

Winter 2011

Fighting Back: How Students with Disabilities Can Hold Schools Liable for Peer-Inflicted Injuries

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Recommended Citation

Brittany Smith, *Fighting Back: How Students with Disabilities Can Hold Schools Liable for Peer-Inflicted Injuries*, 45 Val. U. L. Rev. 741 (2011).

Available at: <https://scholar.valpo.edu/vulr/vol45/iss2/8>

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FIGHTING BACK: HOW STUDENTS WITH DISABILITIES CAN HOLD SCHOOLS LIABLE FOR PEER-INFLICTED INJURIES

I. INTRODUCTION

Renee Soper was a special needs student at OxBow Elementary School in Michigan.¹ She attended both special education and mainstream classes outside of the special education program.² School officials allowed Renee to walk unattended from her special education classes to the mainstream classes.³ In 1993, Brandon, a middle school boy two years older than Renee, led Renee off school property and kissed her.⁴ Renee reported what happened to her mother, Lina Soper.⁵ Lina immediately called Renee's teacher, Ms. Rombach, and requested that someone watch both Renee and Brandon to prevent future problems.⁶ A year later, before Renee transitioned to Muir Middle School, Lina met with Renee's new "educable mentally impaired" ("EMI") teacher, Ms. Harmala, and reiterated her concerns about Brandon.⁷ Ms. Harmala assured Lina that "we'll keep an eye on the children. They're well supervised."⁸ The school placed Renee in Ms. Harmala's EMI classroom with ten other students, including Brandon.⁹

¹ Soper *ex rel.* Soper v. Hoben, 195 F.3d 845, 848 (6th Cir. 1999). Renee was a "mentally retarded" child who had been labeled "'educable mentally impaired' ('EMI')" at her elementary school. *Id.* The Michigan Administrative Code defines EMI as a person identified with a developmental rate two to three deviations below the mean intellectual assessment, standardized test scores within the lowest sixth percentile in reading and math, lack of cognitive development, and an unsatisfactory academic performance not based on the student's social, economic, and cultural factors. *Id.* at n.1.

² *Id.* at 848.

³ *Id.*

⁴ *Id.* "Brandon" is a fictitious name created by the author.

⁵ *Id.* Renee also told her mother, Lina, that after Brandon kissed her, he told her that he was excited for her to start middle school. *Id.*

⁶ *Id.*

⁷ *Id.* at 848-49. Before Renee started at Muir Middle School, Lina and Renee's teachers attended an Individualized Education Program Committee ("IEPC") meeting, during which the school ultimately concluded that Renee should remain in the EMI program. *Id.* at 848. Furthermore, the school determined that Ms. Harmala would implement Renee's IEP. *Id.* Renee was twelve years old but cognitively functioned at the level of a seven-year-old. *Id.* Her IEPC stated that her "social responsibility and personal independence [are] still quite deficient for her age." *Id.* at 848 n.2.

⁸ *Id.* at 849. Lina claimed that she had disclosed both Renee's history of sexual abuse and prior incident with Brandon to Ms. Harmala. *Id.* at 848-49. Ms. Harmala, however, denied that she knew about the prior incident between Renee and Brandon and also denied making a statement promising constant supervision while at school. *Id.* at 849.

⁹ *Id.* The EMI classroom had no aide, even though Ms. Harmala had requested one because of the increasing number of students in her multi-station classroom. *Id.*

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At the beginning of the school year, Lina, with knowledge of Brandon's abusive family background, requested that Renee never be left alone with him.¹⁰

On October 6, 1994, Renee told her mother that two boys in her EMI class had sexually assaulted her in the Muir Middle School EMI classroom while Ms. Harmala was in the hallway.¹¹ Renee also reported that Brandon, whom Ms. Harmala had allowed to escort Renee to her locker, raped her in the classroom after Ms. Harmala left the room for lunch.¹² The boys involved threatened to beat up Renee if she told anyone about the assault.¹³ Lina confronted Ms. Harmala and Muir Middle School's principal and reported the events to law enforcement.¹⁴ After Lina reported the rape, the school district took many remedial steps, including installing windows to the EMI classroom, placing an aide in the room with Ms. Harmala, and having an aide on the school bus with EMI students.¹⁵ Criminal charges were brought against Brandon, but the other two boys were never prosecuted.¹⁶

The Sopers filed a complaint in Oakland County Circuit Court against Ms. Harmala, the Muir Middle School principal, the superintendent, the school district, and the school board for negligence, gross negligence, a violation of 42 U.S.C. § 1983, and a violation of Title IX.¹⁷ The district court granted the defendants' motion for summary judgment, and the Sixth Circuit Court of Appeals affirmed the lower court's decision, rejecting Renee's § 1983 and Title IX claims.¹⁸

¹⁰ *Id.*

¹¹ *Id.* Renee also reported that the two boys had fondled her on the school bus. *Id.*

¹² *Id.* Renee explained that Ms. Harmala allowed Brandon to assist her to open her locker. *Id.* While Ms. Harmala was locking up the classroom for lunch, Brandon then forced Renee to hide in the back of the room. *Id.* Once Ms. Harmala had left the room, Brandon raped her. *Id.* Brandon claimed the sexual penetration was consensual and the other boys denied ever fondling Renee on the bus or in the EMI classroom. *Id.*

¹³ *Id.*

¹⁴ *Id.* Ms. Harmala contacted both Child Protective Services and Renee's mainstream teachers to inform them of Renee's allegations and to develop a supervision plan, which included an escort. *Id.*

¹⁵ *Id.* at 850. The school also advised Renee, Brandon, and the other two EMI boys allegedly involved "to attend student counseling sessions concerning how to function socially with the opposite sex." *Id.*

¹⁶ *Id.* Renee returned to school in 1995. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 850, 853, 855. The Sixth Circuit rejected the § 1983 claim, finding that the plaintiff did not prove that the defendants violated a constitutionally protected right and thus were entitled to qualified immunity. *Id.* at 853. The court also denied Title IX liability because of the "prompt and thorough response by school officials to the Sopers' complaint." *Id.* at 855.

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Consequently, Renee was left without a remedy for the assaults against her.¹⁹

Cases such as Renee's are all too common.²⁰ Children with disabilities suffer from foreseeable injuries inflicted by their peers while they are in school and under the supervision of school officials, yet these schools and school officials are able to escape liability.²¹ The current legal remedies have yet to catch up with reality, and victims such as Renee are left without any hope of a remedy.²² A change in legal theory is necessary in order to encourage schools to prevent these injuries and, if they fail to do so, to compensate those students who fall victim to peer-inflicted injury as a result of inadequate school supervision.²³

To begin, Part II.A of this Note explains how students with disabilities are easy targets for victimization by their peers.²⁴ Part II.B reviews several statutes and causes of action typically utilized by victims like Renee to attempt to hold a school liable for their injuries.²⁵ Next, Part III analyzes and critiques the courts' treatment of victims' claims under these statutes and causes of action.²⁶ Finally, Part IV proposes a solution that utilizes and expands upon the tort theory of negligent supervision.²⁷ Part IV.A proposes that courts throughout the country recognize that harm to special education students is foreseeable, as supported by both the California Court of Appeal's method of analyzing the issue, demonstrated by *M.W. v. Panama Buena Vista Union School* and *Jennifer C. v. Los Angeles Unified School District*, and the approach adopted by the Restatement (Third) of Torts.²⁸ In addition, Part IV.B proposes that courts also recognize a presumption that schools have a heightened duty to supervise students with disabilities and that it is reasonably

¹⁹ See *id.* at 853, 855 (holding that the school was not liable).

²⁰ See *infra* Part II.B (reviewing existing case law and other examples of children with disabilities subjected to peer-inflicted abuse).

²¹ See *infra* Part III (noting the general ineffectiveness of the current legal theories).

²² See *infra* Part III (reiterating that schools and school officials tend to avoid liability under the current legal theories).

²³ See *infra* Part IV (presenting a model statute and a common law presumption of duty and foreseeability as the legal theories that can effectively address this problem).

²⁴ See *infra* Part II.A (demonstrating that children with disabilities are disproportionately subject to abuse by their peers while in school).

²⁵ See *infra* Part II.B (exploring various cases in which schools and school officials have failed to intervene and prevent abuse inflicted by peers upon students with disabilities).

²⁶ See *infra* Part III (analyzing the current legal theories utilized by victims).

²⁷ See *infra* Part IV (proposing that courts should view the infliction of injury on special education students by their peers as foreseeable).

²⁸ See *infra* Part IV.A (suggesting that courts adopt a method of reasoning similar to the California Court of Appeals and find that injuries inflicted upon children with disabilities are foreseeable).

foreseeable for a student with a disability, absent such supervision, to be injured by a peer.²⁹

II. BACKGROUND

Generally, students with disabilities are often the targets of injuries and victimization at the hands of their peers.³⁰ As a result, victims often turn to various legal remedies to bring claims against the school officials who allowed such abuse to occur.³¹ This section explains several statutes and sources that can be utilized to remedy the wrong, along with accompanying case law identifying the success and failures of such causes of action.³² First, Part II.A discusses how students with disabilities tend to be easy targets for peer-inflicted injuries.³³ Part II.B.1 explores theories of negligent supervision under state tort law.³⁴ Next, Part II.B.2 discusses causes of action under § 1983 of the Civil Rights Act of 1964.³⁵ Finally, Part II.B.3 examines actions under Title IX of the Educational Amendments Act of 1972 and the Individuals with Disabilities Education Act (“IDEA”).³⁶

²⁹ See *infra* Part IV.B (recommending that courts recognize a presumption of foreseeability in regards to injuries inflicted upon children with disabilities).

³⁰ See *infra* Part II.A (discussing how children with disabilities are more prone to victimization by peers due to perceived differences). For the purposes of this Note, a “child with a disability” is defined pursuant to the United States Code, which states that a “child with a disability” is a child

- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education . . . services.

20 U.S.C. § 1401(3)(A)(i)-(ii) (2006).

³¹ See *infra* Part II.B (noting some traditional causes of action that are available to victims).

³² See *infra* Part II.B (discussing several cases in which victims of peer-inflicted injury attempt to bring school districts and officials to justice by utilizing some common causes of action).

³³ See *infra* Part II.A (explaining that students with disabilities tend to be stigmatized and are disproportionately subject to victimization by peers).

³⁴ See *infra* Part II.B.1 (discussing the state tort theory of negligent supervision and instances where peer-inflicted injuries may violate a school’s duty to adequately supervise its students).

³⁵ See *infra* Part II.B.2 (discussing § 1983 case law and instances in which victims attempted to utilize this cause of action in order to hold schools accountable).

³⁶ See *infra* Part II.B.3 (discussing Title IX case law and attempts to hold schools liable for injuries with some sort of sexual element, as well as IDEA case law and attempts to hold schools liable under the theory that injuries inflicted by fellow students is a denial of a free and appropriate education).

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Public schools have become a hostile environment where violence and harassment are common.³⁷ Nearly one out of every three students feels unsafe while at school.³⁸ Much of the violence and harassment is the result of peer-on-peer abuse—a type of abuse that has a significant emotional and developmental impact on the victim.³⁹ The problem is

³⁷ Robert L. Phillips, *Peer Abuse in Public Schools: Should Schools Be Liable for Student to Student Injuries Under Section 1983?*, 1995 BYU L. REV. 237, 250 (1995). According to a recent U.S.A. Today poll, “[m]ost students knew someone who had brought a weapon to school. Fifty percent said they knew someone who had switched schools to feel safer.” *Id.* Additionally, according to an American Association University of Women (“AAUW”) survey, “[e]ighty-five percent of girls . . . reported ‘unwanted and unwelcome sexual behavior [at school] that interferes with their lives.’” *Id.* Others report the same phenomenon. See Helena K. Dolan, Note, *The Fourth R—Respect: Combatting Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 216 (1994) (explaining that school sexual harassment poses a unique threat in secondary, intermediate, and elementary schools because students are both the victims and the perpetrators); Adam Michael Greenfield, Note, *Annie Get Your Gun ‘Cause Help Ain’t Comin: The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 589 (1993) (noting that it is becoming increasingly common for students to suffer attacks at the hands of their peers). For example, Phoebe Prince, a teenager, hanged herself as the result of relentless taunting and bullying that occurred over a period of three months during and after school hours. Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate’s Suicide*, N.Y. TIMES, Mar. 29, 2010, at A14. Further investigation revealed that certain “teachers, administrators and . . . staff members . . . were aware of the harassment,” yet did nothing to stop it. *Id.* Still, as noted by the district attorney on the case, while the inaction of school officials was disturbing, it was not a violation of any law. *Id.* Surprisingly, the district attorney did charge several of Prince’s peers with felony charges including “violation[s] of civil rights with bodily injury, harassment, [and] stalking.” *Id.* Eckholm and Zezima explain that these “charges were an unusually sharp legal response to the problem of adolescent bullying, which is increasingly conducted in cyberspace as well as in the schoolyard and has drawn growing concern from parents, educators and lawmakers.” *Id.*

³⁸ Phillips, *supra* note 37, at 250.

³⁹ See Ivan E. Bodensteiner, *Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 4 (2000) (explaining the educational and emotional impact that harassment creates). Harassment can have an educational impact, with victims not wanting to attend school, refusing to speak in class, finding it more difficult to pay attention, and receiving lower grades. *Id.* Harassment can also have an emotional impact, with victims feeling embarrassed, self-conscious, and less confident. *Id.*; see also Dolan, *supra* note 37, at 216 (discussing the frequency and emotional impact of peer-on-peer sexual abuse and noting that it occurs more often than teacher-to-student abuse and has more severe consequences); Greenfield, *supra* note 37, at 589 (noting that the “long-standing problem” of peer-on-peer harassment ranges from “physical and verbal abuse, sexual assaults and harassment, stabbings, shootings, and attacks on mentally handicapped students”). Dolan also explains that nearly all sexual harassment complaints in schools state that the harassment or abuse took place in public view, yet school personnel are rarely found to take preventative action. Dolan, *supra* note 37, at 224. *But see* Editorial, *Education Poll Results Tough to Put into Play*, HERALD-TIMES, Sept. 5, 2009, available at <http://www.allbusiness.com/education-training/education-systems-institutions/12839>

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heightened for students with disabilities, as they are disproportionately subjected to injury and victimization by their peers.⁴⁰ For example, a thirteen-year old special needs student in Texas was raped twice in one day by classmates—first in the boys’ restroom, and then again in the school stairway.⁴¹ The school responded by covering up the incident and telling the victim “to go back to class and deal with the problem.”⁴² In Mississippi, a young deaf boy was sexually molested by a classmate on school grounds.⁴³ The boys were initially separated after the incident; but soon thereafter, the school was forced to end the separation and the same classmate again assaulted the young boy.⁴⁴ In Ohio, an autistic boy was repeatedly bullied and harassed by several of his peers, including

343-1.html (commenting on lack of funding in public schools today). Commentators often blame lack of funding for the inadequate training of teachers necessary to prevent violence in schools. See U.S. DEP’T OF EDUC., WIDE SCOPE, QUESTIONABLE QUALITY: THREE REPORTS FROM THE STUDY ON SCHOOL VIOLENCE & PREVENTION 7 (Oct. 24, 2010), available at <http://www2.ed.gov/offices/OUS/PES/studies-school-violence/3-exec-sum.pdf> (explaining that funding and resources are essential to ensure that teachers are properly trained and that programs are in place to prevent violence).

⁴⁰ See Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor: Bullying and Students with Disabilities*, 21 INT’L J. SPECIAL EDUC. 11, 20-21 (2006), available at <http://www.forockids.org/PDF%20Docs/Bullying.pdf> (noting that various studies indicate that students with disabilities, particularly those that are visible, experience more bullying than their non-disabled peers in the form of physical attacks, extreme verbal aggression, and other threats). This article, which relies on approximately eleven studies, cites the need for additional research in order to further examine the effects of bullying on students with disabilities. *Id.* at 21. It also explains that this type of abuse puts disabled students at an even further disadvantage to their non-disabled peers in addition to the already existing disadvantages of most disabilities. *Id.* at 21-22; see also Kathleen Conn, *Bullying and Harassment: Can IDEA Protect Special Students?*, 239 EDUC. L. REP. 789, 789-90 (2009) (discussing how students with disabilities are more likely to be bullied, harassed, and abused by peers at school); 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) (“Students with disabilities are particularly vulnerable to bullying.”); Lauren Lambert, Note, *Discrimination and Developmental Delays: A Failing Grade in the Public Schools*, 34 SW. U. L. REV. 551, 552-53 (2005) (suggesting that disabled students are targeted for acts of violence because they are often unable to speak or effectively communicate to express their emotions or report abuse). Lambert also explains that there is hardly any case law in the arena of peer-on-peer harassment of disabled students because victims often choose not to sue over the all too common instances of abuse. *Id.* at 553. Lambert further notes that discrimination against disabled students runs rampant and often goes unnoticed in society. *Id.* As a result, there has been very little written on the topic of peer-on-peer harassment of disabled students in public schools. *Id.*

⁴¹ See Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1123 (1994) (discussing the facts of the incident). The parents filed the lawsuit against the school district, school officials, alleged attackers, and their parents. *Id.* at 1123 n.6.

