
VILLANOVA LAW REVIEW

VOLUME 55

2010

NUMBER 2

Articles

COLLEGE BULLIES—PRECURSORS TO CAMPUS VIOLENCE: WHAT SHOULD UNIVERSITIES AND COLLEGE ADMINISTRATORS KNOW ABOUT THE LAW?

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I. INTRODUCTION

DURING the past decade, concerned parents, academics, school administrators, and policymakers placed kindergarten through twelfth grade (K-12) bullying on the social and legislative agenda. Through their efforts, society is beginning to understand the true nature of bullying and the price that is paid by allowing it to remain unchecked. Unfortunately, the same level of interest and attention has not been devoted to post-adolescent bullying, despite the continuing propensities of grade school and high school bullies to torment others in college and later in the workplace. The tragedies at Virginia Tech and other college campuses periodically remind us of the issues involved, but a sustained dialogue has yet to occur.

Perhaps one explanation for the low levels of concern and understanding of bullying at the college level is that historically colleges have been largely immune from liability for their students' actions. This protection has given colleges and universities little motivation to address the problem. Title IX signaled a shift towards holding schools liable for peer-on-peer conduct—albeit gender-based—but very high standards make it a near-illusory remedy. As society becomes more aware of and concerned with post-adolescent bullying, colleges should anticipate a shift, whether tort-based or otherwise, towards a greater risk of liability for peer-on-peer conduct at the college level. Accordingly, colleges should begin implementing appropriate practices and policies to prevent bullying-related harm to students and avoid the risk of liability.

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Confusion currently exists among college and university administrators about the legal liability risks their schools face due to bullying conduct. Stringent substantive requirements requiring actual knowledge and deliberate indifference by school officials make Title IX and Section 1983 suits fruitless remedies to most injuries resulting from peer-on-peer conduct. Although some factual situations may be so egregious as to meet these high standards, much of the bullying present on college campuses or the institutions' responses will not rise to the level required by courts to find liability. State civil rights statutes offer some hope for plaintiffs because they may have lower standards of proof compared to the federal harassment statutes, but a gap remains between state and federal harassment statutes. Statutes that address bullying in schools fail to fill the gap because they address only K-12 bullying and offer no private cause of action for victims of bullying. Without a private cause of action to provide victims with a remedy in court, these anti-bullying statutes remain virtually ineffective. In addition, each of the legal actions discussed above only addresses bullying based on a protected class but fails to address the broader and more prolific bullying of those not belonging to a protected class. Consequently, until more comprehensive bullying laws are passed, plaintiffs must rely on other tort or contract claims. Even those claims might not help, however, because courts have traditionally defined duty, foreseeability, and causation in the student-university context in a manner that insulates colleges from liability. A slight ray of hope for plaintiffs resides in recent decisions, which indicate courts' growing willingness to reconceptualize the student-university relationship and hold universities and colleges liable for student safety.

Regardless of legal liability, colleges should not ignore bullying on campus because colleges' mission of providing a positive educational environment includes developing attitudes of tolerance in their students and promoting public health. Campus responses must be multifaceted to include intervention, prevention, and enforcement components. An effective prevention component must be campus-wide, both systems-oriented (restructuring the social environment of the college) and individual-oriented (addressing issues with individual students), and not time-limited.¹ Studies show that a comprehensive approach to prevention can change student behavior and attitudes.² When designing such approaches, and

1. See U.S. Dep't of Educ., Exploring the Nature and Prevention of Bullying: Day 4—The Need For a Comprehensive Approach, http://www.ed.gov/admins/lead/safety/training/bullying/bullying_pg26.html.

2. See JAMES A. FOX ET AL., BULLYING PREVENTION IS CRIME PREVENTION (2003), available at <http://www.fightcrime.org/sites/default/files/reports/BullyingReport.pdf>; Doug Toft, *Owlweus Bullying Prevention Program: One of the Most Effective Tools to Prevent Bullying*, HAZELDEN VOICE, Winter 2007, available at <http://www.hazelden.org/web/public/vc07olweus.page> ("Six studies of the Olweus program involving over 40,000 students indicate 30%-70% reductions in reports of bullying. These occurred along with significant reductions in vandalism, fighting, theft, and truancy.").

especially when drafting any type of anti-bullying policies, colleges must pay careful attention to First Amendment constraints.

As a precursor to formulating a comprehensive response, colleges must better understand the nature of bullying on campus. Part II of this Article furthers this goal by defining bullying and exploring its prevalence at all levels of education and the workforce, as well as detailing its detrimental effects on the bully, the victim, and bystanders. Next, Part III of this Article reviews and analyzes the possible legal theories plaintiffs might use to recover from a university or college after being bullied. Even though substantial barriers currently exist to finding a college or university liable for bullying conduct, this Article urges colleges and universities to shield their students from bullying on campus to avoid the detrimental impact that bullying has on campus culture and to minimize incidents of campus violence. In Part IV, this Article concludes by exploring how colleges and universities can best protect themselves from legal liability and maintain a safe and respectful learning and living environment for their students.

II. BULLYING AND ITS IMPACT ON COLLEGE CAMPUSES

A. *What Is Bullying?*

A common problem with predicting when an institution of higher education may be liable for bullying, as well as in enacting and implementing school anti-bullying policies, is assigning an appropriate definition to bullying. Opponents of any type of legal response to bullying often cite concerns of regulating protected speech or harmless conduct such as teasing or flirting. Such insults or banter, however, should not be confused with or used as an excuse to condone or ignore true acts of bullying, which need to be viewed as acts of school violence. To avoid ensnaring protected conduct and free speech, legislation, regulation, and policy must be drafted carefully. Although multiple and varying definitions of bullying exist, most definitions incorporate these four characteristics:

1. Bullying involves intentional, and largely unprovoked, efforts to harm another.
2. Bullying can be physical or verbal and direct or indirect in nature.
3. Bullying involves repeated negative actions by one or more persons against another.
4. Bullying, unlike teasing, centers upon an imbalance of physical or psychological power.³

3. See U.S. Dep't of Educ., Exploring the Nature and Prevention of Bullying: Day 1—Bullying Myths and Facts, http://www.ed.gov/admins/lead/safety/training/bullying/bullying_pg3.html (last visited May 17, 2010). Commentators have defined bullying as “the willful, conscious desire to hurt or threaten or frighten someone else.” See MARGARET JOHNSTONE ET AL., ACTION AGAINST BULLYING (1991). Bullying is repeated oppression, psychological or physical, of a less power-

Bullying also becomes difficult to discuss because it can incorporate many behaviors that span a continuum of severity, including physical bullying (punching, poking, strangling, hair pulling, beating, biting, inappropriate touching, and excessive tickling), emotional bullying (rejecting, extorting, defaming, humiliating, blackmailing, manipulating friends, isolating, ostracizing, and peer pressure), sexual bullying (exhibitionism, voyeurism, sexual propositioning, sexual harassment, and abuse involving physical contact and assault), and verbal bullying (hurtful name-calling, teasing, and gossip).⁴ Also, individuals or groups can perpetrate bullying. A college's proper response and potential liability will necessarily depend on the extent and nature of the bullying, as these behaviors differ in their level of severity, with some even being illegal. Nonetheless, ignoring any of the behaviors can be dangerous because the less serious actions may easily escalate to more severe behavior.

B. *Bullying Is a Real and Serious Problem*

Bullying is a pervasive problem in schools. Studies in the United States estimate that 30% of youths (5.7 million) were a bully, a target of bullying, or both.⁵ According to the National Institute of Child Health and Human Development's (NICHD) 1998 survey of youths in grades six through ten, 3.2 million students reported that they were victims of bullying and 3.7 million students reported that they bullied others.⁶ Other countries have similar survey results, with some countries reporting even higher rates of bullying incidents.⁷ Some studies indicate bullying usually "begins in elementary school, peaks in middle school, and diminishes but does not disappear in high school."⁸

Although bullying continues into high school and college, much of this behavior goes unreported. One likely explanation may be that bullying continues across all ages, but the type of bullying changes from physical bullying to sexual or emotional bullying, which is more difficult to

ful person by a more powerful person or group of persons. See David P. Farrington, *Understanding and Preventing Bullying*, 17 CRIME & JUST. 381 (1993). For many more definitions, see U.S. Dep't of Educ., Exploring the Nature and Prevention of Bullying: Other Definitions of Bullying, http://www.ed.gov/admins/lead/safety/training/bullying/bullying_pg4.html#definitions (last visited May 17, 2010). Contrast these definitions to teasing when students have equal physical or psychological power and usually are friends who remain friends. See Dr. Dorothy Espelage, *Bullying: An Old Problem Gets New Attention*, TEX. CLASSROOM TCHRS. ASS'N, <http://www.tcta.org/edmatters/trouble/bullying.htm> (last visited May 17, 2010).

4. See U.S. Dep't of Educ., *supra* note 3.

5. See National Youth Violence Prevention Resource Center, *Bullying Facts and Statistics*, <http://www.safeyouth.org/scripts/faq/bullying.asp> (last visited Nov. 8, 2009).

6. U.S. Dep't of Educ., *supra* note 3.

7. See FOX ET AL., *supra* note 2; U.S. Dep't of Educ., *supra* note 3.

8. See, e.g., *Bullying*, ISSUE BRIEF (Maine Legislative Youth Advisory Council, Augusta, Me.), Oct. 3, 2006, at 2, available at <http://maine.gov/legis/opla/lyacbullybrief.pdf>.

detect and is often more harmful and disruptive to learning.⁹ Another likely factor contributing to underreporting of bullying in high school and college is the transition from children living under their parents' care and supervision to living "on their own." Likewise, once in the work force, victims of bullying have their employer or supervisor to turn to in addressing such incidents and may do so if work performance is compromised as a result of bullying. A college student entering into a new phase of independence is less likely to know who to turn to with regard to personal confrontations with a peer student.

