

# CLEARINGHOUSE REVIEW

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# A Novel IDEA

## Protecting Students with Disabilities from School Bullies

BY CHERYL-LYN D. BENTLEY

Amir is a 12-year-old boy with a learning disorder.<sup>1</sup> From his very first days in seventh grade, his classmates have been calling him names, taunting him, hitting and kicking him, and following him into the boys' bathroom where they punch and stab him with pencils outside the view of school staff. He is so afraid to go to the bathroom that his physical health is impaired. Amir reports the ongoing harassment to his teachers and the school nurse, but no one intervenes. Embarrassed and worried about retaliation, Amir conceals the harassment from his mother. His anxieties increase, his emotional health deteriorates, and he refuses to go to school. Only after he suffers a serious injury in the schoolyard at the hands of his harassers does he finally reveal to his mother what he has endured over the past several months. Amir's mother immediately goes to his school to report the bullying, but school officials do nothing to end the harassment, protect Amir, or punish the bullies. Fearing for her son's safety, Amir's mother decides to keep him out of school for several months until she can secure a school transfer.<sup>2</sup>

Amir's story is not unique. Bullying has an adverse impact on both students with and students without disabilities. School districts may not have strong antibullying policies or may ineffectively implement these policies, leaving students to suffer the deleterious consequences of bullying.

1 Amir was a client of New York Lawyers for the Public Interest; the name is not his real one, and I altered other details to protect his confidentiality.

2 New York Lawyers for the Public Interest used mediation to assist Amir and his mother in obtaining a school transfer and other relief from the district.



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**Bullying is defined as “a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child.”**

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Research shows that students with disabilities are especially vulnerable to bullying.<sup>3</sup> Despite strong evidence of the disproportionate impact that bullying has on students with disabilities, legal advocacy tools protecting the rights of students who have disabilities and who are subjected to bul-

3 See [Jonathan Young et al., White House Conference on Bullying Prevention, Bullying and Students with Disabilities \(2011\)](#); David Ellis Ferster, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 *GEORGIA LAW REVIEW* 191, 199 (2008).

lying have been underutilized.<sup>4</sup> Few courts have taken up the question of whether the bullying of a student with a disability violates that student's educational rights.

The Individuals with Disabilities Education Act (IDEA) provides a mechanism for both challenging bullying and asserting the rights of students with disabilities.<sup>5</sup>

4 See Young et al., *supra* note 3.

5 [Individuals with Disabilities Education Act](#), 20 U.S.C. §§ 1400–1487.

Pursuant to the IDEA, children with qualifying disabilities are entitled to a free appropriate public education that meets their unique needs.<sup>6</sup> The IDEA provides special education students, unlike their typical peers, with additional protections for an appropriate education. Accordingly the IDEA gives advocates a legal tool to use when representing students who have disabilities and who cannot benefit from education fully because of bullying.

Here I propose a new framework that advocates can use when seeking relief for IDEA violations resulting from bullying.<sup>7</sup> This framework highlights the IDEA's legal protections for students with disabilities and focuses on the educational rights of the child. I examine, as background, previous approaches to analyzing disability-related bullying claims and outline the problems with applying them to IDEA claims. Next I introduce a framework for redressing IDEA violations resulting from bullying and answer possible challenges to this approach. And I demonstrate how the proposed framework can be applied for relief for students with disabilities.

### Alternative Approaches to IDEA-Related Bullying Claims

Bullying is defined as “a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate,

frighten, or isolate the child.”<sup>8</sup> Parents seeking relief for bullying of students with disabilities have brought claims under the IDEA and Section 504 of the Rehabilitation Act; the parents allege disability discrimination.<sup>9</sup> In analyzing these claims, some courts have used a Section 504 prima facie test. Others have relied on adaptations of the peer-to-peer sexual harassment test under Title IX, the federal law prohibiting sex discrimination in education. Both approaches fail to emphasize adequately the student's statutory interest in an appropriate education.