⁴² *Id.*

⁴³ *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995) (en banc).

⁴⁴ *Id.* at 1300.

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several instances of physical assault.⁴⁵ School officials not only ignored the bullying, claiming it was simply part of a disciplinary system where older students hazed younger students, but they also failed to get the boy proper medical attention after acts of abuse.⁴⁶

Rape, molestation, and other forms of abuse are widespread in classrooms, hallways, and playgrounds across the United States, and disabled students are commonly the target.⁴⁷ Mencap, a leading foundation for learning disability awareness in the United Kingdom, recently revealed that eight out of ten children with disabilities are subject to harassment by their peers.⁴⁸ This disproportionate level of victimization is due to the fact that, unlike regular students, students with disabilities may stand out in terms of physical characteristics.⁴⁹ Students with disabilities may also exhibit a lack of social awareness that can also make them susceptible to victimization.⁵⁰ Additionally,

⁴⁵ M.Y. *ex rel.* Yorkavitz v. Grand River Acad., No. 1:09 CV 2884, 2010 WL 2195650, at *1 (N.D. Ohio May 28, 2010).

⁴⁶ *Id.* School officials also disciplined the victim for the repeated assaults. *Id.*

⁴⁷ See Lambert, *supra* note 40, at 552-53 (explaining that schools are “obvious and fertile arena[s] for peer-to-peer harassment” of disabled students).

⁴⁸ “Don’t Stick It, Stop It!” Campaign Information, MENCAP, http://www.dontstickit.org.uk/campaign_information.html (last visited Sept. 30, 2010). Mencap interviewed over five hundred children and young people with disabilities throughout England, Wales, and Northern Ireland. *Id.* The organization came to the conclusion that nearly all of these children are subject to bullying and abuse because of their disabilities. *Id.* As such, Mencap instituted the “Don’t Stick it, Stop it!” campaign to help children cope with the issue. *Welcome to Mencap’s Campaign Against Bullying*, MENCAP, <http://www.dontstickit.org.uk/index.html> (last visited Sept. 30, 2010). A study of fifty-four middle school students from a suburban Minnesota town compared the number of times disabled students reported bullying or harassment with the number of times their regular education counterparts reported the same. Eric J. Carlson, Michelle Crow Flannery & Melissa Steinbring Kral, *Differences in Bully/Victim Problems Between Early Adolescents with Learning Disabilities and Their Non-Disabled Peers*, UNIV. OF WIS.-RIVER FALLS 19 (Apr. 30, 2005), <http://eric.ed.gov/PDFS/ED490374.pdf>. Results of the study demonstrated that students in special education programs experience significantly more incidents of bullying by peers than children in regular education programs. *Id.*

⁴⁹ See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1090 (2002) (“[O]bservations from daily life show that disability harassment occurs constantly at school.”); Ferster, *supra* note 40, at 193 (stating that “[c]hildren with disabilities, who often stand out due to unique physical and mental characteristics, are particularly vulnerable” to abuse by their peers); see also Telephone Interview with Corry Smith, Special Education Resource Instructor, Woodland Elementary School in Gages Lake, Ill. (Feb. 1, 2010) (explaining that one difficulty of mainstreaming special education students into regular education classrooms continues to be special education students’ interactions with their regular education counterparts).

⁵⁰ See Carter & Spencer, *supra* note 40, at 12 (explaining that students with disabilities such as “learning disabilities, emotional disorders, attention deficit hyperactivity disorder, and physical disabilities often demonstrate a lack of social awareness which may make them more vulnerable to victimization”); see also Soper *ex rel.* Soper v. Hoben, 195 F.3d 845,

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students with disabilities are stigmatized and frequently referred to by their peers with derogatory and insulting terms such as “retarded” because they appear and act differently than other students.⁵¹ It is clear that peers view students with disabilities as easy targets.⁵²

Studies also show that violent, aggressive behavior increases when school rules and restrictions are unclear, when discipline is lax, and when teachers fail to effectively monitor students’ behavior or protect the “weaker students in the school.”⁵³ Thus, it is critical for schools to adequately supervise students with disabilities to protect them from peer

848 (6th Cir. 1999) (noting a disabled student who was educationally mentally impaired displayed Down Syndrome-like characteristics when she would inappropriately hug other children and adults).

⁵¹ See Weber, *supra* note 49, at 1091 (“The word ‘retard’ has become a common insult on and off the playground.”); Lambert, *supra* note 40, at 551–52 (explaining the word “retarded” is socially acceptable in society, particularly in schools, and results in prejudice, discrimination, and harassment); John C. McGinley, *Spread the Word to End the Word*, HUFFINGTON POST, (Mar. 2, 2010, 06:52 PM), http://www.huffingtonpost.com/john-c-mcginley/spread-the-word-to-end-th_b_483157.html (discussing the interplay between use of the word “retarded” and First Amendment rights). While every American has the right to use the word, McGinley suggests that the consequences for doing so should be analogous to using other hateful language, such as racial slurs, sexist epithets, and homophobic terms. *Id.* He further explains that the r-word is a source of pain that “demeans a group that is not in a position to defend itself and who . . . never did anything to merit this kind of derision.” *Id.* McGinley urges society to use heightened sensitivity and compassion towards use of the word and to think about “the way we treat, regard and address the special needs population.” *Id.*; see also Maria King Carroll, Op-Ed., *New Rule: A Word We Should Despise*, CHI. TRIB., Mar. 27, 2009, http://articles.chicagotribune.com/2009-03-27/news/0903260596_1_intellectual-disabilities-word-describes (discussing the Special Olympics’ “Spread the Word to End the Word” campaign, a campaign launched on March 31, 2009 in order to end the use of the word “retard”). Carroll suggests that the “R-word” should be abolished, as it is an awful term that connotes that a person is defective or stupid. *Id.* She also believes that ending the use of this word is a step in the right direction towards humanizing the world for disabled persons. *Id.*

⁵² See Weber, *supra* note 49, at 1081 (noting that “much disability discrimination is the overt expression of hostility and the conscious effort to subordinate members of a group with less power and social standing than the majority” and “[n]owhere is the injury more common or more severe than in . . . schools.”); Ferster, *supra* note 40, at 199 (“[Students with disabilities] often look or act different than their peers as a result of their physical, intellectual, or emotional impairments, and these characteristics make them natural targets for harassment.”).

⁵³ Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 654 (2004) (suggesting that if teachers do not intervene, some students may deem this as permission to continue such attacks); Wayne N. Welsh, *The Effects of School Climate on School Disorder*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 88, 89–90 (2000) (stating that perceptions of disorder in schools has a resultant effect on student behavior); Lambert, *supra* note 40, at 566–67 (discussing that school officials condone discrimination against disabled students by peers when they fail to take action). Thus, the school officials themselves can foster an environment where harassment is seen as acceptable amongst students. *Id.* at 567.

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abuse, which is reasonably foreseeable to occur.⁵⁴ Legal remedies should be available to victims in instances where the school condones such abuse and fails to protect its disabled students from this harm.⁵⁵

B. Traditional Legal Remedies Available

When a victim seeks recovery for an injury caused by another student, courts commonly hold that the school is not liable for the actions of the offending student because the doctrine of respondeat superior does not apply between the school and the student.⁵⁶ A school is not the insurer of students' safety and cannot supervise all students' activities and movements.⁵⁷ Still, victims can potentially hold schools liable if the staff was negligent; for example, a school should be held liable if the teacher failed to adequately supervise the classroom or permitted the offending student to commit conduct reasonably foreseeable to injure other students.⁵⁸ Many disabled students who suffer from peer-inflicted injuries at school have attempted to utilize a variety of statutes and causes of action to hold the schools and school officials liable.⁵⁹ Regardless of which claims the disabled student brings,

⁵⁴ See Weber, *supra* note 49, at 1084 (noting that both legal scholars and courts alike have failed to adequately consider bullying and its effects on students with disabilities); see also Weddle, *Bullying in Schools*, *supra* note 53, at 652 (emphasizing that the school must be the source of the solution because the school is the very place where the bullying occurs). In fact, studies have demonstrated that children "may actually appreciate good supervision because it creates an atmosphere of safety." *Id.*

⁵⁵ See Bodensteiner, *supra* note 39, at 47 ("The prospect of liability will cause school officials to take more seriously their duty to take all reasonable steps to prevent harassment and, when it occurs despite their best efforts, to respond promptly with appropriate corrective/remedial efforts."); see also *infra* Part IV (recommending that courts treat the infliction of injury to special education students by their peers as foreseeable so that victims of peer-on-peer abuse have a viable remedy).

⁵⁶ See Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision*, 38 A.L.R. 3d 830, § 2b (1971) (stating that respondeat superior does not apply; therefore, liability of schools can only be found when a school breaches a duty owed to a student).

⁵⁷ See, e.g., *Mirand v. City of New York*, 736 N.E.2d 263, 266 (N.Y. 1994) (explaining that, while schools are under a duty to adequately supervise students, they are not insurers of safety and cannot be expected to supervise or control all of their students' actions); see also *infra* note 66 (discussing a school's duties and the subsequent limitation on such duties). But see Frank J. Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 AM. U. L. REV. 673, 697-98 (1981) (explaining that tort liability should be placed on the party best situated to prevent the harm).

⁵⁸ Korpela, *supra* note 56, § 5; see also *infra* Part II.B.1 (discussing theories of negligent supervision).

⁵⁹ See Weddle, *Bullying in Schools*, *supra* note 53, at 643-44, 658-59 (noting that "[t]he nation needs a change in its current legal theories," as many victims are unable to hold schools accountable under theories of negligent supervision, causes of action under Title

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foreseeability is often the central issue.⁶⁰ Students who are subject to harassment and assault by their peers on school grounds oftentimes will have no remedy against the school that allowed the injury to occur.⁶¹ The following subsections discuss the different sources of law that victims have attempted to utilize and several cases in which these sources have been asserted.⁶²

1. Causes of Action Under Tort Theory of Negligent Supervision

Students injured by their peers may bring claims under the theory of negligent supervision by the school.⁶³ Some states, however, shield schools and school officials from liability at the outset by providing governmental immunity through tort claims acts.⁶⁴ In the states that

IX, or constitutional theories, and that even anti-bullying statutes fail to protect students from such harm); *see also infra* Part II.B (explaining the traditional legal remedies utilized).

⁶⁰ *See, e.g.,* *Graham v. Indep. Sch. Dist. No. 1-89*, 22 F.3d 991, 994 (10th Cir. 1994) (holding “foreseeability cannot create an affirmative duty to protect” the victim when no custodial relationship is established); *see also infra* note 71 and accompanying text (discussing how it is difficult to overcome the hurdle of foreseeability).

⁶¹ Phillips, *supra* note 37, at 257. While the injured student has a right against the peer that inflicted the injury, this remedy does nothing to ameliorate the school environment that could allow for future injuries and incidents to occur. *Id.* at 257-58. The public may oppose school liability believing that it would increase the costs of schools. *Id.* at 258. Section 1983, however, was enacted to prevent this very type of harm—“a deprivation of federal rights due to local officials’ reluctance . . . to enforce the law.” *Id.*

⁶² *See infra* Part II.B (explaining the traditional legal remedies utilized).

⁶³ *See* Jennifer C. v. L.A. Unified Sch. Dist., 86 Cal. Rptr. 3d 274, 280-82 (Cal. Ct. App. 2009) (holding that the injury to a special needs student was reasonably foreseeable and that the school was liable under theory of negligent supervision); *M.W. v. Pan. Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d 673, 685-86 (Cal. Ct. App. 2003) (holding a school liable under a theory of negligent supervision for the injury of a special needs student); *see also* Todd A. DeMitchell & Thomas Carroll, *A Duty Owed: Tort Liability and the Perceptions of Public School Principals*, 201 EDUC. L. REP. 1, 6 n.34 (2005) (“In a nationwide study by LRP, negligent supervision accounted for 43% of the school negligence suits resulting in awards.”). *But see* Weddle, *Bullying in School*, *supra* note 53, at 682-83 (“Tort theories are currently so lopsided in favor of schools that there can be no real fear of damage awards for ignoring best practices in the face of what schools should know is a dangerous and pervasive problem.”) (footnote omitted).

⁶⁴ *See* Daniel B. Weddle, *Brutality and Blindness: Bullying in Schools and Negligent Supervision by School Officials*, in *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA’S CHILDREN* 385, 387 (Maurice R. Dyson & Daniel B. Weddle eds., 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319397 (noting that, under many state tort claims acts, “states shield schools and school officials from liability for negligence unless [their actions rise] to a level of recklessness or gross negligence”); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 187 (2009) (noting that based on the “doctrine of sovereign immunity, school districts, as political subdivisions that perform government functions, are commonly immunized from civil suits for injuries, death, or property damage allegedly caused by the acts or omissions of the district or its employees”

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allow the negligent supervision cause of action, plaintiffs must show the existence of the following elements: (1) the school had a duty to supervise its students; (2) there was a breach of the duty by the teacher or school; (3) the breach of the duty was the proximate cause of the student's injury; and (4) the injury resulted in damages.⁶⁵ Regarding the first essential element, courts have long held that schools have a duty to supervise children in their custody, although the scope of the duty may vary depending on the circumstances.⁶⁶ The standard of care imposed

and can escape liability from suit); Jill Grim, Note, *Peer Harassment in Our Schools: Should Teachers and Administrators Join in the Fight?*, 10 BARRY L. REV. 155, 163 (2008) (stating that some courts simply dismiss tort claims against a school based on the principle of sovereign immunity). For example, a Texas court concluded that school personnel were not liable for their negligence because they were immune from suit under the Texas Tort Claims Act. *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987). In *Hopkins*, an elementary student that suffered from cerebral palsy was left unsupervised and students proceeded to push her into a stack of chairs. *Id.* at 617. She sustained a head injury, resulting in a mild convulsion. *Id.* The student was dazed and incoherent, yet the teacher did not contact the student's doctors or mother and the student later suffered severe convulsions on the bus. *Id.* at 617-18. She was then dropped off at a day care center where she finally received medical treatment. *Id.* at 618. Still, the court determined that the school was entitled to immunity, leaving the victim without a remedy. *Id.* at 619. The Eleventh Amendment establishes the doctrine of sovereign immunity. See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (explaining that, as a result of the passage of the Eleventh Amendment, a federal court may not hear a suit against a state without the state's consent). This immunity from suit—called sovereign immunity—can be waived, but the state must unequivocally express its desire to waive its immunity. *Id.* at 99.

⁶⁵ See Weddle, *Brutality and Blindness*, *supra* note 64, at 391. Weddle breaks down the generally accepted definition of negligent supervision, as follows: "(1) The existence of a teacher-student relationship giving rise to a legal duty to supervise; (2) the negligent breach of that duty by the teacher; and (3) proximate causation of the student's injury by the teacher's negligence." *Id.* Weddle also explains that this definition is not limited to teachers, but can be extended to all school employees. *Id.*; see also Todd A. DeMitchell, *Essay: Safety Sensitive Positions and the Duty Owed to Students: From Drugs to Torts*, 217 EDUC. L. REP. 789, 798 (2009) ("Public schools owe a duty to use ordinary care and to take reasonable steps to minimize foreseeable risks to students thereby providing a safe school environment." (footnote omitted)); Korpela, *supra* note 56, § 2[a] (discussing peer-inflicted injuries in school and noting that, "while the cases do not appear to be entirely consistent, there is authority imposing liability upon school agencies where there was evidence warranting a finding that the occurrence was reasonably foreseeable and could have been prevented by adequate supervision").

⁶⁶ See, e.g., *Mirand v. City of New York*, 736 N.E.2d 263, 266 (N.Y. 1994) ("Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision." (citations omitted)); see also RESTATEMENT (SECOND) OF TORTS § 320 (1965) (explaining the "duty of [a] person having custody of another to control conduct of third persons" (title capitalization omitted) and suggesting that schools, institutions that take custody of

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upon school personnel in carrying out the duty is the degree of care that a person of ordinary prudence, charged with comparable duties, would exercise under the circumstances.⁶⁷ Additionally, many commentators and authorities, particularly a recently proposed final draft to the Restatement (Third) of Torts, have even expanded upon the duty, suggesting that a school has an affirmative duty to *protect* students from

children during school hours, should have such a duty). The Restatement states the following:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Id. In addition, comment (a) specifically explains that “[t]he rule stated in this Section is applicable to . . . teachers or other persons in charge of a public school [or] . . . a private school.” *Id.* § 320 cmt. a; Weddle, *Brutality and Blindness*, *supra* note 64, at 392 (explaining that drafts of Restatement (Third) of Torts section 40 validates the theory that schools have a duty to adequately supervise students, a duty that includes protecting students from the tortuous acts of other students). Weddle notes that the duty varies in scope, depending on “the age and maturity of the children being supervised.” *Id.* *But see* *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 198–202 (1989) (holding that the Due Process Clause of the Fourteenth Amendment does not require a state to protect a child from harm inflicted by the actions of a third party, absent some type of special relationship or circumstance); Grim, *supra* note 64, at 164 (explaining that while schools have a duty to supervise, they do not have a duty to protect their students). Still, she suggests that, as the Constitution was written before school attendance became mandatory, or even very common, “[t]he lack of duty for educators to protect students against other students seems inconsistent now that school attendance is compulsory in every state.” *Id.* at 163. Grim also elaborates that there is only so much a parent can do for her child once she enters the schoolhouse gates, and thus, general tort principles suggest that the official taking custody of the child should give her the same type of protection that she is being deprived of while separated from her parent. *Id.* at 164; Phillips, *supra* note 37, at 253 (explaining that while there is an established duty to supervise students, the Supreme Court has yet to determine that there is a similar duty to protect students from harm of third parties).