Hardly an adolescent issue, bullying continues to be a major problem in the workplace.¹⁰ Studies find that bullying occurs frequently in the workplace and is among the fastest growing complaints of American workers.¹¹ A 2007 U.S. Workplace Bullying Survey found workplace bullying to be an epidemic, with fifty-four million people—amounting to 37% of American workers—who have reported being the victims of bullying.¹² Workplace bullying, like bullying in educational settings, results in victims reporting a decrease in productivity due to efforts to avoid the bully or worrying about the situation.¹³ A substantial number of bullied workers, 46%, consider changing jobs and 12% actually change jobs as a result of being bullied.¹⁴

At least one court has taken notice of this type of bullying and considered expert testimony about workplace bullying at trial. In a recent case, the Indiana Supreme Court upheld a \$325,000 verdict for assault brought by an operating room perfusionist (a person who operates the heart/lung machine during open heart surgeries) against a cardiovascular surgeon, who the perfusionist claimed behaved as a workplace bully.¹⁵ The bullying that gave rise to the assault claim occurred when the surgeon, angry over the perfusionist's complaints to hospital administration regarding the surgeon's treatment of other perfusionists, "aggressively and rapidly advanced on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins, and scream[ed] and sw[ore] at him."¹⁶ The surgeon argued that the jury's award on the assault claim was unfairly influenced by

9. See U.S. Dep't of Educ., *supra* note 3.

10. See Mogens Arervold, *Bullying at Work: A Discussion of Definitions and Prevalence, Based on an Empirical Study*, 48 SCANDANAVIAN J. PSYCHOL. 161 (2007); R.A. Baron & J. H. Neuman, *Workplace Aggression—The Iceberg Beneath the Tip of Workplace Violence: Evidence on Its Forms, Frequency and Targets*, 21 PUB. ADMIN. Q. 446 (1998). For more articles on this subject, see New York Healthy Workplace Advocates, www.nyhwa.org/4.html (last visited May 17, 2010).

11. See Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 30 (1999).

12. See WORKPLACE BULLYING INST. & ZOGBY INT'L, U.S. WORKPLACE BULLYING SURVEY (2007), available at <http://www.workplacebullying.org/res/N-N-Zogby2007.pdf>.

13. See Ehrenreich, *supra* note 11, at n.238.

14. See *id.*

15. See Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008).

16. *Id.* at 794.

expert testimony that labeled the surgeon's behavior "workplace bullying."¹⁷ Among other alleged errors, the surgeon complained that the trial court should have instructed the jury that the phrase "workplace bully" was irrelevant to the perfusionist's claims and that workplace bullying is not against the law.¹⁸ The Indiana Supreme Court disagreed, stating that workplace bullying could be considered a form of intentional infliction of emotional distress and, therefore, the trial court properly admitted the expert testimony concerning workplace bullying.¹⁹

Although bullying is a well-documented problem in K-12 schools and in the workforce, relatively little research exists concerning bullying in postsecondary settings. Anecdotally, a growing concern among college and graduate school professors is the perceived increase in student "incivility, insubordination, and intimidation."²⁰ Students not only perform physically violent acts, such as the recent mass murders at colleges, but also engage in verbal abuse directed towards professors and classmates.²¹ The Internet provides a readily available venue for students to bully, and several articles have been written recently on the phenomenon of cyberbullying.²² Law enforcement officials have even advised some colleges to adopt policies and devote resources to this problem.²³

Confirming educators' growing concern about the problem of bullying, two recent studies specific to college-age students indicate that bullying is not limited to younger age groups. The first study surveyed 1,025 undergraduate students.²⁴ Of that group, 33.4% reported witnessing a student bully another student in college once or twice.²⁵ An additional

17. See *id.* at 795-96.

18. See *id.* at 798.

19. See *id.* at 799.

20. See Helen Smith et al., *Violence on Campus: Practical Recommendations for Legal Educators* (Univ. of Tenn. Legal Studies Research Paper No. 21, 2008) (citing GERALD AMADA, *COPING WITH THE DISRUPTIVE COLLEGE STUDENT* (1999)), available at <http://ssrn.com/abstract=981497>.

21. See *id.* (quoting Alison Schneider, *Insubordination and Intimidation Signal the End of Decorum in Many Classrooms*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Mar. 27, 1998, at A12).

22. See, e.g., Juicy Campus, www.juicycampus.com; Kevin P. Brady & Kathleen Conn, *Bullying Without Borders: The Rise of Cyberbullying in America's Schools*, *SCH. BUS. AFFAIRS* 6, 8 (Oct. 2006); Press Release, Anne Milgram, N.J. Attorney Gen., Attorney General Advises College Students to Be Alert to Cyber-Bullies and Sexual Predators on the Internet (Aug. 26, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20080826a.html>; Alberto D. Morales, *First Amendment Groups Warn N.J. Attorney General of Broad 'Cyberbullying' Definition*, *STUDENT PRESS L. CENTER*, Nov. 10, 2008, http://splc.org/newsflash_archives.asp?id=1831&year=2008. Although since closed, Juicy Campus was a popular website among college students where they could post all types of anonymous gossip making it an ideal platform for bullies to harass their victims.

23. See Press Release, *supra* note 22.

24. See Mark Chapell, *Bullying in College by Students and Teachers*, 39 *ADOLESCENCE* 53, 56 (2004).

25. See *id.* at 58.

24.7% reported seeing bullying occur occasionally and 2.8% reported seeing it very frequently.²⁶ Although slightly lower, over 40% of respondents reported seeing a teacher bully a student compared to over 60% seeing student-on-student bullying.²⁷ These responses are consistent with bullying in the workplace and confirm that bullying is likewise a fairly common problem in college. Indeed, to think that bullying begins in K-12, stops in college, and then begins again in the workplace defies common sense.

A 2006 study confirmed that although bullying does decrease as students matriculate, it does not stop.²⁸ In addition, college students were more likely to be bullied if they had been bullied in elementary or high school.²⁹ Interestingly, unlike bullying in high school, the study reported that no significant sex differences existed as to which gender was more likely to be bullied in college, though the type of bullying experienced by males differed from that experienced by females.³⁰ In particular, males were bullied physically and verbally more than female students, who engaged in indirect or social bullying.³¹ Finally, the study indicated that teachers and coaches primarily used verbal bullying followed in prevalence by social bullying, while two students reported physical bullying by their coaches.³²

Another rich source of data on college bullying is research exploring bullying of college students who are lesbian, gay, bisexual, and transgender (LGBT), as well as bullying that occurs during hazing of students who are initiated into some larger group. A recent National Gay and Lesbian Task Force report found that 20% of the respondents feared for their safety on campus and 36% of LGBT undergraduates experienced harassment within the past year.³³ To avoid intimidation, over half of the respondents concealed their sexual identity from their classmates. Although some respondents felt the university offered positive environments in which to work and attend class, many respondents still found their campuses hostile and homophobic.

Likewise, hazing continues to be a major problem facing universities. Accurate numbers are often difficult to ascertain because of underreporting. One study indicated that 95% of the hazing incidents identified by

26. *See id.*

27. *See id.* at 59.

28. *See* Mark S. Chapell et al., *Bullying in Elementary, High School and College*, 41 *ADOLESCENCE* 633, 633-34 (2006).

29. *See id.* at 642.

30. *See id.* at 643.

31. *See id.*

32. *See id.* at 641.

33. *See* SUSAN R. RANKIN, THE POLICY INST. OF THE NAT'L GAY AND LESBIAN TASK FORCE, *CAMPUS CLIMATE FOR GAY, LESBIAN, BISEXUAL, AND TRANSGENDER PEOPLE: A NATIONAL PERSPECTIVE* (2003), available at <http://www.thetaskforce.org/downloads/reports/reports/CampusClimate.pdf>.

students were not reported to campus officials.³⁴ Despite students' reluctance to report incidents, it is clear that a large number of them are being hazed.³⁵ In a recent report from a national study on student hazing, 55% of college students involved in clubs, teams, and organizations experience hazing.³⁶ These hazing experiences take many forms, from degrading an individual, physical intimidation, making prank calls, or harassing others, to drinking large amounts of alcoholic or non-alcoholic liquids that endanger a person's safety.

C. *Why Should Colleges and Universities Be Concerned with Bullies?*

Colleges and universities combating school violence should be concerned with bullying because bullying is a form of school violence and often leads to more severe acts of school violence. Unfortunately, most administrators narrowly define school violence as incidents involving personal injuries such as school shootings. Instead, a better definition of school violence would be "any behavior that violates a school's educational mission or climate of respect or jeopardizes the intent of the school to be free of aggression against persons or property, drugs, weapons, disruptions, and disorder."³⁷ This definition is not limited to a safe school setting and also focuses on providing an appropriate learning environment.

Focusing on physical security measures alone such as keeping guns off of campus will never solve the school violence problem. Schools also must address underlying causes of high-profile violent incidents that often have roots in bullying behavior. Bullying behavior should serve as a warning sign to campus administrators because of its potential to escalate and lead to other more serious types of campus violence such as "rape, assault, fighting, hazing, dating violence, sexual harassment, hate and bias-related violence,"³⁸ or even "stalking, rioting, disorderly conduct, property crime, and even self-harm and suicide."³⁹

Although bullying may be at the lower end of the spectrum of school violence, bullying harms the campus climate by producing detrimental

34. See ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK, INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING (2008), http://www.hazingstudy.org/publications/hazing_in_view_web.pdf.

35. See Florence L. Denmark et al., *Bullying and Hazing: A Form of Campus Harassment*, in UNDERSTANDING AND PREVENTING CAMPUS VIOLENCE 27, 30 (Michele A. Paludi ed., 2008).

36. See ALLAN & MADDEN, *supra* note 34.

37. *Just What Is "School Violence"?*, NEWS BRIEF (Ctr. for the Prevention of Sch. Violence, N.C. Dep't of Juvenile Justice and Delinquency Prevention, Raleigh, N.C.), May 2002, http://www.ncdjjdp.org/cpsv/pdf_files/newsbrief5_02.pdf.

38. U.S. DEP'T OF JUSTICE, HATE CRIMES ON CAMPUS: THE PROBLEM AND EFFORTS TO CONFRONT IT (2001), *available at* <http://www.ncjrs.gov/pdffiles1/bja/187249.pdf>.