#### APPLYING THE SECTION 504 TEST FOR DISABILITY DISCRIMINATION

In many cases, plaintiffs' Section 504 and IDEA claims may overlap since Section 504 may also cover qualifying disabilities under the IDEA. However, while the IDEA sets forth an affirmative duty for districts to provide an appropriate education to students with disabilities, Section 504 “is a negative prohibition against disability discrimination.”<sup>10</sup> For a prima facie showing of disability discrimination under Section 504, plaintiff must show that plaintiff (1) has a disability; (2) is otherwise qualified for the benefit that has been denied; and (3) has been denied the benefit by reason of plaintiff's disability.<sup>11</sup> This third prong requiring that plaintiff was subjected to harassment on the basis of plaintiff's disability may prove insuperable.

8 Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 *TEMPLE LAW REVIEW* 641, 645 (2004); see, e.g., Ferster, *supra* note 3, at 196 (defining bullying “as aggressive behavior that is carried out repeatedly”); [StopBullying.gov](http://StopBullying.gov), U.S. Department of Health and Human Services, [What Is Bullying: Bullying Definition](http://WhatIsBullying.org) (n.d.) (“bullying is unwanted, aggressive behavior ... that involves a real or perceived power imbalance. The behavior is repeated ...”); Nels Ericson, [Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Addressing the Problem of Juvenile Bullying](http://OfficeofJuvenileJusticeandDelinquencyPrevention.org), OJJDP FACT SHEET, June 2001, at 1 (“bullying ... encompasses a variety of negative acts carried out repeatedly over time”).

9 [Rehabilitation Act of 1973](http://RehabilitationActof1973.gov), 29 U.S.C. § 794.

10 *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995).

11 See 29 U.S.C. § 794(a).

### Few courts have taken up the question of whether the bullying of a student with a disability violates that student's educational rights.

Students may have a qualifying disability under Section 504 or the IDEA but be bullied for reasons unrelated to their disability. Although they were targeted for unrelated reasons, they may still be deprived of educational benefit as a result of bullying.

The Second Circuit noted this issue in *Smith v. Guilford Board of Education*.<sup>12</sup> The victim of bullying, Jeremy, was a 4-foot-7 ninth-grader who was diagnosed with attention deficit hyperactivity disorder, a qualifying learning disability under the IDEA.<sup>13</sup> Jeremy was so persistently and severely bullied that he eventually transferred to another school to escape his harassers.<sup>14</sup> Arguably, Jeremy was unable to receive educational benefit in such a hostile school environment. His parents claimed that he had been denied an appropriate education and was targeted due to his diminutive stature, not his learning disability.<sup>15</sup> The Second Circuit remanded plaintiff's claim to the district court for further consideration; the Second Circuit noted that it was “unable to determine whether and to what extent liability may arise from conduct unrelated to the triggering disability under IDEA” because Jeremy's special education plan was not before it.<sup>16</sup> A narrow construction of disability-based harassment may frustrate Section 504 and IDEA claims where bullying unrelated

12 *Smith v. Guilford Board of Education*, 226 F. App'x 58 (2d Cir. 2007).

13 *Id.* at 61.

14 *Id.* at 62.

15 *Id.* at 64.

16 *Id.*

6 See *id.* § 1400(d)(1)(A).

7 In most jurisdictions monetary damages are not allowed under the Individuals with Disabilities Education Act (IDEA). Relief is generally limited to other remedies such as compensatory educational services or reimbursement for out-of-pocket expenses for a denial of a free appropriate public education (see [Elizabeth Rodd, An Exhausting Idea: The Fifth Circuit Examines the Idea Exhaustion Requirement in Stewart v. Waco Independent School District](http://ElizabethRoddy.com), 55 *BOSTON COLLEGE LAW REVIEW* 89, 92 (2014); Davis Stewart, *Expanding Remedies for IDEA Violations*, 31 *JOURNAL OF LAW AND EDUCATION* 373, 375 (2002)).

to a student's disability has resulted in the denial of an appropriate education.

