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## Don't Blame The Bully: Holding Preschools Accountable for Bullying Against Students With Disabilities

Rachel Summer

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## NOTE

### DON'T BLAME THE BULLY: HOLDING PRESCHOOLS ACCOUNTABLE FOR BULLYING AGAINST STUDENTS WITH DISABILITIES

#### I. INTRODUCTION

"We don't like you." [Toby says to Noah.]

....

"Let's go smash his [truck]," Toby tells Sean and Russell, who are sitting near him at the table, as Toby hits four-year-old Noah's small plastic truck driver with his own. Noah slowly stands up and walks silently to the block area, his shoulders slumped and his face impassive.<sup>1</sup>

Preschool<sup>2</sup> bullying is more common than people think.<sup>3</sup> Approximately twenty-two percent of preschoolers are bullied.<sup>4</sup> This

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1. JANE KATCH, THEY DON'T LIKE ME: LESSONS ON BULLYING AND TEASING FROM A PRESCHOOL CLASSROOM 1 (2003).

2. In this Note, preschool will refer to all federally-funded programs serving four-year-old children. See *Early Learning: America's Middle Class Promise Begins Early*, U.S. DEPARTMENT EDUC., <http://www.ed.gov/early-learning> (last visited Apr. 12, 2015) (stating that the goal of President Barack Obama's plan for universal pre-kindergarten is to provide a quality program for all four-year-olds).

3. Charlina Stewart, *Bullying in Preschool: What Parents Need to Know*, EDUCATION.COM, <http://www.education.com/magazine/article/bullying-preschool> (last visited Apr. 12, 2015); see also Greta Griffin Freeman, *The Implementation of Character Education and Children's Literature to Teach Bullying Characteristics and Prevention Strategies to Preschool Children: An Action Research Project*, 42 EARLY CHILDHOOD EDUC. J. 305, 306 (2014) (bullying occurs in children as young as two-years-old, and is becoming more prevalent in preschools); *Understanding the Roles of Early Education and Child Care Providers in Community-Wide Bullying Prevention Efforts*, STOPBULLYING.GOV 2, [http://www.stopbullying.gov/prevention/training-center/hrsa\\_guide\\_early-education-child-care-providers\\_508v2.pdf](http://www.stopbullying.gov/prevention/training-center/hrsa_guide_early-education-child-care-providers_508v2.pdf) (last visited Apr. 12, 2015) (finding that as many as twenty-five percent of boys and eighteen percent of girls between the ages of two and five were physically bullied, and fifteen percent were emotionally bullied).

4. Maria Vlachou et al., *Bully/Victim Problems Among Preschool Children: A Review of Current Research Evidence*, 23 EDUC. PSYCHOL. REV. 329, 334 (2011).

number is even higher among children with disabilities.<sup>5</sup> About one-third of preschoolers with disabilities are bullied.<sup>6</sup> Around age three, children develop empathy and become capable of excluding and degrading others.<sup>7</sup> Bullying in preschool can lead to other problems later in life, such as depression, health problems, substance abuse, and decreased educational performance.<sup>8</sup> Despite the severity of bullying at such a young age, no legal rights have been enforced to protect preschoolers with disabilities who are victims of bullying.<sup>9</sup>

Section 504 of the Rehabilitation Act of 1973 ("Section 504")<sup>10</sup> prohibits any program receiving federal funds from discriminating on the basis of disability.<sup>11</sup> Under Section 504, preschools, elementary schools, and secondary schools are required to provide an appropriate education to all qualified students with disabilities.<sup>12</sup> The U.S. Department of Education has declared that if peer-on-peer harassment is so severe as to create a hostile environment, a student's rights under Section 504 may be violated.<sup>13</sup>

In practice, the courts have established a five-prong test, known as the deliberate indifference test, to determine when peer-on-peer bullying can violate Section 504.<sup>14</sup> To satisfy the test and prove that bullying is a violation, the student must prove:

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5. Esther Son et al., *National Prevalence of Peer Victimization Among Young Children with Disabilities in the United States*, 34 CHILD. & YOUTH SERVICES REV. 1540, 1540, 1542 (2012).

6. *Id.* at 1542.

7. Sally Farhat Kassab, *Bullying Starts in Preschool – How to Stop It Early*, iVILLAGE (Mar. 3, 2011) (on file with the Hofstra Law Review); see also Karen E. Diamond & Soo-Young Hong, *Young Children's Decisions to Include Peers with Physical Disabilities in Play*, 32 J. EARLY INTERVENTION 163, 172 (2010) ("[P]reschool children are sensitive to demands of activity settings and to issues of fairness and equity when making a decision to include a child with a physical disability in play.").

8. Son et al., *supra* note 5, at 1540, 1544; Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 646-47 (2004) (stating that the effects of bullying are "long lasting and debilitating," and that the emotional effects can last through adulthood); Erin Michelle Burris, Comment, *Combating Bullying by Amending the Individuals with Disabilities Education Act*, 93 OR. L. REV. 229, 237 (2014) (identifying depression, anxiety, suicide, colds, illness, headaches, stomachaches, and decreased energy as side effects of being bullied).

9. See *infra* Part III.A.

10. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (2012).

11. 29 U.S.C. § 794(a); Burris, *supra* note 8, at 243.

12. See 34 C.F.R. §§ 104.31, 104.33(a) (2000).

13. See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleague (Oct. 26, 2010) (on file with the Hofstra Law Review).

14. *E.g.*, M.J. v. Marion Indep. Sch. Dist., No. SA-10-CV-00978, 2013 WL 1882330, at \*7 (W.D. Tex. May 3, 2013); D.A. *ex rel.* M.A. v. Meridian Joint Sch. Dist. No. 2, 289 F.R.D. 614, 628 (D. Idaho 2013) (citing S.S. v. E. Ky. Univ., 532 F.3d 445, 453 (6th Cir. 2008)).

(1) the plaintiff is an individual with a disability; (2) he or she was harassed based on that disability; (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment; (4) the defendant knew about the harassment; and (5) the defendant was deliberately indifferent to the harassment.<sup>15</sup>

Since it was created, the deliberate indifference test has *only* been applied to school-age<sup>16</sup> students.<sup>17</sup>

This Note argues that preschool students with disabilities have a civil right under Section 504 to be educated in an environment free from bullying.<sup>18</sup> When that right is violated, preschool students with disabilities have a cause of action against the school.<sup>19</sup> This Note proposes that courts apply the deliberate indifference test to claims of preschool bullying to determine if a preschool violated a student's rights under Section 504.<sup>20</sup>

Part II of this Note provides background information and an overview of Section 504.<sup>21</sup> It discusses the origins of the statute,<sup>22</sup> the programs and organizations required to comply with the statute,<sup>23</sup> and the protections the statute and implementing regulations afford to students with disabilities.<sup>24</sup> Part II then defines bullying<sup>25</sup> and outlines the origins of the deliberate indifference test.<sup>26</sup> Finally, Part II concludes with an in-depth analysis of how courts have applied the deliberate indifference test to cases brought under Section 504 by school-age students with disabilities.<sup>27</sup> Part III describes the current lack of clarity regarding the protections afforded to preschoolers with disabilities who are bullied.<sup>28</sup> Moreover, it explains the prevalence of bullying in preschools<sup>29</sup> and the heightened risk of bullying for preschoolers with

15. *D.A. ex rel. M.A.*, 289 F.R.D. at 628.

16. For the purposes of this Note, school-age will refer to all students enrolled in elementary, middle, and high schools.

17. *E.g.*, *Sutherlin v. Indep. Sch. Dist. No. 40*, 960 F. Supp. 2d 1254, 1259, 1266-67 (N.D. Okla. 2013) ("S.S. is approximately 13 years old . . ."); *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 238, 241 (W.D.N.Y. 2012) ("A.P. is a seventeen-year-old student . . .").

18. *See infra* Part IV.A.

19. *See infra* Part IV.A.

20. *See infra* Part IV.A.

21. *See infra* Part II.A-B.

22. *See infra* Part II.A.

23. *See infra* Part II.B.

24. *See infra* Part II.B.

25. *See infra* Part II.C.

26. *See infra* Part II.D.

27. *See infra* Part II.E.

28. *See infra* Part III.A.

29. *See infra* Part III.B.

disabilities.<sup>30</sup> To resolve this issue, this Note argues that preschoolers with disabilities who are victims of bullying have a civil right, and a legal cause of action, under Section 504.<sup>31</sup> To determine if the preschool has violated that right by failing to address the bullying, this Note advocates for the application of the deliberate indifference test.<sup>32</sup>

## II. OVERVIEW OF SECTION 504 OF THE REHABILITATION ACT OF 1973 AND THE CREATION OF THE DELIBERATE INDIFFERENCE STANDARD

Section 504 is federal legislation prohibiting discrimination based on a person's disability.<sup>33</sup> Though the original intent of the legislation was not to protect students, it has been applied in an educational context.<sup>34</sup> Recently, severe bullying of students with disabilities has been held to violate the students' Section 504 rights.<sup>35</sup> To understand how Section 504 protects students with disabilities, and specifically, those students who are bullied, Subpart A first presents the court-created protections for students with disabilities prior to the enactment of Section 504, and the subsequent creation of the law.<sup>36</sup> Subpart B provides an overview of which organizations are required to comply with Section 504, who is protected under Section 504, and what it means to discriminate against a person with a disability.<sup>37</sup> Subpart C defines bullying,<sup>38</sup> as per the standard definition created by the U.S. Department of Education Office for Civil Rights ("OCR").<sup>39</sup> Subpart D describes the creation of the deliberate indifference test,<sup>40</sup> and Subpart E analyzes how

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30. See *infra* Part III.C.

31. See *infra* Part IV.

32. See *infra* Part IV.A.

33. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2012); see also Lynn M. Daggett, "Minor Adjustments" and Other Not-so-Minor Obligations: Section 504, Private Religious K-12 Schools, and Students with Disabilities, 52 U. LOUISVILLE L. REV. 301, 305-06 (2014) (describing Section 504 as an affirmative obligation on schools receiving federal funds to avoid discrimination).

34. See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 52-53 (2d ed. 2001); *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, U.S. DEPARTMENT EDUC., <http://www.ed.gov/about/offices/list/ocr/docs/hq5269.html> (last updated Mar. 14, 2005) [hereinafter *The Civil Rights of Students with Hidden Disabilities*].

35. See, e.g., D.A. *ex rel.* M.A. v. Meridian Joint Sch. Dist. No. 2, 289 F.R.D. 614, 631 (D. Idaho 2013).

36. See *infra* Part II.A.

37. See *infra* Part II.B.

38. See *infra* Part II.C.

39. See Letter from Norma V. Cantu, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., and Judith E. Heumann, Assistant Sec'y, Office of Special Educ. & Rehabilitative Servs., U.S. Dep't of Educ., to Colleague (July 25, 2000) (on file with the *Hofstra Law Review*).

40. See *infra* Part II.D.

courts have applied this test to claims brought under Section 504 by school-age students.<sup>41</sup>

#### A. Establishment of Section 504 of the Rehabilitation Act of 1973

Section 504 was passed during the Civil Rights Movement.<sup>42</sup> During this time, there was significant movement toward protecting the rights of people with disabilities and preventing discrimination against them.<sup>43</sup> People with disabilities were active participants in the Civil Rights Movement.<sup>44</sup> As a result of their participation, they viewed their disability “in the same political sense as blacks viewed their race or women their gender.”<sup>45</sup> Overcoming hurdles imposed by one’s disability came to be seen as a right.<sup>46</sup> This public mentality assisted in bringing to light educational discrimination against students with disabilities.<sup>47</sup>

Advocates brought education discrimination issues before the courts.<sup>48</sup> The Pennsylvania Association for Retarded Children filed suit against the state on behalf of children diagnosed with Mental Retardation who were excluded from their local public schools.<sup>49</sup> At the time of the complaint, it was estimated that of the 126,000 students with disabilities in Pennsylvania, only about 46,000 were enrolled in public schools.<sup>50</sup> The court ordered the state:

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41. See *infra* Part II.E.

42. See SCOTCH, *supra* note 34, at 7 (noting that Section 504 was passed during a time when people’s civil rights were being expanded).