39. LINDA LANGFORD, THE HIGHER EDUC. CTR. FOR ALCOHOL AND OTHER DRUG ABUSE AND VIOLENCE PREVENTION, PREVENTING VIOLENCE AND PROMOTING SAFETY IN HIGHER EDUCATION SETTINGS (2004), *available at* <http://www.higheredcenter.org/pubs/violence.html>.

long-term and short-term effects on the victim, the bully, and the bystander. Not only do victims of bullying suffer physical ramifications such as headaches, stomach aches, weight loss, vomiting, and general poor health,⁴⁰ but victims also suffer psychological effects such as depression, loss of concentration, anxiety, and insomnia.⁴¹ These conditions impact both academic achievement and the mental health of the victim.⁴² For example, some studies find that victims of bullying perform below average

40. See Joseph A. Dake et al., *The Nature and Extent of Bullying at School*, 73 J. SCH. HEALTH 173 (2003) (finding one study that concluded that victims were 4.6 times more likely and bullies 5.1 times more likely to experience psychosomatic symptoms than students not involved in bullying; these symptoms included low back pain, neck and shoulder pain, stomach ache, nervousness, irritation or tantrums, difficulty sleeping or waking, fatigue, and headache); R. Kaltiala-Heino et al., *Bullying at School—An Indicator of Adolescents at Risk for Mental Disorders*, 23 J. ADOLESCENCE 661 (2000) (illustrating that psychosomatic health issues, such as poor appetite and anxiety, are also more common among victims and bully/victims); Ken Rigby, *Peer Victimization at School and the Health of Secondary School Students*, 69 BRIT. J. EDUC. PSYCHOL. 95 (1999); Katrina Williams et al., *Association of Common Health Symptoms with Bullying in Primary School Children*, 313 BRIT. MED. J. 17 (1996) (finding that victimized children have been found to experience more frequent stomach aches and headaches, and to be more likely to have troubles with sleeping and bed wetting); D. Wolke et al., *Bullying Involvement in Primary School and Common Health Problems*, 85 ARCHIVES OF DISEASE IN CHILDHOOD 197 (2001), available at <http://adc.bmj.com/cgi/reprint/85/3/197.pdf> (concluding that victims of bullying and bully/victims are most likely to present physical health symptoms such as sore throats, colds, and cough).

41. See Dake et al., *supra* note 40 (finding that (1) bullies are 2.8 to 4.3 times more likely, victims four times more likely, and bully/victims 6.3 to 8.8 times more likely to suffer from depressive symptoms than children not involved in bullying; and (2) that bullies are four times more likely, victims 2.1 times more likely, and bully/victims 2.5 times more likely to report having serious thoughts of suicide); Kirsti Kumpulainen & Eila Rasanen, *Children Involved in Bullying at Elementary School Age: Their Psychiatric Symptoms and Deviance in Adolescence: An Epidemiological Sample*, 24 CHILD ABUSE & NEGLECT 1567 (2000) (finding that children involved in bullying at early age have been found to have more psychiatric symptoms in adolescence than youth not involved in bullying); see also *Addressing the Problem of Juvenile Bullying*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION FACT SHEET (U.S. Dep't of Justice, Wash., D.C.), June 2001, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf> (describing that short-term psychological effects on victims include increased feelings of loneliness, loss of self-esteem, and difficulties making friends or maintaining relationships with classmates, and that victims may also suffer humiliation, insecurity, and fear of attending school).

42. See Jaana Juvonen et al., *Peer Harassment, Psychological Adjustment, and School Functioning in Early Adolescence*, 92 J. EDUC. PSYCHOL. 349 (2000) (examining grade point averages of victimized students ages twelve to fifteen and finding them to be lower than those of middle school students not involved in bullying, and noting that bullying at school is also related to academic competence and school adjustment, although research findings in this area do not always agree); David Schwartz et al., *The Emergence of Chronic Peer Victimization in Boys' Play Groups*, 64 CHILD DEV. 1755 (1993) (noting that results are consistent with conclusion of study involving U.S. children of nearly same age, which found that victims and bullies showed lower academic competence, whereas study by Schwartz found that students who were bully/victims had lower academic competence on same scale as bullies).

in school and below students who are not subjected to bullying.⁴³ Victims may also try to avoid contact with the bully by changing their everyday routines, avoiding the classroom or other school facilities, and in some extremes, even withdrawing from college. In addition to withdrawal and social isolation, victims may engage in negative or harmful conduct such as acting more aggressively, turning to alcohol or drugs, or even committing suicide.⁴⁴

Victims may also resort to physical violence in response to persistent bullying. For example, reports from students indicated the Virginia Tech gunman was bullied.⁴⁵ Though these horrific incidents are relatively rare, universities should not overlook the more common experience of being bullied as a very real precursor to campus violence.⁴⁶ Colleges that ignore

43. See Helen Mynard & Stephen Joseph, *Bully/victim Problems and Their Association with Eysenck's Personality Dimensions in 8 to 13 Year Olds*, BRIT. J. EDUC. PSYCHOL. 1997 (1993) (finding that both bullies and victims did worse in school than children not involved in bullying, and that victims were affected more than bullies); Tonja R. Nansel et al., *Relationships Between Bullying and Violence Among U.S. Youth*, 157 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 348, 348 (2003), available at <http://archpedi.ama-assn.org/cgi/reprint/157/4/348?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=Relationships+Between+Bullying+and+Violence+Among+U.S.+Youth&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT> (highlighting that although researchers did not find significant relationship between academic achievement and bullying victimization, they did discover that bully/victims had poorer scholastic competence than students not involved in bullying, and that bullies were 1.8 times more likely to be below average students as they were to be good students).

44. See Marcel F. van der Wal et al., *Psychosocial Health Among Young Victims and Offenders of Direct and Indirect Bullying*, 111 PEDIATRICS 1312 (2003) (indicating that depression and thoughts of committing suicide are much more common among boys and girls who have been bullied than among those who have not); see also Kaltiala-Heino et al., *supra* note 40 (commenting that frequent consumption of alcohol and use of other controlled substances are more common among bullies and bully/victims). But see Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094 (2001) (finding that alcohol use was positively associated with bullying others, but negatively associated with being bullied, and finding that smoking was found to be more common among both bullies and bully/victims).

45. See Posting of Amanda Phillips to The Depravity Scale, <https://depravityscale.org/blog/?p=19> (June 1, 2007, 20:11 EST). Experts caution against profiling because there have been so few murder rampages on campuses, so it is difficult to make any conclusions about likely perpetrators. See Sheldon F. Greenberg, *Active Shooters on College Campuses: Conflicting Advice, Roles of the Individual and First Responder, and the Need to Maintain Perspective*, DISASTER MED. & PUB. HEALTH PREPAREDNESS, June 28, 2007, http://www.dmph.org/cgi/content/full/1/Supplement_1/S57#R9-17. However, studies about secondary school shootings do support the proposition that bullying contributes to the perpetrator's violent behavior. For discussion of these studies, see *infra* note 46.

46. See U.S. SECRET SERV. NAT'L THREAT ASSESSMENT CTR., SAFE SCHOOL INITIATIVE: AN INTERIM REPORT ON THE PREVENTION OF TARGETED VIOLENCE IN SCHOOL (2000), available at http://cecp.air.org/download/ntac_ssi_report.pdf (noting that bullying also seems to have been contributing factor in many mass school shootings). The U.S. Secret Service National Threat Assessment Center examined thirty-seven school shootings in the United States, and found that bullying played a

bullying on campus help create an environment ripe for tragedy like the one at Virginia Tech.

The victim is not the only one to experience negative effects from bullying. Hazing research illustrates that some bullies suffer guilt, shame, and discomfort after a bullying incident in which they act in a manner that is inconsistent with their values.⁴⁷ Moreover, bullies may also suffer depression and suicidal ideation, though the cause of these symptoms may be the result of having also been bullied.⁴⁸ Bullies are more likely to engage in unlawful and/or violent behavior as children and later as adults than their non-bullying peers.⁴⁹ For example, a NICHD survey found that “approximately 60 percent of boys who were classified by researchers as bullies in grades six through nine were convicted of at least one crime by the age of 24, compared to only 23 percent of the boys who were not characterized as bullies or victims.”⁵⁰ Of those classified as bullies, 40% had three or more convictions by age twenty-four, compared to 10% of those who were neither victims nor bullies.⁵¹ Several other studies report more frequent delinquent behavior among bullying offenders.⁵²

The negative effects of bullying are also widely felt by bystanders.⁵³ Bystanders witness the bullying and often for various reasons fail to intervene.⁵⁴ This failure causes different forms of distress for the individual

key role in two-thirds of these incidents. *See id.* A number of these attackers had gone through harsh, long-term bullying, and their experiences seemed to be a major motivation behind the attacks. *See id.*

47. *See* Denmark et al., *supra* note 35, at 35.

48. *See* van der Wal et al., *supra* note 44, at 1316.

49. *See* Nansel et al., *supra* note 43, at 348 (referencing significant quantity of research examining link between bullying and violent behavior). In particular, studies have found that bullying and being bullied are strongly associated with involvement in physical fights and carrying weapons to school. *See id.* at 348-49 (explaining connection between bullying and future violent behavior). Bullying can also be a marker for a variety of serious violent behaviors, including frequent fighting, fighting-related injury, and weapon carrying. *See id.* (concluding based on substantive research that bullying increases propensity for future violent activities and behaviors).

50. FOX ET AL., *supra* note 2, at 5 (citing research indicating correlation between youth bullying and later criminal activity or convictions); *see also* Ctr. for the Study and Prevention of Violence, Olweus Bullying Prevention Program (BPP), <http://colorado.edu/cspv/blueprints/modelprograms/BPP.html> (noting that children who bully are 37% more likely to commit offenses as adults) (last visited May 17, 2010).

51. *See* FOX ET AL., *supra* note 2, at 5.

52. *See, e.g.,* van der Wal et al., *supra* note 44, at 1316 (providing statistics indicating that bullying offenders are more likely to engage in delinquent behavior).

53. *See* Julian Knight, *Bullied Workers Suffer “Battle Stress,”* BBC NEWS ONLINE, Aug. 17, 2004, <http://news.bbc.co.uk/1/hi/business/3563450.stm> (noting that witnesses of bullying often suffer similar mental problems to those bullied). For further discussion of the effects of bullying on bystanders, *see infra* note 55 and accompanying text.

54. Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91 (2002).

who witnesses bullying, including guilt for not stopping it, fear of being a future victim or losing social influence, and anger and frustration towards the aggressor.⁵⁵

These negative effects of feeling uncomfortable, helpless, or degraded do not disappear with age; even adults suffer both physically and psychologically when bullied.⁵⁶ Some experts have compared the post-traumatic stress felt by bullied workers to Post Traumatic Stress Disorder symptoms experienced by soldiers.⁵⁷ These findings make addressing bullying in college all the more important and refute arguments that bullying only occurs among, or exclusively impacts, children.

III. LEGAL THEORIES

Because no independent cause of action exists for bullying, students must rely on other grounds to challenge bullying.⁵⁸ Plaintiffs can file harassment claims under federal statutes; however, such claims require a high standard of proof, which makes it very difficult for bullying victims to recover.⁵⁹ Finding colleges and universities liable for peer harassment is more challenging than similar actions against elementary and secondary schools because of the reduced control over students in the university setting. Historically, tort actions based on bullying conduct have been unsuc-

55. See Jennifer L. Martin, *Gendered Violence on Campus: Unpacking Bullying, Harassment, and Stalking*, in UNDERSTANDING AND PREVENTING CAMPUS VIOLENCE, *supra* note 35, at 3, 5; see also *School Violence: Prevalence, Fears, and Prevention*, ISSUE PAPER (RAND Education, Santa Monica, Cal.), 2001, available at http://www.rand.org/pubs/issue_papers/IP219/index2.html (recognizing prevalence of bullying and suggesting school programs, counseling, and mediation, among other recommendations, to help alleviate bullying in schools).

56. See Knight, *supra* note 53 (identifying nightmares, "susceptibility to illness, heart disease and alcoholism" among physical and psychological conditions suffered by bullying victims and noting that bullied employees average seven more sick days per year than their non-bullied coworkers).

57. See *id.* (presenting conclusions of research indicating that workplace bullying victims exhibit symptoms associated with Post Traumatic Stress Disorder). Specifically, the author cited the research of Dr. Noreen Tehrani, who conducted a study of 165 professionals in the "caring sector" and found that one in five exhibited symptoms of Post Traumatic Stress Disorder. See *id.* (identifying research findings of Dr. Tehrani). In particular, these symptoms included "hyper arousal, a feeling of constant anxiety and over-vigilance; avoidance of anything to do with the traumatizing event; and re-experiencing, in which subjects suffer flashbacks or obsessive thoughts concerning the trauma." See *id.* (providing examples of three main signs of Post Traumatic Stress Disorder).

58. See Kathleen Conn, *Bullying in K-12 Public Schools: Searching for Solutions*, COMMONWEALTH EDUCATION POLICY INSTITUTE, Winter 2006, at 4, available at <http://www.cepionline.org/pdf/Policy%20Briefs/Kathleen%20Conn-Bullying%20VCU%20PolicyPaper%202-11-06.pdf> (noting that bullying victims often rely on harassment actions because no current state anti-bullying statute provides private cause of action and anti-bullying statutes providing enforcement mechanisms generally leave enforcement "to the discretion of local Boards").

59. See *id.* at 4-5 (noting that many students and parents attempt to seek redress via harassment suits but explaining that high standards of proof imposed on plaintiffs render recovery difficult).

cessful against colleges because of courts' reluctance to impose any special duties on schools for students' safety.⁶⁰

Plaintiffs have increasingly, and with some measure of success, pursued tort theories with lower standards of proof. For example, several claimants have asserted claims under state-based civil rights statutes to successfully recover against K-12 schools for their failure to stop extreme bullying.⁶¹ Universities and colleges should be prepared for such suits to be filed against them and appreciate the lower standard a plaintiff needs to satisfy for recovery. This section provides a brief overview of the legal theories plaintiffs have applied in pursuing their bullying claims.

A. *Legal Theories Based on Protected Class Membership*

1. *Title IX*

a. Background to Title IX

In 1972, Congress passed Title IX primarily to help women gain access to the same educational opportunities as their male counterparts.⁶² Congress debated whether Title IX was actually needed or, instead, if Congress could just add the word "sex" to existing Title VI prohibitions against racial discrimination.⁶³ Title IX's proponents were ultimately victorious and Title IX was passed, providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁶⁴

At the time of Title IX's passage, there was uncertainty as to whether it was intended to cover sexual harassment.⁶⁵ In fact, it was not until the 1990s that the Supreme Court heard cases pertaining to sexual harassment and Title IX. One of the first of these cases, *Gebser v. Lago Vista Independent School District*,⁶⁶ involved the alleged sexual harassment of an eighth-grader

60. See *Marshall v. Cortland Enlarged City Sch. Dist.*, 697 N.Y.S.2d 395, 396 (N.Y. App. Div. 1999).

61. For a discussion of the state-based civil rights statutes, see *infra* notes 166-75 and accompanying text.

62. See Kelly Titus, *Students, Beware: Gebser v. Lago Vista Independent School District*, 60 LA. L. REV. 321, 327 (1999) (reviewing legislative history of Title IX and citing House Subcommittee on Education and Labor hearings where debate centered on providing women greater access to higher education).

63. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 663 (1999); see also 20 U.S.C. § 1681 (Supp. 1999) (exempting educational facilities from Title VII's prohibition of sex discrimination).

64. See *id.* 20 U.S.C. § 1681(a).

65. See *Davis*, 526 U.S. at 663-64 (explaining that when Title IX was passed, the "concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts" and thus concluding that "there is no basis to think that Congress contemplated liability for a school's failure to remedy discriminatory acts by students or that the States would believe the statute imposed on them a clear obligation to do so").

66. 524 U.S. 274 (1998).

by her teacher.⁶⁷ The student claimed that the teacher made sexually suggestive comments to her and other female students.⁶⁸ The teacher also fondled the student's breasts and ultimately engaged in sexual intercourse with her.⁶⁹

The Court in *Gebser* set out a two-part standard for holding schools liable under Title IX.⁷⁰ First, an official with authority to address the problem must have actual notice of the harassment.⁷¹ Second, the official must fail to respond adequately.⁷² The Court's interpretation of its ade-

67. *See id.* at 278-79 (describing facts and procedural posture of case). Specifically, the plaintiff student and her mother filed Title IX, § 1983, and state negligence claims against the school district, as well as state law claims against the teacher individually. *See id.* (describing procedural posture of case).

68. *See id.* at 277-78 (describing facts of case).

69. *See id.* at 278 (describing facts of case). According to the record, the teacher commenced a sexual relationship with the plaintiff in the spring of her freshman year in high school when he visited her house to give her a book, and kissed and fondled her. *See id.* The plaintiff and teacher had sexual intercourse numerous times during the school year and continued their relationship until January 1993, when the teacher was arrested after a police officer discovered them engaged in sexual intercourse. *See id.* Throughout the course of their relationship, the plaintiff did not report the relationship to school officials because "while she realized [the teacher's] conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher." *See id.*

70. *See id.* at 292 (holding that until Congress directly addresses issue of school district liability for sexual harassment claims, "actual notice" and "deliberate indifference" are required for plaintiff recovery). The Court recognized that because Title IX provides a "judicially implied" rather than an expressed right to private action, "there is no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages." *Id.* at 283-84. Consequently, in the absence of additional guidance from Congress, the Court developed a two-part standard as a "sensible remedial scheme that best comports with the statute." *Id.* at 284.

71. *See id.* at 285-88 (holding plaintiffs must show that defendant school district had "actual notice" of sexual harassment in Title IX claim). The plaintiffs argued that the Court should employ "constructive notice" or "respondeat superior" standards rather than impose a requirement of "actual notice." *See id.* at 282-83. Rejecting these standards, the Court noted that both would provide for "unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy." *Id.* at 286 (evaluating plaintiff's arguments against legislative history of Title IX). Moreover, the Court stipulated that where Congress "attaches conditions to the award of federal funds under its spending power"—as it did in Title IX—"ensuring 'that the receiving entity of federal funds [had] notice'" of liability for monetary damages is a "central concern." *Id.* at 287 (examining legislative history of Title IX and Court precedent in spending clause cases) (internal citations omitted). Finally, the Court concluded that Congress did not envision vicarious liability or constructive notice as the applicable standards based on its stipulation that Title IX funding can only be suspended or terminated through enforcement proceedings "until it 'has advised the appropriate person or persons of the failure to comply with the requirement.'" *Id.* at 288. In view of these considerations, the Court held that actual notice was the appropriate standard in assessing liability. *See id.* at 285-88 (concluding based on legislative history that Congress envisioned actual notice as appropriate standard).

72. *See id.* at 290 (noting that Title IX's "express remedial scheme" provides "an opportunity to rectify the violation" and concluding that congressional ap-

quacy requirement was arguably generous for school defendants in that they could meet the standard without actually stopping the harassment. Specifically, the Court concluded that liability based on this standard lies only upon a showing that the school official acted with “deliberate indifference” or made an official decision not to correct the violation.⁷³ Applying this standard to the facts of *Gebser*, school officials were aware of the teacher’s sexually inappropriate comments to female students and warned him to watch his classroom comments, but did not have actual notice of the teacher’s sexual acts with the plaintiff.⁷⁴ Consequently, based on this lack of actual notice, the Court refused to find the school liable under Title IX for sexual harassment.⁷⁵

b. *Davis v. Monroe County Board of Education*⁷⁶

In 1999, the Court once again heard a case involving Title IX and sexual harassment issues.⁷⁷ Instead of teacher-on-student sexual harassment, the sexual harassment in *Davis* was peer-on-peer. The plaintiff sued the school district, not for the other student’s actions, but for the school’s inaction in allowing the known harassment to continue against the student.⁷⁸ During the 1999 school year, Davis, a fifth-grade girl, endured

proval of “corrective action” demands that plaintiff also show school district’s inadequate response to actual notice).

73. *See id.* (concluding that Title IX’s “administrative enforcement scheme” requires imposition of “deliberate indifference” standard because the “scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance” or officially decides “not to remedy the violation”). *See id.* (examining Title IX’s “administrative enforcement scheme” to identify appropriate “adequacy” interpretation).

74. *See id.* at 278 (noting *Gesber* failed to report the sexual relationship to administrators). Although complaints were made regarding the teacher’s comments, no complaints were made about the relationship. *See id.* (describing facts of case).