#### APPLYING THE DAVIS SEX DISCRIMINATION TEST TO DISABILITY DISCRIMINATION

The U.S. Supreme Court has not yet considered school district liability for peer-to-peer disability-based harassment. However, some lower courts and the U.S. Department of Education have applied a modified version of the *Davis v. Monroe County Board of Education* sex discrimination test to peer-to-peer disability harassment.<sup>17</sup>

#### The Modified Davis Sex Discrimination

**Test.** According to the modified *Davis* test, plaintiff must show that (1) plaintiff is an individual with a disability; (2) plaintiff was harassed on the basis of that disability; (3) the harassment was sufficiently severe or pervasive that it altered the condition of plaintiff's education and created an abusive educational environment; (4) defendant knew about the harassment; and (5) defendant was deliberately indifferent to the harassment.<sup>18</sup>

The U.S. Department of Education Office for Civil Rights and Office of Special Education and Rehabilitative Services adopted this analysis for peer-to-peer disability-based harassment. In 2000 the Office for Civil Rights and Office of Special Education and Rehabilitative Services published a letter informing school districts that disability harassment

17 In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640–53 (1999), the Supreme Court held that, for a peer-to-peer sexual discrimination claim, plaintiff is required to prove “1) that she was harassed due to her gender; 2) the alleged harassment was so severe, pervasive and objectively offensive that it altered her education; 3) the school district had actual notice of the gender-based harassment; and 4) the school was deliberately indifferent to the harassment.”

18 See, e.g., *S.S. v. Eastern Kentucky University*, 532 F.3d 445, 454 (6th Cir. 2008); *Werth v. Board of Directors of Public Schools*, 472 F. Supp. 2d 1113, 1127 (E.D. Wis. 2007); *K.M. v. Hyde Park Central School District*, 381 F. Supp. 2d 343, 358–60 (S.D.N.Y. 2005); *Biggs v. Board of Education*, 229 F. Supp. 2d 437, 444–45 (D. Md. 2002).

may deny a student an equal opportunity to education under Section 504.<sup>19</sup>

In 2010 the Office for Civil Rights' guidance more closely reflected the framework of the modified *Davis* test. The Office for Civil Rights directly borrowed from the language in *Davis* and the modified *Davis* test: it described harassment that creates a hostile environment as “conduct that is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.”<sup>20</sup> It considered the knowledge element and advised that a

In 2011 the Eastern District of New York developed a new standard to determine whether bullying inhibited a child's ability to receive an appropriate education. The court applied a new version of the modified *Davis* test to an IDEA claim for tuition reimbursement in *T.K. v. New York City Department of Education*.<sup>23</sup> Plaintiff L.K. was classified with a learning disability and was repeatedly bullied for an entire school year.<sup>24</sup> Although L.K.'s parents notified her school about the bullying on several occasions and her assigned paraprofessionals attempted to report the harassment, the school did nothing about it. The court explained that “under IDEA

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### The modified *Davis* test presents several barriers for plaintiffs attempting to hold schools liable for the bullying of students with disabilities.

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school is “responsible for addressing harassment incidents about which it knows or reasonably should have known.”<sup>21</sup> It offered guidance on a school's response to harassment—such as the school's responsibility to investigate and “to take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.”<sup>22</sup> This guidance refers to the fourth and fifth elements in the modified *Davis* test concerning a school's deliberate indifference to known harassment. The guidance sets out the appropriate actions that schools should take in order to respond to disability-based harassment.

the question to be asked is whether school personnel was deliberately indifferent to or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities.”<sup>25</sup> Using this standard, the court arrived at a favorable outcome for plaintiffs. The court recognized that bullying could deny students with disabilities the opportunity to receive educational benefit. However, it erroneously preserved the deliberate-indifference standard and mistakenly focused on the measures that the school took to prevent bullying. The court's analysis deviates from the IDEA's emphasis on the student's educational needs. For IDEA violations, the inquiry should focus on the appropriateness of the student's educational program.