43. See *id.* at 7-8, 35; see also Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1428 (2007) (“The racial civil rights movement also influenced the disability movement towards integration. Educators began to argue that there were parallels between the treatment of African-Americans and individuals with disabilities, and that integration was necessary to eliminate negative stereotypes.”).

44. SCOTCH, *supra* note 34, at 35; see also Mary Johnson, *Overcoming the Social Barriers*, NATION, Apr. 9, 1988, at 489 (“[D]eaf people joined protestors in wheelchairs, on crutches and with guide dogs . . . around the country to demand that the Carter Administration sign rules implementing nondiscrimination provisions of the 1973 Rehabilitation Act’s Section 504.”).

45. SCOTCH, *supra* note 34, at 35; see also Colker, *supra* note 43, at 1430-31 (noting that special education arguments piggy-backed on race discrimination in education under the idea that separate is not equal).

46. See SCOTCH, *supra* note 34, at 41-42 (stating that the issue was framed not as helping the disabled, but rather as a civil rights issue, because it ensured that the rights of the disabled population would be protected regardless of the political and economic climate).

47. See *id.* at 37-38.

48. See, e.g., *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 281-82 (E.D. Pa. 1972); *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 868 (D.D.C. 1972); see also SCOTCH, *supra* note 34, at 37-38 (discussing *Mills* and *Pennsylvania Ass’n for Retarded Children*).

49. *Pa. Ass’n for Retarded Children*, 343 F. Supp. at 281-82; see also Colker, *supra* note 43, at 1432 & n.82 (describing this as one of the earliest lawsuits brought on behalf of students for exclusion).

50. *Pa. Ass’n for Retarded Children*, 343 F. Supp. at 296 (“[T]he State’s 1965 Pennsylvania

[(1)] to provide . . . to every retarded person between the ages of six and twenty-one years . . . access to a free public program of education and training appropriate to his learning capacities;  
[and] [(2)] to provide . . . wherever [the state provides] a *preschool program* of education and training for children aged less than six years of age, access to a free public program of education and training appropriate to his learning capacities to every mentally retarded child of the same age.<sup>51</sup>

Thus, the court ordered all public schools to provide a free appropriate public education ("FAPE")<sup>52</sup> to students diagnosed with Mental Retardation.<sup>53</sup>

A few months after *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*,<sup>54</sup> Peter Mills and six other students filed a class action in the U.S. District Court for the District of Columbia.<sup>55</sup> The students in *Mills v. Board of Education of District of Columbia*<sup>56</sup> were excluded from D.C. public schools.<sup>57</sup> It was estimated that approximately 22,000 students in D.C. had a disability, and as many as 18,000 were not provided an appropriate education.<sup>58</sup> The court held that all children in D.C. were entitled to attend public school and could not be excluded.<sup>59</sup> Therefore, the court ordered that, regardless of available resources,<sup>60</sup> the school district had to "provide each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical, or emotional disability or impairment."<sup>61</sup>

Concurrently in the legislature, Senator Hubert Humphrey advocated for the protection of students in schools, stating that children with disabilities were kept out of schools only because they were seen as

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Mental Retardation Plan estimates that while 46,000 school age retarded children were enrolled in public schools, another 70,000 to 80,000 retarded children between the ages of 5 and 21 were denied access to any public education services in schools . . .").

51. *Id.* at 302-03 (emphasis added).

52. See 34 C.F.R. § 104.33(b)(1)(i) (2000) (defining FAPE as special education and related services designed to meet the unique needs of the student).

53. *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 302-03.

54. 343 F. Supp. 279 (E.D. Pa. 1972).

55. *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 868 (D.D.C. 1972).

56. 348 F. Supp. 866 (D.D.C. 1972).

57. *Id.* at 868.

58. *Id.* Since *Mills*, education is deemed appropriate if it is reasonably calculated to permit the student to obtain some educational benefit, as shown through passing grades and yearly promotion. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203-04 (1982).

59. *Mills*, 348 F. Supp. at 878.

60. *Id.* ("[D]efendants shall not exclude any child resident in the District of Columbia from such publicly-supported education on the basis of a claim of insufficient resources.").

61. *Id.*

a “disturbing influence.”<sup>62</sup> He declared that these students deserved special classes and programs, and had a right to an education.<sup>63</sup> After being vetoed twice by President Richard Nixon, the Rehabilitation Act was signed into law on September 26, 1973.<sup>64</sup> Since then, Section 504 has been widely used in education litigation.<sup>65</sup>

### B. Protected Individuals and Their Rights

Section 504 states that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>66</sup> Section 504 has three requirements: (1) all programs and activities receiving federal funding must comply with its regulations and requirements; (2) qualified individuals with disabilities must be protected under Section 504; and (3) programs cannot discriminate against a person with a disability because of the disability.<sup>67</sup> For Section 504 obligations and rights to be applicable, all three requirements must be met.<sup>68</sup>

Section 504 requires all programs and activities receiving federal funding to comply with its regulations.<sup>69</sup> Furthermore, Section 504 defines a program as “a local educational agency . . . system of vocational education, or other school system.”<sup>70</sup> Educational agencies and school systems include preschools, elementary schools, and secondary schools.<sup>71</sup> All covered programs receive federal funding.<sup>72</sup>

62. SCOTCH, *supra* note 34, at 43 (internal quotation marks omitted).

63. *Id.* at 43-44.

64. President Richard Nixon, *Statement on Signing the Rehabilitation Act of 1973*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=3979> (last visited Apr. 12, 2015) (admitting to having vetoed the bill in October 1972, and again in March 1973, before finally signing it into law).

65. See *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34 (stating that compliance with Section 504 is overseen by the U.S. Department of Education).

66. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2012).

67. *Id.*

68. See *id.*

69. *Id.*; Daggett, *supra* note 33, at 305-06; Lauren French LaRochelle, Note, *Dollars and Sense: Designing a Reasonable Accommodation Under Section 504 of the Rehabilitation Act*, 69 OHIO ST. L.J. 525, 532 (2008).

70. 29 U.S.C. § 794(b)(2)(B).

71. 34 C.F.R. § 104.31 (2000); see also *Protecting Students with Disabilities: Frequently Asked Question About Section 504 and the Education of Children with Disabilities*, U.S. DEPARTMENT EDUC., <http://www.ed.gov/about/offices/list/ocr/504faq.html> (last updated Dec. 19, 2013) [hereinafter *Protecting Students with Disabilities*] (“[The U.S. Department of Education Office for Civil Rights] enforces Section 504 in programs and activities that receive Federal financial assistance from [the Department of Education]. Recipients of this Federal financial



However, the federal funding received by the program does not need to be the sole source of the program's funding,<sup>73</sup> rather, it only needs to provide some assistance.<sup>74</sup>

To be protected under Section 504, a person must be "qualified."<sup>75</sup> To be "qualified," the student must be eligible to attend public school.<sup>76</sup> This includes students who are the same age as peers who are provided educational services, regardless of whether the educational services are mandatory.<sup>77</sup> Students are also "qualified" if they are protected under the Individuals with Disabilities Education Act ("IDEA").<sup>78</sup>

Furthermore, to qualify, a student must have a disability.<sup>79</sup> Section 504's implementing regulations provide a definition of the term disability rather than listing specific disabilities.<sup>80</sup> This allows for broader coverage.<sup>81</sup> Thus, a person with a disability must: "[(1) have] a physical or mental impairment which substantially limits one or more

assistance include public school districts, institutions of higher education, and other state and local education agencies.").

72. 29 U.S.C. § 794(a); Daggett, *supra* note 33, at 305-06 (requiring that schools receive at least *de minimis* funding); LaRochelle, *supra* note 69, at 534; *Protecting Students with Disabilities*, *supra* note 71.

73. See 34 C.F.R. § 104.3(f) ("Recipient means . . . any public or private agency . . . to which Federal financial assistance is extended directly or through another recipient."); see also *Thomas ex rel. Thomas v. Davidson Acad.*, 846 F. Supp. 611, 613, 618 (M.D. Tenn. 1994) (holding that a private school participating in federally-funded programs was required to comply with Section 504).

74. *Thomas ex rel. Thomas*, 846 F. Supp. at 618 (receiving federal funds through participation in three programs was sufficient to require compliance with Section 504 procedural safeguards); Daggett, *supra* note 33, at 305-06 (receiving federally-funded services or property is sufficient to trigger Section 504 obligations).

75. 29 U.S.C. § 794(a); Daggett, *supra* note 33, at 310; *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

76. 34 C.F.R. § 104.3(k)(2); Daggett, *supra* note 33, at 310; *Protecting Students with Disabilities*, *supra* note 71.

77. See 34 C.F.R. § 104.3(k)(2); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

78. 20 U.S.C. § 1400(a) (2012); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34; see U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS 3 (2012) [hereinafter DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS], available at <http://www.ed.gov/documents/news/section-504.pdf> ("[IDEA] is a federal law that provides federal funds for special education and sets requirements for such services. . . . IDEA is limited to students who need special education."). Under IDEA, a child with a disability is "a child with intellectual disabilities, hearing impairment[,]. . . speech or language impairments, visual impairments[,]. . . serious emotional disturbance[,]. . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A) (2012).

79. Daggett, *supra* note 33, at 310 ("Qualified students must also have a past, present, or perceived disability.").

80. See 34 C.F.R. § 104.3(j)(2)(i).

81. See DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS, *supra* note 78, at 1.

major life activities; [(2) have] a record of such an impairment; or [(3) be] regarded as having such an impairment.”<sup>82</sup>

A physical impairment is a physiological disorder, disfigurement, or anatomical loss that affects at least one body system.<sup>83</sup> A mental impairment is a mental or psychological disorder.<sup>84</sup> The regulations do not list specific diseases or conditions because ensuring a comprehensive list would be too difficult.<sup>85</sup> The regulations do, however, require that the impairment affect a major life activity, such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>86</sup>

The language of the regulation protects students who have a history of a disability or are regarded as having an impairment.<sup>87</sup> This allows for the protection of individuals not readily classified as having a disability.<sup>88</sup> Rather, students with “a history of, or [who] have been misclassified as having, a mental or physical impairment” are also protected.<sup>89</sup>

The final mandate under Section 504 is that programs receiving federal funds are prohibited from discriminating against a person based on that person’s disability.<sup>90</sup> Generally, discrimination involves denying a person with a disability “the opportunity to participate in or benefit from” the program.<sup>91</sup> When applying Section 504 to schools, peer-on-

82. 34 C.F.R. § 104.3(j)(1).

83. 34 C.F.R. § 104.3(j)(2)(i)(A) (defining a physical impairment as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine”); see *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

84. 34 C.F.R. § 104.3(j)(2)(i)(B); Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?*, 22 AM. U. J. GENDER SOC. POL’Y & L. 519, 551 (2014) (identifying Post-Traumatic Stress Disorder, Bipolar Disorder, other mood disorders, and Schizophrenia as examples of mental impairments); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

85. *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

86. 34 C.F.R. § 104.3(j)(2)(ii); see also *Protecting Students with Disabilities*, *supra* note 71 (including “eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating” as major life activities).

87. 34 C.F.R. § 104.3(j)(2)(iii)–(iv). A student has a history of a disability if a disability existed in the past, though it is no longer present. See Daggett, *supra* note 33, at 310–11 (“For example, a student who was hospitalized for acute mental illness, but now enjoys good mental health, is protected from discrimination based on that history.”). A person is regarded as having a disability if the disability is unknown, but it is believed that the disability may be present. See *id.* at 311.

88. *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

89. *Id.*

90. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2012).

91. 34 C.F.R. § 104.4(b)(1)(i).

peer harassment can rise to the level of discrimination when it creates a hostile environment and the school fails to rectify the situation.<sup>92</sup> The harassment must be so severe that it interferes with or denies the student full “participation in or receipt of benefits, services, or opportunities” at the school.<sup>93</sup>

### C. *Bullying in Schools and Against Students with Disabilities*

Bullying is a large problem in schools,<sup>94</sup> especially against students with disabilities.<sup>95</sup> OCR defines disability harassment as “intimidation or abusive behavior toward a student based on a disability that creates a hostile environment by interfering with or denying a student’s participation in, or receipt of, benefits, services, or opportunities in the institution’s program.”<sup>96</sup> Bullying, as opposed to disability harassment, has been defined as “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.”<sup>97</sup> Bullying involves an imbalance of power where the actions directed at the victim are done with the intent of embarrassing, scaring, intimidating, or isolating the victim.<sup>98</sup> An action constitutes bullying when it occurs repeatedly and over time; single acts are not sufficient.<sup>99</sup> Bullying can be

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92. Letter from Russlynn Ali, *supra* note 13; see also DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS, *supra* note 78, at 16 (“[When] harassment based on disability creates a hostile environment serious enough to limit or interfere with a student’s ability to benefit from opportunities offered by a school, the harassment violates Section 504 . . .”).

