⁰⁶

II. BULLYING AND IDEA IN THE SEVENTH, THIRD, NINTH, EIGHTH, AND SECOND CIRCUITS

Although there is relatively little case law addressing the issue within the circuit courts, at least five circuit courts have acknowledged that bullying can be a basis for finding denial of a FAPE under the IDEA.¹⁰⁷ In chronological order, this Part addresses the cases decided by these courts and summarizes the various frameworks—or lack thereof—utilized by each to analyze whether bullying deprived a student with a disability access to a FAPE. This Part also addresses the framework proposed by the USDOE and DOJ in *T.K. ex rel. L.K. v. New York City Department of Education*.¹⁰⁸

A. *The Seventh Circuit*

In *Charlie F. ex rel. Neil F. v. Board of Education of Skokie School District*,¹⁰⁹ the parents of a student with a disability brought a case seeking monetary damages for violations of their son’s due process and

¹⁰¹ *Id.* at 418–20 (finding that the severity of the bullying and the school’s deliberate indifference toward the bullying threatened to severely restrict L.K.’s educational opportunities).

¹⁰² *Id.* at 420–22.

¹⁰³ *Id.* at 427.

¹⁰⁴ *T.K. ex rel. L.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869 (2d Cir. 2016).

¹⁰⁵ See *Allowing Bullying of a Student with a Disability Amounts to Denial of FAPE*, ADA COMPLIANCE GUIDE NEWSL. (Thompson Publ’g Grp., Inc., Washington D.C.), Aug. 2011.

¹⁰⁶ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24.

¹⁰⁷ See cases cited *supra* note 20.

¹⁰⁸ *T.K. ex rel. L.K.*, 810 F.3d 869.

¹⁰⁹ *Charlie F. ex rel. Neil F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989 (7th Cir. 1996).

equal protection rights under the U.S. Constitution, the Rehabilitation Act, the Americans with Disabilities Act, and state tort law.¹¹⁰ According to the parents' complaint, their son, Charlie, was the victim of repeated harassment at the hands of both his classmates and his fourth-grade teacher throughout the 1993–1994 school year.¹¹¹

In September 1993, when Charlie was in fourth grade, he was placed in a general education classroom.¹¹² According to Charlie's parents, throughout the 1993–1994 school year, Charlie's teacher held a series of class meetings where students were encouraged to "vent" their feelings on a variety of topics.¹¹³ During these meetings, Charlie's teacher encouraged the other students to openly discuss their feelings about Charlie, including their feelings about his disabilities.¹¹⁴

As the school year progressed, Charlie's parents became concerned that he seemed to be having difficulties in school.¹¹⁵ In January 1994, after hiring a psychologist to observe Charlie in the classroom, Charlie's mother reached out to the school principal expressing concern about her son's depression and agitation following a class meeting the psychologist observed.¹¹⁶ The principal made no effort to allay Charlie's mother's concerns, and told her to not bring up the class meeting at any school meetings.¹¹⁷ On January 21, 1994, Charlie's parents transferred him to another school.¹¹⁸

Charlie's parents first brought their case in the Northern District of Illinois.¹¹⁹ Although the parents' complaint did not bring any claims under the IDEA, the defendants moved for summary judgment alleging that the district court did not have subject matter jurisdiction because the parents had failed to exhaust the administrative remedies available under the IDEA.¹²⁰ The court found that because the complaint was related to Charlie's educational placement and the provision of a FAPE,

¹¹⁰ *Charlie F. ex rel. Neil F. v. Bd. of Educ. of Skokie Sch. Dist.*, No. 95 C 5496, 1996 WL 66050, at *1 (N.D. Ill. Feb. 8, 1996). The parents did not bring any claims under the IDEA. *Charlie F. ex rel. Neil F.*, 98 F.3d at 991.

¹¹¹ *Charlie F. ex rel. Neil F.*, 98 F.3d at 990.

¹¹² *Charlie F. ex rel. Neil F.*, 1996 WL 66050, at *1.

¹¹³ *Id.*

¹¹⁴ *Id.* ("During these meetings, [Charlie's teacher] encouraged the children to vent their feelings regarding Charlie's disabilities, his flaws as a person, his personality, and his classroom behavior.").

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Charlie F. ex rel. Neil F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 991 (7th Cir. 1996). The IDEA requires that before filing a civil action seeking relief that is also available under the Constitution, the Americans with Disabilities Act, or title V of the Rehabilitation Act, the procedures under 20 U.S.C. § 1415(f) and 20 U.S.C. § 1415(g) must first be exhausted. 20 U.S.C. § 1415(l) (2012).

the relief sought by Charlie's parents was indeed available under the IDEA.¹²¹ And while the court acknowledged that the IDEA was not the exclusive avenue through which relief could be granted,¹²² the court determined that the IDEA required the parents to pursue the administrative remedies provided by the IDEA before bringing their case in federal court.¹²³ Because Charlie's parents failed to pursue these administrative remedies before bringing their case in the Northern District of Illinois, the court granted the defendants' motion and dismissed the case for lack of subject matter jurisdiction.¹²⁴

The parents appealed to the Seventh Circuit challenging the district court's determination that relief was available under the IDEA.¹²⁵ The parents argued that because they sought monetary damages, a form of relief not authorized by the IDEA, the district court should not have found that the IDEA could provide relief.¹²⁶ The court agreed that the IDEA does not provide for monetary relief, but determined that this did not necessarily mean that the IDEA did not apply.¹²⁷

Ultimately, the court held that, at least in principle, the IDEA could provide relief to Charlie and his parents.¹²⁸ The court reasoned that because the complaint was couched on the school's failure to provide Charlie with an appropriate education and related services,¹²⁹ and because the IDEA offers "comprehensive educational services," the parents were required to pursue the IDEA's administrative remedies before bringing their case in federal court.¹³⁰

Although the Seventh Circuit determined that the type of harassment experienced by Charlie could be a basis for finding a violation of the IDEA, *Charlie F. ex rel. v. Board of Education of Skokie*

¹²¹ *Charlie F. ex rel. Neil F.*, 1996 WL 66050, at *4 ("Charlie's complaint seeks relief that is available under the IDEA. . . . The IDEA clearly provides a remedy for complaints about inappropriate placement of disabled children. Under section 1415(b)(1)(E) of the IDEA, parents of disabled children can complain about 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.'").

¹²² *Id.* at *3.

¹²³ *Id.* at *4.

¹²⁴ *Id.*

¹²⁵ *Charlie F. ex rel. Neil F.*, 98 F.3d at 991.