⁶⁷ See 78 C.J.S. *Schools and School Districts* § 502 (2010) (“In other words, the standard of care of teachers is that of an ordinary, prudent, or reasonable person in such a position acting under similar circumstances.”); see also Ralph D. Mawdsley, *Standard of Care for Students with Disabilities: The Intersection of Liability Under the IDEA and Tort Theories*, 2010 B.Y.U. EDUC. & L.J. 359, 359 (explaining that the responsibility of public schools to provide students with disabilities certain services pursuant to the IDEA “intersects with [the] schools’ obligation to protect students from harm”). Mawdsley explains that many schools now have detailed knowledge of a disabled student’s needs and behaviors as a result of the student’s IEP. *Id.* This creates an issue as to whether this knowledge affects the duty or standard of care that the school owes its disabled students with IEPs. *Id.*

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the risk of harm stemming from the school's special relationship with its student.⁶⁸

To determine whether a school breached its duty to supervise when a peer or third party inflicts an injury and to satisfy the second and third elements of a negligence claim, the victim must establish that the school's action was (1) the proximate cause of the injury; and (2) that the school authorities had specific knowledge or notice of the dangerous conduct that caused the injury.⁶⁹ In other words, third party acts must have been reasonably foreseeable.⁷⁰ The foreseeability requirement is a difficult hurdle to overcome because courts tend to presume that injuries inflicted by third parties are generally not foreseeable.⁷¹

⁶⁸ RESTATEMENT (THIRD) OF TORTS §§ 40(a), (b)(5) (Proposed Final Draft No. 1 2005). The Restatement suggests that a school is in a special relationship with its students, which gives rise to "a duty of reasonable care with regard to risks that arise within the scope of the relationship." *Id.* § 40(a); see also *supra* note 66 (discussing the Restatement approach).

⁶⁹ See *Doe ex rel. Doe v. Bd. of Educ.*, 780 N.Y.S.2d 198, 200 (N.Y. App. Div. 2004) ("Where . . . the underlying injury is caused by the intentional act of a fellow student, the 'plaintiff [must] demonstrate, by the school's prior knowledge or notice of the dangerous conduct which caused the injury, that the acts of the fellow student[] could have reasonably been anticipated.") (quoting *Druba v. East Greenbrush Cent. School Dist.*, 734 N.Y.S.2d 331, 332 (N.Y. App. Div. 2001)). Another New York court, using *Mirand v. City of New York* to support its decision, stated that

[i]n determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated.

Marshall v. Cortland Enlarged City Sch. Dist., 697 N.Y.S.2d 395, 396 (N.Y. App. Div. 1999) (quoting *Mirand*, 637 N.E.2d at 266); see also *Korpela*, *supra* note 56, § 2[b] (explaining that defendant schools often utilize these requirements as defenses to liability, as plaintiffs generally have a difficult time providing proof of these elements). Schools often claim that the independent act of the perpetrating student, rather than negligent supervision, is the proximate cause of the injury and that the occurrence of the injury itself was not reasonably foreseeable. *Id.*

⁷⁰ See *Doe*, 780 N.Y.S.2d at 200 (reiterating that the act of the third party must have been reasonably anticipated or foreseen); *Korpela*, *supra* note 56, § 2[b] (explaining the need for a victim to prove that the injury was foreseeable).

⁷¹ See 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 501 (2010) ("[A]n injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act."); see also *Weddle, Bullying in Schools*, *supra* note 53, at 683 (explaining that issues with foreseeability and causation make it very difficult for these student victims to obtain remedies). But see *Matthew Earhart, Note, Bullying: What's Being Done and Why Schools Aren't Doing More*, 25 J. JUV. L. 26, 29 (2005) (noting that several school districts and state legislatures have passed anti-bullying policies and legislation, which suggests that these schools and states believe that bullying is not only prevalent, but also foreseeable and should be prevented); *Lambert*, *supra* note 40, at 569 (explaining that injuries to developmentally delayed or disabled

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Marshall v. Cortland Enlarged City School District demonstrates the difficulty victims face in establishing the foreseeability requirement.⁷² In *Marshall*, the parents of a special education student alleged that the school negligently supervised their daughter after another student murdered her on school grounds.⁷³ The perpetrator, a fellow special education student, made several threats during the year.⁷⁴ Still, the court determined that the school district was not liable because, despite the prior threats against the deceased by the student who ultimately murdered her, the injury was not foreseeable since the threats did not sufficiently put the school on notice that the perpetrator was dangerous and needed extra monitoring.⁷⁵

On the other hand, some courts, particularly in California, have demonstrated a new trend in which the injury inflicted upon a special needs student by a peer is deemed foreseeable.⁷⁶ For example, in *M.W. v. Panama Buena Vista Union School*, the California Court of Appeals held a school liable for injury to a special education student under a theory of negligent supervision.⁷⁷ In *M.W.*, a special education student known to be a disciplinary threat lured another special education student into a restroom and sexually assaulted him.⁷⁸ Teachers and school officials were unaware this assault occurred.⁷⁹ Due to “the foreseeability of harm

students at school are foreseeable given their unique characteristics). The safety of disabled students depends in large part on the school placing them in a safe environment with adequate supervision. *Id.* It is reasonable to find injuries to disabled students foreseeable when supervision is lacking. *Id.*

⁷² 697 N.Y.S.2d at 395.

⁷³ *Id.*

⁷⁴ *Id.* at 396. The student’s murder took place during lunch and occurred outside of the school building in a wooded area on the school property. *Id.* at 395.

⁷⁵ *Id.* at 396. The court specifically noted that “[a]ctual or constructive notice to the school of prior conduct is generally required because, obviously, school personnel cannot reasonably be expected to take guard against all of the sudden, spontaneous acts that take place.” *Id.* (quoting *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994)). The court concluded that the student’s statement to a teacher that he intended to “stick his girlfriend . . . with a needle and try killing her” did not constitute specific knowledge necessary for such a murder to have been reasonably anticipated under the circumstances. *Id.* Furthermore, the court was “unpersuaded” by the plaintiff’s argument that the school owed a higher duty of care to the student simply because she was a disabled student. *Id.*

⁷⁶ See, e.g., *Jennifer C. v. L.A. Unified Sch. Dist.*, 86 Cal. Rptr. 3d 274, 280–82 (Cal. Ct. App. 2008) (holding that it was reasonably foreseeable that a special needs student would be vulnerable to injury at the hands of a peer); *M.W. v. Pan. Buena Vista Union Sch.*, 1 Cal. Rptr. 3d 673, 685–86 (Cal. Ct. App. 2003) (holding a school liable under a theory of negligent supervision because the injury inflicted upon a special needs student was foreseeable).

⁷⁷ 1 Cal. Rptr. 3d at 685–86.

⁷⁸ *Id.* at 676–77.

⁷⁹ *Id.* at 677.

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to special education students, the well-settled statutory duty of school districts to take all reasonable steps to protect them... and the paramount policy concern of providing our children with safe learning environments," the school district was held liable for an injury inflicted upon a student with disabilities.⁸⁰

Similarly, in *Jennifer C. v. Los Angeles Unified School District*, the California Court of Appeals reiterated that "[g]iven the unique vulnerability of 'special needs' students, it is foreseeable that they may be victimized by other students."⁸¹ In *Jennifer C.*, the victim was a special needs student who was sexually assaulted by another special needs student during a lunch break.⁸² The court began its analysis by noting that, while the law in regard to special needs children is emerging, it is obvious that these students are uniquely vulnerable to threats by their peers, particularly in an area that the school knew to be hidden from sight.⁸³ Therefore, the court held the school liable for negligent supervision, as it was reasonably foreseeable that this victim would be exposed to harm by a fellow student.⁸⁴

Nonetheless, success under theories of negligent supervision is still rare, as most courts, unlike those in California, maintain that injuries

⁸⁰ *Id.* at 683. The court further articulated that the school should be held liable because "[t]he assault occurred on the school's watch, while the student was entrusted to the school's care. It was substantially caused by the school's indifference toward the dangers posed by failing to adequately supervise its students, particularly special education students." *Id.* at 675. Still, the dissent in *M.V.* critiqued the majority's decision, claiming that the focus centered on the victim's status without adequately considering the foreseeability of the particular type of harm that was inflicted. *Id.* at 686 (Levy, J., dissenting). The dissent also argued that "[t]he majority's contrary position expands the concept of duty to the point of essentially imposing strict liability on school districts for the criminal conduct of any student with a discipline record that includes hitting and kicking other students." *Id.*

⁸¹ *Jennifer C.*, 86 Cal. Rptr. 3d at 281. As a preface to the case, the court noted that [a] "special needs" child, i.e. a child suffering from mental and/or physical disability, cannot reasonably be expected to take care of himself or herself. Such a child at public school needs help and protection. This case illustrates the unique vulnerability of such a child and the unique responsibility of a school district to such a child.

Id. at 278.

⁸² *Id.* at 278. The victim was a fourteen-year-old middle school student with disabilities, suffering from hearing problems, aphasia, emotional problems, and cognitive difficulties. *Id.* The perpetrator, another special needs student whom the victim did not know, led her across campus to the hidden alcove and committed the assault. *Id.* While the alcove was not visible from the school grounds, any person walking past the school would see it. *Id.* The assault was reported by a parent walking along the sidewalk past the school. *Id.*

⁸³ *Id.* at 280.

⁸⁴ *Id.* at 280-82.

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inflicted upon special education students by peers are not foreseeable.⁸⁵ Furthermore, some states prevent negligent supervision claims at the outset by shielding local government bodies from liability under state tort law.⁸⁶ When local bodies are immune from tort law, students injured at school have attempted to bring statutory claims to recover damages.⁸⁷

2. Causes of Action Under § 1983 of the Civil Rights Act of 1964

Section 1983 was originally passed as part of the Civil Rights Act of 1871 and has been expanded upon ever since its passage.⁸⁸ The purpose of § 1983 is to provide a means of redress for individuals harmed by state actors.⁸⁹ The first step in any § 1983 claim is to identify the constitutional

⁸⁵ See *supra* note 71 and accompanying text (explaining that foreseeability is a difficult element for a plaintiff to prove and that most courts reject the premise that peer-inflicted injuries are foreseeable).

⁸⁶ See *supra* note 64 and accompanying text (discussing issues of sovereign immunity and tort claims acts that bar claims of negligence against school and school officials).

⁸⁷ See *infra* Part II.B.2 (discussing statutory claims under § 1983).

⁸⁸ 42 U.S.C. § 1983 (2006); Phillips, *supra* note 37, at 238. Section 1983 was originally passed as part of section 1 of the Civil Rights Act of 1871. *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 692 n.57 (1978). Congress passed it with little dispute, so the legislative history is scarce. *Id.* Even though there is limited legislative history, the Supreme Court has concluded that one reason that Congress passed § 1983 was to afford individuals deprived of a federal right to a relief in federal courts when states or state officials are unwilling or unable to enforce the law. *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled in part by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 659 (1978). Despite being passed in 1871, § 1983 was essentially dormant for nearly a century until the Supreme Court, in *Monroe v. Pape*, held that § 1983 allowed plaintiffs to sue state officers for damages for actions taken "under color" of state law. *Id.* at 187. Although the *Monroe* Court gave an expansive interpretation to the phrase "under color of state law," the Court still concluded that a municipality is not a "person" within the meaning of § 1983. *Id.* at 191 n.50, 192. In 1978, however, the Supreme Court overruled this conclusion in *Monell v. Department of Social Services* when it held that a plaintiff may sue a municipality or other local government unit pursuant to § 1983. 436 U.S. at 690-91. The Court made clear, however, that a municipality cannot be held liable unless the action that resulted in the alleged injury was done pursuant to official custom or policy. *Id.* at 691. Furthermore, the municipality cannot be held liable solely based upon the theory of respondeat superior for the actions of its employees. *Id.* Nevertheless, in *Will v. Michigan Department of State Police*, the Supreme Court declined to expand § 1983 to hold states or its agencies liable under § 1983. 491 U.S. 58, 66-67 (1989). Therefore, if a plaintiff can prove that a school district is not a state actor or arm of the state, then the school may be subject to liability under § 1983. Phillips, *supra* note 37, at 242.

⁸⁹ 42 U.S.C. § 1983. This statute states that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

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right that was allegedly infringed.⁹⁰ While it may sound simple, bringing a § 1983 claim has been analogized to “walking through a mine field: [plaintiffs are] uncertain where to step next.”⁹¹ Plaintiffs often use the Due Process Clause of the Fourteenth Amendment, which provides that states shall not “deprive any person of life, liberty, or property, without due process of law,” as the source of law under which to bring a § 1983 claim.⁹² No matter what theory the plaintiff pursues, in order to prevail the plaintiff must show a direct link between the policy or custom in question and the alleged injury.⁹³ For peer-on-peer injuries, it is often difficult to show causation sufficient to sustain a § 1983 claim because the injury is inflicted by another student, not the school or school official.⁹⁴ To compound the causation problem, the Supreme Court has held that the government has no affirmative duty to protect citizens from private actors.⁹⁵ Likewise, nothing in the language of the Due Process Clause itself requires states to protect the life, liberty, and property of its citizens against invasions by private actors.⁹⁶ The Due Process Clause is a limitation on states’ power to act, not a guarantee of certain minimal levels of safety and security.⁹⁷

Nevertheless, the Court conceded that causation problems can be overcome because there are particular situations in which “the Constitution imposes upon the State affirmative duties of care and

Id. In order to state a claim under § 1983, a plaintiff must establish that a person acting under the color of state law deprived the plaintiff of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The first step is to identify the specific constitutional right infringed. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (explaining that the plaintiff must allege a violation of either federal statutory law or constitutional law); Phillips, *supra* note 37, at 238 (“Section 1983 jurisprudence is so complex that essential elements of a . . . claim are easily overlooked.”). Aside from the sentence provided in title 42 of the United States Code, “Congress has given little guidance for section 1983 civil rights claims. Thus, the meaning of section 1983 elements [has] been promulgated by the courts.” *Id.* at 243. The courts have interpreted the elements of the claim to require a person, acting under color of the state, to cause a deprivation of rights. *Id.*

⁹⁰ *Thiboutot*, 448 U.S. at 4.

⁹¹ Phillips, *supra* note 37, at 266.

⁹² U.S. CONST. amend. XIV, § 1; *see also* Phillips, *supra* note 37, at 249 (explaining that section 1983 cannot be used simply for a general injury, as it “is limited to deprivations of federal or constitutional rights”). In peer-on-peer violence, it is common for victims to “claim a [constitutional] violation of bodily integrity.” *Id.*

⁹³ Phillips, *supra* note 37, at 248.

⁹⁴ *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978) (“Congress did not intend municipalities to be held liable unless action pursuant to official policy of some nature caused a constitutional tort.”); *see also* Phillips, *supra* note 37, at 248 (explaining the difficulty of holding a school liable under § 1983 for the act of a third party).

⁹⁵ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989).

⁹⁶ U.S. CONST. amend. XIV, § 1.

⁹⁷ *DeShaney*, 489 U.S. at 198–202.

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protection with respect to particular individuals.”⁹⁸ The exception is applicable in two specific situations: (1) circumstances in which the State has taken a person into full custody against his or her will, thus creating a “special relationship;”⁹⁹ or (2) circumstances where the State has created the injury or harm, commonly known as the “state-created danger” exception.¹⁰⁰ The Supreme Court addressed the special relationship exception in *DeShaney v. Winnebago County Department of Social Services*.¹⁰¹

In *DeShaney*, the Court held that the Due Process Clause of the Fourteenth Amendment does not require a state to protect a child from harm inflicted by the actions of another, absent some type of special circumstance.¹⁰² *DeShaney* involved a § 1983 action brought by the mother of a boy who had been beaten by his father.¹⁰³ The mother filed

⁹⁸ *Id.* at 198.

⁹⁹ Phillips, *supra* note 37, at 253 (citing *DeShaney*, 489 U.S. at 198-99, 201 n.9).

¹⁰⁰ See *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 910-11, 912-13 (6th Cir. 1995) (explaining that a plaintiff can succeed in a § 1983 action by proving a “special relationship” existed between the victim and the school or school officials or, alternatively, by proceeding under a “state-created danger theory”).

¹⁰¹ *DeShaney*, 489 U.S. at 198-202.