93. Letter from Norma V. Cantu, *supra* note 39; see also Burris, *supra* note 8, at 243 (acknowledging that a claim under Section 504 must prove that the student was denied a FAPE and was bullied because of the student’s disability).

94. Chad A. Rose et al., *Bullying and Victimization Among Students in Special Education and General Education Curricula*, EXCEPTIONALITY EDUC. INT’L, Sept. 2011, at 2, 3 (identifying bullying as “a nationwide epidemic”); see also Weddle, *supra* note 8, at 650 (stating that the prevalence and severity of bullying has increased in recent years).

95. John W. Maag & Antonis Katsiyannis, *Bullying and Students with Disabilities: Legal and Practice Considerations*, 37 BEHAV. DISORDERS 78, 82 (2012) (identifying one study that found higher rates of bullying against students with disabilities than their nondisabled peers); see also Burris, *supra* note 8, at 233 (“[S]tudents with disabilities are at high risk for being bullied.”); David Ellis Ferster, Note, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191, 199 (2008) (describing conditions that leave students with disabilities more susceptible to bullying).

96. Letter from Norma V. Cantu, *supra* note 39.

97. Letter from Melody Musgrove, Dir., Office of Special Educ. Programs, U.S. Dep’t of Educ., and Michael K. Yudin, Acting Assistant Sec’y, U.S. Dep’t of Educ., to Colleague 2 (Aug. 20, 2013) (on file with the *Hofstra Law Review*).

98. Weddle, *supra* note 8, at 645.

99. Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor: Bullying and Students with Disabilities*, INT’L J. SPECIAL EDUC., 2006, at 11, 13 (“There is less consensus about single acts of aggression constituting bullying behavior; in fact, some researchers state that the behaviors must be

face-to-face or indirect, such as spreading rumors or excluding a student from a group.<sup>100</sup>

OCR places significant emphasis on bullying and bullying prevention because of the impact it has on students.<sup>101</sup> Research suggests that a student's academic performance decreases, and truancy increases, when bullied.<sup>102</sup> Students who are bullied are also prone to low morale, chronic illness, running away, and suicide.<sup>103</sup> Additionally, bullied students are more likely to "endure anxiety, depression, poor-esteem, impaired concentration, and avoidant behavior."<sup>104</sup> The lasting effects are often more severe for students with disabilities.<sup>105</sup>

The rate of bullying among students with disabilities is higher than their typically developing peers.<sup>106</sup> In 2009, only ten studies on bullying and developmental disabilities had been conducted in the United States.<sup>107</sup> All of these studies found that students with disabilities were two to three times more likely to be bullied than their typically developing peers.<sup>108</sup> Approximately twenty-eight percent of students between the ages of twelve and eighteen were bullied in 2011.<sup>109</sup> In the

repetitive."); Weddle, *supra* note 8, at 645 (noting that the occasional insult or exclusion is not bullying).

100. Carter & Spencer, *supra* note 99, at 12; *see also* Weddle, *supra* note 8, at 646 (distinguishing bullying done by boys compared to girls, and explaining that bullying by girls usually involves gossiping and alienating another student).

101. *See* Letter from Norma V. Cantu, *supra* note 39 ("Disability harassment can have a profound impact on students . . .").

102. Carter & Spencer, *supra* note 99, at 12; *see also* Billie Gastic, *School Truancy and the Disciplinary Problems of Bullying Victims*, 60 EDUC. REV. 391, 398 (2008) (finding that twenty-two percent of bully-victims have been absent from school compared to only fifteen percent of non-victims, a difference deemed statistically significant).

103. Carter & Spencer, *supra* note 99, at 12.

104. *Id.*; *see also* Sandra Yu Rueger & Lyndsay N. Jenkins, *Effects of Peer Victimization on Psychological and Academic Adjustment in Early Adolescence*, 29 SCH. PSYCHOL. Q. 77, 84 (2014) (finding peer victimization can increase anxiety and lead to depression and low self-esteem).

105. *Walk a Mile in Their Shoes: Bullying and the Child with Special Needs*, ABILITYPATH.ORG 10, <http://www.abilitypath.org/areas-of-development/learning--schools/bullying/articles/walk-a-mile-in-their-shoes.pdf> (last visited Apr. 12, 2015) [hereinafter *Walk a Mile in Their Shoes*].

106. *Bullying and Harassment of Students with Disabilities: Top 10 Facts Parents, Educators and Students Need to Know*, PACER'S NAT'L BULLYING PREVENTION CENTER, <http://www.pacer.org/bullying/resources/students-with-disabilities> (last visited Apr. 12, 2015) [hereinafter *Bullying and Harassment of Students with Disabilities*]; *see also* *Walk a Mile in Their Shoes*, *supra* note 105, at 10 ("Research conducted has demonstrated conclusively that children with disabilities are significantly more likely than their peers to be the victims of bullying.").

107. *Bullying and Harassment of Students with Disabilities*, *supra* note 106; *Walk a Mile in Their Shoes*, *supra* note 105, at 10.

108. *Bullying and Harassment of Students with Disabilities*, *supra* note 106; *Walk a Mile in Their Shoes*, *supra* note 105, at 10; *see also* Rose et al., *supra* note 94, at 9 (concluding that children with disabilities are victimized more often than their nondisabled peers).

109. *Bullying*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/>

2009 to 2010 school year, over ten thousand students were bullied based on their disabilities.<sup>110</sup> Bullying of students with disabilities has often been found to be a direct result of their disabilities.<sup>111</sup>

In Massachusetts, it was determined that of four hundred students with Autism, eighty-eight percent were bullied at school in 2009.<sup>112</sup> Of those students, approximately thirty-nine percent of parents indicated that their children had been bullied for over one year.<sup>113</sup> In Connecticut, over fifty percent of bullying complaints made to the State Department of Education involved students with disabilities.<sup>114</sup>

After determining that students with disabilities were bullied at a higher rate than other students, studies often tried to determine the cause for this disparity.<sup>115</sup> One study identified four factors that influenced a student's chance of being bullied: "[(1)] receiving extra help in school[; (2)] being alone at playtime[; (3)] having less than two good friends[; (4)] and being male."<sup>116</sup> Students with disabilities often exhibit these behaviors.<sup>117</sup> For example, when a child has a disability, her chances of needing and attending special classes or extra help increase.<sup>118</sup> Additionally, having a disability causes a student to exhibit different behaviors, patterns of speech, and have distinguishing physical appearances, causing other students to intentionally exclude the student with a disability.<sup>119</sup> By being excluded, the student is also more likely to have less than two good friends, and is, therefore, more likely to be bullied.<sup>120</sup>

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display.asp?id=719 (last visited Apr. 12, 2015).

110. DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS, *supra* note 78, at 19-20.

111. *Walk a Mile in Their Shoes*, *supra* note 105, at 10; *see also* Rose et al., *supra* note 94, at 9-10 (stating that students with disabilities often have characteristics that put them at higher risks of victimization).

112. *Walk a Mile in Their Shoes*, *supra* note 105, at 11.

113. *Id.* at 13.

114. *Id.* at 11.

115. *See* Carter & Spencer, *supra* note 99, at 14.

116. *Id.*

117. *See id.* Another study found similar results:

[S]tudents with disabilities are often characterized by several attributes that place them at a greater risk for involvement within the bullying dynamic. For example, students with disabilities may lack age appropriate social skills, which may result in fewer close friendships or unstable relationships and their inability to avoid bullying situations. Additionally, students with disabilities may be perceived by their peers as dependent on teacher assistance, which may result in social rejection.

Rose et al., *supra* note 94, at 9-10 (citations omitted).

118. Carter & Spencer, *supra* note 99, at 14.

119. *Walk a Mile in Their Shoes*, *supra* note 105, at 9-10.

120. *See* Carter & Spencer, *supra* note 99, at 14; Rose et al., *supra* note 94, at 10 (implying that a cycle is created where the student's differences resulting from her disability lead to social rejection, which may subsequently perpetuate the student's lack of friendships and increase the

#### D. Creation of the Deliberate Indifference Standard

The U.S. Supreme Court has never addressed the issue of peer-on-peer bullying as a violation of Section 504.<sup>121</sup> However, the Supreme Court has held that peer-on-peer sexual harassment can violate Title IX of the Education Amendments of 1972 ("Title IX").<sup>122</sup> In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*,<sup>123</sup> the petitioner, a fifth-grader, was the victim of prolonged sexual harassment.<sup>124</sup> In December, the petitioner's classmate "attempted to touch [her] breasts and genital area and made vulgar statements such as 'I want to get in bed with you' and 'I want to feel your boobs.'"<sup>125</sup> In February, the student "placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward [petitioner]."<sup>126</sup> In April, the student rubbed his body against petitioner in a sexually suggestive manner.<sup>127</sup> In May, the student pled guilty to sexual battery.<sup>128</sup> On each occasion, the petitioner reported the other student's conduct to her teacher.<sup>129</sup>

The Supreme Court held that the petitioner had properly stated a claim against the school for sexual harassment under Title IX.<sup>130</sup> Title IX is a civil rights statute providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>131</sup> The Supreme Court held that the school board was a recipient of federal funding and was required to comply with Title IX regulations.<sup>132</sup> However, the school could only be held responsible for its own misconduct.<sup>133</sup>

The Supreme Court held that schools are liable under, and in violation of, Title IX, "where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe,

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child's chances of being bullied).

121. *Werth ex rel. Werth v. Bd. of Dirs. of Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1126 (E.D. Wis. 2007).

122. 20 U.S.C. § 1681 (2012); *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

123. 526 U.S. 629 (1999).

124. *Id.* at 633.

125. *Id.*

126. *Id.* at 634.

127. *Id.*

128. *Id.*

129. *Id.* at 633-34.

130. *Id.* at 654.

131. 20 U.S.C. § 1681(a) (2012).

132. *Davis ex rel. LaShonda D.*, 526 U.S. at 639.

133. *Id.* at 640-41; see Weddle, *supra* note 8, at 661-62.

pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>134</sup> A school acts with deliberate indifference when its actions either cause the student to experience harassment, or make the student susceptible to harassment.<sup>135</sup> To prove that the school did not act with deliberate indifference, the school must show that its actions in response to the peer harassment were not unreasonable.<sup>136</sup>

Under the deliberate indifference test, the victim must prove that she did not receive an educational benefit.<sup>137</sup> Proof of exclusion does not need to be physical.<sup>138</sup> Rather, the victim only needs to establish that the harassment undercut and took away from her education.<sup>139</sup> Establishing a denial of educational benefits is a high standard: “Damages are not available for simple acts of teasing and name-calling among school children . . . . Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education . . . .”<sup>140</sup> Moreover, the Supreme Court held that a student’s drop in grades would not be sufficient to establish a denial of educational benefits.<sup>141</sup> Thus, under the deliberate indifference test, a school district can be held liable under Title IX for sexual harassment when it fails to respond to peer-on-peer harassment, and when the harassment rises to a denial of educational benefits for the bullied student.<sup>142</sup>

*E. Application of the Deliberate Indifference Test to  
Claims of School-Age Bullying Brought Under  
Section 504 of the Rehabilitation Act of 1973*

Applying a version of the test established by the Supreme Court in *Davis ex rel. LaShonda D.*, the Eighth Circuit held that peer-on-peer

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134. *Davis ex rel. LaShonda D.*, 526 U.S. at 650.

135. *Id.* at 644-45; see also Weddle, *supra* note 8, at 660 (noting that the standard created by the Supreme Court holds a school accountable only for the school’s actions in response to a specific incident, not the school’s overall climate).