75. *See id.* at 291 (noting that plaintiffs conceded school did not have actual notice and holding that because teacher’s offensive comments to other students were “plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student,” Title IX liability standards were not met).

76. 526 U.S. 629 (1999).

77. *See id.* at 632-33 (describing nature of “student-on-student” Title IX sexual harassment suit and defining question presented as “whether a private damages action may lie against the school board in cases of student-on-student harassment”).

78. *See id.* at 635-36 (describing facts and procedural posture of case). The plaintiff, the harassed student’s mother, filed suit against the school Board, the district superintendent, and the school principal based on their alleged failure to discipline the harassing student in violation of Title IX. *See id.* at 635 (describing facts and procedural posture of case). Specifically, the complaint alleged that “‘the persistent sexual advances and harassment . . . interfered with [the plaintiff’s] ability to attend school and perform her studies and activities,’ and that ‘the deliberate indifference by Defendants to the unwelcomed sexual advances . . . created an intimidating, hostile, offensive and abusive school environment’” that violated Title IX. *Id.* at 636.

continual verbal and physical harassment by one of her classmates. The male classmate attempted to touch her genital area and breasts, rubbed against her in a sexually suggestive way, and persistently made harassing comments to her such as “I want to feel your boobs” and “I want to get in bed with you.”⁷⁹ Even though Davis and her mother complained to school officials, the officials took no action to stop or deter the harassment.⁸⁰ Rather, the harassment did not stop until the offending classmate was charged with, and plead guilty to, sexual battery.⁸¹

The Court reversed the Eleventh Circuit’s holding that schools could not be liable for peer-on-peer harassment, holding instead that a recipient of federal funds can be liable for its own misconduct.⁸² To this end, the Court held that for a school—as a recipient of federal funds—to be liable under Title IX, the school must “‘exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under its ‘programs or activities.’”⁸³ Moreover, in addition to being subject to liability for its own action, the Court concluded that a school can be liable where its “deliberate indifference ‘subjects’ its students to harassment” and the harassment occurs in a “context subject to the school district’s control.”⁸⁴ Here, the Court held that because the

79. *See id.* at 633-34 (describing facts of case).

80. *See id.* (describing facts of case). According to the record, from December 1992 until May of 1993 the student verbally and physically sexually harassed Davis. *See id.* at 634. After each incident, Davis reported the harassing student’s conduct to her teachers, and her mother contacted the teachers to “follow up.” *See id.* Moreover, Davis’s mother met with the school principal in mid-May to inquire as to what disciplinary was being taken to prevent the student from further harassing her daughter. *See id.* In response to her inquiry, the principal indicated “I guess I’ll have to threaten him a little bit harder.” *See id.*

81. *See id.* (describing facts of case).

82. *See id.* at 633 (describing procedural posture of case).

83. *Id.* at 640-41 (rejecting contention that government’s enforcement power under Title IX extends to liability for third parties’ actions and holding that school liability requires school itself acted in violation of Title XI). Here, the Court developed its requirement that the school itself must act to cause the alleged injury by employing the language of Title IX, which states, “no 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 educational program or activity receiving Federal financial assistance.” *Id.* at 638 (quoting 20 U.S.C. § 1681(a)).

84. *Id.* at 644-45 (holding that school liability was not restricted to harassment perpetrated by school and expanding school liability to encompass situations where deliberate indifference or inaction contributed to harassment). In particular, the Court explained:

[I]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference “subjects” its students to harassment. That is, the deliberate indifference must, at a minimum, “cause [students] to undergo” harassment or “make them liable or vulnerable” to it. Moreover, because the harassment must occur “under” “the operations of” a funding recipient, the harassment must take place in a context subject to the school district’s control.

Id. (internal citations omitted).

harassing student's actions occurred during school hours and on school property, the misconduct was within the school's control.⁸⁵

After determining that a private remedy is available under Title IX where the school is indifferent to peer-on-peer harassment, the Court defined sexual discrimination in the same fashion as Title VII.⁸⁶ Prior Title VII cases included sexual harassment as a form of sex discrimination.⁸⁷ Under Title VII, employers can be liable for both quid pro quo sexual harassment and hostile environment sexual harassment.⁸⁸ Adopting this approach for Title IX, the Court concluded that a school district could be liable for hostile environment sexual harassment when the harassing student's behavior is so "severe, pervasive, and objectively offensive" as to deprive the victim of the educational opportunities provided by the school.⁸⁹ Unlike Title VII, which uses agency principles, Title IX liability only attaches if the school has actual knowledge of the harassment and acts with deliberate indifference.⁹⁰ In remanding the case to the district court for further proceedings, the Court concluded that the school may have created a hostile environment for the plaintiff by failing to take disciplinary actions against the harassing student.⁹¹

c. Applying *Davis's* Ill-Defined Standard

Just what constitutes "severe, pervasive, and objectively offensive," however, has been the subject of much discussion. Justice Kennedy's dissent in *Davis* anticipated that such a nebulous standard would result in

85. *See id.* at 645 (applying requirement that "the harassment must occur 'under' 'the operations of' a funding recipient" to facts of instant case).

86. For a discussion of how the Supreme Court has defined sexual harassment under Title VII, see *infra* notes 87-90 and accompanying text.

87. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (noting that 1990 EEOC Guidelines included "sexual harassment" as "sexual discrimination" prohibited by Title VII). Specifically, the Court explained that "while [the Guidelines are] not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and affirmed that the "EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII." *Id.*

88. *See id.* at 65-66 (defining scope of employer liability for sexual harassment claims under Title VII); *see also Titus, supra* note 62, at 324-25 (explaining that Court defined quid pro quo sexual harassment as "advances or requests for sexual favors in return for advancements or other employment decisions," and "hostile environment" as "an environment that interferes with performance").

89. *See Davis*, 526 U.S. at 650 (determining that sexual harassment constitutes "'discrimination' in the school context under Title IX" and thus concluding that sexual harassment when sufficiently severe rises "to the level of discrimination actionable under the statute").

90. *See id.* at 643 (stipulating that per *Gesber*, "actual notice" and "deliberate indifference" are also required to avoid subjecting Title IX recipients to liability for employee independent actions).

91. *See id.* at 649 (concluding based on record that plaintiff may be able to show *Davis* was subjected "to discrimination by failing to respond in any way over a period of five months of complaints").

widespread problems for schools.⁹² In an effort to help define factors constituting a “hostile environment,” the Office of Civil Rights (OCR) publishes a guide to aid schools in determining their responsibilities for peer-on-peer sexual harassment.⁹³ The OCR guide instructs that it is “the totality of the circumstances” in which the behavior occurs that is critical in determining whether a hostile environment exists.⁹⁴ Among the factors that should be considered in this totality of the circumstances assessment are: “the degree to which the conduct affected one or more students’ education”; “the type, frequency, and duration of the conduct”; “the identity of and relationship between the alleged harasser and the subject or subjects of the harassment”; “the number of individuals involved”; “the age and sex of the alleged harasser and the subject or subjects of the harassment”; “the size of the school, location of the incidents, and context in which they occurred”; and “other incidents at the school.”⁹⁵ These guidelines, although helpful, illustrate the problem schools and courts face with Title IX lawsuits. Specifically, these factors must be examined on a case-by-case basis and what may qualify as a hostile environment at one school may not be actionable at another.⁹⁶ Unfortunately, a bright line test in this area of law is impractical.

d. Application to College Students

Although *Gebser* and *Davis* involved elementary and secondary students, the principles established in these decisions apply to college students as well.⁹⁷ Specifically, the elements set forth in *Gebser* and *Davis* are

92. *See id.* at 654-85 (Kennedy, J., dissenting) (expressing concern with majority’s “severe, pervasive, and objectively offensive” standard). In particular, the dissent, comprised of Justice Kennedy, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, explained that, “[t]he majority’s opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion.” *Id.* at 657 (arguing that majority’s holding expands school liability in harassment cases beyond that envisioned by Congress).

93. *See* Office for Civil Rights, U.S. Dep’t. of Educ., Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Mar. 13, 1997), <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (containing sexual harassment guidelines published by Office for Civil Rights that examines, among other things, situations for which schools may be found liable for hostile environment harassment claims).

94. *See id.* (articulating that “totality of the circumstances” assessment is necessary in determining whether “harassment occurred”).

95. *See id.* (stipulating that assessment of hostile environment setting requires consideration of subjective and objective elements, and examining factors pertinent to thorough assessment) (internal citations omitted).

96. *See id.*

97. *See Davis*, 526 U.S. at 649 (noting that *Davis* standard is “sufficiently flexible” to allow both grade schools and universities to exercise appropriate “degree of control over its students”); *see also* Martha McCarthy & Suzanne Eckes, *Sexual Harassment*, in *CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW* 277, 282 (Joseph Beckman & David Dagley ed., 2005) (explaining that standards enunciated in *Gebser* and *Davis* apply to higher education students).

all required in the college setting: (1) school control; (2) actual knowledge; (3) deliberate indifference; (4) severe, pervasive, and objectively offensive harassment; and (5) occurrence of the harassment under an educational program or facility. However, these elements may be even more formidable barriers for college students than for K-12 students.⁹⁸

i. Control

Peer harassment claims will be successful only when the school “exercises substantial control over both harasser and the context in which the known harassment occurs.”⁹⁹ Obviously, elementary and secondary schools have more control over their students than do colleges and universities.¹⁰⁰ As a result, peer harassment-based claims have not been particularly common among higher education students.¹⁰¹ That is not to say that courts never find factual situations in which the college can exercise control. For example, in *Williams v. Board of Regents of the University System of Georgia*,¹⁰² the Eleventh Circuit found that a University of Georgia student alleged facts sufficient to withstand the defendants’ motion to dismiss her Title IX claim based on student-on-student sexual harassment.¹⁰³ In *Williams*, the plaintiff had consensual sex with Tony Cole, a UGA basketball player in his dorm room.¹⁰⁴ Cole did not tell the plaintiff, however, that a football player was in his closet during the encounter and that the two had previously agreed that the football player would sexually assault the plaintiff after she and Cole finished having sex.¹⁰⁵ While the football player sexually assaulted and attempted to rape the plaintiff, Cole also called other male students to tell them they were gang raping the plaintiff and watched as one of these individuals entered his room and raped her.¹⁰⁶ In her complaint, the plaintiff alleged that university officials knew Cole had

98. For a discussion of how the *Gesber* and *Davis* Title IX liability requirements apply in the college setting, see *infra* notes 99-138 and accompanying text.