¹²⁶ *Id.*

¹²⁷ *Id.* at 992 ("The nature of the claim and the governing law determine the relief no matter what the plaintiff demands. . . . [T]he theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply.").

¹²⁸ *Id.* at 993.

¹²⁹ *Id.* ("Yet the complaint [Charlie's parents] filed on his behalf deals with acts that have both an educational source and an adverse educational consequence; the complaint contends that his education has suffered as a result of the events in fourth grade.").

¹³⁰ *Id.* ("Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA . . . so that in the end money is the only balm. But parents cannot know that without asking [T]he IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.").

*School District*¹³¹ does not provide a usable framework for determining when such harassment constitutes a violation. The court merely acknowledged that because it was possible for the parents to seek relief through the IDEA, they were required to pursue the administrative remedies made available by the IDEA before filing a civil action in federal court under the Constitution, the Americans with Disabilities Act, and Title V of the Rehabilitation Act.¹³² The decision provides little guidance with regard to what is required of schools under the IDEA when faced with the harassment of a student with a disability. The court's decision also provides almost no guidance to families regarding what must be shown in order to substantiate a claim that the harassment of a student with a disability resulted in a violation of the IDEA.

B. *The Third Circuit*

In *Shore Regional High School v. P.S. ex rel. P.S.*, the Third Circuit was asked to determine whether bullying could be the basis for finding denial of a FAPE under the IDEA.¹³³ The case involved a student, P.S., who was the frequent target of physical and verbal harassment, as well as social isolation by his classmates.¹³⁴ P.S. began experiencing bullying in elementary school, which continued throughout middle school.¹³⁵ In fifth grade, P.S. was diagnosed with depression and his grades began to drop.¹³⁶ That same year, P.S. was classified as a student with a disability and began to receive special education and related services.¹³⁷ P.S. continued to struggle with bullying and depression throughout the sixth and seventh grades.¹³⁸ In eighth grade, the bullying became so intolerable that P.S. attempted suicide.¹³⁹

Following the suicide attempt, P.S.'s parents began looking for a different high school for their son to attend.¹⁴⁰ P.S.'s parents feared that if he attended the local high school, Shore Regional High School (Shore), the bullying would continue and P.S.'s emotional and physical

¹³¹ *Charlie F. ex rel. Neil F.*, 98 F.3d 989.

¹³² *Id.* at 993.

¹³³ *Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 195 (3d Cir. 2004).

¹³⁴ *Id.* ("Bullies constantly called P.S. names such as 'faggot,' 'gay,' 'homo,' 'transvestite,' 'transsexual,' 'slut,' 'queer,' 'loser,' 'big tits,' and 'fat ass.' Bullies told new students not to socialize with P.S. Children threw rocks at P.S., and one student hit him with a padlock in gym class. When P.S. sat down at a cafeteria table, the other students moved.")

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 195–96.

¹³⁸ *Id.* at 196.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

health would be at risk.¹⁴¹ P.S.'s parents reached out to Shore and requested that P.S. be placed at a high school in a neighboring school district.¹⁴² Shore rejected this request because it believed that the school would be able to contain the bullying.¹⁴³

After Shore rejected P.S.'s parents' requested placement, P.S.'s father filed a mediation request with the New Jersey Department of Education.¹⁴⁴ When mediation proved unsuccessful, an Impartial Due Process Hearing commenced.¹⁴⁵ During the hearing, the Administrative Law Judge (ALJ) heard conflicting expert testimony regarding whether Shore would be able to offer P.S. an education "sufficiently free from the threat of harassment to constitute a FAPE."¹⁴⁶ Ultimately, the ALJ credited the witnesses who testified that a placement at Shore would have subjected P.S. to continued bullying and held that Shore could not provide P.S. with a FAPE.¹⁴⁷ Shore challenged the ALJ's decision in district court, which found in favor of Shore and reversed the ALJ's decision.¹⁴⁸

P.S.'s parents appealed the district court's decision in the Third Circuit.¹⁴⁹ The court reversed the district court's decision and reinstated the ALJ's determination that bullying had denied P.S. a FAPE.¹⁵⁰ But, just as in *Charlie F. ex rel. Neil F. v. Board of Education of Skokie School District*,¹⁵¹ the court failed to provide a framework under which P.S.'s claims could be analyzed. Instead, the court based its reversal on the fact that the district court failed to give the requisite deference to determinations made by the ALJ regarding conflicting expert testimony.¹⁵²

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* ("Shore's affirmative action officer, Dr. Barbara Chas, contended that Shore could contain the bullying by disciplining bullies and by utilizing peer and social worker mediation.").

¹⁴⁴ *Id.* at 197.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 199. "All of the witnesses agreed that P.S. had been subjected to unusual levels of harassment. While Dr. Chas testified that she believed that Shore could control the bullying, P.S., his mother, Dr. Corbin-Fliger, and Dr. Friedman all disagreed." *Id.* at 197.

¹⁴⁷ *Id.* at 197 ("The ALJ concluded that Shore could not provide P.S. with a 'free appropriate public education,' as required by the IDEA . . . because of the 'legitimate and real fear that the same harassers who had followed P.S. through elementary and middle school would continue [to bully him.]'").

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 195.

¹⁵⁰ *Id.* at 201–02.

¹⁵¹ See discussion *supra* Section II.A.

¹⁵² *Shore Reg'l High Sch. Bd. of Educ.*, 381 F.3d at 199–200 ("Both the ALJ and the District Court were confronted with conflicting opinions by experts on the question whether placement at Shore offered P.S. an education that was sufficiently free from the threat of harassment to constitute a FAPE. The ALJ who heard the witnesses during [the] hearing . . . credited the witnesses who opined that placement at Shore would have exposed P.S. to a continuation of the

C. *The Ninth Circuit*

The Ninth Circuit developed a framework for determining when bullying results in a denial of a FAPE under the IDEA in *M.L. v. Federal Way School District*.¹⁵³ The case involved a student, M.L., diagnosed with multiple disabilities.¹⁵⁴ At the beginning of the 2000–2001 school year, M.L. was placed in an integrated¹⁵⁵ kindergarten class at the Mark Twain Elementary School in the Federal Way School District (FWSD).¹⁵⁶ After just five days, M.L.’s mother removed him from the school claiming that M.L. was being bullied by other students.¹⁵⁷