¹⁰² *Id.*; see also Phillips, *supra* note 37, at 252-53 (explaining the Supreme Court’s reasoning in *DeShaney* focused on the premises that if the state wanted the Department of Social Services (“DSS”) to be liable, it could have created a system under tort law to allow for such suits; and that if DSS had acted too quickly, the boy’s father could have argued it was a violation of his Due Process rights). *But see Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002) (upholding a suspicionless school drug testing policy under the premise that a school’s interest in preventing drug use and establishing an environment conducive to learning outweighs a student’s interest in privacy). In *Earls*, the Court contended that “[a] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” *Id.* at 830. The Court further noted that to secure order in school and create an environment conducive to learning, “the school has the obligation to protect pupils from mistreatment by other children.” *Id.* at 831 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring)). In *Vernonia School District 47J v. Acton*, the Court upheld a school drug testing program that authorized random urinalysis sampling of student athletes. 515 U.S. 646, 666 (1995). The *Vernonia* Court emphasized that the school’s custodial authority over students permits a “degree of supervision and control that could not be exercised over free adults.” *Id.* at 655. The Court further stated that an “educational environment requires close supervision of schoolchildren.” *Id.* (quoting *T.L.O.*, 469 U.S. at 339). *Earls* and *Vernonia* suggest that the Supreme Court is more inclined to protect students from drug use than it is to protect students from physical abuse of others.

¹⁰³ *DeShaney*, 489 U.S. at 192-93. DSS received several notifications about the abuse, and after the boy was admitted to the hospital with injuries inflicted by his father, DSS entered into an agreement with the father to allow him to take the boy home under certain conditions. *Id.* A DSS caseworker made several visits to the home, observed several suspicious injuries, noted that the boy was not placed in school as the father had agreed to do, and noted that the father had still not complied with the agreement. *Id.* Then the father beat the boy so ruthlessly that he suffered severe brain damage that rendered him

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the claim against the social workers and local officials who had received numerous complaints about the abuse but refused to remove the boy from his father's custody.¹⁰⁴ The Court found that the State was not liable, even though it knew about the father's abuse, because it did not create the harm and did not restrict the boy from acting on his own behalf.¹⁰⁵ It elaborated that no special relationship existed between the State and the boy simply because the State had knowledge of the abuse.¹⁰⁶ *DeShaney's* rule and exceptions have had important implications in the public school context, as courts often cite *DeShaney* as controlling precedent to deny that the special relationship or state-created harm existed, even though it is a child-welfare case.¹⁰⁷

a. *The DeShaney Special Relationship Exception*

There is a very narrow class of people who stand in a "special relationship" with a state.¹⁰⁸ Public schools are under no constitutional obligation to protect school students from the actions of private parties

profoundly mentally disabled. *Id.* at 193. Nonetheless, the Court held that the state officials could not be held liable. *Id.* at 203.

¹⁰⁴ *Id.* at 193.

¹⁰⁵ *Id.* at 201. Chief Justice Rehnquist, writing for the majority, noted that the government played no role in creating the dangers faced by the young boy and further the government did not make the child more vulnerable. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Phillips, *supra* note 37, at 253. "Courts have been reluctant to extend the special relationship doctrine to public schools." *Id.*; *see also, e.g.,* Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 528-29 (5th Cir. 1994) (discussing the *DeShaney* special relationship doctrine before holding that a school had no affirmative duty under § 1983 to protect a student killed by random gunfire in its parking lot after a non-mandatory school dance); Graham v. Indep. Sch. Dist. No. 1-89, 22 F.3d 991, 994-95 (10th Cir. 1994) (holding no custodial relationship exists between schools and students; thus, a school district has no affirmative duty to protect students from other students, even if the school had warnings of threatened violence).

¹⁰⁸ Teague v. Tex. City Indep. Sch. Dist., 185 F. App'x 355, 357 (5th Cir. 2006). In *Teague*, the court explained that in order "[t]o secure liability against the state for private harm under section 1983, plaintiffs must show that their claims fit within the narrow class of exceptions to the *DeShaney* rule." *Id.* In *Walton v. Alexander*, the Fifth Circuit declined to find a special relationship where a deaf student had been sexually abused by a peer at his Mississippi school. 44 F.3d 1297, 1299 (5th Cir. 1995) (en banc). The plaintiff was attacked twice and sued the superintendent under § 1983 for failure to protect. *Id.* at 1299-1300. The court found the school owed the plaintiff no duty to protect him from third party harms. *Id.* at 1300-01; *see also* Sacks & Salem, *supra* note 64, at 182 (noting that even though schools have a substantial amount of control over students in their custody during the school day, most courts refuse to find that a special relationship is created as a result of this custody). Sacks and Salem also note that "[c]ourts likewise reject application of the state-created-danger exception because administrators' failure to intervene in harassment is not the same as *actively encouraging* pre-existing behaviors." *Id.* at 182-83.

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absent a special relationship between the student and school.¹⁰⁹ The applicability of the special relationship doctrine in the public school context is a question left open by *DeShaney*.¹¹⁰ Victims assert that compulsory school laws and *in loco parentis* standing create a special relationship between the school and student falling within the *DeShaney* exception.¹¹¹

¹⁰⁹ See, e.g., *Teague*, 185 F. App'x. at 357 (asserting that the plaintiff failed to state a proper § 1983 claim, as neither a special relationship nor a state-created danger existed as required by *DeShaney*); *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 853 (6th Cir. 1999) (holding that the student did not state a viable § 1983 claim because there was no special relationship formed between the student and the school); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732-34 (8th Cir. 1993) (holding the school had no duty to protect its students under *DeShaney* and that the school was not liable under § 1983); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (rejecting the premise that the school could be held liable under § 1983); *Maxwell ex rel. Maxwell v. Sch. Dist.*, 53 F. Supp. 2d 787, 791 (E.D. Pa. 1999) ("Total and exclusive custody, not mere restraint, is at the heart of a due process claim relying upon a special relationship."); see also *Conn*, *supra* note 40, at 791 (stating that the consequences of the courts' failure to find the existence of a special relationship between a school and students, as well as the courts' failure to find any type of state-created danger, unless the harm is so severe that it shocks the conscience of the court, have led to several harsh decisions); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 TEMP. POL. & CIV. RTS. L. REV. 47, 49 (2006) (noting that out of twenty-one recent appellate cases, only two survived the state-created danger test).

¹¹⁰ *Spivey v. Elliott*, 29 F.3d 1522, 1523, 1526-27 (11th Cir. 1994) (holding that an eight-year old deaf student who resided at the Georgia School of the Deaf had a special relationship with the school, but that the school officials were entitled to qualified immunity because the law on what constitutes a special relationship was not clearly established); see also *Dolan*, *supra* note 37, at 228-29 (discussing the application of the special relationship doctrine following *DeShaney* and noting that the *DeShaney* Court did not provide definite guidance). Most courts, nonetheless, decline to find a special relationship between a student and an ordinary public school. *Id.* Still, there is a trend for courts to find that residential schools, schools that maintain custody of students during the week and provides for students' basic needs, have an affirmative duty to protect students. *Id.* at 231.

¹¹¹ See *supra* note 109 (providing an overview of cases where victims were unable to prove the requisite special relationship); see also *Conn*, *supra* note 40, at 790-91 (suggesting that causes of action under § 1983 are typically ineffective); *Sacks & Salem*, *supra* note 64, at 182-83 (noting that despite schools' substantial control over students, courts generally reject § 1983 claims); Alison Bethel, Note, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 185-86 (2004) (noting "the majority view that schools do not have an affirmative duty under the Due Process Clause to protect students from harm by other students."); *Grim*, *supra* note 64, at 164 (arguing that because school attendance is compulsory in every state, it makes little sense that schools do not have a duty to protect their students from injuries inflicted by other students). But see RESTATEMENT (THIRD) OF TORTS §§ 40(a), (b)(5) (Proposed Final Draft No. 1 2005) ("An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship. Special relationships [give] rise to the duty [of reasonable care within the relationship of] a school

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Victims argue that compulsory school laws, which require students to attend school and hold students in class against their will, create the type of special relationship prescribed by the *DeShaney* standard.¹¹² The state arguably cultivates a special relationship with the child by compelling a child to attend school.¹¹³ Students are unable to walk off the school's premises during school hours without permission, which

with its students.") (internal numbering system omitted). In addition, the comment (l) asserts that

[t]he affirmative duty imposed on schools in this Section is in addition to the ordinary duty of a school to exercise reasonable care in its operations for the safety of its students. The relationship between a school and its students parallels aspects of several other special relationships—it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents. The Second Restatement of Torts contained no Section that specifically identified the school-student relationship as special. However, a generally ignored passage in § 320, Comment *b*, which imposed an affirmative duty on custodians to control third persons, observes that the custodial relationship is also applicable to schools and their students. Despite the Second Restatement's limited treatment of affirmative duties by schools, such a duty has enjoyed substantial acceptance among courts.

Id. § 40 cmt. *l*.

¹¹² See, e.g., *Middle Bucks*, 972 F.2d at 1376 (finding that no special relationship existed between the student and the school).

¹¹³ See *Davis*, *supra* note 41, at 1135 (expanding upon the argument for finding a special relationship between a school and student under the compulsory education argument). According to *Davis*, the most logical conclusion is that when a school maintains custody of a student, the school should be required to act reasonably and protect the student from peer abuse. *Id.* Furthermore, *Davis* suggests that if parents cannot be certain that their children will be watched in school, then the parents are failing to fulfill their legal and moral duties to supervise by sending the children to school each day. *Id.* In *Doe v. Taylor Independent School District*, the Fifth Circuit once elaborated upon this idea, stating that

[p]arents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily.

975 F.2d 137, 147 (5th Cir. 1992), *vacated*, 987 F.2d 213 (5th Cir. 1993), *aff'd in part, rev'd in part*, 15 F.3d 443 (5th Cir. 1994); see also *Dolan*, *supra* note 37, at 236 (arguing that compulsory school attendance should be recognized as a special relationship because similar to foster care, the state's affirmative act of requiring school attendance places a significant number of children in state approved schools). Students during the school day rely on the school to provide a reasonably safe environment, a basic need recognized in *DeShaney*. *Id.* at 237.

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prevents students from removing themselves from dangerous situations.¹¹⁴ Furthermore, the Restatement (Third) of Torts specifically lists “a school with its students” as an example of a type of special relationship.¹¹⁵

Nonetheless, the Eighth Circuit rejected a claim by a special education student who was sexually assaulted and raped by a fellow student because “[p]ublic school attendance does not render a child’s guardians unable to care for the child’s basic needs,” and no special relationship exists between the school and the student.¹¹⁶ In *Doe v. Hillsboro Independent School District*, the Fifth Circuit refused “to hold that compulsory attendance laws alone create a special relationship.”¹¹⁷ Among the many courts that have also considered the issue of whether a special relationship exists due to compulsory school attendance laws, nearly all have refused to find that such a relationship exists.¹¹⁸ Most courts conclude that attending an educational school program for seven hours a day is not similar to the restraints imposed by prisons and mental institutions, both of which currently are sufficient to establish the existence of a special relationship.¹¹⁹

¹¹⁴ See Dolan, *supra* note 37, at 236 (advocating for the position that schools have sufficient control over students under compulsory attendance laws for courts to find a special relationship between the student and school).

¹¹⁵ RESTATEMENT (THIRD) OF TORTS §§ 40(b)(5).

¹¹⁶ *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732–34 (8th Cir. 1993). In *Dorothy J.*, a mentally retarded student was sexually assaulted and raped by another special education student in the school shower. *Id.* at 731. The student brought a § 1983 claim, alleging that the school, as a state actor, failed to protect him from assault. *Id.*; see also Phillips, *supra* note 37, at 260 (explaining that guardians are the primary care providers for children and no affirmative duty is assumed by the school).

¹¹⁷ 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc). In *Hillsboro*, the Fifth Circuit denied the claim of a thirteen-year-old who was raped by a school janitor as it found no special relationship existed between the student and the school. *Id.*

¹¹⁸ See, e.g., *Dorothy J.*, 7 F.3d at 732–34 (noting the fact that a child must attend public school does not make a child’s guardian incapable of caring for the child’s fundamental needs); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1373 (3d Cir. 1992) (en banc) (holding that there was no custodial or special relationship created because the parents, not the state, remained the student’s primary caretaker).

¹¹⁹ *Hillsboro*, 113 F.3d at 1415; see also *Russell v. Fannin Cnty. Sch. Dist.*, 784 F. Supp. 1576, 1582 (N.D. Ga. 1992) *aff’d without opinion*, 981 F.2d 1263 (11th Cir. 1992) (“The key concept is the exercise of dominion or restraint by the state. The state must somehow significantly limit an individual’s freedom or impair his ability to act on his own before it can be constitutionally required to care and provide for that person.” (quoting *Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1035–36 (11th Cir. 1987))). *But see Pagano ex rel. Pagano v. Massapequa Pub. Schs.*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (recognizing a duty of protection based on the special relationship doctrine between elementary school students who are required to attend school and the school they attend). The *Pagano* court allowed the claim to go forward based on the special relationship doctrine that had been

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Alternatively, victims contend that under the *in loco parentis* doctrine, school officials have undertaken a parental duty to oversee students in school, therefore creating a special relationship.¹²⁰ The *in loco parentis* argument essentially is that the school has been given authority via state compulsory education laws, and therefore should be responsible during the school day while it maintains custody of the children.¹²¹ The argument requires courts to consider the particular circumstances to determine whether there was an affirmative duty, specifically focusing on the school's control and the child's dependency and vulnerability.¹²² Proponents argue that schools have functional custody because when a student is in school, his ability to protect himself is restricted, as is his parents' ability to intervene and protect him.¹²³ When a school acts in its *parens patriae* capacity in caring for students, the school's duty to the

previously recognized in cases of institutionalized persons, incarcerated individuals, and foster care situations. *Id.*

¹²⁰ See, e.g., *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 853 (6th Cir. 1999) (rejecting the plaintiff's assertion that a special relationship existed based on the school's *in loco parentis* status).

¹²¹ See Phillips, *supra* note 37, at 256 (explaining the *in loco parentis* argument).

¹²² See Dolan, *supra* note 37, at 234 (explaining that the factors that should be considered by the courts to determine if a special relationship exists include the following: how vulnerable and dependent the student is at the time, whether the state has compulsory attendance laws, how mature the student is at the time, and the amount of discretion the school has in controlling the students); Phillips, *supra* note 37, at 256 (discussing factors which weigh in favor of finding a special relationship under the theory of *in loco parentis*).

¹²³ See Dolan, *supra* note 37, at 234 (comparing institutionalized persons and incarcerated individuals with school children as all are unable to protect themselves or provide for their own basic needs). Public school children are in an environment at school where the state exercises some control over their liberty. *Id.* at 235–36; see also Grim, *supra* note 64, at 160 (finding irony in the Court's findings that a custodial relationship exists between mental patients and hospital officials, as well as between prisoners and prison officials, but not between students and school officials). A custodial relationship exists when individuals are held against their will such that the state interferes with the individuals' ability to protect themselves. *Id.* Students are in a similar situation due to compulsory school laws. *Id.*; see also Phillips, *supra* note 37, at 256 (noting that the primary argument for finding a special relationship under the *in loco parentis* theory is that schools maintain control over their students). Weddle reflects on the competing interests that result in the irony when he states that

[w]hile there is something disturbing about the fact that the state can compel children to attend school yet not incur a duty to protect them from their peers, the Court's approach actually makes a good deal of constitutional sense. . . .

On the other hand, such a formulation ignores the significant disability placed upon school children, . . . [as they] must remain in the school where the torment is carried out, and the parents can do nothing to shield [them] from torment.

Weddle, *Bullying in Schools*, *supra* note 53, at 666.

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students should increase because the school stands in the place of the parents and also acts as a part of the government.¹²⁴

Most courts determine that teachers have the authority to act in each child's best interest but have no duty to do so.¹²⁵ The reasoning for not finding a special relationship under *in loco parentis* is that the parents, not the State, remain the student's primary caretaker.¹²⁶ For example, in *D.R. v. Middle Bucks Area Vocational Technical School*, the Third Circuit held that school officials were not liable for the violent sexual assaults repeatedly inflicted upon a hearing-impaired student by her peers because her parents remained her primary caretaker; as such, no special relationship with the school existed under the *in loco parentis* theory.¹²⁷

b. DeShaney State-Created Danger Exception

A second exception to the *DeShaney* standard occurs where the government created or enhanced the risk of harm.¹²⁸ Several courts have recognized the state-created danger theory and established liability in cases where a state's own affirmative actions work to the plaintiff's detriment.¹²⁹ In *Maxwell ex rel. Maxwell v. School District of the City of*

¹²⁴ Lambert, *supra* note 40, at 567-68. Courts must begin to recognize that the special relationship doctrine should apply between disabled school children and the schools they attend. *Id.* at 568. If courts do not acknowledge the application of this doctrine, students with developmental delays and mental impairments essentially have no defense against the frequent harassment and abuse against them. *Id.*

¹²⁵ *E.g.*, *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371 (3d Cir. 1992) (en banc). The court noted that even though the student was required to attend classes and the school officials could exercise discipline over the student, "the school . . . did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs." *Id.* at 1372.

¹²⁶ *Id.* at 1373. In *Middle Bucks*, the high school student victim, who suffered from hearing problems and related communication problems, alleged that fellow students frequently forced her into the bathroom and physically and sexually abused her. *Id.* at 1366. Accordingly, the student brought a § 1983 claim, asserting that the school should have taken action to correct the situation as the teacher should have been in the classroom during the alleged incidents or should have heard them taking place. *Id.*

¹²⁷ *Id.* at 1373. The Third Circuit rejected the *in loco parentis* theory for liability, stating students are not sufficiently restricted from seeking help outside the school on a daily basis. *Id.* at 1372.