99. *Davis*, 526 U.S. at 668 (Kennedy, J., dissenting) (explaining level of school control required in majority opinion for school liability).

100. See McCarthy & Eckes, *supra* note 97, at 288 (noting that universities exercise less control over student population than at K-12 levels).

101. See *id.* (explaining that because *Davis* required “control” as element of school liability and because universities exercise less control over their student body, fewer harassment claims result at higher education level).

102. 477 F.3d 1282 (11th Cir. 2007).

103. See *id.* at 1290-91 (describing facts and procedural posture of case).

104. See *id.* at 1288 (describing facts of case). The record indicated that Cole called the plaintiff around 9:00 p.m. on January 14, 2002 and invited her to come to his room in the student-athletes dormitory. See *id.* Cole and the plaintiff engaged in consensual sex shortly after she arrived to his room. See *id.*

105. See *id.* (describing facts of case). Cole went to the bathroom after having sex with the plaintiff. See *id.* When Cole exited the room, the football player “emerged from the closet naked” and sexually assaulted and attempted to rape the plaintiff. See *id.*

106. See *id.* (describing facts of case). According to the record, Cole encouraged the individual who raped the plaintiff to do so. See *id.*

a history of sexual abuse charges, but still recruited him to the university and failed to inform him of the school's sexual harassment policies.¹⁰⁷

Upholding the district court's denial of the motion to dismiss, the Eleventh Circuit specifically considered the issue of school control, stating:

[b]y placing Cole in a student dormitory and failing to supervise him in any way or to inform him of their expectations of him under the applicable sexual harassment policy, UGA and UGAA substantially increased the risk faced by female students at UGA Even though "[a] university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy," UGA and UGAA exercised almost no control over Cole, even though they knew about his past sexual misconduct.¹⁰⁸

ii. Actual Knowledge

Establishing that the school exercised control, however, presents only one of many obstacles a plaintiff must overcome. The levels of conduct necessary to satisfy the elements of peer harassment claims under Title IX remain formidable barriers preventing the success of most claims. Among these necessary elements, proving a university has actual notice of prior harassment remains very difficult. Normally, prior sexual harassment by a different student against a different victim does not satisfy the known acts requirement.¹⁰⁹ In at least one case, however, a federal appellate court allowed the plaintiff to argue that showing knowledge of policies or practices that create a risk of possible harassment could fulfill the actual knowledge requirement.¹¹⁰ Specifically, in *Simpson v. University of Colorado*

107. See *id.* at 1292-93 (describing procedural posture of case).

108. *Id.* at 1296-97 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649 (1999)).

109. See, e.g., *Ostrander v. Duggan*, 341 F.3d 745, 750-51 (8th Cir. 2003) (noting that plaintiff's complaint included claim that school had actual knowledge based on sexual abuses allegedly complained of by other female students, but concluding that plaintiff "failed to adduce sufficient evidence that would allow a reasonable jury to find either [that the school] had actual knowledge of the sexual abuse complained of or was deliberately indifferent to complaints of sexual violence brought by female students").

110. See *Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (holding that actual notice requirement was satisfied where school had knowledge of past sexual assaults that occurred in connection with high-school athlete recruitment visits and school failed to remedy recruitment program). In particular, the court concluded that a Title IX funding recipient can be found in violation of the statute where "the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient." *Id.* (applying actual notice requirement to facts of case). In *Simpson*, the record established:

(1) that [the school] had an official policy of showing high-school football recruits a "good time" on their visits to the . . . campus, (2) that the

Boulder,¹¹¹ the Tenth Circuit reversed the district court's summary judgment in favor of the university because the Tenth Circuit found that an issue of fact existed as to whether the university was on notice as to a pattern of sexual assault and harassment in the football program and whether the university acted with deliberate indifference to the ongoing culture of hostility and abuse of women.¹¹² In *Simpson*, football recruits raped a woman during one of their college visits.¹¹³ The woman argued that the university's ineffective or non-existent recruiting policies exposed female students and other women to severe sexual harassment and possible assaults.¹¹⁴ The case ultimately settled for 2.5 million dollars.¹¹⁵

iii. Deliberate Indifference

Title IX plaintiffs must also show that the institution remained deliberately indifferent to acts of harassment. No particular response is required and liability attaches only when an institution's response is "clearly unreasonable in light of the known circumstances."¹¹⁶ Universities are not required to expel or suspend an alleged harasser and courts have found no deliberate indifference where administration officials met with the alleged harasser to discuss appropriate behavior, notified faculty members, and took measures to prevent encounters between the students, while allowing the harassing student to remain on campus.¹¹⁷

alleged sexual assaults were caused by [the school's] failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a "good time," and (3) that the likelihood of such misconduct was so obvious that [the school's] failure was the result of deliberate indifference.

Id. at 1172.

111. 500 F.3d 1170 (10th Cir. 2007).

112. *See id.* at 1180-85.

113. *See id.* at 1180 (describing facts of case).

114. *See id.* at 1173 (describing nature of plaintiff's Title IX claims as alleging that school "knew of the risk of sexual harassment of female . . . students in connection with [the school's] football recruiting program," yet failed to remedy program to prevent further harassment).

115. *See* American Civil Liberties Union, *Simpson v. University of Colorado* (Apr. 24, 2006), <http://www.aclu.org/womens-rights/simpson-v-university-colorado> (describing settlement of case following Tenth Circuit opinion).

116. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (explaining that school administrators retain "the flexibility they require" unless their action or lack of action "is clearly unreasonable," and further stating that "clearly unreasonable" standard does not require remedying "peer harassment" or "'ensur[ing] that . . . students conform their conduct to' certain rules").

117. *See, e.g.*, *Cubie v. Bryan Career Coll.*, 244 F. Supp. 2d 1191, 1203 (D. Kan. 2003) (noting that expulsion of harassing student was not required for school to "show it reacted reasonably," and explaining that "clearly unreasonable" standard was imposed to ensure courts "will continue to refrain from 'second-guessing' school disciplinary judgments"); *see also* *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751-52 (2d Cir. 2003) (holding school administrators acted reasonably and without "deliberate indifference" where officials met to discuss harassment and arranged counseling session with harasser despite deciding not to remove harassing individ-

In contrast, evidence that might support a claim of deliberate indifference could include a failure to investigate, the absence of a sexual harassment policy, or the failure to discipline.¹¹⁸ For example, in *Williams*, the plaintiff, after being gang raped by several university athletes, brought a Title IX action alleging that the president, athletic director, and coaches knew about one of the athlete's past sexual misconduct at several other schools when they recruited him.¹¹⁹ The Eleventh Circuit held that this knowledge, combined with the university's decision to wait eight months before conducting a disciplinary hearing, indicated a deliberate indifference sufficient to survive a motion to dismiss.¹²⁰

iv. Severe, Pervasive, and Objectively Offensive Harassment

Even assuming the university has notice, the harassment must still be severe, pervasive, and objectively offensive for a school to be liable under Title IX.¹²¹ This standard, however, is difficult for plaintiffs to meet in practice. In a recent case, the District of Kansas struck down a student's Title IX claim, holding that the harassment the student complained of was not sufficiently severe or pervasive when it involved four incidents of unwanted touching by a male classmate.¹²² Likewise, the Seventh Circuit in

ual); *Ostrander v. Duggan*, 341 F.3d 745, 745 (8th Cir. 2003) (determining that school's decision not to sanction fraternity where sexual assault occurred was not "clearly unreasonable" where administration officials met personally with chapter president, wrote to fraternity's national president explaining seriousness of offense, and sponsored educational program for fraternity members); *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 388 (5th Cir. 2000) (concluding school did not act with "deliberate indifference" where school officials explained seriousness of alleged sexual harassment offense to harasser and instructed him not "repeat the behavior that made the child accuse him of abuse").

118. See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 261-63 (6th Cir. 2000) (surveying relevant case law including *Davis v. Monroe County Board of Education*, *Murrell v. School District No. 1*, and *Willis v. Brown University* to identify factors that may render schools liable based on "deliberate indifference").

119. See *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1292-93 (11th Cir. 2007) (citing district court's finding that school knew of athlete's sexual misconduct when athlete was recruited, and holding that plaintiff's Title IX claims alleging "actual notice" should not have been dismissed because such knowledge can constitute actual notice).

120. See *id.* at 1296-97 (holding that school's knowledge of athlete's past sexual misconduct, failure to supervise athlete in dormitory or inform him of sexual harassment policy, and significant delay in conducting disciplinary hearing amounted to facts sufficient to constitute Title IX claim and possible showing of "deliberate indifference").

121. For a discussion of the "severe, pervasive, and objectively offensive" standard, as well as a review of the case in which the standard was adopted, see *supra* notes 89-96 and accompanying text.

122. See *Cubie*, 244 F. Supp. 2d at 1203-04 (analyzing scope of "severe, pervasive, and objectively offensive" standard and concluding that alleged conduct did not create a "hostile environment" as required for Title IX actions). In particular, the court noted that the severe and pervasive standard demands that the conduct "must be so extreme that it interfered with or altered the conditions of [the plaintiff's] school environment, so that she was denied access to an educational oppor-

*Adusumilli v. Illinois Institute of Technology*¹²³ refused to find incidents of inappropriate touching—one on the shoulder and one on the breast—to be severe.¹²⁴ In actuality there were twelve incidents of harassment, but the court refused to consider them because the student reported only two.¹²⁵

v. Educational Program or Activity

Finally, Title IX claims require that the harassment occur under an educational program or activity and have the “systemic effect” of depriving plaintiffs of access to educational opportunities.¹²⁶ This requirement may be more heavily disputed in a university setting than in elementary or secondary schools because most of the alleged harassment in the latter setting occurs “during the school hours and on school grounds.”¹²⁷ The issue becomes more complicated when the alleged harassment occurs outside of the classroom or off of campus.¹²⁸ The university’s liability in these cases may turn on the extent to which the off-campus incidents create a hostile environment within the institution.¹²⁹

tunity or benefit.” *Id.* at 1204. Here, the court held that four incidents of touching—three times on the back or neck and once on the thigh—for a few seconds, failed to establish a hostile environment. *See id.* at 1203 (describing facts of case).