In October 2000, after M.L.’s mother removed him from Mark Twain Elementary School, FWSD conducted an initial evaluation to determine whether he should receive special education and related services in the FWSD.¹⁵⁸ Based on the evaluation, FWSD recommended placements at several schools within the district, all of which M.L.’s family rejected.¹⁵⁹ On October 27, 2000, M.L.’s parents filed a written objection to the evaluation conducted by FWSD and requested that FWSD provide an independent evaluation of M.L. at the district’s expense.¹⁶⁰ FWSD filed a request for a due process hearing.¹⁶¹

Both the ALJ and the district court found in favor of FWSD.¹⁶² On appeal to the Ninth Circuit, M.L.’s parents argued, *inter alia*, that their son was denied a FAPE due to FWSD’s failure to take action to prevent other students from bullying M.L.¹⁶³ In order to resolve this question, the court developed a test to analyze whether M.L. had been denied a FAPE as a result of the bullying experienced during his five days at

devastating bullying that had occurred in Middle School. The District Court did not point to any ‘nontestimonial evidence’ that undermined the testimony of these witnesses. . . . [T]he Court simply chose to credit a witness who expressed a contrary opinion. In taking this approach, the District Court did not give the requisite deference to the ALJ’s evaluation of the witnesses’ credibility.”). Under Supreme Court precedent, the district court was required to afford “due weight” to the ALJ’s determinations regarding the conflicting witness testimony. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

¹⁵³ *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005).

¹⁵⁴ *Id.* at 636–37.

¹⁵⁵ Integration is a term developed by educators to describe one of the various ways of meeting the IDEA’s LRE requirement. Integration often refers to the placement of a student with a disability in a general education classroom with nondisabled, age-appropriate peers. DISABILITY RIGHTS CAL., *Chapter 7: Information on Least Restrictive Environment, in SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES 7-1, 7-1-7-2* (2011).

¹⁵⁶ *M.L.*, 394 F.3d at 638.

¹⁵⁷ *Id.* at 639.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 641.

¹⁶³ *Id.* at 650.

Mark Twain Elementary School.¹⁶⁴ Under this framework, a student with a disability is denied a FAPE where: 1) a teacher is deliberately indifferent to the bullying, and 2) the bullying is so severe that the child derives no benefit from the special education and related services provided by the school district.¹⁶⁵ Applying this test, the court determined that bullying had not denied M.L. a FAPE because his parents failed to provide FWSD with a “reasonable opportunity” to find a way to prevent the bullying, and because they failed to demonstrate that the bullying resulted in the loss of an educational benefit.¹⁶⁶

The Ninth Circuit derived this framework from a gender discrimination case, *Davis v. Monroe County Board of Education*.¹⁶⁷ In *Davis*, the Supreme Court held that a violation of Title IX occurs where a school district is deliberately indifferent to harassment, and the harassment is so severe that the victim is effectively barred from accessing an educational opportunity or benefit.¹⁶⁸ The Ninth Circuit modified the *Davis* test by requiring that in order to find denial of a FAPE, it must be shown that the student received *no* educational benefit as a result of the bullying.¹⁶⁹ Under this rigid framework, a student with a disability whose academic progress is stunted, but not entirely prevented as a result of bullying, may not be afforded relief under the IDEA.¹⁷⁰

¹⁶⁴ *Id.* (“Neither the statute nor any court has directly addressed the question whether unremedied teasing can constitute a denial of a FAPE. Under the IDEA, a disabled child is guaranteed a FAPE, which “provide[s] *educational benefit* to the handicapped child.”” (internal citations omitted)).

¹⁶⁵ *Id.* (“If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive *no* benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.” (emphasis added)).

¹⁶⁶ *Id.* at 651 (“The record shows that by removing M.L. from Mark Twain Elementary School after only five days, [the parents] failed to give the FWSD a reasonable opportunity to find a way to prevent the other students from teasing M.L. [The parents] have also failed to demonstrate that teasing resulted in the loss of an educational benefit. [The parents] have offered no evidence that the teasing affected M.L. or interfered with his education.”).

¹⁶⁷ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

¹⁶⁸ *Id.* at 633 (holding that a school district violates Title IX where “the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. . . . [and] that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”).

¹⁶⁹ *T.K. ex rel. L.K. v. N.Y.C. Dep’t of Educ.*, 779 F. Supp. 2d 289, 313 (E.D.N.Y. 2011) (“The court based its reasoning on the gender discrimination case of *Davis v. Monroe County Board of Education*, but seemingly modified *Davis* by requiring a finding that no educational benefit was received.” (citation omitted)).

¹⁷⁰ *See, e.g., id.* at 314 (explaining that the test developed by the Ninth Circuit in *M.L. v. Federal Way School District* is “too rigid and too narrow” because “[i]t fails to acknowledge that a student may have her academic success stunted as a result of harassment, but still achieve some success.”).

D. *The Eighth Circuit*

*Sneitzer v. Iowa Department of Education*¹⁷¹ concerns an appeal brought in the Eighth Circuit by the mother of a high school student with a disability, K.S., claiming that the school district failed to offer her child a FAPE for the 2012–2013 school year.¹⁷² The complaint alleges several issues with K.S.’s 2012–2013 IEP and recommended school placement, including that the school district’s recommended placement at Cedar Rapids Kennedy High School (Kennedy) was not appropriate.¹⁷³ K.S.’s mother argued that continued placement at Kennedy posed a serious threat to K.S.’s emotional health, and that K.S. required a more therapeutic environment than Kennedy could offer.¹⁷⁴

K.S. attended Kennedy during the 2010–2011 and 2011–2012 school years and did quite well.¹⁷⁵ Unfortunately, in early 2012, K.S. experienced a traumatic event while vacationing with her family over winter break.¹⁷⁶ After consulting with K.S.’s medical team, the family decided that the best way to help K.S. move past the trauma was to get her back into a normal routine.¹⁷⁷ Thus, when the spring semester started, K.S. returned to Kennedy.¹⁷⁸

As the spring semester progressed, K.S. experienced two disturbing interactions with other students. First, in January 2012, K.S. reported to her mother that another student held a knife to her throat and threatened to cut her.¹⁷⁹ The incident was investigated by the school, but no further action was taken against the student.¹⁸⁰ Second, in April 2012, K.S. accused another student of poking her repeatedly.¹⁸¹ K.S. responded by slapping the student in the face and using inappropriate language.¹⁸²

¹⁷¹ *Sneitzer v. Iowa Dep’t of Educ.*, 796 F.3d 942 (8th Cir. 2015).

¹⁷² *Id.* at 943–44.