136. *Davis ex rel. LaShonda D.*, 526 U.S. at 648-49; see also Weddle, *supra* note 8, at 661 (stating that the Court did not impose a proactive requirement on schools, but instead only imposed a duty to react).

137. See *Davis ex rel. LaShonda D.*, 526 U.S. at 650.

138. *Id.* at 651.

139. *Id.*

140. *Id.* at 652.

141. *Id.*

142. *Id.* at 650.

bullying can violate Section 504.<sup>143</sup> In that case, the court held that Section 504 is violated if the student proves:

(1) [s]he is a qualified individual with a disability; (2) [s]he was denied the benefits of a program or activity of a public entity receiving federal funds; [(3)] [s]he was discriminated against on the basis of [her] disability[; and (4) she] must make a showing of “either bad faith or gross misjudgment.”<sup>144</sup>

Though not explicitly required by the rule, like the Supreme Court in *Davis ex rel. LaShonda D.*, the Eighth Circuit required that the school have actual knowledge.<sup>145</sup>

The court found that all requirements may have been met and remanded the case for further proceedings.<sup>146</sup> First, the court found that the student had a disability under the statute.<sup>147</sup> The student was diagnosed with Schizophrenia,<sup>148</sup> and, therefore, neither the student nor the school disputed that the student was a qualified individual under Section 504.<sup>149</sup> Second, the student was denied the benefits of the school because of the student’s disability, as evidenced by the fact that the student transferred to a different school the following year.<sup>150</sup> Third, the student was not bullied until the student’s “medical information became

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143. *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 982-83 (8th Cir. 2003). The courts easily applied the *Davis ex rel. LaShonda D.* standard to cases brought under Section 504 due to the similarity in language between the statutes. Compare Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2012) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .” (emphasis added)), with 20 U.S.C. § 1681(a) (2012) (“No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” (emphasis added)).

144. *M.P. ex rel. K.*, 326 F.3d at 981-82 (quoting *Monahan ex rel. Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982)). The fourth prong, in other words, means that the student must prove deliberate indifference. *Id.*

145. *Id.* at 982 (“Although [the student] may not have complained to the school faculty about the harassment he suffered, his mother called school administrators on a weekly basis to discuss the harassment.”); see also *Davis ex rel. LaShonda D.*, 526 U.S. at 650 (requiring that schools have actual knowledge of the harassment).

146. *M.P. ex rel. K.*, 326 F.3d at 982-83.

147. *Id.* at 982; see also 34 C.F.R. § 104.3(j)(1) (2000) (defining a disability as a physical or mental impairment).

148. *M.P. ex rel. K.*, 326 F.3d at 977. Schizophrenia is a neurological disorder that causes people to hear voices. *Schizophrenia*, NAT’L INST. MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml> (last visited Apr. 12, 2015). Schizophrenia would be deemed a mental impairment under Section 504. See 34 C.F.R. § 104.3(j)(2)(i)(B).

149. *M.P. ex rel. K.*, 326 F.3d at 982.

150. See *id.* at 978, 982.



common knowledge within the student body.”<sup>151</sup> The court also found actual knowledge existed because the mother continually called school administrators to discuss the harassment.<sup>152</sup> Finally, the court held that the school may have acted with deliberate indifference when school administrators failed to return the mother’s phone calls, and failed to alter the student’s school day or transfer the student to another school.<sup>153</sup>

*Biggs v. Board of Education of Cecil County, Maryland*<sup>154</sup> was the first case where the exact deliberate indifference standard established by the Supreme Court in *Davis ex rel. LaShonda D.* was applied to Section 504.<sup>155</sup> Applying this standard, the court held:

[A] prima facie case of peer-on-peer disability harassment[] would require proof of the following: [(1)] that [the student] was an individual with a disability, [(2)] that she was harassed based on her disability, [(3)] that the harassment was sufficiently severe or pervasive that it altered the condition of her education and created an abusive educational environment, [(4)] that defendant knew about the harassment, and [(5)] that defendant was deliberately indifferent to the harassment.<sup>156</sup>

In that case, and in subsequent cases applying the deliberate indifference test, courts have analyzed the meaning of each prong in the context of bullying and Section 504.<sup>157</sup>

Subpart 1 explains how courts have determined when a student is qualified under Section 504.<sup>158</sup> Subpart 2 provides examples of when a student was harassed based on her disability.<sup>159</sup> Subpart 3 clarifies what it means for the harassment to create an altered condition of education and an abusive educational environment.<sup>160</sup> Subpart 4 elaborates on the requirement that the school possess actual knowledge.<sup>161</sup> Finally, Subpart 5 reviews the requirement that a school act with deliberate indifference.<sup>162</sup>

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151. *Id.* at 978 (implying that the bullying was caused by, and a result of, the student’s disability).

152. *Id.* at 982.

153. *Id.*

154. 229 F. Supp. 2d 437 (D. Md. 2002).

155. *Id.* at 444-45.

156. *Id.* at 445.

157. *See id.*; *infra* Part II.E.1-5.

158. *See infra* Part II.E.1.

159. *See infra* Part II.E.2.

160. *See infra* Part II.E.3.

161. *See infra* Part II.E.4.

162. *See infra* Part II.E.5.

### 1. Student as an Individual with a Disability

To qualify as a student with a disability under the deliberate indifference test, the student must qualify as a person with a disability under Section 504.<sup>163</sup> Section 504 requires the student to: “[ (1) have] a physical or mental impairment which substantially limits one or more major life activities[; (2) have] a record of such an impairment[;] or [(3) be] regarded as having such an impairment.”<sup>164</sup> Applying this definition, whether the student is qualified under the statute as a student with a disability is generally not in dispute.<sup>165</sup>

### 2. Harassment Based on Disability

Under the deliberate indifference test, the student must be harassed based on her disability.<sup>166</sup> It is not sufficient that a student with a disability was harassed.<sup>167</sup> Rather, it must be shown that the harassment was related to, or was because of, the student’s disability.<sup>168</sup>

Verbal insults related to, and based on, a disability are sufficient to establish bullying based on a student’s disability.<sup>169</sup> The U.S. District Court for the Western District of New York found a connection between bullying and the student’s disability when the insults directly referenced that disability.<sup>170</sup> In that case, a student diagnosed with Asperger’s Syndrome was repeatedly called a “fucking retard” and an “autistic piece of shit.”<sup>171</sup> In a different case, the U.S. District Court for the District of

163. *E.g.*, *Moore ex rel. A.M. v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1314 (M.D. Ala. 2013); *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

164. 34 C.F.R. § 104.3(j)(1) (2000); *see also supra* Part II.B (summarizing the requirements of Section 504).

165. *E.g.*, *D.A. ex rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614, 628 (D. Idaho 2013) (“It is undisputed in this case that [the student] suffers from a disability.”); *Werth ex rel. Werth v. Bd. of Dirs. of Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1128 (E.D. Wis. 2007) (“[I]t is undisputed that [the student] was disabled.”); *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 358 (S.D.N.Y. 2005) (“[T]here is no genuine dispute that [the student] is disabled for purposes of Section 504 . . .”).

166. *E.g.*, *Hill v. Bradley Cnty. Bd. of Educ.*, No. 1:05-cv-279, 2007 WL 4124495, at \*17 (E.D. Tenn. Nov. 19, 2007), *aff’d*, 295 F. App’x 740 (6th Cir. 2008); *Biggs*, 229 F. Supp. 2d at 445.

167. *See Werth ex rel. Werth*, 472 F. Supp. 2d at 1128.

168. *Id.* (holding that a student failed to show that he was harassed based on his disability when evidence only indicated that other students threw pieces of wood at the student, and no evidence connected the harassment to the student’s disability).

169. *D.A. ex rel. M.A.*, 289 F.R.D. at 628; *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 WL 1882330, at \*7 (W.D. Tex. May 3, 2013); *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 242 (W.D.N.Y. 2012).

170. *Preston ex rel. AP*, 876 F. Supp. 2d at 242.

171. *Id.* at 238, 242 (internal quotation marks omitted). Asperger’s Syndrome is an Autism Spectrum Disorder. *About Autism: What You Need to Know*, AUTISM SPEAKS 7 (2013), [http://www.autismspeaks.org/sites/default/files/afyo\\_about\\_autism.pdf](http://www.autismspeaks.org/sites/default/files/afyo_about_autism.pdf) [hereinafter *About Autism*]. Colloquially, people with Autism are often referred to as autistic. *See id.* at 11 (advocating for

Idaho held that the student, also diagnosed with Asperger's Syndrome, was bullied based on his disability when called a "retard."<sup>172</sup> Finally, the U.S. District Court for the Western District of Texas held that prong two was satisfied when a student diagnosed with Bipolar Disorder and Attention Deficit Hyperactivity Disorder was called "stupid, dumb ass, retard, idiot, special ed, and psycho."<sup>173</sup>

Proving harassment based on a disability can be shown other ways, as well.<sup>174</sup> In a case before the U.S. District Court for the Northern District of Oklahoma, the student was diagnosed with Asperger's Syndrome and, as a result, had poor social skills.<sup>175</sup> Other students called him "retard, crazy, creepy, and freak."<sup>176</sup> The court held that the student was bullied based on his disability because it could be reasonably inferred that the teasing related to the student's difficulties in socializing with others.<sup>177</sup>

### 3. Altered Condition of Education and an Abusive Educational Environment

The deliberate indifference test requires "that the harassment [be] sufficiently severe or pervasive that it alter[s] the condition of [the student's] education and create[s] an abusive educational environment."<sup>178</sup> The bullying must be such that it "distracts from the victims' educational experience, [causing] the victim-students [to be] effectively denied equal access to an institution's resources and opportunities."<sup>179</sup> However, denial of a FAPE alone is insufficient.<sup>180</sup>

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people-first language).

172. *D.A. ex rel. M.A.*, 289 F.R.D. at 618, 628 (internal quotation marks omitted).

173. *M.J.*, 2013 WL 1882330, at \*1, \*7 (internal quotation marks omitted). Bipolar Disorder is a brain disorder that results in drastic mood and behavioral changes. *Bipolar Disorder*, NAT'L INST. MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml> (last visited Apr. 12, 2015).

174. *See Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, 960 F. Supp. 2d 1254, 1267 (N.D. Okla. 2013).

175. *Id.*; *see also About Autism*, *supra* note 171, at 7 (identifying social awkwardness as a characteristic of someone with an Autism Spectrum Disorder).

176. *Sutherlin*, 960 F. Supp. 2d at 1267 (internal quotation marks omitted).

177. *Id.*

178. *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

179. *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 241 (W.D.N.Y. 2012) (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)) (internal quotation marks omitted).

180. *Sellers ex rel. Sellers v. Sch. Bd. of Manassas, Va.*, 141 F.3d 524, 528-29 (4th Cir. 1998) ("[P]laintiffs must prove that they have either been 'subjected to discrimination' or excluded from a program or denied benefits 'solely by reason of' their disability. To prove discrimination in the education context, 'something more than a mere failure to provide [a FAPE] . . . must be shown.'" (quoting *Monahan ex rel. Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982)); *see also Burris*, *supra* note 8, at 243 (noting that the student must have been denied a FAPE, and must have

Moreover, when bullying is sporadic and brief, it also fails to satisfy the requirements of the third prong.<sup>181</sup>

Common examples that prove the bullying denied the student equal access to education include: “dropping grades, change[s] in the student’s demeanor or classroom participation, becoming homebound or hospitalized due to harassment, or self-destructive and suicidal behavior.”<sup>182</sup> For example, the U.S. District Court for the Western District of New York held that the plaintiff showed a denial of access to educational opportunities when the student stopped attending school and was unable to complete his final exams.<sup>183</sup> Bullying was also held to have created an abusive educational environment when, after being repeatedly bullied, a student “failed to answer any questions on the 8th grade assessment for math, earning a score of 0 out of 40.”<sup>184</sup>

Destructive behavior outside of school also constitutes an abusive educational environment.<sup>185</sup> In *D.A. ex rel. M.A. v. Meridian Joint School District*,<sup>186</sup> the court held that the bullying was sufficiently severe when the student set fire to his parents’ house and was incarcerated for eighteen months.<sup>187</sup> In another case, the court held that the harassment was sufficiently severe when it caused the student to commit suicide.<sup>188</sup>

#### 4. The School Knew About the Harassment

To be held liable under Section 504, the school must know about the harassment.<sup>189</sup> The student must prove that either teachers or school administrators had actual knowledge of the bullying.<sup>190</sup> Knowledge is

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been discriminated against because of the student’s disability).