¹²⁸ *See, e.g.*, *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732-34 (8th Cir. 1993) (finding that the school did not enhance or create the danger); *Maxwell ex rel. Maxwell v. Sch. Dist.*, 53 F. Supp. 2d 787, 792 (E.D. Pa. 1999) ("If a state actor creates a danger which harms an individual or renders him or her more vulnerable to that danger, although the state actor does not actually harm the individual the state actor may be held to have violated the due process clause.").

¹²⁹ *See Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (holding that the plaintiff could maintain a constitutional claim by alleging that the police chief, a close personal friend of the man who killed his wife and her daughter, stopped the police officers from

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Philadelphia, a Pennsylvania district court accepted a student's § 1983 claim under the state-created danger theory of liability.¹³⁰ In *Maxwell*, two students attacked and raped a special education student while a substitute teacher, aware of the events that were transpiring, failed to intervene to stop the attackers.¹³¹ The court held the school district and teacher liable under the state-created danger test because the harm was foreseeable, the teacher acted in willful disregard of the victim's safety, and the school district and the teacher directly placed the victim in harm's way.¹³²

Conversely, in *Teague v. Texas City Independent School District*, the Fifth Circuit held that the state-created danger theory was inapplicable where a peer assaulted an eighteen-year-old Downs Syndrome student

enforcing a restraining order issued in response to the wife's complaints); *Wood v. Ostrander*, 879 F.2d 583, 596 (9th Cir. 1989) (holding the state liable for injuries caused by a rape when a trooper impounded a woman's car and left her to find her way home on foot). *But see Middle Bucks*, 972 F.2d at 1374 (holding that the school defendants did not create plaintiff's peril or increase the risk of harm to make the student more vulnerable to the assaults as sexual abuse from inadequate supervision was not foreseeable). Davis suggests that the court in *Middle Bucks* got it wrong. *See* Davis, *supra* note 41, at 1141. In 1989 when *Middle Bucks* was decided, educators might have been able to argue that sexual assault was not a foreseeable consequence of inadequate supervision. *Id.* Today, however, in light of the significant evidence and news regarding peer-on-peer abuse, it is difficult to assert that sexual abuse in the classroom is unforeseeable. *Id.*

¹³⁰ *Maxwell*, 53 F. Supp. 2d at 792-93. In *Maxwell*, the court noted that during the day in question, the victim was unable to exit the room because the defendants had locked the door to the classroom. *Id.* at 789. Furthermore, the substitute teacher charged with supervising the students sat idly while watching the events occur. *Id.*

¹³¹ *Id.* When the students became disruptive, the teacher explicitly stated to the students, "I don't care what you do as long as you do not bother me." *Id.*

¹³² *Id.* at 792-93. The *Maxwell* court followed the Third Circuit four-part test for the state-created danger basis for liability, as adopted in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1997). *Id.* at 792. Under this test, liability is found if:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) the state actor acted in willful disregard for the safety of the plaintiff;
- (3) there existed some relationship between the state and the plaintiff;
- [and] (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Id. (alteration in original) (quoting *Kneipp*, 95 F.3d at 1208). The *Maxwell* court first concluded that the rape was in fact a foreseeable and direct result of the substitute's actions, as she had knowledge that the two perpetrating students had assaulted a different female student earlier that morning. *Id.* In addition, the court found that, in light of the teacher's statement to the class that she did not care about their actions so long as she was left undisturbed, and because she sat idle while the assault occurred, the teacher acted with willful disregard for the victim's safety. *Id.* at 793. Next, the court determined that the victim was also a foreseeable plaintiff because the teacher knew that she had been attacked previously. *Id.* Finally, the court found that the state created the opportunity for the attack when the school locked the door to the classroom and the teacher explicitly told the students that she would neither watch nor control them. *Id.*

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in the bathroom between classes, as the school did not have actual knowledge of the risk and did not disregard any excessive risk.¹³³ This case demonstrated that, to some extent, the special relationship duty considers the age and maturity of the child involved.¹³⁴ While the lower court initially ruled that a special relationship existed between the school and a cognitively disabled student, it vacated this finding upon learning the victim functioned at the level of a thirteen-year-old.¹³⁵

Despite the holding in *Maxwell*, courts generally refuse to impose § 1983 liability upon schools as a result of the Supreme Court's decision in *DeShaney*.¹³⁶ Courts consistently determine that compulsory school education laws do not change parents' status as a child's primary caretaker and schools have no affirmative duty to protect their

¹³³ *Teague v. Tex. City Indep. Sch. Dist.*, 185 F. App'x 355, 357 (5th Cir. 2006), *aff'g* 386 F. Supp. 2d 893 (S.D. Tex. 2005), *vacating in part* 348 F. Supp. 2d 785 (S.D. Tex. 2004). In *Teague*, a special education student was sexually assaulted by another student in the school bathroom between classes. *See id.* at 357 (referring to facts delineated in *Teague*, 386 F. Supp. 2d at 894). The student's parent brought suit alleging that the school violated the student's constitutional rights and should be held liable under § 1983. *Id.* The court noted that in order "[t]o secure liability against the state for private harm under section 1983, plaintiffs must show that their claims fit within the narrow class of exceptions to the *DeShaney* rule," which includes either the special relationship exception or the state-created danger exception. *Id.* Initially, the district court in *Teague* denied the school's motion to dismiss because the pleadings left room for finding that a special relationship existed between the plaintiff and the school. 348 F. Supp. 2d at 798. Later, the district court granted summary judgment to the school finding no special relationship between the plaintiff and the school. *Teague*, 893 F. Supp. 2d at 896. Consideration of all the evidence, including uncontroverted evidence that the plaintiff functioned at the level of a thirteen-year old, still led the court to conclude that no special relationship existed. *Id.* On appeal, the Fifth Circuit affirmed. *Teague*, 185 F. App'x at 357.

¹³⁴ *Teague*, 893 F. Supp. 2d at 896 n.1 (citing *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997)).

¹³⁵ *Id.* at 896. The age of thirteen, whether functional or cognitive, was insufficient for the court to override precedent and find a special relationship existed, even in conjunction with compulsory attendance laws. *Id.*

¹³⁶ *See* *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (finding that no special relationship existed and rejecting the victim's § 1983 claim); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (rejecting the argument that a special relationship had been formed due to the compulsory attendance laws and rejecting a § 1983 claim); *see also* Oren, *supra* note 109, at 49 (noting that it is difficult to shock the judicial conscience); Weddle, *Bullying in Schools*, *supra* note 53, at 670 ("[T]he trend has been for courts to reject [the state-created danger exception] even in the face of seemingly egregious conduct on the part of school officials."); Bethel, *supra* note 111, at 189 (stating that, "according to the court, [a] state's requirement that children receive an education does not restrict students' freedom to the extent that they [or their parents] are unable to meet their own basic needs;" and as a result, there is no affirmative duty to protect students from harm).

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students.¹³⁷ As a result, victims have continued to search for other causes of action to hold schools liable, including Title IX or the IDEA.¹³⁸

3. Other Attempts at a Cause of Action: Title IX of the Educational Amendments Act of 1972 and the Individuals with Disabilities Education Act

Alternatively, victims of peer-inflicted injuries have attempted to use Title IX as an available remedy against schools.¹³⁹ Actions under Title IX, however, are automatically limited in scope to gender-based abuse or injuries, such as crimes involving a sexual element.¹⁴⁰ Title IX states 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.”¹⁴¹ Nevertheless, even if the victim can prove that the injury is gender-based, the threshold to establish liability is very difficult to meet.¹⁴² In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Supreme Court held that a school district could be liable for acts of sexual abuse and harassment by a student if: (1) the school had knowledge of the abuse or harassment; (2) the abuse or

¹³⁷ See *supra* note 136 (reiterating that schools have no duty to protect students).

¹³⁸ See *infra* Part II.B.3 (discussing plaintiffs’ claims under Title IX and the IDEA).

¹³⁹ 20 U.S.C. § 1681(a) (2006); see, e.g., *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (creating an exception where schools potentially can be held liable under Title IX); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008) (noting that if a school engages in egregious conduct that is severe, pervasive, and offensive, it can be held liable under Title IX); *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 854–55 (6th Cir. 1999) (contending that Title IX may support a claim for student-on-student harassment).

¹⁴⁰ See Paul M. Secunda, *At the Crossroads of Title IX and a New “IDEA”: Why Bullying Need Not Be “A Normal Part of Growing Up” for Special Education Children*, 12 DUKE J. GENDER L. & POL’Y 1, 3 (2005) (“[T]he Supreme Court . . . has yet to endorse the idea of a same-sex harassment cause of action for more common forms of bullying under Title IX . . .”); Susan Stuart, *Jack and Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243, 245 (2005) (explaining the complicated nature of bringing a Title IX claim and warning that “courts are loathe to hold schools liable for sexual harassment under Title IX under any circumstances”).

¹⁴¹ § 1681(a).

¹⁴² See Ferster, *supra* note 40, at 203 (“The deliberate indifference standard is criticized as establishing a barrier to relief from all but unconscionable action or inaction by school officials.”); see also Secunda, *supra* note 140, at 8–9 (clarifying that in order to establish actionable misconduct, the victim must establish “three elements: (1) that there was an ‘appropriate person’ with the ability to take corrective action; (2) who had actual knowledge of the harassment; and (3) who responded with deliberate indifference to that knowledge”) (citations omitted). This standard establishes difficult hurdles for victims to defeat in order to establish school liability. *Id.* at 9.

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harassment was severe, pervasive, and offensive; and (3) the school was deliberately indifferent to the victim's injuries.¹⁴³

Post-*Davis*, courts continually reject claims for peer-inflicted injuries brought under Title IX unless the school acted in a clearly indifferent manner.¹⁴⁴ For example, in *Soper ex rel. Soper v. Hoben*, the court rejected the special education student's Title IX claim based on the student-on-student sexual harassment that occurred on school grounds.¹⁴⁵ Similarly, in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, the Tenth Circuit dismissed a Title IX claim where a special needs student claimed that she was subject to numerous counts of sexual harassment and injury at the hands of her peers.¹⁴⁶ The court explained that the school had neither been deliberately indifferent nor acted "unreasonabl[y] in light of the known circumstances."¹⁴⁷ Thus, to prevail under Title IX, a victim

¹⁴³ *Davis*, 526 U.S. at 633. In *Davis*, the parent of a fifth grade student sued the school, pursuant to Title IX, alleging that her daughter repeatedly had been sexually harassed by a fellow student. *Id.* at 632. The student had reported each episode to her mother and to the teacher, and the teacher told the mother that the principal had been informed of the harassment. *Id.* at 633-34. Nonetheless, no action was taken against the alleged harasser and the behavior continued for several months until the student was charged with sexual battery for his actions. *Id.* at 634. The Court noted that a Title IX claim "will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633. Furthermore, the Court stated that a school could only be held liable if it "intentionally acted in clear violation of Title IX by remaining deliberately indifferent" to the harassment. *Id.* at 642.

¹⁴⁴ See *infra* notes 145-47 and accompanying text (providing examples of post-*Davis* courts rejecting students' claims).

¹⁴⁵ See *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 854-55 (6th Cir. 1999) (concluding that because the victim failed to prove both that the school had actual knowledge of the harassment and that the school was deliberately indifferent to the abuse, she did not have a viable Title IX claim); see also *supra* notes 1-19 and accompanying text (delineating the facts of *Soper*).

¹⁴⁶ *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1126 (10th Cir. 2008).

¹⁴⁷ *Rost*, 511 F.3d at 1121 (quoting *Davis*, 526 U.S. at 648). In *Rost*, the mother of a special needs student filed suit against the school under Title IX, alleging that the school had actual knowledge of the ongoing sexual harassment and was deliberately indifferent to the numerous reports of such activity. *Id.* at 1118. The student had been coerced into various sex acts with a number of her male peers, beginning as early as the seventh grade. *Id.* at 1117. The boys would threaten to show naked pictures of her at school and spread rumors about her promiscuous behavior. *Id.* The mother of the student claimed the school had "a custom of acquiescing to student-on-student sexual harassment and created a dangerous educational environment." *Id.* at 1118. Even though it was undisputed that the student specifically told the school about the sexual harassment in question, the court still held that, because the school had not been deliberately indifferent or acted "unreasonabl[y] in light of the known circumstances," it could not be liable. *Id.* at 1121. Specifically, the principal was not charged with such deliberate indifference because he claimed to have believed that these events were not taking place on school property, and thus he was under the impression that there was nothing he could do about it. *Id.* at 1121-22.

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must prove the school engaged in egregious conduct, acted indifferent, and the harassment was “severe, pervasive, and objectively offensive.”¹⁴⁸

Alternatively, disabled students who have been injured by peers have attempted to bring claims under the Individuals with Disabilities Education Act (“IDEA”).¹⁴⁹ The IDEA was enacted with the goal of providing all children with disabilities a “free appropriate public education” (“FAPE”) in the least restrictive environment.¹⁵⁰ If a school violates a child’s right to such an education, a parent can request a formal due process hearing and seek relief in the form of compensatory education or tuition reimbursement.¹⁵¹ Only when the parent has

¹⁴⁸ *Davis*, 526 U.S. at 650; *see Secunda, supra* note 140, at 13–14 (reiterating this exacting standard).

¹⁴⁹ *See Conn, supra* note 40, at 792 (noting that some believed that the IDEA could prove “to be an ancillary or alternative path to holding American school districts accountable for protecting special students from harms and abuses at school”); *Secunda, supra* note 140, at 16 (explaining that when a special education student is bullied or injured by a fellow student, the victim could potentially bring an IDEA-based § 1983 claim); *Ferster, supra* note 40, at 211 (suggesting that victims can attempt to avoid the exacting standard of deliberate indifference by instead asserting a violation of the IDEA and a deprivation of any meaningful educational benefit).

¹⁵⁰ 20 U.S.C. § 1401(9) (2006). As guaranteed by the statute,

The term “free appropriate public education” means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id.; *see also* *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (noting that the Education of the Handicapped Act, which was the precursor the IDEA, “represent[ed] an ambitious federal effort to promote the education of handicapped children”); *Mawdsley, supra* note 67, at 361 (explaining that the IDEA also contains a Least Restrictive Environment (“LRE”) requirement that mandates that students with disabilities be educated with regular education students “[t]o the maximum extent appropriate” (quoting 20 U.S.C. § 1412(a)(5)(A))). As a result of this requirement, many students with disabilities will be educated in regular classrooms with regular education students, often leaving disabled students at risk for harmful interactions with their regular education counterparts. *Id.* at 361–62.

¹⁵¹ *See* 20 U.S.C. § 1400(b)(6) (discussing the opportunity for a person claiming an alleged violation of the IDEA to bring a complaint). The Court in *Rowley* also discussed the remedies available based on the statute when it states that

[c]omplaints brought by parents or guardians must be resolved at “an impartial due process hearing,” and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. Thereafter, “[a]ny party aggrieved by the findings and decision” of the . . . hearing has “the right to bring a civil action.”

458 U.S. at 182 (citation omitted) (quoting 20 U.S.C. §§ 1415(b)(2), (c), (e)(2)).

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exhausted all of these administrative remedies can they seek judicial review in state or federal court.¹⁵² Moreover, in *Board of Education of Hendrick Hudson Central School District v. Rowley ex rel. Rowley*, the Supreme Court held that a student must show that the school's actions denied her *any* meaningful benefit from her individualized educational program ("IEP")¹⁵³ in order to assert a denial of a FAPE.¹⁵⁴ Still, it has

¹⁵² 20 U.S.C. § 1400(b)(6); see also Conn, *supra* note 40, at 797 (discussing cases demonstrating the importance of exhausting such remedies prior to bringing suit and noting that "[f]ailure to exhaust administrative remedies can be fatal to violation of IDEA claims").

¹⁵³ 458 U.S. at 203-04. The United States Code defines the term "individualized education program" as follows:

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance . . .

....

(II) a statement of measurable annual goals, including academic and functional goals . . .

....

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured

(IV) a statement of the special education and related services and supplementary aids and services . . . to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child . . .

....

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title . . .

....

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter.

20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(VIII).