¹⁷³ *Id.* at 948.

¹⁷⁴ *Id.* (K.S.’s mother argued that “there was a serious risk that K.S.’s placement at Kennedy for the Fall 2012 semester would have triggered a ‘downward spiral’ in her emotional health, including a suicide risk; and . . . that K.S. needed a more intensely therapeutic environment than Kennedy could offer.”).

¹⁷⁵ *Id.* at 944 (“K.S. is considered ‘twice exceptional’ meaning that she is both gifted academically . . . and on the autism spectrum. She excels in math and science; successfully took several advanced placement classes at Kennedy, and she was involved in extracurricular activities . . .”).

¹⁷⁶ *Id.* (“[T]he beginning of the year 2012 was very traumatic for K.S. and her family. While her family vacationed over Christmas break on a Caribbean cruise, K.S. was raped by two young men on the cruise ship.”).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 945.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

As a result of this incident, K.S.'s IEP was amended to include paraprofessional support during extracurricular activities.¹⁸³

Based in part on the two incidents outlined above, K.S.'s mother argued that placement at Kennedy for the 2012–2013 school year would deny K.S. a FAPE.¹⁸⁴ Both the ALJ and the district court disagreed, holding that the school district had offered K.S. a FAPE for the 2012–2013 school year.¹⁸⁵

The Eight Circuit affirmed the decisions of the ALJ and the district court.¹⁸⁶ On the question of bullying, the court agreed with the ALJ's determination that there was not enough evidence to support the claim that returning to Kennedy would cause K.S. severe emotional harm.¹⁸⁷ In support of this conclusion, the court pointed to the ALJ's finding that each reported incident of bullying was "promptly" investigated and resolved.¹⁸⁸ The court also pointed to the evidence presented by the school district refuting the allegation that K.S. was the victim of "ongoing" bullying or harassment.¹⁸⁹

Although no clear framework is articulated by the court, the opinion implies that bullying might be a basis for finding denial of a FAPE where a student with a disability is subjected to "ongoing" bullying or harassment, and the school fails to "promptly" investigate and resolve reports of bullying.¹⁹⁰ The court, however, does not address the possibility that a single incident of bullying or harassment might be so severe as to constitute denial of a FAPE, which seems to conflict with the guidance provided by OSERS regarding a school district's responsibilities under the IDEA to address bullying of students with disabilities.¹⁹¹

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 948 ("[K.S.'s mother] alleges that the district did not conduct a genuine review in August 2012 to address K.S.'s needs for the upcoming school year; that there was a serious risk that K.S.'s placement at Kennedy for the Fall 2012 semester would have triggered a 'downward spiral' in her emotional health, including a suicide risk; and, finally, that K.S. needed a more intensely therapeutic environment than Kennedy could offer.").

¹⁸⁵ *Id.* at 947.

¹⁸⁶ *Id.* at 944.

¹⁸⁷ *Id.* at 950.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ("[E]ach incident of bullying that was reported to the school was promptly investigated and resolved, and the district presented substantial evidence refuting the claim that K.S. was subjected to *ongoing* bullying or harassment." (emphasis added)).

¹⁹¹ The guidance provided by OSERS does not necessarily require that bullying be ongoing in order to constitute a denial of a FAPE. OSERS explains that "*any* bullying of a student with a disability that results in the student not receiving meaningful educational benefit from the special education and related services provided by the school is a denial of FAPE." OSERS DCL Aug. 20, 2013, *supra* note 8 (emphasis added).

E. *The Second Circuit*

In *T.K. ex rel. L.K. v. New York City Department of Education*, the Eastern District of New York developed a framework to determine whether bullying had resulted in a substantive denial of a FAPE.¹⁹² Borrowing heavily from the test established in *Davis v. Monroe County Board of Education* to resolve claims of sexual harassment against schools under Title IX,¹⁹³ the court created a standard that asks whether a school was deliberately indifferent to bullying that substantially restricted educational opportunities for a student with a disability.¹⁹⁴ Under this standard, the bullying need not be “outrageous,” but it must be severe enough to constitute a “hostile environment.”¹⁹⁵ Additionally, the standard does not require a showing that the bullying was related to the student’s disability, nor does it require a showing that bullying prevented *all* opportunity for an appropriate education.¹⁹⁶ When faced with allegations of bullying, a school must promptly investigate.¹⁹⁷ If bullying is found to have occurred, the school must take steps to prevent future incidents of bullying.¹⁹⁸

The court applied this framework to L.K.’s parents’ claim against the NYC DOE when they brought their case in the Eastern District of New York for the second time.¹⁹⁹ In holding that L.K. had been denied a FAPE for the 2008–2009 school year, the court found, inter alia, that the school’s failure to address bullying, despite repeated requests by L.K.’s parents, supported a finding of deliberate indifference on the part of the school.²⁰⁰

The NYC DOE appealed to the Second Circuit, which affirmed the decision of the court below and granted the parents’ motion for tuition reimbursement.²⁰¹ Although the court agreed that L.K. had been denied a FAPE, it based its reasoning on finding a procedural violation of the

¹⁹² *T.K. ex rel. L.K. v. N.Y.C. Dep’t of Educ.*, 32 F. Supp. 3d 405, 410 (E.D.N.Y. 2014), *aff’d*, 810 F.3d 869 (2d Cir. 2016).

¹⁹³ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (requiring plaintiff asserting a Title IX claim to show that: harassment was based on gender; the harassment was severe, pervasive, and so objectively offensive that it altered her education; the school district had actual notice of the harassment; and the school was deliberately indifferent to the harassment).

¹⁹⁴ *T.K. ex rel. L.K.*, 779 F. Supp. 2d at 316.

¹⁹⁵ *Id.* at 317 (“Conduct need not be outrageous to fit within the category of harassment that rises to a level of deprivation of rights of a disabled student. The conduct must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment.”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *T.K. ex rel. L.K. v. N.Y.C. Dep’t of Educ.*, 32 F. Supp. 3d 405, 410 (E.D.N.Y. 2014), *aff’d*, 810 F.3d 869 (2d Cir. 2016).

²⁰⁰ *Id.* at 419–20.

²⁰¹ *T.K. ex rel. L.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869, 872 (2d Cir. 2016).