19 [U.S. Department of Education, Prohibited Disability Harassment](#) (July 25, 2000).

20 [Office for Civil Rights, U.S. Department of Education, Dear Colleague 2](#) (Oct. 26, 2010) (letter on harassment and bullying).

21 *Id.*

22 *Id.* at 2–3.

23 [T.K. v. New York City Department of Education](#), 779 F. Supp. 2d 289 (E.D.N.Y. 2011).

24 *Id.* at 294–96.

25 *Id.* at 316.

**Problems with Applying the Modified Davis Test to IDEA Claims.** The modified *Davis* test presents several barriers for plaintiffs attempting to hold schools liable for the bullying of students with disabilities.<sup>26</sup>

The knowledge requirement wrongly absolves educators of their responsibility to provide for students with disabilities an appropriate education if they were unaware of the harassment. Victims of harassment may be reluctant to report bullying to school officials and even their own parents for a host of reasons, such as stigma and fear of reprisal.<sup>27</sup> Victims may also be unwilling to report harassment due to feelings of helplessness, hopelessness, and shame.<sup>28</sup> Moreover, depending on the severity of a student's disability, the student may be unable to communicate or relay the facts surrounding harassment. Accordingly the knowledge element of the modified *Davis* test unfairly burdens the victims of bullying while shifting responsibility from school officials.

The knowledge element also relegates to a contingency a student's statutory right to an appropriate education. Students with disabilities are unconditionally entitled to an appropriate education under the IDEA. This right exists regardless of the school's knowledge of bullying. The knowledge element only serves as a

distractor in determining whether a student received an appropriate education.<sup>29</sup>

The deliberate-indifference requirement in the modified *Davis* test may be difficult to overcome given the discretion afforded to school officials.<sup>30</sup> Deliberate indifference requires a failure to respond adequately to known bullying. Plaintiffs must first establish knowledge on the part of the school. Then plaintiffs must challenge the reasonableness or adequacy of the school's response; as one court noted, "deliberate indifference is a difficult, exacting standard."<sup>31</sup> In *Davis* and the subsequent peer-to-peer disability discrimination cases, courts have reasoned that "school administrators enjoy flexibility in disciplinary decisions responding to student-on-student harassment unless the response is 'clearly unreasonable in light of the known circumstances.'"<sup>32</sup> Ineffective responses to harassment are not deemed clearly unreasonable, however.<sup>33</sup>

A school's actions to remedy bullying cannot clearly forecast whether a student with a disability receives an appropriate education. The school's interventions may be inadequate. Bullying, notwithstanding the school's response, could have the effect of depriving the student of the

opportunity to benefit from the educational program. In *Werth v. Board of Directors of the Public Schools of Milwaukee*, students harassed, teased, and hit Werth, a student with a disability, on two separate occasions causing serious injury.<sup>34</sup> The teacher in the class did not act immediately but eventually reported the student offenders, and they were suspended. Arguably, Werth was denied the opportunity to benefit from the educational program since he remained out of school for a long time. However, the court applied the modified *Davis* test and found that there was no showing of deliberate indifference and that the teacher's actions were not "clearly unreasonable in light of the known circumstances."<sup>35</sup> In adopting a deliberate-indifference standard, courts minimize the student's right to an appropriate education.<sup>36</sup>

### Proposed Framework: Interpreting Bullying as a Denial of an Appropriate Education

The Section 504 prima facie test and the modified *Davis* test are unsuitable for assessing whether bullying deprived a student of the student's right to an appropriate education under the IDEA. These approaches neglect to focus on the educational needs and rights of the child. I propose an alternative that is student-focused, reinforcing the IDEA's guarantee that students with disabilities will receive an appropriate education.

I propose the following framework: (1) the student has a qualifying disability under the IDEA; (2) the student was the subject of severe or pervasive harassment; and (3) the student was denied

29 Instead a school's knowledge of harassment may speak to the steps that, upon being put on notice, the school should take to investigate and prevent harassment.