181. *Werth ex rel. Werth v. Bd. of Dirs. of Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1129 (E.D. Wis. 2007) (holding that two incidents of bullying that were brief and separated in time were not severe or pervasive); see *supra* note 99 and accompanying text.

182. *D.A. ex rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614, 629 (D. Idaho 2013).

183. *Preston ex rel. AP*, 876 F. Supp. 2d at 242.

184. *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 WL 1882330, at \*10 (W.D. Tex. May 3, 2013).

185. See *D.A. ex rel. M.A.*, 289 F.R.D. at 629; *Moore ex rel. A.M. v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1304, 1314 (M.D. Ala. 2013).

186. 289 F.R.D. 614 (D. Idaho 2013).

187. *Id.* at 629.

188. *Moore ex rel. A.M.*, 936 F. Supp. 2d at 1304, 1314.

189. *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

190. See *Werth ex rel. Werth v. Bd. of Dirs. of Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1129 (E.D. Wis. 2007) (holding that the student failed to show that the school had knowledge when the only evidence presented was that the teacher had heard from other teachers about the harassment, but was never told who the bullies were, when the bullying occurred, or how the student was bullied). “Knowledge” is defined as an awareness of a circumstance. BLACK’S LAW DICTIONARY 950 (9th ed. 2009). “Actual knowledge” is defined as “direct and clear knowledge.” *Id.*

not established if the student does not meet her burden.<sup>191</sup> The student can prove knowledge if the school staff witnessed the bullying, or someone notified the school of the bullying.<sup>192</sup> The court in *Moore ex rel. A.M. v. Chilton County Board of Education*<sup>193</sup> held that the school had knowledge when

school administrators, staff, and teachers observed firsthand a variety of bullying activities directed at [the student], . . . peers bullied [the student] in plain view and some times right in front of the school office, [the student] reported some of the bullying, and [the] school bus driver joined other students in taking perverse delight in watching the [bullying].<sup>194</sup>

In *Preston ex rel. AP v. Hilton Central School District*,<sup>195</sup> the court held that the school had knowledge after the student and his parents called, e-mailed, and had in-person meetings with multiple teachers.<sup>196</sup> The school was also held to have knowledge when the student consistently complained to teachers and staff members.<sup>197</sup>

### 5. The School Was Deliberately Indifferent

Finally, the student must show that the school acted with deliberate indifference.<sup>198</sup> A school is deliberately indifferent if it knows about the harassment, but fails to reasonably respond.<sup>199</sup> The failure of the school to respond must be more than just negligent; it must involve a level of deliberateness.<sup>200</sup> The school must intend for the discrimination to

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191. See *Hill v. Bradley Cnty. Bd. of Educ.*, No. 1:05-cv-279, 2007 WL 4124495, at \*19 (E.D. Tenn. Nov. 19, 2007), *aff'd*, 295 F. App'x 740 (6th Cir. 2008) (holding that the school did not have knowledge when the student failed to establish that anyone with authority, including teachers and the student's guidance counselor, knew that he was being harassed).

192. See *Moore ex rel. A.M.*, 936 F. Supp. 2d at 1314; *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 242 (W.D.N.Y. 2012).

193. 936 F. Supp. 2d 1300 (M.D. Ala. 2013).

194. *Id.* at 1314 (internal quotation marks omitted).

195. 876 F. Supp. 2d 235 (W.D.N.Y. 2012).

196. *Id.* at 242.

197. See *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 WL 1882330, at \*8 (W.D. Tex. May 3, 2013) (stating that the school had knowledge because the student complained to his teachers, and other school staff members, throughout grades five through nine).

198. *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

199. *D.A. ex rel. M.A. v. Meridian Joint Sch. Dist.* No. 2, 289 F.R.D. 614, 630 (D. Idaho 2013).

200. See *Hill v. Bradley Cnty. Bd. of Educ.*, No. 1:05-cv-279, 2007 WL 4124495, at \*18 (E.D. Tenn. Nov. 19, 2007), *aff'd*, 295 F. App'x 740 (6th Cir. 2008) (requiring intent for compensatory damages sought under Section 504).

occur.<sup>201</sup> Additionally, the school's lack of response must lead to a perpetuation of the bullying.<sup>202</sup>

Deliberate indifference has been proven when a student and her parents reported bullying to the school, but the school failed to "take responsive action to cease or prevent the harassing behavior."<sup>203</sup> It has also been held that a school acted with deliberate indifference when the school failed to investigate reports of bullying.<sup>204</sup> Moreover, the school even failed to follow its own policy in responding to bullying.<sup>205</sup>

Deliberate indifference was not proven in *S.S. v. Eastern Kentucky University*.<sup>206</sup> In that case, the court held that the school did not act deliberately indifferent because it took various actions in response to the bullying—the school interviewed and reprimanded the student's classmates, and brought in outside speakers to discuss name-calling.<sup>207</sup> When the school responds, even if the response is unsuccessful and the bullying continues, the school has not acted with deliberate indifference.<sup>208</sup>

In conclusion, students can bring claims under Section 504 against schools for peer-on-peer bullying.<sup>209</sup> The burden then rests on the student to prove: (1) she is a qualified individual with a disability under Section 504; (2) she was harassed because of her disability; (3) the harassment negatively altered her education; (4) the school had actual knowledge of the bullying; and (5) the school failed to respond, thus acting with deliberate indifference.<sup>210</sup> If successful, the student may receive a monetary award,<sup>211</sup> and the school will need to resolve the problem.<sup>212</sup>

201. *Preston ex rel. AP*, 876 F. Supp. 2d at 242.

202. *D.A. ex rel. M.A.*, 289 F.R.D. at 630.

203. See, e.g., *Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, 960 F. Supp. 2d 1254, 1267 (N.D. Okla. 2013); see also *Preston ex rel. AP*, 876 F. Supp. 2d at 242 ("Plaintiffs state that on multiple occasions . . . they notified multiple District employees of the ongoing harassment . . . [but] those individuals nonetheless failed to act, acquiesced in the harassment . . . and imposed no discipline on [the student's] harassers.").

204. See *D.A. ex rel. M.A.*, 289 F.R.D. at 631.

205. *Id.*

206. 532 F.3d 445, 455-56 (6th Cir. 2008).

207. *Id.* at 455 (adding that the school also monitored the student, separated the student from the bully, held mediation sessions between the student and bully, disciplined the bully, had the police speak with the bully, and called both the student's and the bully's parents).

208. *Id.* at 455-56 (having difficulty identifying other actions the school could have done); see also *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 WL 1882330, at \*8 (W.D. Tex. May 3, 2013) ("[M]erely marginally effective actions do not expose a school district to liability.").

209. See, e.g., *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

210. *Id.*

211. *Burris*, *supra* note 8, at 243.

212. See DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS, *supra* note 78, at 16-17

### III. PEER-ON-PEER BULLYING AGAINST PRESCHOOL STUDENTS WITH DISABILITIES

Preschool students in federally-funded programs are entitled to the same rights under Section 504 as school-age students.<sup>213</sup> However, the application of Section 504 to preschool students who are the victims of bullying is less clear than its application to school-age students.<sup>214</sup> Regardless, preschoolers with disabilities who are bullied deserve the same protections.<sup>215</sup> Subpart A describes the importance of preschool for young children, and the lack of clarity regarding the protections provided to those students under Section 504.<sup>216</sup> Subpart B discusses the prevalence of bullying in preschools,<sup>217</sup> while Subpart C addresses the occurrence of bullying against preschool students with disabilities.<sup>218</sup>

#### A. Importance of Preschool and Lack of Clarity Under Section 504 of the Rehabilitation Act of 1973

Starting education early in life is beneficial to children.<sup>219</sup> It has been shown that children receiving early childhood education “grow up more likely to read and do math at grade level, graduate high school, hold a job, [and] form more stable families of their own.”<sup>220</sup> This is because learning during early childhood builds the foundation for later

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(summarizing three different complaints and remedies).

213. See 34 C.F.R. § 104.38 (2000).

214. See *infra* notes 224-35 and accompanying text.

215. Cf. *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759, 762, 767 (S.D. Miss. 2008) (holding in favor of the student when the student’s mother filed a Section 504 claim because the preschool failed to provide services for to accommodate her child’s disability).

216. See *infra* Part III.A.

217. See *infra* Part III.B.

218. See *infra* Part III.C.

219. President Barack Obama, State of the Union Address (Feb. 12, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

Over the past decade, enrollment in state-funded preschools “has grown dramatically, nearly doubling the percentage of the population served.” W. Steven Barnett et al., *The State of Preschool 2012: Executive Summary*, NAT’L INST. EARLY EDUC. RESEARCH 13 (2012), [http://nieer.org/sites/nieer/files/yearbook2012\\_executivesummary.pdf](http://nieer.org/sites/nieer/files/yearbook2012_executivesummary.pdf). Currently, approximately twenty-eight percent of four-year-olds are enrolled in state-funded preschool programs. Motoko Rich, *Few States Look to Extend Preschool to All 4-Year-Olds*, N.Y. TIMES, Feb. 14, 2013, at A19. During the 2011 to 2012 year, over “1.3 million children attended state-funded [preschools],” of which 433,973 were children in special education. Barnett et al., *supra*, at 6, 7. Though these statistics represent enrollment in state-funded, and thus, federally-funded preschools, as is required for the school to be held accountable under Section 504, they indicate an overall increase in the number of students enrolling in preschool nationally. See Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2012); Barnett et al., *supra*, at 7, 21 (finding that just under 830,000 children were enrolled in the federal Head Start program).

220. President Barack Obama, *supra* note 219.

learning.<sup>221</sup> A good preschool program is just as, if not more, important for children with disabilities.<sup>222</sup> For these children, “a good preschool program increases the likelihood that special needs will be identified early and appropriate services will be provided.”<sup>223</sup>

Preschools receiving federal funds are required to comply with Section 504.<sup>224</sup> Subpart D of the proposed regulations applies to federally-funded preschools, elementary and secondary schools, and adult education programs and activities.<sup>225</sup> Yet, throughout Subpart D, the word “preschool” is continually left out of the regulations.<sup>226</sup> Other than in the statement of application at the beginning of the section,<sup>227</sup> the term preschool is used only once.<sup>228</sup> Nevertheless, it has been held that preschools receiving federal funding are required to comply with Section 504, and cannot discriminate based on a student’s disability.<sup>229</sup>

There are no cases relating to preschool students and bullying.<sup>230</sup> It is, therefore, difficult to establish the legal rights of preschool students with disabilities when they are bullied.<sup>231</sup> Specifically, it is difficult to determine if these students have the same rights as school-age students to an environment free from bullying because every student with a

221. See *Fact Sheet: President Obama's Plan for Early Education for All Americans*, WHITE HOUSE (Feb. 13, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/13/fact-sheet-president-obama-s-plan-early-education-all-americans>.

222. W. Steven Barnett & Megan E. Carolan, *Trends in State Funded Preschool Programs: Survey Findings from 2001-2002 to 2011-2012*, NAT'L INST. EARLY EDUC. RES. 15-16 (June 2013), [http://nieer.org/sites/nieer/files/Trends%20in%20State%20Funded%20Preschool%20Programs\\_0.pdf](http://nieer.org/sites/nieer/files/Trends%20in%20State%20Funded%20Preschool%20Programs_0.pdf).

223. *Id.* at 15. There has been movement toward increasing and prioritizing the enrollment of children with disabilities. See *id.* at 16. Since the 2008 to 2009 school year, an additional 30,000 students in special education have enrolled in preschool. *Id.*

224. 34 C.F.R. § 104.31 (2000).

225. *Id.*

226. See 34 C.F.R. §§ 104.32–37.

227. 34 C.F.R. § 104.31 (“Subpart D applies to *preschool*, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.” (emphasis added)).

228. See 34 C.F.R. § 104.38 (“A recipient to which this subpart applies that operates a *preschool* education or day care program or activity . . . may not, on the basis of handicap, exclude qualified handicapped persons . . . and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.” (emphasis added)).