IDEA, rather than a substantive violation.²⁰² The Second Circuit found that the school's refusal to discuss bullying with L.K.'s parents "significantly impeded" Plaintiffs' right to participate in the development of L.K.'s 2008–2009 IEP.²⁰³ The court assumed that bullying could result in denial of a FAPE, but did not reach the question.²⁰⁴ Because the court based its decision on a procedural violation of the IDEA, it did not consider the frameworks proposed by the district court, and the USDOE and DOJ.²⁰⁵

F. *The USDOE's and DOJ's Proposed Framework in T.K. ex rel. L.K. v. New York City Department of Education*

The USDOE and DOJ submitted an amicus brief in support of L.K.'s parents arguing that bullying can result in denial of a FAPE, and, thus, provide a basis for finding a violation of the IDEA.²⁰⁶ The USDOE and DOJ proposed a framework that asks the court to determine: (1) whether bullying and its effects prevented the student from obtaining a meaningful educational benefit, and (2) whether the school district's response to the bullying ensured or denied access to a FAPE.²⁰⁷ Under this standard, a student may establish denial of a FAPE where a school fails to address bullying that results in a "significantly measurable change" in a student's academic performance, or when a student's behavior is affected in a way that makes it difficult to concentrate,

²⁰² *Id.* at 876 ("We conclude that the Department denied L.K. a FAPE by violating her parents' *procedural* right to participate in the development of her IEP." (emphasis added)). The IDEA provides that procedural inadequacies that "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE]" can serve as a basis for finding denial of a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii).

²⁰³ *T.K. ex rel. L.K.*, 810 F.3d at 877.

²⁰⁴ *Id.* at 876 ("Because the [NYC DOE] concedes that [bullying] can be an appropriate consideration when it 'reaches a level where a student is substantially restricted in learning opportunities,' we assume as much without deciding the issue here." (citation omitted)).

²⁰⁵ *Id.* at 876 n.3 ("Because we hold that the Department denied L.K. a FAPE as a result of its procedural violations, we also need not and do not reach the question whether the bullying at issue here was so severe that the failure to address it in L.K.'s IEP resulted in a substantive denial of a FAPE. For the same reason, we express no opinion as to whether the District Court's four-part test for determining when bullying results in the substantive denial of a FAPE correctly states the law.").

²⁰⁶ See discussion *supra* Section I.C.

²⁰⁷ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 12–13 ("The Court's assessment . . . must determine whether the serious bullying and its effects interfered with L.K.'s special education program, including her academic and nonacademic developments, in a way that prevents the child from obtaining a meaningful educational benefit and thus denies her a FAPE; and whether the school district's response ensured or denied L.K.'s continuing receipt of a FAPE.").

communicate, or participate in academic or social activities.²⁰⁸ Where bullying has denied a student with a disability a FAPE, the IEP team must revise the IEP and identify special education and related services designed to mitigate the effects of bullying, and “ensure prospectively that the student is receiving a FAPE.”²⁰⁹

Unlike the frameworks utilized by the Ninth Circuit and the Eastern District of New York,²¹⁰ the framework proposed by the USDOE and DOJ does not require a showing of deliberate indifference.²¹¹ The USDOE and DOJ argue that an assessment of liability under the IDEA is different from assessments under other civil rights laws seeking compensatory damages.²¹² Under other civil rights laws, deliberate indifference requires “actual notice of harassment that is based on a protected status,” and an “absent or unreasonably lax response by school officials.”²¹³ Under the IDEA, however, the focus must be on whether bullying prevented the student from obtaining a meaningful educational benefit, and whether the IEP addresses the needs of the student being bullied.²¹⁴

III. PROPOSAL

There seems to be consensus among the five circuit courts discussed in Part II that bullying can be a basis for finding denial of a FAPE under the IDEA.²¹⁵ This Part supports the conclusion that bullying can result in denial of a FAPE and proposes that the correct framework courts should use to analyze the issue is the framework established by the USDOE and DOJ in the amicus brief submitted to the Second Circuit in *T.K. ex rel. L.K. v. New York City Department of Education*.²¹⁶ This Part concludes by offering additional guidance and

²⁰⁸ *Id.* at 21–22. The USDOE and DOJ go on to explain that not every instance of bullying will result in a denial of a FAPE. *Id.* at 22–23 (“A brief or minimal drop in a student’s academic performance in one class, or atypical sullen behavior for a short, limited time, does not reflect a substantial impact on the student’s overall program or significant interference with an integral part of the student’s academic or behavioral program.”).

²⁰⁹ *Id.* at 25.

²¹⁰ See discussion *supra* Sections II.C, II.E.

²¹¹ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 24.

²¹² *Id.* at 23.

²¹³ *Id.* at 24.

²¹⁴ *Id.* (“The standards for ‘deliberate indifference’ that require actual notice of the cause of the harassment do not define a denial of a FAPE. That denial is based on the school’s failure to address bullying and its effects on the child’s education program; the question under the IDEA is whether there is significant bullying that denies a child a FAPE, not *why* there is bullying.” (emphasis added)).

²¹⁵ See discussion *supra* Sections II.A–E.

²¹⁶ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24.

proposing an assessment and intervention tool for school districts to consider when addressing the bullying of students with disabilities.

A. *Bullying Can Be a Basis for Finding Denial of a FAPE and Courts Should Use the Framework Proposed by the USDOE and DOJ*

In an amicus brief submitted to the Second Circuit in *T.K. ex rel. v. New York City Department of Education*,²¹⁷ the USDOE and DOJ argue that bullying can result in denial of a FAPE under the IDEA.²¹⁸ When determining whether bullying resulted in denial of a FAPE, the USDOE and DOJ argue that a court should determine: (1) whether bullying and its effects interfered with the student's educational program, and (2) whether the school district's response ensured or denied continuing access to a FAPE.²¹⁹

The position and framework proposed by the USDOE and DOJ are supported by a number of policy letters and guidance issued by the USDOE's OCR and OSERS addressing school districts' obligations with regard to bullying and harassment under the IDEA and other civil rights laws.²²⁰ Because the USDOE has the authority to monitor and enforce the IDEA, its interpretations of the law are entitled to deference when consistent with the IDEA's purpose and principles.²²¹

Over the years, the USDOE and its affiliated offices have consistently supported the position that bullying can interfere with a student's ability to receive a FAPE.²²² Significantly, OCR and OSERS have released guidance indicating that bullying need not be related to a student's disability in order to result in denial of a FAPE under the IDEA.²²³ Citing the numerous adverse effects bullying has on a student's

²¹⁷ *T.K. ex rel. L.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869 (2d Cir. 2016).

²¹⁸ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 13.

²¹⁹ *Id.* at 12–13.

²²⁰ *Id.* at 5.