30 See *Kinman v. Omaha Public School District*, 171 F.3d 607, 610 (8th Cir. 1999) (school officials were not deliberately indifferent, as they did not "turn a blind eye and do nothing" once alerted to harassing behavior).

31 *Long v. Murray County School District*, No. 4:10-cv-00015-HLM, 2012 U.S. Dist. LEXIS 86155 (N.D. Ga. May 21, 2012), aff'd, No. 12-13248 (11th Cir. June 18, 2013).

32 *Werth*, 472 F. Supp. 2d at 1130 (citing *Davis*, 526 U.S. 629, 648 (teacher could have handled notification of student bullying differently, but teacher's conduct was not clearly unreasonable)).

33 See, e.g., *Long*, 2012 U.S. Dist. LEXIS 86155, at \*123 (district "should have done more" to protect student "and address disability harassment," but its response was not clearly unreasonable); *Estate of Montana Lance v. Lewisville Independent School District*, No. 12-41139 (5th Cir. Feb. 28, 2014) (no showing of deliberate indifference because district actively responded to harassment).

34 *Werth*, 472 F. Supp. 2d. at 1118–21.

35 *Id.* at 1129

36 Note that, although Werth had an individualized education program (IEP), plaintiffs pursued Fourteenth Amendment and Section 504 claims. There was no consideration of the appropriateness of the education under the IDEA.

26 I discussed the challenges to the second prong—harassment that is not based on a student's disability—in "Applying the Section 504 Test for Disability Discrimination" above.

27 See Weddle, *supra* note 8, at 661; see also *M.P. v. Independent School District No. 721*, 326 F.3d 975 (8th Cir. 2003) (student did not report harassment to parents or school faculty for several months).

28 See Ron Banks, *Bullying in Schools*, ERIC DIGEST, April 1997 ("students feel adult intervention is infrequent and ineffective"); Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 NEVADA LAW JOURNAL 545, 548 (2009) (victims feel "they should handle bullying themselves" and worry about "other children's disapproval").

an appropriate education as a result of the harassment.<sup>37</sup> This framework is consistent with the approach used when redressing other IDEA violations.<sup>38</sup>

If this framework is accepted as a model for seeking relief under the IDEA, broadly defining a free appropriate public education would be most advantageous to potential plaintiffs.<sup>39</sup> An appropriate education “confer[s] some educational benefit upon the handicapped child,” the Supreme Court explained in *Board of Education v. Rowley*.<sup>40</sup> Since *Rowley*, an appropriate education has evolved to require more than “some” educational benefit.<sup>41</sup> For example, the Third Circuit in *Polk v. Central Susquehanna Intermediate Unit* held that “Congress intended to afford children with special needs an education that would confer meaningful benefit” and that “*Rowley* ... does not militate against” that interpretation.<sup>42</sup> Other courts following *Polk* have adopted this broader interpretation of what an appropriate education entails.<sup>43</sup>

37 See generally [StopBullying.gov](#), *supra* note 8 (second prong corresponds to definition of bullying I present here).

38 Consider the standard for tuition reimbursement or compensatory services (see generally [School Committee of Burlington v. Massachusetts Department of Education](#), 471 U.S. 359 (1985) (authorizing retroactive reimbursement to parents who unilaterally place their child in private school after school district fails to offer child appropriate education); *P. v. Newington Board of Education*, 546 F.3d 111, 123 (2d. Cir. 2008) (“compensatory education is an available option under [the IDEA] to make up for denial of a free and appropriate public education”).

39 See Ferster, *supra* note 3, at 212.

40 *Board of Education v. Rowley*, 458 U.S. 176, 200 (1982).

41 See Ferster, *supra* note 3, at 211–16.

42 *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171, 184 (3d Cir. 1988) (establishing meaningful benefit standard).

43 See, e.g., *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1120 (2d Cir. 1997) (“[A] state IEP must be reasonably calculated to provide some ‘meaningful’ benefit.”); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 258 (5th Cir. 1997) (IEPs were designed to produce “a meaningful educational benefit and were therefore appropriate under the IDEA”); *Deal v. Hamilton County Board of Education*, 392 F.3d 840, 862 (6th Cir. 2004) (IDEA requires IEP to confer “meaningful educational benefit”); *D.B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012) (IEP conferred meaningful educational benefits).