¹⁵⁴ In *Rowley*, a student with hearing impairments brought a claim against the school district, asserting that the school denied her a FAPE by failing to provide her with a sign language interpreter. 458 U.S. at 184. The school had prepared an IEP for the deaf student,

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been difficult to establish that a student with disabilities has been deprived of any real benefit of an IEP due to an injury inflicted by a peer; as a result, plaintiffs often fail to meet the requirements for a successful claim under the IDEA.¹⁵⁵

As demonstrated, many students with disabilities suffer from peer-inflicted injuries at school.¹⁵⁶ As such, these victims attempt to use a variety of legal statutes and causes of action to hold these schools and school officials liable.¹⁵⁷ Yet, while some victims have been successful in developing these different sources of law, many victims continue to be left without a remedy.¹⁵⁸

suggesting that she be placed in a regular classroom, use a hearing aid, receive assistance from a tutor for the deaf an hour a day, and receive assistance from a speech therapist three hours a week. *Id.* Rowley's parents, however, wanted her to be provided with a sign language interpreter for her classes instead of the assistance proposed by the school. *Id.* The Court concluded that to maintain a claim of a denial of a FAPE, the victim must assert a denial of any meaningful benefit under the student's IEP. *Id.* at 203-04. The Court noted that in passing the IDEA, Congress only desired "to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child." *Id.* at 189. Because at the time of enactment of the IDEA, "one million [out of nearly eight million disabled children in the United States] were 'excluded entirely from the public school system' and more than half were receiving an inappropriate education." *Id.* Congress simply intended to provide access to public education to these children. *Id.* at 192. As such, the Court emphasized that Congress did not impose "any greater substantive . . . standard than would be necessary to make such access meaningful." *Id.*

¹⁵⁵ See, e.g., *R.P. ex rel. K.P. v. Springdale Sch. Dist.*, No. 06-5014, 2007 WL 552117, at *4 (W.D. Ark. Feb. 21, 2007) (holding that despite a school's repeated failure to combat constant harassment of a disabled student by his non-disabled peers, the school was not liable because the victim's parents had "failed to exhaust their administrative remedies"). In *R.P.*, the victim was a mentally impaired student who was born with a congenital heart disease. *Id.* at *1. Due to his mental impairments, the student was subjected to various violent assaults by his non-disabled classmates, including being confined in a dog cage, force-fed dog feces, and sexually assaulted. *Id.* As a result of these assaults, the victim's parents alerted school officials, who assured them that their son would be safe at school. *Id.* The victim's therapist also contacted the school in order to establish a plan to help him return to school. *Id.* Despite the school's alleged efforts to ensure the student's safety, the harassment and ridicule continued. *Id.* Nonetheless, the court ultimately dismissed the complaint because the parents settled with the school prior to the scheduled hearings despite having begun the administrative process by filing two due process complaints. *Id.* at *4. The court concluded that "settling the claims prior to the hearing does not, 'rise to the level of an exhaustion of administrative remedies.'" *Id.* at *4 (quoting *S.A.S. v. Hibbing Pub. Sch.*, No. Civ. 04-3204JRT/RL, 2005 WL 1593011, at *3 (D. Minn. July 1, 2005)).

¹⁵⁶ See *supra* Part II.A (emphasizing that students with disabilities are disproportionately subject to victimization by peers).

¹⁵⁷ See *supra* Part II.B (explaining the traditional legal remedies utilized).

¹⁵⁸ See *supra* Part II.B (reviewing the relevant cases in which special education victims brought suit against schools for injuries inflicted by peers).

III. ANALYSIS

Despite the fact that many children with disabilities suffer from peer-inflicted injuries while under the supervision of school officials, most schools are able to escape liability from suit.¹⁵⁹ This Part explains the strengths and weaknesses of the causes of action that victims attempt to utilize to hold schools accountable and how most of these options are doomed to fail.¹⁶⁰ In addition, this Part critiques the analyses of several courts that considered the issue of peer-inflicted injuries.¹⁶¹ First, Part III.A critiques the theory of negligent supervision under state tort law, describes its successes and failures, but ultimately concludes that it is the most likely avenue for success.¹⁶² Next, Part III.B assesses the lack of effectiveness of causes of action brought under § 1983 of the Civil Rights Act of 1964 and policy reasons for and against finding a special relationship between a school and its students.¹⁶³ Finally, Part III.C evaluates courts' treatment of actions brought pursuant to Title IX of the Educational Amendments Act of 1972 and under the IDEA.¹⁶⁴

A. *The Costs and Benefits of Causes of Action Under Tort Theory of Negligent Supervision*

While theories of negligent supervision have statistically been proven to be one of the most effective means of legal remedy, there are still many obstacles that a victim must overcome before successfully

¹⁵⁹ See Sacks & Salem, *supra* note 64, at 151 (noting that the law is inadequate both in terms of deterring peer-to-peer harassment and providing the victims any sort of redress); Secunda, *supra* note 140, at 3 (“[L]egal remedies for victims of bullying continue to be woefully inadequate.”); Weddle, *Bullying in Schools*, *supra* note 53, at 643 (“The nation needs a change in its current legal theories.”). Many victims are unable to hold schools accountable under theories of negligent supervision, causes of action under Title IX, or constitutional theories, and that even anti-bullying statutes fail to protect students from such harm. *Id.* at 658-59.

¹⁶⁰ See *infra* Part III (discussing the strengths and weakness of the traditional legal remedies available to students who are victims of peer-inflicted injuries, and how, in many cases, schools and school officials are able to completely escape liability).

¹⁶¹ See *infra* Part III (commenting on the reasoning of several courts' decisions regarding peer-inflicted injuries).

¹⁶² See *infra* Part III.A (discussing the state tort theory of negligent supervision and critiquing the hurdles that a victim must overcome in order to hold a school liable under this theory).

¹⁶³ See *infra* Part III.B (critiquing the flaws inherent in courts' reasoning on § 1983 claims).

¹⁶⁴ See *infra* Part III.C (discussing claims under Title IX and the IDEA and the difficulties of successfully bringing a claim under these statutes).

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holding a school liable.¹⁶⁵ These obstacles include the issue of states granting schools and school officials immunity from suit, the difficulty in proving that the school's negligence was the proximate cause of the injury, and the difficulty in establishing that the injury was in fact foreseeable.¹⁶⁶

1. Sovereign Immunity Issues

First, some courts may be forced to dismiss tort claims against school officials, who are state actors, based on principles of sovereign immunity stemming from the Eleventh Amendment.¹⁶⁷ Some states opt for immunity from claims brought by victims for injuries inflicted by their peers under the rationale of protecting the state from paying out huge awards in damages and avoiding the opening of the floodgates of litigation.¹⁶⁸ These state interests in sovereign immunity are legitimate.¹⁶⁹ Funds available to public schools are limited to begin with and should not be drained.¹⁷⁰ Still, it is a well-settled theory of torts "that accident losses should be placed upon the party who is in the best position to prevent the injury."¹⁷¹ In this case, schools are the best party able to prevent the injury through adequate supervision.¹⁷² Providing

¹⁶⁵ See DeMitchell & Carroll, *supra* note 63, at 10-11 n.34 (noting that negligent supervision claims consisted of forty-three percent of negligence suits against schools that resulted in awards).

¹⁶⁶ See *infra* Part III.A (discussing the obstacles many victims of peer-inflicted injury face in their pursuit to hold schools liable).

¹⁶⁷ See *supra* note 64 (discussing the Eleventh Amendment and sovereign immunity issues).

¹⁶⁸ Weddle, *Bullying in Schools*, *supra* note 53, at 683; see also, e.g., Yanero *ex rel.* Yanero v. Davis, 65 S.W.3d 510, 527 (Ky. 2001) (holding that the local school board was entitled to governmental immunity); Carr v. Salem City Schs., 48 Va. Cir. 84, 84 (Va. Cir. Ct. 1999) (holding that the school board was entitled to sovereign immunity).

¹⁶⁹ Weddle, *Bullying in Schools*, *supra* note 53, at 683.

¹⁷⁰ See Phillips, *supra* note 37, at 258 ("Public perception, whether accurate or not, is that expanding school liability will increase the cost of schools."); Editorial, *supra* note 39 (reporting that in 2009 nearly thirty-two percent of Americans perceive that lack of funding is the biggest problem facing public schools).

¹⁷¹ Vandall, *supra* note 57, at 697-98. Vandall discusses the area of products liability and contends that statutes of repose, which bar suit by a victim after a certain number of years, ignore the policy of prevention by placing the loss on a victim who is often unable to prevent the injury. *Id.* at 698. This is analogous to issues of sovereign immunity in schools, which also ignores the policy of prevention by placing liability on disabled students for injuries inflicted by peers. Like victims injured by defective products, disabled students are often unable to prevent injuries.

¹⁷² See Bodensteiner, *supra* note 39, at 6 (asserting that teachers are among those best-positioned to prevent harassment); Weddle, *Bullying in Schools*, *supra* note 53, at 686 (suggesting that courts and legislatures are uncomfortable placing additional responsibilities on overburdened and underpaid teachers). Yet, "children are being

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schools with unlimited liability from suit ignores the policy of prevention by oftentimes placing the loss on the victim, a disabled student, who is unable to prevent the injury.¹⁷³ When a state chooses to insulate its schools and school officials from liability, presumably guilty parties can escape liability by meeting a minimal burden of proof.¹⁷⁴

Proponents for state immunity also cite the need to protect school officials from the fear of constant lawsuits.¹⁷⁵ While it is logical to shield these officials from suit for being unable to control unpredictable and unforeseeable injuries, these injuries are not unforeseeable—nearly all students with disabilities are subject to harassment by their peers.¹⁷⁶ Providing immunity for schools and school officials merely “solves one problem at the expense of another and protects adults at the expense of the most vulnerable children.”¹⁷⁷ Furthermore, providing immunity does nothing to encourage schools to adequately address issues of safety concerns, especially those surrounding children with disabilities.¹⁷⁸ At the very least, the threat of tort liability encourages schools to take these issues more seriously and to be more careful at the outset.¹⁷⁹

brutalized on a daily basis,” and arguably it must stop. *Id.* at 687. Weddle also asserts that schools and teachers are in the best position to prevent such injuries and should be held liable for failure to intervene. *Id.*

¹⁷³ See Weddle, *Bullying in Schools*, *supra* note 53, at 686–87 (explaining the school is best able to prevent the injury).

¹⁷⁴ See, e.g., *B.M.H. v. Sch. Bd.*, 833 F. Supp. 560, 573–74 (E.D. Va. 1993) (holding that the Virginia doctrine of sovereign immunity barred any action against teachers for simple negligence, and that the victim was only entitled to damages if the jury could conclude that the teacher’s actions constituted gross negligence); see also Sacks & Salem, *supra* note 64, at 187 (“States that follow variations of this doctrine have made it difficult for victims to sue districts or employees for damages resulting from the negligent supervision of student bullies or the negligent enforcement of student conduct rules.”).

¹⁷⁵ Weddle, *Bullying in Schools*, *supra* note 53, at 683.

¹⁷⁶ See *Campaign Information*, *supra* note 48 (concluding that eight out of ten disabled students are subject to bullying and abuse because of their disabilities); see also *supra* Part II.A (discussing how students with disabilities are easy targets for peer-to-peer abuse).

¹⁷⁷ Weddle, *Bullying in Schools*, *supra* note 53, at 687. Weddle continues:

Characterizing the result in that way is in some ways unfair and in some ways exactly accurate. It is not the protecting of teachers and administrators that is deplorable; the alternative could cripple education. It is the failing to protect the children that cannot continue if the nation is to take seriously its obligations to them.

Id.

¹⁷⁸ See *id.* at 683 (suggesting that principles of state immunity do nothing to influence schools or officials to actually prevent the harms in the first place, which really should be the number one priority in this situation).

¹⁷⁹ See Sacks & Salem, *supra* note 64, at 190 (explaining that because the doctrine of sovereign immunity is likely to shield schools from liability for peer-inflicted injuries, advocates must come up with creative solutions, including helping schools design preventative policies).

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2. The Proximate Cause Issue

Another area where courts are hesitant to rule in favor of a victim is the proximate cause element.¹⁸⁰ Courts are reluctant to hold school districts liable for a student's injuries when the injuries are inflicted by a peer or third party because they typically find that such injuries are a superseding act that severs the proximate cause.¹⁸¹ It is important that a school be free from liability for unforeseeable actions of a third party.¹⁸² Nevertheless, simply because the injury is inflicted by a third party does not signify that the school was not culpable in its actions.¹⁸³ When a school has been negligent and failed to supervise disabled students—students who studies show typically need protection from peers—any resulting injury can also be attributed to the school.¹⁸⁴

3. The Foreseeability Issue

Courts are also reluctant to hold that an injury inflicted upon a disabled student by a peer was foreseeable.¹⁸⁵ Generally, all a school district must do is claim that it lacked actual or constructive notice of

¹⁸⁰ See *infra* notes 181–84 (discussing proximate cause in cases of peer-inflicted injuries).

¹⁸¹ Sacks & Salem, *supra* note 64, at 188–89; Weddle, *Bullying in Schools*, *supra* note 53, at 690.

¹⁸² See Weddle, *Bullying in Schools*, *supra* note 53, at 687–88 (noting the difficulty in anticipating actions by third parties).

¹⁸³ See *id.* at 690 (“[W]hile a school may have been derelict in its duty to supervise the children in its care, the legal cause of the plaintiff’s injury will generally be attributed completely or in large measure to the student or students who actually attacked the plaintiff.”).

¹⁸⁴ See Mawdsley, *supra* note 67 at 359 (explaining that if a disabled student has an IEP, the school has specific knowledge of that student’s needs and behaviors). This additional information could make it easier for victims to argue that the school possessed actual knowledge of the student’s condition and limitations, and thus Mawdsley questions whether the school should have taken greater steps to ensure that student’s safety. *Id.* at 364, 386.

¹⁸⁵ Weddle discusses this reality when he states that

[w]hen victims attempt to hold schools accountable for failing to protect them from peer-on-peer abuse, courts routinely hold that, under theories of negligent supervision, the bullying and associated attacks and injuries were simply unforeseeable to the school officials who could have intervened, even though education research has repeatedly demonstrated that such abuse is occurring in virtually every school setting.

Weddle, *Bullying in Schools*, *supra* note 53, at 643 (citation omitted); see also, e.g., *Marshall v. Cortland Enlarged City Sch. Dist.*, 697 N.Y.S.2d 395, 396 (N.Y. App. Div. 1999) (holding that the murder of a special education student on school grounds was not reasonably foreseeable).

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such harm and they are free from liability.¹⁸⁶ It is clear, however, that injuries to students with disabilities on school grounds are not only foreseeable but are in fact obvious.¹⁸⁷ Studies show that nearly all students with disabilities are subject to harassment by their peers.¹⁸⁸ Additionally, any special education teacher can attest that instructing special education students is difficult, requiring teachers to be constantly vigilant to ensure that they adequately supervise these students in order to provide a safe learning environment.¹⁸⁹ The reality is that disabled students are “special” and have unique relationships with their teachers and schools because they are wholly dependent on attentive and meticulous aid.¹⁹⁰ The safety of disabled students depends in large part on schools placing them in a safe environment with adequate supervision; therefore, it is reasonable to find injuries to disabled students foreseeable when supervision is lacking.¹⁹¹ Courts’ rigid adherence to this idea that such harm is not foreseeable often leads to decisions that appear to defy common sense.¹⁹² But when the law takes

¹⁸⁶ See Weddle, *Brutality and Blindness*, *supra* note 64, at 387 (“[C]ourts usually will not find [the school liable] unless school officials were aware of a specific threat and did nothing to prevent injury or school officials were simply absent altogether from an area where supervision was required.”).

¹⁸⁷ See Earhart, *supra* note 71, at 29 (noting that several school districts and state legislatures have responded with policies and legislation that acknowledge that “not only is bullying a foreseeable problem, it is so prevalent and inevitable that district-wide policies and state-wide legislation are needed to address it”). Earhart also questions why, in light of all of these policies and legislation, courts still continue to cite lack of foreseeability as a justification in ruling in favor of schools. *Id.*; see also Carlson, Flannery, & Kral, *supra* note 48 (concluding that disabled students are bullied significantly more than children in regular education programs); Mawdsley, *supra* note 67, at 359 (reiterating that schools have knowledge of a student’s vulnerabilities if such information is listed in the student’s IEP); Weddle, *Brutality and Blindness*, *supra* note 64, at 643 (explaining that the educational community knows that such abuse is taking place on school grounds).

¹⁸⁸ *Campaign Information*, *supra* note 48; see also *supra* Part II.A (discussing how students with disabilities are easy targets for peer-inflicted injuries).

¹⁸⁹ Smith Telephone Interview, *supra* note 49; see also Mawdsley, *supra* note 67, at 361 (explaining that the difficulty of supervising disabled students is compounded by the IDEA’s LRE requirement that a disabled student be educated, “[t]o the maximum extent appropriate,” with regular education students) (alteration in original).

¹⁹⁰ Lambert, *supra* note 40, at 569.

¹⁹¹ See *id.* (comparing a disabled student with a preschooler, as both lack skills and knowledge to protect themselves and need placement in a safe environment where they will be closely supervised). “As the age of the student (either chronological or developmental) decreases, the [school’s] duty to protect” should increase. *Id.* at 571.