229. See *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759, 765, 767 (S.D. Miss. 2008); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

230. See, e.g., *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 448-49 (6th Cir. 2008) (discussing claims brought by the parents of a middle-school student); *Moore ex rel. A.M. v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1303 (M.D. Ala. 2013) (deciding a case brought on behalf of a high-school student).

231. See *supra* note 230 and accompanying text (noting a lack of precedent for bringing a claim under Section 504 to protect the rights of preschool students with disabilities).



disability who brought a case under Section 504 was of school-age.<sup>232</sup> Moreover, OCR publications discuss requirements for elementary and secondary schools, but not preschools.<sup>233</sup> This does not mean that preschool bullying does not exist.<sup>234</sup> Rather, it only means that the courts have not yet established a standard for determining when preschool bullying violates Section 504.<sup>235</sup>

### B. Existence of Bullying in Preschools

It has been noted that: “Preschoolers can be bullies.”<sup>236</sup> Studies have found that bullying begins in preschool.<sup>237</sup> Empathy begins around age three.<sup>238</sup> Consequently, even if children do not know that their actions constitute bullying, they are capable of intentionally hurting others by the time they enter preschool.<sup>239</sup> By age four, children are capable of relational aggression—“harming others through purposeful manipulation and damage to relationships.”<sup>240</sup> A key component in preschool bullying is that the bully has no remorse when the victim is

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232. *E.g.*, *Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, 960 F. Supp. 2d 1254, 1259, 1265 (N.D. Okla. 2013) (“S.S. is approximately 13 years old . . .”); *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 238, 240-41 (W.D.N.Y. 2012) (“A.P. is a seventeen-year-old student . . .”).

233. *See, e.g.*, DISABILITY RIGHTS: ENFORCEMENT HIGHLIGHTS, *supra* note 78, at 2 (referencing enforcement in elementary and secondary schools, and other educational institutions); *Protecting Students with Disabilities*, *supra* note 71 (“OCR receives numerous complaints and inquiries in the area of elementary and secondary education involving Section 504 . . .”); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34 (stating that elementary and secondary schools must ensure students with disabilities are provided with a FAPE and an equal opportunity to participate in extracurricular activities, but not mentioning preschools).

234. *See Vlachou et al.*, *supra* note 4, at 334; Kassab, *supra* note 7.

235. *See, e.g.*, *S.S.*, 532 F.3d at 448, 454 (applying the deliberate indifference test to a middle-school student); *Moore ex rel. A.M.*, 936 F. Supp. 2d at 1303, 1314 (applying the deliberate indifference test to a high-school student); *Werth ex rel. Werth v. Bd. of Dirs. of Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1115, 1128 (E.D. Wis. 2007) (applying the deliberate indifference test to a high-school student).

236. Kassab, *supra* note 7.

237. *Vlachou et al.*, *supra* note 4, at 332; Kassab, *supra* note 7; *see also* Diamond & Hong, *supra* note 7, at 167 (studying how preschool students decide whom to include and whom to exclude); Freeman, *supra* note 3, at 306 (researching preschool students’ reactions to bullying).

238. Kassab, *supra* note 7.

239. *Id.*

240. *Mean Girls Start in Preschool, BYU Study Shows*, *BYU NEWS* (May 4, 2005), <http://news.byu.edu/archive05-May-mean.aspx>; *see also* *Vlachou et al.*, *supra* note 4, at 335 (noting that relational aggression is common in preschool classrooms).

upset.<sup>241</sup> Thus, preschoolers can be bullies and victims of direct and indirect peer aggression.<sup>242</sup>

Preschool bullying appears differently than school-age bullying due to differences in children's maturity and stage of development.<sup>243</sup> In general, bullying behavior must include: "[ (1) an] imbalance of power[; (2)] repetition[;] and [(3)] intentional harmdoing."<sup>244</sup> However, to better capture a definition for preschool bullying, experts recommend using the term "unjustified behavior" instead of "intentional harmdoing."<sup>245</sup> Put simply, preschool "[b]ullying is a set of actions that happen when a child who is, or who wants to feel, more powerful targets a weaker and/or smaller person by hurting or frightening that person, and does so repeatedly."<sup>246</sup>

Preschool bullying takes many forms.<sup>247</sup> Possible actions that, when done repeatedly, constitute bullying, include: "name-calling; exclusion [from playing together]; put-downs; teasing; hitting; ignoring; breaking possessions; hurting feelings; scaring; threatening; kicking; lying; acting superior; laughing at others; being bossy; pushing; taking people's things; [and] making fun of people's appearance or disability."<sup>248</sup> In preschool, bullying often differs based on sex.<sup>249</sup> Boys tend to exhibit behavior relating to power and dominance—they often hit or belittle others.<sup>250</sup> Girls' behaviors, by contrast, relate to affiliation and exclusion.<sup>251</sup> Girls will manipulate others—they will spread rumors or ignore girls with whom they do not want to be friends.<sup>252</sup>

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241. See Kassab, *supra* note 7; see also Stewart, *supra* note 3 ("[W]hen children enjoys [sic] seeing others hurt, as opposed to just asserting themselves socially, they may deliberately and systematically find ways to inflict injury or harm to their victims—and they may even laugh after the deed is done.").

242. Vlachou et al., *supra* note 4, at 333.

243. See *id.* at 331 (stating that children's patterns of behavior during early childhood need to be taken into consideration when defining bullying at such a young age).

244. *Id.* at 335.

245. *Id.*

246. Betsy Evans, *Bullying: Can It Begin in Preschool?*, 25 HIGHSOPE EXTENTIONS, no. 3 (HighScope Educ. Research Found., Ypsilanti, MI), 2011, at 1, 2, available at [http://www.highscope.org/file/NewsandInformation/Extensions/ExtVol25No3\\_low.pdf](http://www.highscope.org/file/NewsandInformation/Extensions/ExtVol25No3_low.pdf).

247. See *id.* at 3; see also Freeman, *supra* note 3, at 307 (identifying bullies as people who say bad things, laugh at other students, steal, hit or use other physical force, or bite).

248. Evans, *supra* note 246, at 2-3.

249. See, e.g., Vlachou et al., *supra* note 4, at 339; Alexandra Starr, *Subadolescent Queen Bees*, N.Y. TIMES MAG. (Dec. 11, 2005), [http://www.nytimes.com/2005/12/11/magazine/11ideas\\_section4-2.html](http://www.nytimes.com/2005/12/11/magazine/11ideas_section4-2.html).

250. Vlachou et al., *supra* note 4, at 339; Starr, *supra* note 249.

251. Vlachou et al., *supra* note 4, at 339.

252. See Starr, *supra* note 249.

### C. *Bullying Against Preschool Students with Disabilities*

Children with disabilities are bullied more frequently than their typically developing peers.<sup>253</sup> In general, approximately twenty-two percent of preschoolers are bullied.<sup>254</sup> However, almost one third of children with disabilities aged three to five-years-old are bullied.<sup>255</sup>

Studies have found that certain characteristics make a child more likely to be the victim of bullying.<sup>256</sup> Victims tend to be “smaller in size, appear to look younger in age, and are less mature compared with other children.”<sup>257</sup> Children who are sensitive and have low self-esteem also tend to be victimized, as they are seen as easy targets that will not fight back.<sup>258</sup> Moreover, research indicates a higher chance of a student being bullied if the student has no friends, or fewer friends than average.<sup>259</sup> Thus, “[a]ny child who happens to be different in some way” is at a higher risk of being bullied.<sup>260</sup>

Children with disabilities are different from their typically developing peers, and are, therefore, at a higher risk of being bullied.<sup>261</sup> Qualified students under Section 504 have physical and/or mental impairments.<sup>262</sup> Physical impairments include physiological disorders, disfigurement, or anatomical loss.<sup>263</sup> Mental impairments are mental or

253. Son et al., *supra* note 5, at 1540, 1542; *see also* Diamond & Hong, *supra* note 7, at 172 (finding that “children are more likely to choose the doll representing a child without a disability than a child with a physical disability to join a play activity”).

254. Vlachou et al., *supra* note 4, at 334.

255. Son et al., *supra* note 5, at 1542.

256. Vlachou et al., *supra* note 4, at 340; *see also* Diamond & Hong, *supra* note 7, at 172 (stating that children are more likely to include peers with disabilities when they do not believe the disability will negatively influence their play).

257. Vlachou et al., *supra* note 4, at 340; *see also* Diamond & Hong, *supra* note 7, at 172 (noting that young children can tell differences between themselves and their peers with physical disabilities).

258. Vlachou et al., *supra* note 4, at 340.

259. *See* Rose et al., *supra* note 94, at 10 (discussing how children with fewer friends are at a higher risk of being bullied, and this social rejection leads to lower self-esteem and confidence, thus creating a perpetual cycle); Vlachou et al., *supra* note 4, at 340 (identifying a cyclical pattern for victims who initially have few friends, develop a lower sense of self-worth as they are bullied, and then lose the friends they do have because they are perceived as “worthless”).

260. Vlachou et al., *supra* note 4, at 341.

261. *See Categories of Disability Under IDEA*, NAT’L DISSEMINATION CTR. FOR CHILD. WITH DISABILITIES 2 (Mar. 2012), <http://nichcy.org/wp-content/uploads/docs/gr3.pdf>; *see also* Rose et al., *supra* note 94, at 4.

262. 34 C.F.R. § 104.3(j)(1) (2000); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34. Additionally, children are protected under Section 504 if they are classified as having a disability under IDEA. *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34.

263. 34 C.F.R. § 104.3(j)(2)(i)(A). For example, a child who qualifies under Section 504 due to an IDEA classification may have an orthopedic impairment, thus appearing physically different because of an amputation, fracture, or burn. *See Categories of Disability Under IDEA*, *supra* note 261, at 4.

psychological disorders.<sup>264</sup> Both of these characteristics have been linked to higher chances of a student being bullied.<sup>265</sup>

Research has found that preschool students with disabilities experience verbal, relational, and physical bullying.<sup>266</sup> One study found that the rate of victimization of students with disabilities between ages three and five increased from twenty-one percent at age three to thirty percent at age five.<sup>267</sup> Though most of the students only experienced one type of bullying, between two and four percent “experienced all three types of peer victimization overall and, as children aged, the rates of experiencing all three types of peer victimization increased.”<sup>268</sup> The rates found among preschool students with disabilities were higher than the bullying rates among middle- and high-school students with disabilities.<sup>269</sup>

Preschool victims of bullying are likely to experience problems later in school and in life.<sup>270</sup> When a child is victimized at such a young age, it can create a cycle of continuous victimization.<sup>271</sup> Children who are victims of bullying “are more likely than other children to develop depression, loneliness, low self-esteem, physical health problems, social withdrawal, alcohol or drug abuse, school absence and avoidance,

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264. 34 C.F.R. § 104.3(j)(2)(i)(B); *The Civil Rights of Students with Hidden Disabilities*, *supra* note 34. Under IDEA, Autism and intellectual disabilities are possible classifications of eligibility. *See Categories of Disability Under IDEA*, *supra* note 261, at 3.

265. Vlachou et al., *supra* note 4, at 340 (referring to physical differences and reduced social development as characteristics that increase a child’s risk of being bullied). The characteristics of students with disabilities under IDEA correlate with those that studies have found are present in victims of bullying. *Compare Categories of Disability Under IDEA*, *supra* note 261, at 3 (defining a child with an intellectual disability as one with “significantly subaverage general intellectual functioning”), with Vlachou et al., *supra* note 4, at 340 (identifying that children who are less mature than their peers are prone to being bullied).

266. Son et al., *supra* note 5, at 1540, 1542 (“Physical victimization includes such actions as hitting, kicking, punching, or tripping. Verbal victimization includes threats of physical harm, name-calling, teasing, or general verbal harassment. Relational victimization includes gossip, exclusion from a group, or threatening the withdrawal of a friendship or group acceptance.”).

267. *Id.* at 1542-43 & fig.2.

268. *Id.* at 1542.

269. *Id.* at 1543 (citing the middle- and high-school bullying rate as being between nineteen and twenty-two percent, respectively).