The Office of Special Education and Rehabilitative Services adopted this broader definition as recently as August 2013 when it advised school districts about their “responsibilities under the [IDEA] to address bullying of students with disabilities.”<sup>44</sup> It advised that

bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied. However, even when situations do not rise to a level that constitutes a denial of FAPE, bullying can undermine a student’s ability to achieve his or her full academic potential.<sup>45</sup>

There is ample support for a modern view of an appropriate education that embraces a standard of meaningful educational benefit. This guidance also makes clear that school safety affects the level of educational benefit that a student may receive.

Under the proposed framework, whether bullying is related to the student’s disability

44 [Office of Special Education and Rehabilitative Services, U.S. Department of Education, Dear Colleague 1](#) (Aug. 20, 2013) (letter on bullying of students with disabilities).

45 *Id.*

is irrelevant. Any bullying that deprives a student with a disability of the opportunity to receive meaningful educational benefit would deny the student an appropriate education under the IDEA. Examples of such deprivation may be exclusion from school resources and opportunities or harassment that has “a ‘concrete negative effect’ on the victim’s education” causing the victim to regress academically or become homebound or hospitalized.<sup>46</sup>

Critics of this framework may argue that removing the nexus between a child’s disability and bullying risks expanding potential claims outside the IDEA’s scope. However, when accepting federal funds, school districts agree to make educational modifications and deal with problems such as school climate to allow students with disabilities to benefit from educational services.<sup>47</sup> Demanding that schools act to protect students from any harassment that interferes with their access to an appropriate education is completely within the IDEA’s parameters.

The proposed framework jettisons the knowledge requirement found in the

46 Long, 2012 U.S. Dist. LEXIS 86155, at \*87 (citing *Gabrielle M. v. Park Forest–Chicago Heights, Illinois School District 163*, 315 F.3d 817, 821 (7th Cir. 2003)).

47 See Young et al., *supra* note 3.

modified *Davis* test. This incentivizes schools to take proactive measures to cultivate a safe school environment for students with disabilities.

Critics may resist abandoning the knowledge element and contend that school districts should be held liable only for their own actions. Critics may argue that if educators have no knowledge about bullying, they are unable to act; imposing liability penalizes schools for a third party's action. Moreover, bullying can be subtle and covert; harassment may be difficult to detect, especially where social media is involved.

However, the IDEA's requirement that students with disabilities receive an individualized education program (IEP) should prompt educators to learn actively about harassment that deprives students of an appropriate education.<sup>48</sup> Among other requirements, the plan should outline the student's measurable annual goals, the student's progress toward meeting those goals, and accommodations.<sup>49</sup> Educators should continually monitor students' progress and ensure that students' plans are appropriate and that they are steadily advancing toward their goals. If an educator discovers that a student with a disability is not meeting the student's goals throughout the school year, then the special education team should investigate the reasons for this shortcoming and take appropriate action to remedy it. In situations where the child's failure to progress stems from bullying, then school officials must resolve the bullying. The proposed framework encourages educators to attend to students' educational needs to ensure that students reach their academic goals and receive meaningful educational benefit.

To comply with their obligations under the IDEA, educators should take affirmative steps to protect the rights of students with disabilities and ensure that their ability to receive meaningful educational benefit is not compromised by bullying.