²²¹ See *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988) (deferring to the USDOE's interpretation of a statute where it has authority to monitor and enforce the statute, and where the interpretation "comports fully with the purposes of the statute"); see also Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 20 n.4.

²²² See, e.g., Dear Colleague Letter, U.S. Dep't of Educ. Office for Civil Rights (Oct. 21, 2014) [hereinafter OCR DCL Oct. 21, 2014], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf> ("[B]ullying of a student with a disability on any basis can result in a denial of FAPE under IDEA . . ."); OSERS DCL Aug. 20, 2013, *supra* note 8 ("[B]ullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education . . ."); Dear Colleague Letter, U.S. Dep't of Educ. (July 25, 2000) [hereinafter USDOE DCL July 25, 2000], <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> ("Disability harassment may result in a denial of FAPE under [the IDEA].").

²²³ See OCR DCL Oct. 21, 2014, *supra* note 222 ("[B]ullying of a student with a disability on any basis can result in a denial of FAPE under IDEA . . ."); OSERS DCL Aug. 20, 2013, *supra* note 8 ("[A]ny bullying of a student with a disability that results in the student not receiving

ability to learn, OCR and OSERS direct that *any* bullying that prevents a student with a disability from obtaining a meaningful educational benefit from her IEP can result in denial of a FAPE.²²⁴ This position is supported by much of the research on bullying and its effects on victims.²²⁵

The guidance provided by OCR and OSERS not only supports the framework proposed by the USDOE and DOJ in their amicus brief to the Second Circuit, but it also suggests that other frameworks based on Title IX or Title VI deliberate indifference are not appropriate when determining whether bullying has resulted in denial of a FAPE under the IDEA.²²⁶ Liability based on deliberate indifference is designed, in part, to determine when a victim is entitled to compensatory or punitive damages due to a school district's absent or lax response to known harassment based on a protected status.²²⁷ Under this standard, a school is not liable for the conduct of bullies.²²⁸ Instead, a school is held liable for its official decision to ignore bullying based on a protected status.²²⁹

meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied." (emphasis added)).

²²⁴ See OSERS DCL Aug. 20, 2013, *supra* note 8 ("A student must feel safe in school in order to fulfill his or her full academic potential."); Dear Colleague Letter, U.S. Dep't of Educ. Office for Civil Rights (Oct. 26, 2010) [hereinafter OCR DCL Oct. 26, 2010], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> ("Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."); see also USDOE DCL July 25, 2000, *supra* note 222 (explaining that harassment of a student with a disability "may decrease the student's ability to benefit from his or her education . . .").

²²⁵ See, e.g., Gini & Pozzoli, *supra* note 7, at 1059 ("Frequent victimization is related with low self-esteem and self-worth, with depression, and with suicidal ideation." (footnotes omitted)); Merrell et al., *supra* note 33, at 27 (explaining that research on victims of bullying shows that a "high percentage of victims tend to engage in school avoidance behaviors, and many repeated victims of bullying at school end up dropping out of the school system.").

²²⁶ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 23–24 ("An assessment of liability under the IDEA is different from the assessment in a private action seeking compensatory damages under other civil rights laws A denial of a FAPE does not require 'deliberate indifference' as that term is used in Title IX or Title VI cases.").

²²⁷ See, e.g., *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 647–48 (1999); see also Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 24 ("Title VI and Title IX liability based on deliberate indifference requires actual notice of harassment that is based on a protected status (e.g., race, sex, or disability) and an absent or unreasonably lax response by school officials."); Kathleen Conn, *Guidance on Bullying of Students with Disabilities*, 297 EDUC. L. REP. 1, 4 (2013) ("[M]any courts have adopted the standards enunciated in *Davis v. Monroe County Board of Education* for violation of Title IX, and require school officials' actual knowledge of the bullying, deliberate indifference to the bullying [C]ourts may also require that the student prove that the bullying was based on the student's disability." (footnotes omitted)).

²²⁸ Sacks & Salem, *supra* note 15, at 153.

²²⁹ *Id.* at 153–54 ("Title IX does not make a district liable for the conduct of school bullies. Rather, a school board is liable only for its own official decision to ignore known harassment. To avoid a finding of 'deliberate indifference,' school administrators need not expel harassers or

This standard is proper where the relief sought against a public school district is compensatory or punitive damages because the burden ultimately falls on the public.²³⁰

But under the IDEA, finding denial of a FAPE turns on whether the IEP provides the student with appropriate special education and related services that ensure access to a meaningful educational benefit.²³¹ Furthermore, the IDEA has been interpreted to provide students with access to educational services, as opposed to compensatory or punitive damages.²³² As such, when a student with a disability alleges that bullying resulted in denial of a FAPE under the IDEA, the focus must be whether, as a result of bullying, the IEP no longer provides the student with access to a meaningful educational benefit and, if so, whether the school revised the IEP to address the bullying.²³³ This framework is in line with the IDEA's goal of ensuring that students with disabilities have access to educational opportunities.²³⁴ Additionally, this standard is appropriate given that the relief contemplated under the IDEA does not expose public school districts to liability for compensatory or punitive damages as in Title IX or Title VI cases.²³⁵ A framework based on deliberate indifference, on the other hand, misses the point of the IDEA

remedy peer harassment, but 'must merely respond to known peer harassment in a manner that is not clearly unreasonable' under the circumstances." (footnotes omitted)).

²³⁰ David Ellis Ferster, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191, 224 (2008) ("Courts are rightly hesitant to impose damages on public schools, as this burden ultimately falls on the public at large. Avoiding this burden, the Supreme Court developed the unyielding deliberate indifference standard" (footnote omitted)).

²³¹ 20 U.S.C. § 1414(d)(1)(A) (2012). See also OSERS DCL Aug. 20, 2013, *supra* note 8 (explaining that the focus should be on whether "the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit." (emphasis added)).

²³² See, e.g., Brian L. Porto, Annotation, *Availability of Damages in Action to Remedy Violations of Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400 et seq.)*, 165 A.L.R. Fed. 463 (2000) ("A majority of courts has [sic] concluded that a damage remedy is not available under the IDEA because a damage remedy is not consistent with the IDEA's goal of ensuring that school districts educate, or pay for the private education of, disabled students."). Note that tuition reimbursement is considered educational relief permissible under the IDEA. See 20 U.S.C. § 1412(a)(10)(C); see also *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 396–70 (1985).

²³³ See OSERS DCL Aug. 20, 2013, *supra* note 8 ("Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should . . . convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly.").