270. *Id.* at 1540, 1544; *see also* Alice G. Walton, *The Psychological Toll of Childhood Bullying Can Persist for Decades*, FORBES (Apr. 18, 2014, 12:05 PM), <http://www.forbes.com/sites/alicegwalton/2014/04/18/the-effects-of-childhood-bullying-can-last-a-lifetime> (explaining that bullying is linked to psychological and academic effects that can persist through adulthood).

271. *See* Vlachou et al., *supra* note 4, at 340 (“Studies have revealed that aggression is selectively directed at certain children and that some peers occupy the role of victim repeatedly over time.”); *see also* Rose et al., *supra* note 94, at 10 (stating that social rejection caused by bullying can result in additional negative effects on social and academic participation).

decreased school performance, self-harm, and suicidal ideation.”<sup>272</sup> When bullying is chronic, severe, and persistent, its effects can last into adulthood.<sup>273</sup> Children with disabilities are at a heightened risk of experiencing any or all of the effects of bullying because they are more likely to be victimized than their typically developing peers.<sup>274</sup>

#### IV. APPLYING THE DELIBERATE INDIFFERENCE STANDARD TO PRESCHOOL BULLYING

Elementary and secondary schools can be held liable under Section 504 when a student with a disability is bullied.<sup>275</sup> Preschools receiving federal funds are required to follow the same implementing regulations of Section 504 as elementary and secondary schools receiving federal funds.<sup>276</sup> Therefore, they, too, can violate Section 504 by discriminating against students with disabilities.<sup>277</sup> Thus, preschools should be held to the same standard as elementary and secondary schools for claims of bullying brought under Section 504.<sup>278</sup> Just as the courts have adapted and applied the deliberate indifference test, established by the Supreme Court in *Davis ex rel. LaShonda D.*, to determine when bullying a student with a disability can rise to a violation of Section 504 in elementary and secondary schools,<sup>279</sup> the courts should apply this test for cases involving bullying of a student with a disability in preschool.<sup>280</sup> Subpart A provides an overview of how to apply each prong of the deliberate indifference test to instances of preschool bullying.<sup>281</sup> Subpart B lists and describes possible downsides and push back to implementing this standard, but explains why this standard is important and necessary nonetheless.<sup>282</sup>

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272. Son et al., *supra* note 5, at 1540.

273. *Id.*

274. Rose et al., *supra* note 94, at 3; *see supra* text accompanying notes 253-55.

275. *See, e.g.*, *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008) (applying the deliberate indifference standard to determine if a middle school could be held accountable under Section 504 for bullying against a student with a disability); *Moore ex rel. A.M. v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1314 (M.D. Ala. 2013) (holding that the school board discriminated against a high-school student with a recognized Section 504 handicap who was repeatedly bullied).

276. *See* 34 C.F.R. § 104.31 (2000).

277. *See, e.g.*, *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759, 767 (S.D. Miss. 2008).

278. *Cf. id.* at 762, 767 (holding that a preschool receiving public funds violated Section 504).

279. *E.g.*, *S.S.*, 532 F.3d at 454; *Moore ex rel. A.M.*, 936 F. Supp. 2d at 1314; *D.A. ex rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614, 628, 631 (D. Idaho 2013).

280. *See infra* Part IV.A–B.

281. *See infra* Part IV.A.

282. *See infra* Part IV.B.

*A. Standard for Applying the Deliberate Indifference Test to Claims of Preschool Bullying Under Section 504 of the Rehabilitation Act of 1973*

Preschools, just like elementary and secondary schools, must comply with Section 504.<sup>283</sup> Preschool students are, therefore, afforded the same rights and protections under Section 504 as school-age students.<sup>284</sup> Consequently, when protecting preschool students with disabilities who have been bullied, the same analysis used for protecting school-age victims of bullying should be applied.<sup>285</sup> Thus, the deliberate indifference standard used for holding schools accountable for bullying against school-age students with disabilities should be used to hold preschools accountable when students with disabilities are bullied.<sup>286</sup>

As previously described, the deliberate indifference test has five prongs.<sup>287</sup> First, the student must be considered an individual with a disability under Section 504.<sup>288</sup> Second, the student must have been bullied based on her disability.<sup>289</sup> Third, the bullying must have been so severe that it altered the student's education and created an abusive environment.<sup>290</sup> Fourth, the school must have had knowledge of the bullying.<sup>291</sup> Finally, the school must have acted with deliberate indifference.<sup>292</sup> For the most part, courts should apply the test to preschools in a manner identical to that which courts have previously applied it to elementary and secondary schools.<sup>293</sup>

The first prong of the test requires that the student be qualified as a student with a disability.<sup>294</sup> In determining whether the preschool student has a disability, the definition provided by Section 504 should be used.<sup>295</sup> This is exactly how courts have determined whether the first prong of the test was satisfied in cases involving school-age students.<sup>296</sup>

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283. 34 C.F.R. § 104.31 (2000).

284. See *Spann ex rel. Hopkins*, 589 F. Supp. 2d at 762, 767; see also 34 C.F.R. §§ 104.31, .38 (listing preschools as one of the educational programs prohibited from excluding students with disabilities).

285. See *supra* Part II.E.1–5.

286. See *supra* Part II.E.

287. See *supra* text accompanying note 156.

288. *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002); see *supra* Part II.E.1.

289. *Biggs*, 229 F. Supp. 2d at 445; see *supra* Part II.E.2.

290. *Biggs*, 229 F. Supp. 2d at 445; see *supra* Part II.E.3.

291. *Biggs*, 229 F. Supp. 2d at 445; see *supra* Part II.E.4.

292. *Biggs*, 229 F. Supp. 2d at 445; see *supra* Part II.E.5.

293. See *supra* Part II.E.1–5.

294. E.g., *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 982 (8th Cir. 2003).

295. See 34 C.F.R. § 104.3(j) (2000); *supra* Parts II.B, II.E.1.

296. See *supra* Part II.E.1.

When analyzing prong two—whether the harassment was based on the student’s disability—a similar analysis to the one used by courts in cases of school-age bullying should be applied to instances of preschool bullying.<sup>297</sup> For school-age bullying, courts often relied on verbal insults to determine when harassment was based on the student’s disability.<sup>298</sup> However, when determining if preschool bullying is based on the student’s disability, verbal insults may not be as decisive because of delays in verbal communication for preschool students.<sup>299</sup> As a result, courts may need to focus more on whether a relationship between the bullying and the student’s disability can be inferred.<sup>300</sup>

Prong three of the test requires the bullying to be severe and repetitive, such that it alters the student’s education by creating an abusive educational environment.<sup>301</sup> For school-age students, the courts held that “dropping grades, change[s] in the student’s demeanor or classroom participation, becoming homebound or hospitalized due to harassment, or self-destructive and suicidal behavior” were responses to bullying that proved an altered condition of education.<sup>302</sup> Though these standards should apply to preschool students, additional standards also need to be used.<sup>303</sup> Unlike elementary and secondary schools, preschools do not solely teach children basic academics.<sup>304</sup> One of the most important functions of preschool is teaching children to socialize and interact with others.<sup>305</sup> Therefore, in instances of preschool bullying, the

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297. See *supra* Part II.E.2.

298. E.g., *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 WL 1882330, at \*7 (W.D. Tex. May 3, 2013); *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 242 (W.D.N.Y. 2012).

299. See Siang Sin Goh et al., *Educators’ Perspectives on Instructional Conversations in Preschool Settings*, 40 EARLY CHILDHOOD EDUC. J. 305, 307 (2012) (“[W]hile young children exhibit high degrees of social behavior, they do not always communicate through social speech. Instead, speech is often embedded in or supplemented by nonlinguistic options . . .”).

300. See *Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cnty., Okla.*, 960 F. Supp. 2d 1254, 1267 (N.D. Okla. 2013) (finding bullying based on the student’s disability by inference). One study found that preschool children were more likely to choose a doll without a disability than one with a disability. Diamond & Hong, *supra* note 7, at 172. Specifically, the children chose the doll without the disability when the disability would impact the activity. *Id.* If this occurred with students and not dolls, this would be an example where bullying, in the form of exclusion, based on the student’s disability, could be inferred. See *id.*

301. *Biggs v. Bd. of Educ. of Cecil Cnty., Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

302. *D.A. ex rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614, 629 (D. Idaho 2013).

303. See *infra* notes 304-06 and accompanying text.

304. See Vlachou et al., *supra* note 4, at 334.

305. *Id.* (“During preschool period, children learn how to build and maintain friendships, establish groups of consistent play partners, acquire reputations, and develop social skills.”); see also Gina Conti-Ramsden & Kevin Durkin, *Language Development and Assessment in the Preschool Period*, 22 NEUROPSYCHOLOGY REV. 384, 385 (2012) (“Learning language is one of the

courts should deem bullying that prevents the victim from socializing with other students as a denial of access to equal education and a violation of prong three of the deliberate indifference test.<sup>306</sup>

The fourth prong of the deliberate indifference test requires the school to have knowledge.<sup>307</sup> The courts have interpreted this to mean that the school had actual knowledge.<sup>308</sup> Because there is no difference between actual knowledge for an elementary or secondary school teacher or administrator and for a preschool teacher or administrator, actual knowledge of the bullying by the preschool should be required.<sup>309</sup>

Finally, the preschool must have acted with deliberate indifference.<sup>310</sup> Similar to the determination of whether elementary and secondary schools acted with deliberate indifference, a determination of whether the preschool acted with deliberate indifference should primarily be based on whether or not the school reacted to the bullying in an attempt to stop it.<sup>311</sup> However, whereas schools suspended bullies,<sup>312</sup> preschools should not react in this manner.<sup>313</sup> Rather, they should employ non-exclusionary responses.<sup>314</sup>

In order to prevent the behavior in the future, preschoolers need to learn that what they did was wrong.<sup>315</sup> If the bullies are automatically

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key developmental tasks facing children in the preschool years.”); Barnett & Carolan, *supra* note 222, at 15-16 (identifying preschools as a place for students to improve their language and social skills, as well as general school readiness).

306. See *Moore ex rel. A.M. v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1314 (M.D. Ala. 2013) (“[T]he peer-to-peer harassment was sufficiently severe or pervasive that it [altered] the condition of [the student’s] education ([prong] three).”); *supra* note 300.

307. *E.g., D.A. ex rel. M.A.*, 289 F.R.D. at 630.

308. See, e.g., *Werth ex rel. Werth v. Bd. of Dirs. of Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1129 (E.D. Wis. 2007); *supra* note 190 and accompanying text.

309. See BLACK’S LAW DICTIONARY, *supra* note 190, at 950 (providing a general definition of “actual knowledge”).

310. See *D.A. ex rel. M.A.*, 289 F.R.D. at 630; *supra* Part II.E.5.

311. See *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 455-56 (6th Cir. 2008) (holding the school was not deliberately indifferent because it took sufficient actions in response to the bullying); *supra* Part II.E.5.

312. See, e.g., *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 353 (S.D.N.Y. 2005) (“The two perpetrators were suspended from school for five days.”).

313. See Jill Grim, Student Article, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 174 (2008) (“Student bullies should not be summarily expelled from school . . .”).

314. See Diamond & Hong, *supra* note 7, at 174 (stating that teacher intervention and attention to classroom situations can positively effect peer interactions); Evans, *supra* note 246, at 7 (identifying possible responses to preschool bullying as setting limits, creating opportunities for children to feel empowered, modeling good behavior, and talking to children about their peer relationships).

315. Kassab, *supra* note 7; see also Freeman, *supra* note 3, at 309 (finding that once preschool students were read stories about bullying, they were able to identify bullying behaviors and characteristics, and were able to provide positive strategies for how to react to the bullying).



suspended, they will not learn from their mistakes.<sup>316</sup> Without learning from the experience, the bullies are more likely to repeat their negative actions, be stigmatized, and face other challenges later in life.<sup>317</sup> Consequently, though a time out may be appropriate, talking to the bully is also necessary.<sup>318</sup> The teacher will need to understand why the child bullied in order to prevent reoccurrences.<sup>319</sup> In conclusion, for a preschool to properly respond to bullying and not act deliberately indifferent, it must take steps to prevent the bullying in the future, and these steps must go beyond just removing the bully from the situation.<sup>320</sup> Rather, the preschool must ensure that the child learns from the situation.<sup>321</sup>

*B. Overcoming Possible Downsides and Push Back to Applying the Deliberate Indifference Test to Preschools*

Though applying the deliberate indifference test to victims of preschool bullying will be beneficial to the victims, it may pose problems for other parties.<sup>322</sup> Specifically, bullies will be identified at an early age, and may be stigmatized.<sup>323</sup> Once identified as a bully, the student's behavior may come under scrutiny by the school, and the teacher will see what she expects to see, regardless of whether or not the negative behavior is present.<sup>324</sup> For example, preschool bullies are characterized as children who are larger than others and use their size to

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316. See Evans, *supra* note 246, at 4 ("If children merely are punished for their behavior, with no attention to the reason for the behavior and no help with other ways to express their feelings, it is likely the behavior will continue . . .").