### Application of the Proposed Framework

To illustrate how the proposed framework would apply, let us reconsider three cases: *Smith*, *Werth*, and *T.K.*

Recall that, in *Smith*, plaintiffs alleged IDEA violations but argued that Jeremy was targeted due to his diminutive stature rather than his learning disability.<sup>50</sup> Applying the proposed framework, the court would have likely deemed the school district liable for denying Jeremy an appropriate education regardless of the unrelated bullying. First, Jeremy was a student diagnosed with attention deficit hyperactivity disorder, a qualifying disability under the IDEA. Second, from November 2001 through January 2002, Jeremy was subjected to ongoing harassment throughout the school day.<sup>51</sup> He was pushed and shoved; restrained and imprisoned in classrooms; zipped into a backpack and paraded throughout the hallways; and teased repeatedly.<sup>52</sup> Jeremy was the subject of severe and pervasive harassment, satisfying the second element of the test. The final element in the proposed framework requires that the student was denied an appropriate education due to the harassment. Jeremy eventually withdrew from his school in order to escape the relentless harassment; this withdrawal could be analyzed as a denial of an appropriate education. However, plaintiffs instead argued that Jeremy was "deprived of the ability to enjoy the

friendships he established with students in Guilford and to continue the activities he had enjoyed while in Guilford."<sup>53</sup> If plaintiffs focused on Jeremy's right to an appropriate education and the educational benefit he received given the school environment, they most likely would have prevailed under the proposed framework.

By contrast, applying the suggested framework to *Werth* shows that plaintiffs' arguments might not have succeeded if they had pursued IDEA claims. *Werth's* case was decided unfavorably under the modified *Davis* test. One reason that the court rejected *Werth's* claim was that the incidents for which plaintiffs brought a claim took place on two brief occasions and thus could not be viewed as sufficiently severe or pervasive.<sup>54</sup> This also corresponds to the second element of my proposed test and to my definition of bullying as "a persistent pattern of intimidation and harassment."<sup>55</sup>

In *T.K.* plaintiffs prevailed by using a variation of the modified *Davis* test. However, they would also have been successful by using my framework for their IDEA claims. First, L.K. had an IEP and was classified with a learning disability under the IDEA.<sup>56</sup> During the entire 2007–2008 school year, she was isolated and the victim of severe and pervasive harassment.<sup>57</sup> L.K. grew reluctant to attend school and her academic performance was affected.<sup>58</sup> Arguably, she was denied the opportunity to receive meaningful educational benefit as a result of bullying.

<sup>53</sup> *Id.*

<sup>54</sup> *Werth*, 472 F. Supp. 2d at 1129 ("harassment must have the systemic effect of denying the victim equal access to an educational program or activity, and that a single instance of peer-on-peer harassment is not enough").

<sup>55</sup> See Weddle, *supra* note 8.

<sup>56</sup> *T.K.*, 779 F. Supp. 2d at 294.

<sup>57</sup> *Id.* at 295–96.

<sup>58</sup> *Id.* at 318.

<sup>50</sup> *Smith*, 226 F. App'x at 64.

<sup>51</sup> *Smith v. Guilford Board of Education*, 226 F. App'x 58 (2d Cir. 2007).

<sup>52</sup> *Id.*

<sup>48</sup> 20 U.S.C. § 1414(d).

<sup>49</sup> *Id.*

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Amir missed months of class when school officials failed to protect him from fellow students' ceaseless taunting and attacks. For Amir and other students discussed here, bullying affected not only their emotional, psychological, and physical health but also their academic performance.<sup>59</sup> These students suffered tremendous upheaval in their education as they sought reprieve from harassment. Recognizing such a phenomenon, I have proposed, in dealing with bullying, a framework that leverages IDEA obligations to ensure that students with disabilities receive an appropriate education. This approach would compel school districts to combat harassment more proactively, thereby protecting individual victims as well as creating a safer learning environment for all students.

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#### CHERYL-LYN D. BENTLEY

*Bingham McCutchen Fellow/Staff Attorney*

New York Lawyers for the Public Interest  
151 W. 30th St. 11th Floor  
New York, NY 10001

212.244.4664  
[cbentley@nylpi.org](mailto:cbentley@nylpi.org)

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<sup>59</sup> See Weddle, *supra* note 8, at 647 (effects of bullying).

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**The Sargent Shriver National Center on Poverty Law  
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50 E. Washington St. Suite 500  
Chicago, IL 60602