¹⁹² See, e.g., *Marshall v. Cortland Enlarged City Sch. Dist.*, 697 N.Y.S.2d 395, 396 (N.Y. 1999) (finding the school not liable under the theory of negligent supervision for the death of a special education student that occurred during lunch); *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987) (holding that the victim did not have a viable claim of negligence against the school); see also Weddle, *Bullying in Schools*, *supra* note 53, at 643

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into account the unique situation of special education students and issues of peer-inflicted injury, it gives victims a real chance to seek some sort of remedy.¹⁹³

B. *A Critique of the Courts' Refusal to Recognize Causes of Action Under § 1983 of the Civil Rights Act of 1964*

1. The Search for a Special Relationship

As a result of *DeShaney*, most courts, citing a lack of special relationship between a school and a student, have refused to recognize a cause of action under § 1983 for any injuries or harms inflicted upon a child by a fellow student.¹⁹⁴ There are three commonly cited policy reasons in support of the courts' rejection of a special relationship between a disabled student and the school.¹⁹⁵ First, refusing to find a special relationship allows legislative bodies to decide whether liability should be imposed.¹⁹⁶ The state should have a choice as to whether it desires to create liability; the decision should not be forced on them by a court decision.¹⁹⁷ Because the state created the educational system to satisfy the needs of the community, it should therefore also decide what level of risk is appropriate in public schools.¹⁹⁸ Second, creating liability through finding a special relationship would help relatively few individuals while also opening the door to unnecessary suits in the

(noting that victims often fail in attempts to hold schools accountable for acts of negligence that lead to injury).

¹⁹³ See, e.g., *Jennifer C. v. L.A. Unified Sch. Dist.*, 86 Cal. Rptr. 3d 274, 278 (Cal. Ct. App. 2008) (holding the school liable, as students with special needs are uniquely vulnerable to threats by their peers); *M.W. v. Pan. Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d 673, 685-86 (Cal. Ct. App. 2003) (holding the school liable under negligent supervision, as it is reasonably foreseeable that another student would harm a special education student).

¹⁹⁴ See, e.g., *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732-34 (8th Cir. 1993) (concluding that the victim's § 1983 claim was not viable); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (holding that the plaintiff's § 1983 claim failed); see also Oren, *supra* note 109, at 49 (noting that victims rarely meet the exacting *DeShaney* standard, emphasizing the gross ineffectiveness of the state-created danger exception to the standard); Weddle, *Bullying in Schools*, *supra* note 53, at 663 (noting that victims bringing a § 1983 claim face a "tough road in demonstrating that a constitutional violation by the school flows from a tort committed by a fellow student . . . [and that] most cannot clear the substantial doctrinal hurdles courts have placed in the path of those seeking to hold state actors liable for injuries").

¹⁹⁵ See Phillips, *supra* note 37, at 262-63 (explaining the underlying policy reasons against a special relationship).

¹⁹⁶ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989); Phillips, *supra* note 37, at 262.

¹⁹⁷ Phillips, *supra* note 37, at 262; see also *DeShaney*, 489 U.S. at 203.

¹⁹⁸ Phillips, *supra* note 37, at 262.

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already overcrowded court system.¹⁹⁹ Finally, substantial damage awards under § 1983 take money out of the education system and drain the already limited amount of funds available for public education in the state.²⁰⁰

Nevertheless, “fears that recognizing [a special relationship] will cause excessive litigation, unwarranted awards, and rising insurance premiums” are unfounded.²⁰¹ Concluding that a special relationship exists would only help the victim prove that the school official was acting “under color of law.”²⁰² The victim must still prove causation.²⁰³ Even if such fears were legitimate, however, it would be more harmful to society to allow disabled students to be subjected to continued rape, molestation, and severe abuse in school than to hold a school that failed to adequately supervise liable for a disabled student’s injuries.²⁰⁴ Additionally, a school’s failure to recognize the student’s injuries can compound the emotional impact for the disabled student.²⁰⁵ Legal remedies should be available to victims in instances where the school fails to protect its disabled students from harm.²⁰⁶

Furthermore, many courts continually reject the special relationship doctrine on the premise that schools do not completely restrict the freedom of their students and that students will eventually have the opportunity to seek some sort of help outside of the schoolhouse gates.²⁰⁷

¹⁹⁹ *Id.* Recognizing a § 1983 claim may only help a few victims because the threshold of proof is very high. *Id.* Furthermore, as § 1983 allows for an award of attorneys’ fees pursuant to § 1988, it gives lawyers an incentive to bring more § 1983 claims. *Id.*

²⁰⁰ *Id.*

²⁰¹ Davis, *supra* note 41, at 1162 (arguing in the context of sexual harassment claims against public schools for discrimination based on gender); *see also* Phillips, *supra* note 37, at 258 (“[I]n contrast to public perception, creating a special relationship will not produce a myriad of large civil awards against the schools.”).

²⁰² Phillips, *supra* note 37, at 258.

²⁰³ *Id.*

²⁰⁴ *Cf.* Davis, *supra* note 41, at 1163 (making the same argument regarding the issue of sexual harassment in schools).

²⁰⁵ *See* Bodensteiner, *supra* note 39, at 4 (explaining the educational and emotional impact harassment can have on students); Davis, *supra* note 41, at 1163 (reiterating the devastating effects of harassment, particularly when the school fails to acknowledge that the student has been injured).

²⁰⁶ *See* Lambert, *supra* note 40, at 571 (stating that most commentators, unlike the majority of courts to consider the issue, favor placing a constitutional duty on schools and school officials); *see also infra* Part IV (proposing that courts deem injuries inflicted by peers on disabled students as foreseeable so that these victims have a remedy against these abuses).

²⁰⁷ *See, e.g.,* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732–34 (8th Cir. 1993) (noting the fact that a child must attend public school does not make a child’s guardian incapable of caring for the child’s fundamental needs); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (holding that there was no

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Still, when a victim is in the school's custody, her freedom to seek help from abuse is completely restricted.²⁰⁸ It is also difficult to establish that there is no way she could have protected herself without affirmative action by the school.²⁰⁹

Most importantly, critics of the special relationship doctrine ignore the unique reality faced by disabled students who, unlike their regular education counterparts, may be restricted in their ability to obtain help due to limitations imposed by their disabilities.²¹⁰ Students with disabilities may lack the basic understanding and communication skills of a normal child, which in turn can prevent a student from obtaining help, even once she returns home.²¹¹ For example, the student may not understand that the injury inflicted is wrong.²¹² Also, even if the disabled child knows that the injury is wrong, she may be unable to successfully communicate it to an adult.²¹³ Because of this unique situation, the safety of students with disabilities depends in large part on schools placing them in a safe environment and protecting them from third-party harm.²¹⁴

Furthermore, the theory that no special relationship exists between a student and a school essentially assumes a child is left without

custodial or special relationship created because the parents, not the state, remained the student's primary caretaker).

²⁰⁸ See Weddle, *Bullying in Schools*, *supra* note 53, at 666 (reiterating that a student is unable to leave school during school hours and thus is restricted from seeking help).

²⁰⁹ See *id.* at 664 (explaining the weakness of the custodial relationship approach). Weddle explains that

[t]he Achilles heel of the custodial relationship approach is that the school must have so limited the victim's freedom to seek help that he could not protect himself from his attacker without the affirmative intervention of the school[, and that] the victim must show that he was so cut off from outside aid that there was no one in the victim's life that he could turn to for aid other than school officials themselves.

Id.

²¹⁰ See Lambert, *supra* note 40, at 569 (comparing a disabled student with a preschooler, as both lack skills and knowledge to protect themselves and need placement in a safe environment where they will be closely supervised).

²¹¹ See *id.* at 570 ("Children with developmental delays often lack the communication skills necessary to avail themselves of parental assistance.").

²¹² See *id.* at 570-71 (emphasizing that parents of special needs students rely on schools to keep their children safe and to be their "eyes and ears" to alert them of wrongdoing in the school).

²¹³ See *id.* at 571 (reiterating that a student with disabilities may lack communication skills).

²¹⁴ See *id.* at 569 (asserting that injuries to developmentally delayed or disabled students at school are foreseeable given their unique position and that these students are often completely dependent on their educators).

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protection while in school.²¹⁵ Yet, this reasoning is questionable as a result of recent Supreme Court decisions such as *Vernonia School District 47J v. Acton*.²¹⁶ In *Vernonia*, the Court emphasized the nature of a school's custodial power and its need to closely supervise students in order to justify a school's drug testing policy.²¹⁷ The Court specifically stated that, for many purposes, school authorities act with *in loco parentis* authority and, as a result, have a "duty to 'inculcate the habits and manners of civility.'"²¹⁸ Likewise, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the Supreme Court again relied on the substantial need to protect students from the harms of childhood drug use in order to justify a drug testing policy.²¹⁹ It is difficult to reconcile the differences between the Supreme Court's holdings in school drug testing cases—which are supported by the need to protect children from drug use—with the Supreme Court's holding in *DeShaney* and its application in cases of peer-inflicted injury—where courts refuse to find that schools have a duty to protect students.²²⁰

Finally, the courts' refusal to find a special relationship is difficult to reconcile with a proposed final draft of the Restatement (Third) of Torts asserting that a special relationship exists between a school and its students, giving rise to a duty of reasonable care.²²¹ Therefore, the

²¹⁵ See Weddle, *Bullying in Schools*, *supra* note 53, at 666 (noting that if the school decides not to act, the child is essentially left without a remedy and must remain in school where he is subject to torment and the parents can do nothing about it). *But see* Mawdsley, *supra* note 67, at 388 (explaining that, with the presence of an IEP, a disabled student does have some limited protection available while at school). However, this level of protection could be limited to the standard of care the school delineated in an IEP. *Id.*

²¹⁶ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (upholding a school drug testing policy). While considering the Fourth Amendment issue involved, the *Vernonia* Court noted that it could not "disregard the schools' custodial and tutelary responsibility for children." *Id.* at 656. As such, it appears that the Supreme Court is more inclined to protect students from drug use than it is to protect students from physical abuse of others. *See id.*; *see also supra* note 102 (comparing a state's duty under *DeShaney* with drug testing jurisprudence).

²¹⁷ *Vernonia*, 515 U.S. at 655.

²¹⁸ *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)). Nonetheless, the Court appears to limit application of the terms "habits" and "manners of civility" to the context of drugs and speech and would not extend it to the context of preventing students from injuring fellow students. *See id.*

²¹⁹ 536 U.S. 822, 825 (2002).

²²⁰ Compare *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (holding that the state had no constitutional duty to protect), with *Vernonia*, 515 U.S. at 655 (emphasizing the custodial powers of a school and the requirement of supervision that is necessary in order to create a proper educational environment).

²²¹ RESTATEMENT (THIRD) OF TORTS §§ 40(a)-(b)(5) (Proposed Final Draft No. 1 2005). The Restatement suggests that a school is in a special relationship with its students and owes its students a duty of reasonable care. *See supra* notes 66, 68 (discussing the Restatement's finding of a special relationship).

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assumption by the courts that no special relationship exists between students and school officials is inconsistent with certain legal precedent, secondary authorities, and research.²²² On a related note, it also leads to many victims being left without an effective cause of action.²²³

2. The Difficulty of Establishing a State-Created Danger

Victims additionally attempt to argue that the school created or enhanced the risk of harm, thus falling within the purview of the state-created danger exception.²²⁴ Most courts deny claims under this theory and refuse to hold schools accountable unless the school or school official participated in some sort of affirmative act that increased or enhanced the danger to the student; simple inaction or failure to act is generally insufficient.²²⁵ Many harsh decisions have resulted, drawing the criticism of commentators who suggest that these decisions do nothing to encourage a school to implement positive changes.²²⁶ Rather, under the present standard, a school that is aware of abuse yet does not take any active role in stopping or preventing it is not liable so long as

²²² See *supra* Part II.B.2 (reiterating the legal precedent, secondary authorities, and research that address § 1983 causes of action).

²²³ See, e.g., *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (rejecting the premise that the school could be held liable under § 1983). Although the victim alleged that the teacher could have been able to prevent such acts of abuse from taking place, the court rejected that the teacher had any duty to do so. *Id.* at 1371-72. Disabled children and their parents are in a difficult situation as Weddle depicts:

While there is something disturbing about the fact that the state can compel children to attend school yet not incur a duty to protect them from their peers, the Court's approach actually makes a good deal of constitutional sense. . . .

On the other hand, such a formulation ignores the significant disability placed upon school children . . . [as they] must remain in the school where the torment is carried out, and the parents can do nothing to shield [them] from the torment.

Weddle, *Bullying in Schools*, *supra* note 53, at 666.

²²⁴ See, e.g., *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 734 (8th Cir. 1993) (arguing that the state created or enhanced the danger).

²²⁵ See *Teague v. Tex. City Indep. Sch. Dist.*, 185 F. App'x 355, 357 (5th Cir. 2006) (asserting that there was no state-created danger present in the case as the school did not have actual knowledge of attacks and did not disregard such knowledge at the excessive risk to the victim); see also Weddle, *Bullying in Schools*, *supra* note 53, at 667 (noting that it is difficult to hold schools accountable, as "courts have been unwilling to view the inaction as a danger-enhancing affirmative act absent deliberate indifference to the plaintiff's plight").

²²⁶ See Weddle, *Bullying in Schools*, *supra* note 53, at 667 (commenting that victims are rarely successful in persuading the courts that "the conduct of school officials in the face of severe bullying has been so shocking that the state could be characterized as having created or enhanced the danger").

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such actions do not shock the conscience of the court.²²⁷ Even in cases where students were left unsupervised, courts have refused to hold the school accountable for negligence under the state-created danger theory, reducing the theory to simply “that one comment toward the end of the *DeShaney* opinion.”²²⁸

As a result of this reasoning, schools are free to continue acting deliberately indifferent to a disabled student’s plight without fear of repercussions under § 1983.²²⁹ A victim bringing a § 1983 claim will find it very difficult to establish a special relationship or prove that the state created the danger.²³⁰ Despite the substantial authority suggesting that schools do maintain a special relationship with its students, courts are still reluctant to hold schools responsible and generally will refuse a victim’s § 1983 claim.²³¹

C. *The Costs and Benefits of Actions Under Title IX of the Educational Amendments Act of 1972 and the Individuals with Disabilities Education Act*

Initially, the most obvious bar to a vast number of claims under Title IX is the requirement that there be some type of sexual element to the injury.²³² This is because Title IX applies only to discrimination based on sex.²³³ Therefore, Title IX is likely an ineffective remedy in many cases from the outset because the harassment tends not to be based on gender, but rather on disability.²³⁴ Still, the fact that a Title IX cause of action is

²²⁷ See Oren, *supra* note 109, at 49 (suggesting that it is difficult to shock the judicial conscience); Weddle, *Bullying in Schools*, *supra* note 53, at 670 (“[T]he trend has been for courts to reject [the state-created danger exception] even in the face of seemingly egregious conduct on the part of school officials.”). *But see* Maxwell *ex rel.* Maxwell v. Sch. Dist., 53 F. Supp. 2d 787, 791 (E.D. Pa. 1999) (holding the school liable under the theory of state-created danger even though most courts reject this theory).

²²⁸ *Dorothy J.*, 7 F.3d at 734.

²²⁹ See Weddle, *Bullying in Schools*, *supra* note 53, at 667 (noting the lack of success in bringing a § 1983 claim).

²³⁰ See *supra* Part II.B.2 (reviewing the current § 1983 jurisprudence).

²³¹ See *supra* Part II.B.2.a (analyzing the special relationship exception to the *DeShaney* rule).

²³² See *supra* text accompanying note 141 (quoting Title IX codified at 20 U.S.C. § 1681(a) (2006)).

²³³ *But see* Secunda, *supra* note 140, at 5 (noting that although most courts have not evaluated the complex legal issues surrounding students with disabilities who are subject to harassment, “when another student bullies a special education child based on that child’s appearance, behavior, or failure to live up to stereotyped notions of gender, it is necessary to consider the intersection between Title IX and . . . the Individuals with Disabilities in Education Act (IDEA).”).

²³⁴ See Conn, *supra* note 40, at 791–92 (noting that the harassment must contain a sexual element or gender-basis to fall under Title IX).

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limited to gender harassment makes a good deal of sense.²³⁵ Title IX was not intended to serve as a remedy for injuries inflicted on disabled students by peers, although many victims have tried to use it as such.²³⁶

Another barrier to Title IX claims is the deliberate indifference standard articulated in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.²³⁷ The deliberate indifference standard is favorable for school districts because it focuses on specific instances of known harassment rather than anticipating future acts of third parties.²³⁸ It is based upon the premise that recipients of federal funds should only be held liable for their own actions, not the actions of third parties.²³⁹ Still, because Title IX does not place an affirmative duty on behalf of the school to anticipate harassment or injuries inflicted by peers, it does not force schools or school officials to prevent such behavior in the first place.²⁴⁰ To avoid being charged with deliberate indifference, it is not even necessary for a school to stop the harassment—all a school must do is simply investigate the alleged incident and it can defeat the victim's claim.²⁴¹

Similarly, some believed that the IDEA would provide students with disabilities a way of remedying harms inflicted by peers in school.²⁴² Nevertheless, in *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Supreme Court held that a school is only liable for violation of the IDEA when actions by school officials rise to such a level so as to deny *any* meaningful benefit of education.²⁴³ This standard is justified by the fact that the main purpose of the IDEA was only to provide access to educational opportunities for students with disabilities; nothing more, and nothing less.²⁴⁴ Given the time period in which

²³⁵ See generally Stuart, *supra* note 140, at 245–47 (providing an overview of Title IX and related jurisprudence).

²³⁶ See, e.g., Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1124 (10th Cir. 2008) (denying a victim's Title IX claim).