317. See *infra* notes 323-32 and accompanying text.

318. Kassab, *supra* note 7.

319. See Evans, *supra* note 246, at 8 (recommending the teacher speak with the victim and the bully in order to understand the problem).

320. See Diamond & Hong, *supra* note 7, at 174 (offering different teacher reactions based on the type of exclusion); Freeman, *supra* note 3, at 309 (recommending that teachers use interactive activities while reading picture books about bullying to teach preschool students about bullying).

321. See Evans, *supra* note 246, at 4 (implying a child will repeat actions that got her what she wanted if she did not learn that her actions were wrong or hurtful).

322. See *infra* notes 323-49 and accompanying text.

323. See Janice Harper, *The Bully Label Has to Go*, HUFF POST BUS. BLOG (Nov. 1, 2011, 2:16 PM), [http://www.huffingtonpost.com/janice-harper/the-bully-label-has-to-go\\_b\\_1068456.html](http://www.huffingtonpost.com/janice-harper/the-bully-label-has-to-go_b_1068456.html) ("[C]urrent bullying rhetoric promotes a stereotype of 'bullies' and 'bullying' . . .").

324. Cf. Nicole S. Sorhagen, *Early Teacher Expectations Disproportionately Affect Poor Children's High School Performance*, 105 J. EDUC. PSYCHOL. 465, 472 (2013) (finding that teachers' perceptions of students' academic abilities when young affected how the students performed ten years later); Gale Encyclopedia of Psychology, *Self-Fulfilling Prophecy*, ENCYCLOPEDIA.COM (2001), [http://www.encyclopedia.com/topic/self-fulfilling\\_prophecy.aspx](http://www.encyclopedia.com/topic/self-fulfilling_prophecy.aspx) ("One's beliefs about other people determine how one acts towards them, and thus play a role in determining the behavior that results.").

intimidate other children.<sup>325</sup> Because a child has bullied in the past, the teacher may view every subsequent interaction between that child and a smaller child as another instance of bullying.<sup>326</sup> Once identified as a bully, the child may also face other issues later in life—"childhood bullies are more likely to do drugs and alcohol, abuse their spouses, get involved with criminal activities, and have negative peer relations."<sup>327</sup>

Despite these negative associations with being a bully, once the child is identified, the school will be required to react to the child's behavior.<sup>328</sup> This is because the deliberate indifference standard holds the school, rather than the bully, accountable.<sup>329</sup> The school's response to the bullying should help both the bully and the victim.<sup>330</sup> The school will be required to take action to address the bullying.<sup>331</sup> Once a childhood bully is identified and the school responds, per the requirement under the deliberate indifference test, the child should be educated about his actions, learn why his actions were wrong, and, ideally, change those actions in the future.<sup>332</sup> Consequently, being identified early and having the school assist the child can be in the childhood bully's best interest, too.<sup>333</sup>

Preschools, and the school districts they are associated with, may also be concerned about special education litigation and its related costs.<sup>334</sup> One of the primary causes of litigation is whether a child has a

325. Vlachou et al., *supra* note 4, at 338.

326. Cf. Jere E. Brophy, *Research on the Self-Fulfilling Prophecy and Teacher Expectations*, 75 J. EDUC. PSYCHOL. 631, 633 (1983) ("[F]ew if any reviewers or critics of the expectation effects literature would deny that expectations can and often do have self-fulfilling prophecy effects.").

327. Stewart, *supra* note 3; see also *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/effects/index.html#bully> (last visited Apr. 12, 2015) (listing risky and violent behaviors that bullies are more likely to engage in throughout adulthood).

328. See *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008) (reiterating that, under the deliberate indifference test, if a school fails to take action, it can be held liable); *supra* notes 310-21 and accompanying text.

329. See Weddle, *supra* note 8, at 660 (noting that school officials can be held liable); see also *supra* Part II.E.5.

330. See Evans, *supra* note 246, at 4-5 (understanding a student's bullying behaviors allows the school to teach the student new skills in order to prevent the behaviors from becoming a social pattern).

331. See *S.S.*, 532 F.3d at 455-56 (holding that the school was not deliberately indifferent to the bullying because it interviewed the victim's classmates, reprimanded the bullies, and brought in presenters to discuss name-calling).

332. See Kassab, *supra* note 7 ("If we don't educate kids who bully . . . they won't know their behavior is wrong, and they'll keep doing it.").

333. See *supra* notes 328-32 and accompanying text.

334. See Megan Roberts, Comment, *The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1079 (2008) ("[T]he threat of litigation and its associated costs are very real concerns for school districts . . .").

disability and whether the child is eligible for services.<sup>335</sup> Because the publicly-funded preschool may be the first exposure many children have to an educational setting, the chances of identifying preschool children as having a disability are high.<sup>336</sup> Accordingly, there is a high chance that preschools will face litigation.<sup>337</sup>

Although the preschools' reservations are valid, statistics indicate that formal dispute and litigation are low.<sup>338</sup> Rather than pursuing formal litigation, most complaints are being resolved through mediation,<sup>339</sup> a less expensive alternative.<sup>340</sup> States have also been developing other strategies to resolve disputes without defaulting to litigation.<sup>341</sup> Therefore, though litigation is a possibility, schools can create and use alternative methods to resolve disputes, thereby reducing their litigation costs.<sup>342</sup>

Another concern for preschools may be the need for additional teacher training.<sup>343</sup> Currently, most preschool programs require that teachers have a bachelor's degree and specialized early childhood training.<sup>344</sup> If a bachelor's degree is not required, programs often require

335. *Id.* at 1075.

336. See *Special Education Services for Preschoolers with Disabilities*, CENTER FOR PARENT INFO. & RESOURCES, <http://nichcy.org/schoolage/preschoolers> (last updated June 2014) [hereinafter *Special Education Services*] (finding that many children are identified as having a disability when they begin public school).

337. Compare Roberts, *supra* note 334, at 1075 (stating that identification of disabilities is a major cause of litigation), with *Special Education Services*, *supra* note 336 (noting that identification of disabilities first occurs when children enroll in public school).

338. U.S. GEN. ACCOUNTING OFFICE, GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 12 (2003), available at <http://www.gao.gov/assets/240/239595.pdf>.

339. *Id.* at 15.

340. See *id.* at 16 ("Officials saw mediation as a major resource for . . . reducing cost.").

341. *Id.* at 19-21 (discussing Iowa's Parent-Educator Connection, which provides each school district with staff trained in conflict resolution, and California's facilitators, who attend special education meetings to promote a collaborative process and to build and improve the relationship between the school and the parents).

342. See, e.g., *id.*

343. See, e.g., CONN. GEN. STAT. ANN. § 10-220a(a)(4) (West Supp. 2014) ("Each local or regional board of education shall provide an in-service training program for its teachers [on] . . . school violence prevention, conflict resolution, the prevention of and response to youth suicide and the identification and prevention of and response to bullying . . ."); NEV. REV. STAT. ANN. § 388.133(2)(b)(1) (West 2014) (requiring schools to have a policy that includes "[t]raining in the appropriate methods to facilitate positive human relations among pupils by eliminating the use of bullying and cyber-bullying so that pupils may realize their full academic and personal potential"); N.J. STAT. ANN. § 18A:37-22(a) (West 2013) ("[A]ll candidates for teaching certification . . . shall have satisfactorily completed a program on harassment, intimidation, and bullying prevention.").

344. W. Steven Barnett et al., *The State of Preschool: 2003 State Preschool Yearbook*, NAT'L INST. EARLY EDUC. RES. 32 (2003), <http://nieer.org/sites/nieer/files/2003yearbook.pdf>.

that teachers have an Associate of Arts or a Child Development Associate credential.<sup>345</sup> Not all of these degree programs have courses in preschool bullying.<sup>346</sup> However, in order for the preschool to respond to bullying effectively under the deliberate indifference test, the teachers will need to learn how to distinguish bullying from typical child development.<sup>347</sup> They will also need to learn how to appropriately respond to bullying in their treatment of both the bully and the victim.<sup>348</sup> Although this may require additional teacher training, it is not a far-fetched idea—training on preschool bullying already exists.<sup>349</sup> Thus, despite possible reactions and hesitations toward applying the deliberate indifference test to preschool, it must be applied.<sup>350</sup> Not only do the students have a legal right to this protection under Section 504,<sup>351</sup> the additional requirements created by the test are not excessive for preschools, and may help students during preschool and later in life.<sup>352</sup>

## V. CONCLUSION

Just like elementary and secondary schools, all preschools receiving federal funds are required to comply with Section 504.<sup>353</sup> Preschoolers are, therefore, entitled to the same rights and protections as school-age students.<sup>354</sup> The courts have created and applied the deliberate indifference test to determine when bullying can amount to a violation of an elementary or secondary student's civil rights under Section 504.<sup>355</sup>

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345. *Id.*

346. *E.g., Professional Certificate Programs: Early Childhood Development*, PURCHASE C. ST. UNIV. N.Y., <http://www.purchase.edu/departments/AcademicPrograms/cel/Certificate/EarlyChildhoodCertificate.aspx> (last updated Aug. 22, 2014) (lacking a class in childhood bullying under the required courses list).

347. *See* Evans, *supra* note 246, at 3 (“[Teachers] must understand the difference between behaviors . . . which children use to express feelings because of their undeveloped skills in self-awareness and communication, and the very same behaviors deliberately and repeatedly used to hurt and/or scare a weaker person.”).

348. *See id.* at 4-5 (identifying what teachers should do in response to bullying); *see also* D.A. *ex rel.* M.A. v. Meridian Joint Sch. Dist. No. 2, 289 F.R.D. 614, 631 (D. Idaho 2013) (noting that schools are held accountable as deliberately indifferent when they fail to react to bullying).

349. *E.g., ChildCare Education Institute Announces New Online Professional Development Course on Bullying in the Preschool Classroom*, CHILDCARE EDUC. INST. (Apr. 6, 2011), <https://www.cceionline.com/index.cfm?id=215>.

350. *See* 34 C.F.R. § 104.31 (2000) (requiring preschools to comply with all Section 504 regulations).

351. *Id.*

352. *See supra* notes 323-49 and accompanying text.

353. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2012); 34 C.F.R. §§ 104.31, 104.38.

354. *See* 34 C.F.R. § 104.38; Spann *ex rel.* Hopkins v. Word of Faith Christian Ctr. Church, 589 F. Supp. 2d 759, 762, 767 (S.D. Miss. 2008).

355. *See supra* Part II.E.

This standard has not yet been applied to cases of preschool bullying.<sup>356</sup> For this reason, this Note has argued that the deliberate indifference test should be used by courts in determining if bullying has, under Section 504, violated the rights of a preschooler with a disability.<sup>357</sup>

*Rachel Summer\**

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356. See *supra* note 230 and accompanying text.

357. See *supra* Part IV.A.

\* J.D. candidate, 2015, Maurice A. Deane School of Law at Hofstra University; B.S., 2012, Muhlenberg College. I would first like to thank my parents, Susan and Roy, for all of their love, support, and encouragement, and for instilling in me the importance of a good education; and my sister, Allison, for being my role model and support system. I am extremely appreciative of the hard work and dedication of Aaron Zucker, Addie Katz, Courtney Klapper, Peter Guinnane, Michael Senders, and the entire Volume 43; and extend a special thank you to Rachel Katz, Chelsea Plushanski, Ashley Guarino, Ada Kozicz, and Leron Solomon for their assistance throughout the drafting and publication processes. Finally, I would like to thank my faculty advisor, Theo Liebmann, for his invaluable advice and guidance on this Note and throughout law school.

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