²³⁴ See Ferster, *supra* note 230, at 206–07 ("IDEA entitles each eligible student with a disability to a FAPE that is provided in the [LRE], in conformity with an IEP. IDEA's main purpose is to ensure access to educational opportunities for disabled students." (footnotes omitted)).

²³⁵ See Porto, *supra* note 232.

by asking courts to assess why there is bullying instead of focusing on the effects of bullying.²³⁶

B. *Additional Guidance and an Assessment and Intervention Tool for School Districts Addressing Bullying and Students with Disabilities*

In order to comply with the IDEA, the framework proposed by the USDOE and DOJ requires that a school faced with the bullying of a student with a disability reconvene the student's IEP team to determine whether the IEP remains appropriate.²³⁷ If, as a result of bullying, the student's IEP is no longer appropriate, the IEP team must revise the IEP to ensure that the student receives a FAPE moving forward.²³⁸ Because the IDEA requires that a student's special education be tailored to her "unique needs,"²³⁹ a school's appropriate response to the bullying of a student with a disability will vary depending on the specific needs of the student and the effects of bullying.

In 2000, OCR and OSERS issued a joint Dear Colleague Letter advising schools and school districts of their legal and educational responsibilities with regard to disability harassment.²⁴⁰ The 2000 Dear Colleague Letter includes a series of suggested measures that school officials should take to prevent and eliminate disability harassment.²⁴¹ The suggested measures include: widely publicizing anti-harassment statements and procedures, providing training for staff and students to

²³⁶ See Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 24 ("[T]he question under the IDEA is whether there is significant bullying that denies a child a FAPE, not why there is bullying. Moreover, under Title VI and Title IX, the focus is solely on whether school officials took appropriate steps to try to stop the bullying, while under the IDEA, the focus must be on whether the IEP provides the appropriate programs and services to addresses [sic] the needs of the child being bullied . . .").

²³⁷ *Id.* at 19. The USDOE and DOJ also argue that bullying is a "mandatory topic for discussion" where a member of the IEP team—including a parent—reasonably requests that bullying and its effects be discussed in connection with a student's IEP. *Id.* This position is supported by guidance recently released by OSERS. OSERS DCL Aug. 20, 2013, *supra* note 8 ("[P]arents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying.").

²³⁸ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 25 ("If bullying has denied the child a FAPE, the IEP team must revise the IEP and identify appropriate special education and related services to address the impact of the bullying and ensure prospectively that the student is receiving a FAPE. . . . [T]he team must identify what different or additional needs the student has as a result of bullying and its effects, and the programs or services that are most appropriate for those needs.").

²³⁹ 20 U.S.C. § 1400(d)(1)(A) (2012); § 1401(29).

²⁴⁰ USDOE DCL July 25, 2000, *supra* note 222. Harassment differs from bullying in that harassment is "conduct based on an individual's characteristic that is protected by civil rights laws . . . ; 'bullying' can be motivated by any reason." Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 5.

²⁴¹ USDOE DCL July 25, 2000, *supra* note 222.

recognize and handle harassment, providing counseling services to both victims and perpetrators of harassment, implementing monitoring programs to follow up on past instances of harassment, and regularly assessing and updating harassment policies and procedures.²⁴² Although the 2000 Dear Colleague Letter focuses on schools' legal and educational responsibilities with regard to disability harassment, subsequent guidance released by OCR and OSERS indicates that these suggested measures also apply to bullying.²⁴³

In August 2013, OSERS released another Dear Colleague Letter specifically focusing on school districts' obligations with regard to bullying under the IDEA.²⁴⁴ The August 2013 Dear Colleague Letter includes an enclosure outlining a series of evidence-based practices to prevent and address bullying in schools.²⁴⁵ The recommended practices include: teaching students and staff appropriate school behaviors and how to respond to bullying, active adult supervision that focuses on early intervention to correct behavior problems, ongoing training and support to staff and students for responding to bullying, developing and implementing policies to address bullying, monitoring and tracking incidences of bullying, and including parents in efforts to address bullying.²⁴⁶ OSERS recommends that these practices be implemented within a school-wide, comprehensive multitiered behavioral framework.²⁴⁷ Such a framework helps schools to better organize and monitor the implementation of the recommended evidence-based practices, which allows schools to select strategies that reflect the specific needs of the school community.²⁴⁸

Although the guidance provided by OCR and OSERS is supported by a growing body of research focusing on the prevention of bullying

²⁴² *Id.*

²⁴³ See, e.g., OSERS DCL Aug. 20, 2013, *supra* note 8, at n.1 (explaining that guidance regarding a school district's responsibilities under the IDEA to address bullying "is intended to supplement the July 25, 2000, joint Dear Colleague Letter from OSERS and [OCR], which addressed disability harassment . . .").

²⁴⁴ OSERS DCL Aug. 20, 2013, *supra* note 8.

²⁴⁵ Enclosure, Dear Colleague Letter, U.S. Dep't of Educ. Office of Special Educ. and Rehab. Servs. (Aug. 20, 2013) [hereinafter OSERS DCL Aug. 20, 2013 Enclosure], <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf>.

²⁴⁶ *Id.*

²⁴⁷ *Id.* ("Evidence-based instructional and intervention strategies for preventing and addressing bullying of students, including students with disabilities, are most effective when used as part of a comprehensive multitiered behavioral framework that engages the whole school community, and establishes and maintains positive, safe, and nurturing school environments . . ."). One example of a multitiered behavioral framework is Positive Behavioral Interventions and Supports (PBIS). *Id.* PBIS refers to a system used by schools to organize evidence-based practices, improve the implementation of such practices, and improve academic and social outcomes for students. *PBIS Frequently Asked Questions*, PBIS.ORG, http://www.pbis.org/common/cms/files/pbisresources/PBIS_Q&A.pdf (last visited Jan. 6, 2016).

²⁴⁸ OSERS DCL Aug. 20, 2013 Enclosure, *supra* note 245.

and victimization in schools,²⁴⁹ school-wide, comprehensive behavioral frameworks alone may not be enough to satisfy the IDEA's requirement that a student's special education be individualized and tailored to her "unique needs."²⁵⁰ The USDOE's and DOJ's proposed framework recognizes that an appropriate response to bullying under the IDEA must take into consideration the student's individual needs,²⁵¹ but the framework provides little guidance with regard to the types of procedures or assessments schools should utilize when revising a student's IEP to ensure that she continues to receive a FAPE. Fortunately, the IDEA has outlined two provisions that could be tailored and applied in the context of bullying.