²³⁷ 526 U.S. 629, 650 (1999); see also Ferster, *supra* note 40, at 195 (reiterating that the success rate for Title IX claims is very low because of the deliberate indifference standard).

²³⁸ Weddle, *Bullying in Schools*, *supra* note 53, at 661.

²³⁹ *Davis*, 526 U.S. at 640–41.

²⁴⁰ See Weddle, *Bullying in Schools*, *supra* note 53, at 660 (explaining that the *Davis* deliberate indifference standard offers little motivation for schools or school officials to be proactive in preventing any harassment or injuries to students).

²⁴¹ See, e.g., Rost, 511 F.3d at 1121 (concluding that the principal's investigation was sufficient to defeat the claim of deliberate indifference).

²⁴² See generally Ferster, *supra* note 40, at 212–17 (outlining the FAPE standard under the IDEA).

²⁴³ 458 U.S. 176, 206–07 (1982).

²⁴⁴ Ferster, *supra* note 40, at 207; see also 20 U.S.C. § 1400(c)(3) (2006) (“[T]his chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.”).

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Congress passed the IDEA and the Supreme Court decided *Rowley*, the goal of simply providing educational access to disabled students made sense.²⁴⁵ With only half of the over eight million children with disabilities receiving appropriate educational services and over one million disabled children being excluded from education altogether, simply getting children with disabilities in schools was an accomplishment at the time.²⁴⁶ Now, however, the framework under which the Court decided *Rowley* is outdated and “inconsistent with the modern view of special education.”²⁴⁷ As a result of the low standard that courts require a school to meet, causes of action under the IDEA frequently fail.²⁴⁸

Causes of action under the IDEA, however, may be an appealing standard for the courts to apply because of the remedies involved, despite the fact that several claims under the IDEA have failed.²⁴⁹ Causes of action under § 1983 or Title IX have the potential to result in large monetary damage awards, whereas remedies under the IDEA are limited to tuition reimbursement or compensatory education.²⁵⁰ As such, allowing for such claims to proceed could remedy situations in which plaintiffs do not need or desire money damages.²⁵¹ Still, given the pain and humiliation disabled victims often face in cases of peer-inflicted abuse, this remedy is less than desirable for the victim.²⁵²

Therefore, as demonstrated in this Part, there are some strengths and many weaknesses in the courts’ analyses of claims brought by disabled students for harms inflicted by peers.²⁵³ Bringing claims under the previously discussed causes of action leaves many victims without relief and many schools without any sense of accountability.²⁵⁴ Refusing to

²⁴⁵ *Rowley*, 458 U.S. at 189; Ferster, *supra* note 40, at 213.

²⁴⁶ *Rowley*, 458 U.S. at 189; Ferster, *supra* note 40, at 213.

²⁴⁷ Ferster, *supra* note 40, at 213.

²⁴⁸ See, e.g., R.P. *ex rel.* K.P. v. Springdale Sch. Dist., No. 06-5014, 2007 WL 552117, at *4 (W.D. Ark. Feb. 21, 2007) (failing to hold a school liable for a violation of the IDEA).

²⁴⁹ See Ferster, *supra* note 40, at 228 (suggesting that the IDEA is a superior remedy, as “students with legitimate claims can find relief as IDEA intended, by attending school free from harassment and gaining a meaningful benefit from their education”).

²⁵⁰ See *id.* at 227 (asserting that because the stakes are lower for the schools involved than in claims pursuant to § 1983 or Title IX, there is “no need to apply a strict deliberate indifference standard to protect schools from devastating liability”).

²⁵¹ See *id.* at 225 (acknowledging that the current trend among courts is to deny claims under the IDEA).

²⁵² *Id.*

²⁵³ See *supra* Part III (analyzing the flaws in bringing claims under various causes of action).

²⁵⁴ See *supra* Part III (discussing the strengths and weakness of the traditional legal remedies available to students who are victims of peer-inflicted injuries, and how, in many cases, schools and school officials are able to completely escape liability).

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find schools liable for failure to supervise disabled students and prevent foreseeable peer-inflicted injuries is unjustified, yet this is typically the result due to our current legal framework.²⁵⁵ It is apparent, however, that the cause of action with the greatest likelihood of success is the theory of negligent supervision.²⁵⁶ Still, even the theory of negligent supervision in its current state has its flaws.²⁵⁷

IV. CONTRIBUTION

Children with disabilities are suffering from injuries inflicted by their peers while they are in the custody of and under the supervision of school officials.²⁵⁸ It is all too often the case that school officials who know or have reason to know of abuse either turn a blind eye to the violence or react in a manner that encourages such behavior.²⁵⁹ Schools and school officials who allow awful acts of abuse to occur are generally able to escape liability from suit, leaving the student victims without any remedy.²⁶⁰ Therefore, the current legal theories remain inadequate and are in need of change.²⁶¹ The very welfare of our nation's students depends on it.²⁶² Schools and school officials must be held accountable for failing to adequately supervise their students. Knowing that there will be consequences for allowing acts of peer-inflicted abuse to occur will provide schools with the necessary incentive to remedy the situation.²⁶³ Without such an incentive, there is little likelihood that any school would be motivated to change.

There is hope evidenced by the small number of victims who have recently prevailed under theories of negligent supervision in courts that

²⁵⁵ See *supra* Part III (commenting on the reasoning of several courts' decisions regarding peer-inflicted injuries).

²⁵⁶ See *supra* Part III.A (discussing the theory of negligent supervision).

²⁵⁷ See *supra* Part III.A (critiquing the theory of negligent supervision and noting its flaws).

²⁵⁸ See Weddle, *Brutality & Blindness*, *supra* note 64, at 395 ("[C]ourts should state very plainly and directly that school officials already know or should know that bullying is prevalent in every [sic] virtually every school . . ."); see also *supra* Part II.A (commenting on how children with disabilities are disproportionately subjected to abuse by their peers while in school).

²⁵⁹ See *supra* Part II.B (exploring various cases in which schools and school officials have failed to effectively intervene and prevent abuse inflicted by peers upon students with disabilities).

²⁶⁰ See *supra* Part III (analyzing the current legal theories utilized by victims).

²⁶¹ See *supra* Part III (establishing the general ineffectiveness of the current legal theories).

²⁶² Dolan, *supra* note 37, at 216.

²⁶³ See Weddle, *Brutality & Blindness*, *supra* note 64, at 391 ("The legal requirements governing school officials' duty to supervise their students need to be realigned to reflect these realities about bullying, its prevalence, its effects, and its prevention.").

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recognize that harm inflicted upon special education students by their peers is in fact foreseeable.²⁶⁴ Thus, this Part proposes that one method of updating the way in which our legal system addresses the issue of disabled students and peer-inflicted abuse is to build upon a theory of negligent supervision, specifically taking into account the unique situation of disabled students.²⁶⁵ First, Part IV.A proposes a model state statute that recognizes that special education students stand in a special relationship with schools and deems harms to special needs students by their peers foreseeable.²⁶⁶ Accordingly, courts should take notice of, and begin to implement, the proposed statute, which utilizes the approach adopted by the Restatement (Third) of Torts and the California Court of Appeals.²⁶⁷ In addition, Part IV.B recommends a model jury instruction for courts to use in establishing a presumption of a school's duty to supervise students with disabilities.²⁶⁸ By applying both the proposed statute and proposed jury instruction regarding the presumption, our legal system will take into account the unique situation of students with disabilities and can hold schools accountable for negligence.

A. *Adopting the Restatement (Third) of Torts and California Approach to Theories of Negligent Supervision and Children with Disabilities*

First, courts throughout the nation must acknowledge reality and take notice of the fact that students with disabilities are often the targets of injuries and victimization by their fellow students.²⁶⁹ With studies demonstrating that eight out of ten students with disabilities are subject to abuse or harassment, a court's conclusion that such acts of abuse are unforeseeable defies logic.²⁷⁰ Students are entrusted to a school's care and peer-inflicted injuries occur while the victim is under a school's watch. States should adopt the subsequent model statute, which applies the reasoning of the Restatement (Third) of Torts and California

²⁶⁴ See *supra* Part III.A.3 (examining cases discussing the foreseeability of harm to students with disabilities).

²⁶⁵ See *infra* Part IV (proposing that courts should view the infliction of injury on special education students by their peers as foreseeable).

²⁶⁶ See *infra* Part IV.A (outlining a model state statute establishing the presumption of foreseeability)

²⁶⁷ See *infra* Part IV.A (suggesting that courts adopt a method of reasoning similar to the California Court of Appeals and congruent with the Restatement (Third) of Torts regarding foreseeability of peer-inflicted injuries upon children with disabilities).

²⁶⁸ See *infra* Part IV.B (presenting a model jury instruction that explains the presumption of foreseeability defined in the model state statute).

²⁶⁹ See *supra* Part II.A (commenting on how children with disabilities are disproportionately subject to abuse by their peers while in school).

²⁷⁰ See *supra* Part II.A (exploring studies and statistics confirming that harm to students with disabilities is unfortunately very common in schools).

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appellate courts and mandates that schools have a special relationship with disabled students; therefore, injuries to special education students are foreseeable.

Proposed State Statute: Special Relationship Between School and Disabled Student

Any public educational institution in this state stands in a special relationship with all special needs students who attend the institution. A special needs child is one who suffers from a physical or mental impairment that substantially limits one or more major life activities including but not limited to walking, talking, sleeping, eating, and working. The child must be diagnosed by a doctor or mental health professional and the school must have record of the disability.

A school with knowledge that the child is disabled, particularly where the school provides specialized education or instruction, stands in a special relationship with the student and has a heightened duty to protect the student from all foreseeable injuries. It is foreseeable that a disabled student may be harmed by himself or peers without adequate supervision. Schools should provide every special needs classroom with a classroom aide and should restrict the ratio of disabled students to adults accordingly. If a disabled student is injured at school, it is presumed that the school is liable for breach of its special duty of care.

Exclusion:

A school will not be liable to a disabled student under the special relationship standard where the school has provided adequate supervision and taken all reasonably necessary precautions. The following factors, taken alone or together, may demonstrate that the school should not be liable. The following factors are not exclusive:

- 1) The school restricted the number of special needs students per teacher, per classroom;
- 2) The special needs classroom was equipped with an aide;

- 3) A school maintained a policy mandating that an adult must always accompany a special needs student on school grounds; and
- 4) Teachers were provided sensitivity training, specifically targeting peer-on-peer abuse.

Commentary

The proposed state statute establishes that students with disabilities fall within the special relationship standard of care set forth in *DeShaney*.²⁷¹ This statute mandates that the special relationship between schools and disabled students creates a foreseeable risk of harm; therefore, schools will be presumed liable for peer-on-peer abuse that occurs at school. By adopting this statute, states will clarify to schools and their officials the duties they owe to disabled students. The proposed statute's reasoning and rule are supported by the Restatement (Third) of Torts, cases arising out of the California Court of Appeals, and many additional authorities.²⁷²

A school must fully appreciate "the dangers posed by failing to adequately supervise its students, particularly special education students."²⁷³ "When a school district instructs special education [students], it takes on the unique responsibilities associated with this instruction and the special needs of these children."²⁷⁴ Thus, the school must understand that there is a foreseeability of harm to these particular students. As such, schools have a duty to disabled students based on "the foreseeability of harm to special education students, the well-settled statutory duty of school districts to take all reasonable steps to protect them . . . and the paramount policy concern of providing our children with safe learning environments."²⁷⁵ A disabled student cannot reasonably be expected to care for himself at all times; instead, the disabled student relies on the school for protection.²⁷⁶

The statute proposed above provides schools with "an incentive to drive compliance with the duty to provide adequate supervision."²⁷⁷ School districts that are faced with the prospect of liability for failure to

²⁷¹ See *supra* notes 109-11 and accompanying text (discussing the *DeShaney* special relationship standard).

²⁷² See *supra* notes 68, 80-84 and accompanying text (supporting the proposition that schools have a duty to protect disabled students from harm).

²⁷³ *M.W. v. Pan. Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d 673, 675 (Cal. Ct. App. 2003).

²⁷⁴ *Id.* at 682.

²⁷⁵ *Id.* at 683.

²⁷⁶ *Jennifer C. v. L.A. Unified Sch. Dist.*, 86 Cal. Rptr. 3d 274, 278 (Cal. Ct. App. 2008).

²⁷⁷ *Id.* at 282.

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supervise their students will take more precautionary measures designed to limit their liability, thus increasing the level of safety for students. The proposed statute does not seek to hold all schools liable or to allow frivolous lawsuits. Therefore, the exception provides model factors that schools can use to defeat the presumption of liability. States should adopt the proposed statute because (1) it benefits disabled students by providing them with a remedy for foreseeable injuries that occur at school; (2) it establishes a heightened duty that schools owe to disabled students; and (3) it provides schools with an incentive to take precautionary steps to fulfill their heightened duty. Furthermore, the proposed statute allows schools to escape liability if the school has taken steps to provide adequate supervision. Given its fairness to and benefit for all parties, states should adopt the proposed statute.

B. Children with Disabilities and Peer-Inflicted Injury: A Presumption of Duty and Foreseeability

Alternatively, courts should recognize a presumption that schools have a duty to supervise students with disabilities and that it is reasonably foreseeable for a student with a disability to be injured by a peer, absent such supervision. Such a presumption would ensure that schools effectively deal with the issue of children with disabilities and peer-inflicted injuries, even if states refuse to adopt the aforementioned proposed statute. Furthermore, presumptions of duty and foreseeability will provide victims a way to hold schools accountable because it closes the primary door through which school officials so often escape. No longer could a school defend against liability by asserting that it lacked actual or constructive notice of the harm.²⁷⁸ As a result, victims would have an adequate remedy. A model presumption that could be incorporated into jury instructions follows:

Presumption of Duty and Foreseeability for Injuries Inflicted upon Students with Disabilities

1. Defendant, a school, has a duty to adequately supervise students with disabilities in its charge. This duty requires a degree of reasonable care applicable to circumstances; in the case of a student with a disability, the circumstances require a higher degree of care due to the heightened responsibilities associated with educating a student with disabilities.

²⁷⁸ See *supra* Part III.A.3 (discussing how the requirement of foreseeability acts as a bar to valid claims of negligent supervision).

2. Defendant, a school, as a custodian of a student with disabilities, is also charged with the knowledge that students with disabilities face a general risk of harm from their peers, and, as such, any resulting peer-inflicted injuries will be deemed foreseeable. This presumption may be rebutted with evidence that the act of a third party was a truly intervening cause and no degree of supervision could reasonably have prevented the injury.

3. A failure to fulfill any such duty is negligence and denial of foreseeability does not serve as a defense.

Commentary

This presumption assumes that schools know what research has already established—students in general are at risk of peer-inflicted injuries and students with disabilities are disproportionately subject to such injuries.²⁷⁹ This presumption would finally hold the schools accountable for failure to adequately supervise students.²⁸⁰ The proposed presumption could be used under a negligent supervision claim or a § 1983 claim. If courts apply both this proposed presumption and states enact the proposed state statute for negligent supervision, legal theory will finally reflect the reality of the situation and provide victims with much needed relief. It is essential that courts understand that, given the circumstances, schools have an enhanced duty when dealing with these students and injuries to special education students are foreseeable.

V. CONCLUSION

Under the current legal structure, Renee Soper, the victim from Part I of this Note, was unable to hold her school liable for its negligence.²⁸¹

²⁷⁹ See Weddle, *Bullying in Schools*, *supra* note 53, at 701 (“Research has demonstrated that bullying exists in nearly every school setting and that the most potent indicator of its prevalence and strength is the leadership of the administration and staff of the school.”).

²⁸⁰ See *id.* (“It is therefore neither fair nor rational to exempt school officials from a duty to prevent bullying, and it is neither truthful nor logical to ignore the causal connection between the failure to supervise children and the likelihood they will bully and injure each other.”); see also *supra* Part II.A (noting that students with disabilities are disproportionately subject to peer-inflicted injuries).

²⁸¹ See *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 848 (6th Cir. 1999); see also *supra* Part I (introducing Renee and her story).

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Even though the school had prior notice of Renee's encounter with Brandon, and even though Ms. Soper had repeatedly informed the school of the potential for an attack, the school refused to remedy the situation and an assault occurred. Renee was left without a remedy and the school was left free of liability.

Fortunately, if states utilize both of the proposed solutions set forth in this Note, victims like Renee will stand a chance of holding schools liable for negligence. If the state legislatures take into account the unique situation of special education students in schools and understand that harm to special education students is in fact foreseeable, victims like Renee will have a stronger likelihood of prevailing and recovering something for the unbearable injury they suffered. Furthermore, if courts begin to recognize a presumption of foreseeability of harm to children with disabilities in the context of peer-inflicted injuries, victims like Renee will no longer bear such a heavy burden of proof. Schools will be unable to rest on the argument that the injury was not foreseeable, but rather will have a duty to protect students with disabilities.

Schools and school officials must be held accountable for failing to adequately supervise their students. By imposing liability on schools for allowing acts of peer-inflicted abuse to occur on campus, the courts will provide schools with the necessary incentive to remedy the situation. Under the new proposed framework, schools will be put on notice that they could in fact be held liable for failing to adequately supervise special education students in their charge. Consequently, they hopefully will increase the level of safety and protection they provide for their students.

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