123. No. 98-3561, 1999 WL 528169, at *1-2 (7th Cir. July 21, 1999).

124. *See id.* at *1 (concluding that harassment is characterized as “severe” if it is “repeated” and has “a ‘systemic effect’” on harassed student). With respect to the Title IX claim requirement that the harassment “can be said to deprive the victim of access to the educational opportunities and benefits provided by the school,” the plaintiff alleged that her complaint met this standard because “she received ‘unfair grades’ in retaliation for her complaints.” *See id.* at *1-2 (detailing Title IX claim requirements and describing facts of case). The court rejected the plaintiff’s assertion, based on evidence that her grades dropped on a variety of legitimate grounds, including grammar mistakes. *See id.* at *2 (describing facts of case).

125. *See id.* at *1 (affirming requirement of “actual notice” to school in Title IX claims and therefore concluding that incidents of harassment must be reported).

126. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652-53 (1999) (holding that school must have control over student when harassment occurs and harassment must prove severe enough to cause “systemic effect” reducing equal educational rights).

127. *See id.* at 646 (explaining that elementary and secondary schools are often able to exercise greater control over situations in which harassment occurs).

128. *See, e.g., Ostrander v. Duggan*, 341 F.3d 745, 751 (8th Cir. 2003) (holding university not liable where assault occurred at off-campus house and was not part of educational program).

129. *See Candrell v. N.Y. Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316 (S.D.N.Y. 2000) (articulating that Title IX liability is possible where off-campus harassment caused plaintiff to fear being on campus). To this end, the court specifically noted that “[c]ourts frequently have upheld sexual harassment claims under Title IX where some or all of the alleged misconduct occurred off campus” but “the off campus incidents had created a hostile environment in the institution.” *Id.*

vi. Overall Application to College Students

Analyzing these cases as a whole, it appears that courts are still reluctant to find universities and colleges liable under Title IX for peer harassment unless plaintiffs can show a pervasive campus culture of harassment that is ignored by campus officials. Despite this general reluctance, courts are particularly willing to find universities and colleges liable for subsets of students, such as athletes, whom they have or should have more control over than other college students.¹³⁰

Extending this liability to students who are not part of such a subset presents a more difficult challenge—though not impossible. For example, in an interesting case not involving athletes, the United States District Court for the District of Connecticut allowed a Title IX claim to go forward against Yale University for inadequately responding to a female student's complaints regarding an alleged incident of sexual assault by another student.¹³¹ Unlike other Title IX cases, the issue in this case did not concern liability for the alleged rape itself because the university did not receive notice of the harassing behavior until after it had occurred.¹³² Instead, the plaintiff complained that Yale acted with deliberate indifference when it failed to provide her with academic and residential accommodations following the rape and up until the time the grievance procedures were completed.¹³³

The court held that the plaintiff raised an issue of material fact with respect to the severity of the harassment based on its conclusion that a reasonable jury "could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university."¹³⁴ The court questioned whether the minimal efforts made by Yale to protect the plaintiff from further harassment violated Title IX.¹³⁵ The critical question left for the District Court to resolve in assessing this question was whether Yale's actions caused the student to

130. For a discussion of cases in which federal appellate courts have found schools liable for harassment of other students by student athletes, see *supra* notes 102-08, 110-14, and accompanying text.

131. See *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at *4 (D. Conn. Mar. 26, 2003) (holding plaintiff's Title IX complaint should not be dismissed where facts indicate university failed to respond to plaintiff's needs after being harassed by fellow student).

132. See *id.* at *1-2 (describing facts and procedural posture of case).

133. See *id.* (describing facts and procedural posture of case).

134. *Id.* at *3 (concluding that possibility of "further encounters" between plaintiff and attacker could create hostile environment for plaintiff on campus, and holding that university's awareness of this fact could potentially constitute "actual notice" and satisfy first Title IX requirement in *Davis*).

135. See *id.* at *5 (explaining that finding should be made regarding whether university's minimal actions constituted "clear unreasonable[ness]").

“undergo harassment or make her vulnerable to it.”¹³⁶ Here, the plaintiff requested academic and residential accommodations because of the “discomfort and fear that she would feel if she encountered” her perpetrator.¹³⁷

The discomfort and fear experienced by rape victims also exists, perhaps to a lesser degree, in victims of bullies.¹³⁸ Plaintiffs may argue, therefore, that this case be expanded to find liability when universities and colleges make minimal efforts to protect against future bullying after the bullying has been investigated and verified by the administration. Courts and college administrators need to understand the substantial and detrimental effects that severe, pervasive bullying can have in depriving students of educational opportunities.

2. *Section 1983 Suits*

Because Title IX allows suits only against school districts, students may also want to bring Section 1983¹³⁹ actions against individuals based on Title IX, due process, or equal protection violations.¹⁴⁰ During the 2008-2009 term, the Supreme Court settled a longstanding circuit split by deciding that Title IX is not the sole remedy for sex discrimination in schools.¹⁴¹ Moreover, the Court concluded that Title IX does not preempt Section 1983 constitutional and statutory claims.¹⁴² Even if the Section 1983 claims are procedurally allowed to survive, however, plaintiffs traditionally fare no better with Section 1983 due process actions than with Title IX actions because of enormous substantive barriers implicit in each.¹⁴³ Specifically, because the Due Process Clause does not normally

136. *Id.* at *4 (noting that university’s action or lack of action is “actionable” under Title IX if school’s “deliberate indifference” caused or created environment of harassment).

137. *Id.*

138. See Stig Berge Matthiesen & Stale Einarsen, *Psychiatric Distress and Symptoms of PTSD Among Victims of Bullying at Work*, 32 BRIT. J. GUIDANCE & COUNSELLING 334, 348 (2004), available at <http://www.student.uib.no/People/ppspm/documents/Bullying-PTSD-2004-Matthiesen-Einarsen.pdf>.

139. 42 U.S.C. § 1983 (2000).

140. See Conn, *supra* note 58, at 5 (surveying remedies available to harassed and/or bullied students).

141. See *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 792 (2009) (defining question presented as whether Title XI precludes action under § 1983 and concluding that it does not).

142. See *id.* at 796 (holding that “comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause lends . . . support to the conclusion that Congress did not intend Title IX to preclude” or supersede § 1983 claims).

143. 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) (describing current legal remedies as “woefully inadequate” for harassment victims due to high burdens required in each).

require states to protect their citizens,¹⁴⁴ students generally need to qualify for one of two exceptions: (1) the school has a special relationship with the student, or (2) the school created the danger.¹⁴⁵

Fitting within the special relationship or state created danger exceptions remains difficult for plaintiffs.¹⁴⁶ For example, the Eastern District of Virginia dismissed a female student's complaint of sexual harassment because she failed to fit within either exception.¹⁴⁷ The plaintiff in the case endured constant offensive remarks and unwelcome sexual advances that eventually caused her to be hospitalized for suicidal depression, post-traumatic stress disorder, and anorexia.¹⁴⁸ Throughout the harassment, the plaintiff's teachers did little to address the situation despite being informed of the harassment, and only after the plaintiff was hospitalized were the offending boys suspended.¹⁴⁹ Upon her return to school, the harassment continued and eventually forced the plaintiff to withdraw from school and begin homeschooling.¹⁵⁰ She sued the school for failing to take prompt action and prevent the harassment.¹⁵¹

144. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989) (concluding that "[a] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause").

145. See *Secunda*, *supra* note 143, at 26-27.

146. See *Stevenson v. Martin County Bd. of Educ.*, 93 F. Supp. 2d 644, 648 (E.D.N.C. 1999) (explaining that precedent dictates presence of no special relationship between students and schools, and noting that "[a]n affirmative duty only arises [between the state and student] when 'the state has exercised its power so as to render an individual unable to care for himself or herself'") (quoting *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990)).

147. See *Shores v. Stafford County Sch. Bd.*, No. Civ.A. 04-1325, 2005 WL 2071730, at *2 (E.D. Va. Aug. 26, 2005) (concluding plaintiff did not qualify within exceptions and school was not liable). Specifically, the court found in relevant part that, "(1)[the school district] ha[d] no liability for the sexual harassment which [plaintiff] experienced pursuant to 42 U.S.C. § 1983 based on a bodily integrity claim because [it] did not perpetrate the acts of harassment and there was no special relationship between [the plaintiff] and [the school district]." *Id.*

148. See *id.* at *1 (describing facts of case).

149. See *id.* (describing facts of case). According to the record, the plaintiff and her sister reported the harassment to the plaintiff's teacher. See *id.* The teacher allowed the plaintiff to move her seat, but when the harassing students moved their seats closer to the plaintiff's seat, the teacher took no further action. See *id.* In addition, the plaintiff filed a formal complaint with the school guidance counselor, but this effort also failed to stop the harassing students. See *id.* Rather, disciplinary action was not taken against both harassing students until the plaintiff was hospitalized. See *id.*

150. See *id.* (describing facts of case). The plaintiff returned on a half-day schedule after being hospitalized, but was still subjected to harassment in the hallways of the school by the two offending boys. See *id.* at *1-2. Consequently, the plaintiff decided to permanently withdraw. See *id.* at *2.

151. See *id.* (describing procedural posture of case). In particular, the plaintiff's complaint alleged that the school was "deliberately indifferent to the harassment which she experienced and because they failed to promptly take any action to aid [the plaintiff] and to prevent harassment," it should be held liable under § 1983. *Id.*

In dismissing the victim's Section 1983 claim, the court noted that the school district did not engage in conduct that resulted in the violation of the plaintiff's rights.¹⁵² Moreover, the court refused to find that the school-student relationship satisfied the special relationship exception, despite the fact that the plaintiff was required to attend school.¹⁵³ The court held that even though the school could have taken more timely or effective measures to prevent the harassment, "the state [was not] constitutionally liable for all acts of violence between students."¹⁵⁴ Finding a special relationship with a college student would prove more difficult because compulsory attendance laws have no relevance.