Functional behavioral assessments and behavioral intervention plans are two provisions of the IDEA intended to assist schools in educating students with behavioral needs.²⁵² Together, these provisions are designed to identify the function of a student's misbehavior, develop a plan to address and modify variables that maintain the misbehavior, and use positive interventions to teach appropriate replacement behaviors.²⁵³ Generally, a functional behavior assessment refers to a process in which a student's IEP team identifies the student's misbehavior and devises a plan to collect data on the misbehavior in an

²⁴⁹ See, e.g., Merrell et al., *supra* note 33, at 41 (meta-analysis finding that school-based anti-bullying programs increase "awareness, knowledge, and self-perceived competency in dealing with bullying . . ."); Chad A. Rose & Lisa E. Monda-Amaya, *Bullying and Victimization Among Students with Disabilities: Effective Strategies for Classroom Teachers*, 48 INTERVENTION SCH. & CLINIC 99, 103 fig.1 (2012) (outlining intervention strategies and potential outcomes for bullying prevention within a multitiered framework); Maria M. Ttofi & David P. Farrington, *Effectiveness of School-Based Programs to Reduce Bullying: A Systematic and Meta-Analytic Review*, 7 J. EXPERIMENTAL CRIMINOLOGY 27, 27 (2011) (meta-analysis finding that school-based anti-bullying programs were effective at decreasing bullying and victimization). However, not all studies suggest that school-based anti-bullying programs reduce bullying. See, e.g., Susan M. Swearer et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 EDUC. RESEARCHER 38, 42 (2010) (outlining the varying results school-wide anti-bullying programs have demonstrated in different studies).

²⁵⁰ 20 U.S.C. § 1401(29) (2012).

²⁵¹ Brief of the United States as Amicus Curiae Supporting Appellees, *supra* note 24, at 25 ("Because all programs and services are tailored to the child's 'unique' needs, there is no one-size-fits-all IEP that addresses bullying and its effects. As in all instances when an IEP team is faced with a substantial change in circumstances, the team must identify what different or additional needs the student has as a result of bullying and its effects, and the programs or services that are most appropriate for those needs.").

²⁵² See, e.g., § 1415(k)(D)(ii) (explaining that a child removed from her "current placement" as a result of misbehavior shall "receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."); § 1415(k)(F)(i) (explaining that where a student's misbehavior is manifestation her disability, the IEP team shall "conduct a functional behavioral assessment, and implement a behavioral intervention plan.").

²⁵³ IDEA P'SHIP, FUNCTIONAL BEHAVIOR ASSESSMENT 1, http://www.ideapartnership.org/documents/ASD-Collection/asd-dg_Brief_FBA.pdf. See also discussion *supra* note 78 (explaining functional behavior assessments and behavior intervention plans in New York).

effort to better understand the context in which the misbehavior occurs.²⁵⁴ The IEP team uses this data to formulate a hypothesis explaining the purpose of the misbehavior.²⁵⁵ Once the IEP team has determined the purpose of a student's misbehavior, the team develops a behavior intervention plan to address the misbehavior. A behavior intervention plan may modify the student's physical environment, adjust the student's curriculum, or teach more acceptable behaviors.²⁵⁶

Although designed to address behavioral issues, the frameworks developed for functional behavior assessments and behavior intervention plans could be modified and applied in the context of revising a student's IEP to address bullying. When faced with the bullying of a student with a disability, the IEP team should conduct a bullying assessment. Similar to a functional behavior assessment, a bullying assessment identifies the source of the bullying and devises a plan to collect data on the bullying, including the context in which bullying occurs and its effects on the student. Once the IEP team has determined the source of the bullying and the contexts in which it is most likely to occur, the IEP team should develop a bullying intervention plan designed to address the specific contexts in which bullying occurs. The bullying intervention plan should also address the negative effects of bullying. Examples of appropriate interventions and supports include providing the student with one-on-one paraprofessional support,²⁵⁷ providing the student with counseling services, or ensuring that the student is placed in an appropriate classroom environment.

Because schools are already familiar with similar procedures in the context of addressing misbehavior, the proposed bullying assessment and bullying intervention plan would be relatively easy for school districts to adopt. Furthermore, the proposed approach ensures that a school's response to the bullying of a student with a disability is individualized and designed to address the student's "unique needs" as required by the IDEA.²⁵⁸

²⁵⁴ IDEA P'SHIP, *supra* note 253, at 2. Methods for collecting data on the student's misbehavior can include direct observation of the behavior and the circumstances leading up to the behavior, disciplinary records, and interviews. *Id.*

²⁵⁵ *Id.* at 5.

²⁵⁶ *Id.* at 5–6.

²⁵⁷ Some research suggests that providing additional supervision during recess reduces instances of bullying. Tofi & Farrington, *supra* note 249, at 45. Providing a student with additional support, especially during unstructured times, could be a useful tool for preventing bullying.

²⁵⁸ 20 U.S.C. § 1400(d)(1)(A) (2012); § 1401(29).

CONCLUSION

Bullying can be a basis for finding denial of a FAPE under the IDEA. The proper framework courts should use to determine whether bullying has resulted in denial of a FAPE is the framework proposed by the USDOE and DOJ in *T.K. ex rel. L.K. v. New York City Department of Education*, which focuses on whether bullying interfered with a student's educational program, and whether the school's response to the bullying ensured or denied continuing access to a FAPE.²⁵⁹ This framework is supported by over a decade of guidance released by OCR and OSERS regarding school districts' obligations to address harassment and bullying of students with disabilities, and is in line with the IDEA's goal of ensuring that students with disabilities have access to educational opportunities.²⁶⁰ Alternative frameworks based on Title IX or Title VI deliberate indifference are not appropriate as such frameworks improperly ask courts to focus on why there is bullying, not whether bullying prevented a student with a disability from receiving a meaningful educational benefit.²⁶¹ Furthermore, deliberate indifference standards were developed with compensatory or punitive damages in mind.²⁶² Given that the relief contemplated under the IDEA is educational in nature, and does not expose public school districts to the same level of liability as compensatory or punitive damages, frameworks based on a showing of deliberate indifference place too high of a burden on students and their families.²⁶³ Additionally, the proposed bullying assessment and bullying intervention plan will help ensure that schools faced with the bullying of students with disabilities meet the requirements of the IDEA by revising IEPs in a way that addresses each student's unique needs.

²⁵⁹ See discussion *supra* Section III.A.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See *supra* note 230.

²⁶³ See discussion *supra* Section III.A.