The court also refused, in this case, to accept that the state created a danger in violation of Section 1983.¹⁵⁵ The state-created danger exception requires a showing of a school's conduct that is "so intentional or reckless that it shocks the conscience of federal judges."¹⁵⁶ Therefore, although the school's efforts may have been inefficient, they did not rise to a level of deliberate indifference.¹⁵⁷

As to Section 1983 claims based on equal protection violations, the framework depends on whether the defendant is an educational institution or an individual. To find a school liable, the school must either have

152. *See id.* at *3 (holding school district not liable under § 1983 claim because "[the] Plaintiff did not allege that teacher harassed her and state actors are not liable under § 1983 if they did not perform the conduct that resulted in the alleged violation of the plaintiff's rights").

153. *See id.* (rejecting plaintiff's notion of student-school special relationship and dismissing plaintiff's § 1983 claim because exception was not satisfied). In arriving at its conclusion that a special relationship did not exist between the plaintiff and school, the court relied on the Supreme Court's definition of "special relationship" as being formed

[w]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by . . . the Due Process Clause.

Id. Consequently, because a student is not in "physical custody and, along with parental help, is able to care for his basic human needs," no special relationship exists. *Id.* at *3-4 (applying special relationship definition to school-student relationship).

154. *Id.* at *4 (concluding that although additional measures could have been taken, there was no constitutional violation based on established precedent).

155. *See id.* (articulating that § 1983 is subject to "state-created danger exception" wherein the "state has to take some affirmative steps" for exception to be satisfied).

156. *Id.* (explaining that "state-created danger exception" requires "deliberative indifference" by school and noting that this "is a very high standard to meet). Specifically, the court clarified that "[l]iability does not arise when the state stands by and does nothing in the face of danger" and "[f]ailing to protect an individual from danger caused by a third party does not implicate the state in the harm." *Id.* (commenting on parameters of state-created danger exception).

157. *See id.* (concluding that although school could have been more proactive in terminating harassment of plaintiff, school's conduct did not meet requisite standard of state-created danger).

an official policy or custom allowing employees to engage in sexual harassment, or the harassment must be the result of an action by an official with final policymaking authority.¹⁵⁸ To find an individual liable, courts require a showing that the individual was deliberately indifferent to known sexual harassment.¹⁵⁹

Although the standard for Section 1983 claims based on equal protection violations is relatively high, in a landmark case for gay and lesbian youth, the Seventh Circuit held that a plaintiff could maintain his equal protection claims even though his substantive due process rights were not violated.¹⁶⁰ The case involved the harassment and physical abuse of a homosexual boy throughout middle school and high school.¹⁶¹ Classmates regularly called the plaintiff a “faggot” and subjected him to various forms of physical abuse, including a mock rape.¹⁶² School officials responded to the plaintiff’s complaints by saying “boys will be boys” and that he should “expect” such behavior if he was going to be openly gay.¹⁶³ The court allowed the plaintiff’s claim to survive summary judgment based on evidence that the school had a policy and habit of punishing perpetrators of battery and harassment committed by males towards females, but refused to enforce the same policy against the plaintiff’s tormentors.¹⁶⁴ A jury found the school officials liable, but before they could return a damage verdict, the case settled for nearly one million dollars.¹⁶⁵

158. *See* *Secunda*, *supra* note 143, at 28 (indicating that municipal liability under § 1983 requires “an official policy or custom to engage in sexual harassment or an action by an official with final policymaking authority”).

159. *See id.* (summarizing § 1983 and Title IX requirements for individual and employer liability).

160. *See* *Nabozny v. Podlesny*, 92 F.3d 446, 459-60 (7th Cir. 1996) (noting that plaintiff’s arguments included that defendant school should be liable for “enhanc[ing] his risk of harm . . . because their policies encouraged a climate in which he suffered harm” and agreeing that “defendants could be liable under a due process theory if [the plaintiff] could show that the defendants created a risk of harm, or exacerbated one”).

161. *See id.* at 449 (describing facts of case).

162. *See id.* at 451 (describing facts of case).

163. *See id.* (describing facts of case).

164. *See id.* at 455 (describing facts and evidence of case). According to the record, the defendants acknowledged that they “aggressively punished male-on-female battery and harassment.” *Id.* Although the defendants contended that they pursued harassment of the plaintiff as vigorously as male-on-female battery, the plaintiff presented evidence to support his claim that the investigation and punishment for his offenders was not as aggressive. *See id.* (describing facts of case). Consequently, the court rejected the defendants’ motion for summary judgment because this question was one of “credibility for the fact-finder.” *See id.* (explaining decision to deny defendants’ motion for summary judgment in connection with plaintiff’s argument that school enhanced his risk of harm).

165. *See* Lambda Legal, *Nabozny v. Podlesny*, <http://www.lambdalegal.org/ourwork/in-court/cases/nabozny-v-podlesny.html> (last visited May 17, 2010) (summarizing outcome of case); *see also* *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132 (9th Cir. 2003) (allowing plaintiff’s § 1983 claim alleging discrimination based on sexual orientation to proceed and rejecting defendant’s request for summary judgment based upon presence of “sufficient evidence for the jury to

3. *State Civil Rights Laws*

Because of the stringent requirements associated with federal harassment statutes, some plaintiffs have opted to use state civil rights laws as a basis for bullying suits. The New Jersey Supreme Court recently remanded a case clarifying that Title IX's deliberate indifference standard did not apply to New Jersey's Law Against Discrimination (LAD).¹⁶⁶ This case involved a student's persistent and severe harassment from elementary school through high school based on his perceived sexual orientation.¹⁶⁷ The student endured all types of homosexual epithets ("gay," "homo," "butt boy," "fudge packer"), as well as physical violence.¹⁶⁸ Eventually, the student changed high schools to avoid his tormentors.¹⁶⁹

The Administrative Law Judge (ALJ) that heard the student's case applied Title IX's standards and dismissed the case, finding that the school district did not act deliberately indifferent.¹⁷⁰ The Director of the Division on Civil Rights rejected the ALJ's decision and awarded the plaintiff damages, stating that the school knew or should have known about the harassment and failed to take actions to stop it.¹⁷¹ The appellate court affirmed in part and reversed in part, after which the school district petitioned for certification on the question of whether the civil rights statute provided a cause of action for peer harassment and what standard of liability applies to such a claim.¹⁷²

The New Jersey Supreme Court held the statute did allow a cause of action for peer harassment based on the statute's "plain language, its broad remedial goal, and the prevalent nature of peer sexual harassment."¹⁷³ The court also refused to accept the school's argument that the standard of liability should mirror Title IX.¹⁷⁴ The court differentiated Title IX from LAD by noting that Title IX was grounded in Congress's

infer that defendants acted with deliberate indifference" where plaintiffs harassed for years and school failed to "enforce . . . policies to protect them"); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1098 (D. Minn. 2000) (rejecting motion to dismiss plaintiff's § 1983 claim).

166. *See* *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535, 548 (N.J. 2007) (rejecting deliberate indifference standard).

167. *See id.* at 539-544 (stating that student was verbally taunted since fourth grade, was molested and faced physical aggression in middle school, and eventually transferred high schools due to continued harassment).

168. *See id.* at 539, 541, 543. "The remarks were so frequent in seventh grade that L.W. testified that '[i]f I ma[d]e it through a day without comments, I was lucky.'" *Id.* at 541.

169. *See id.* at 543.

170. *See id.* at 544.

171. *See id.*

172. *See id.* at 545.

173. *Id.* at 547.

174. *See id.* at 548.

Spending Power and that the scope of the two statutes substantially differed.¹⁷⁵

4. *State School Anti-Bullying Laws*

Thirty-six states now have anti-bullying laws, with ten being passed in the last two years.¹⁷⁶ Unfortunately, these statutes vary widely with many failing to include necessary components, thus limiting their effectiveness.¹⁷⁷ Many anti-bullying statutes are too deferential to the decision-making powers of local school authorities in defining bullying and fashioning remedies for violating the anti-bullying policy.¹⁷⁸ In addition, none of these statutes allow for a private cause of action.¹⁷⁹ Finally, and most importantly for purposes of this Article, these statutes are presently limited to students in grades K-12, and would need to be amended to protect college and university students.

B. *Legal Theories Not Based on Protected Class Membership*

1. *Tort Actions*

A plaintiff may try to bring a lawsuit alleging numerous tort theories, including negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.¹⁸⁰ Universities' ability to avoid legal liability has been premised on various theories over the decades.¹⁸¹ Before the 1960s, universities relied on the concept represented in the *in loco parentis* era to insulate them from legal scrutiny.¹⁸² The bystander era, which focused on student freedom and universities' lack of authority and

175. See *id.* at 549 (noting that Title IX and LAD differed on three grounds: (1) Title IX prohibits discrimination based on sex only, (2) Title IX only prohibits beneficiaries of federal educational funds from discriminating against students due to sex, and (3) LAD expressly authorizes private action to file causes of actions, whereas Title IX impliedly allows private right of action).

176. See generally Bully Police USA, www.bullypolice.org (last visited May 17, 2010) (rating states' anti-bullying laws).

177. See Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 ED. L. REP. 1, 13-19 (2005).

178. See Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53, 71 (2005).

179. For a further discussion of the lack of private action afforded by anti-bullying statutes, see *supra* note 58 and accompanying text.

180. See, e.g., Complaint, *Vilardo v. Daniel Webster College*, available at <http://media.nashuatelegraph.com/assets/bullysuit.pdf> (citing student's complaint of college's gross negligence) (last visited May 17, 2010).

181. See generally ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE?* (1999).

182. See *id.* at 7.

control of students, imposed little or no responsibility on universities to protect students from harm.¹⁸³

The most significant barrier to these actions is establishing that a university or college has a general duty to provide a safe learning environment.¹⁸⁴ Generally, no duty exists to keep a student safe from the acts of a third party, and a majority of courts have rejected the university-student relationship alone as a basis for liability.¹⁸⁵ Courts likewise dismiss the custodian-charge relationship as establishing a duty because college students are adults who are able to take care of themselves.¹⁸⁶

Today, with front-page news reporting hazing, harassment, and other violence on campus, uncertainty exists as to whether a college or university owes any duty at all to its students.¹⁸⁷ Although most courts do not automatically impose a duty as a matter of law, courts seem willing to reconceptualize the student-university relationship and find colleges and universities responsible for student safety under certain fact patterns when special relationships exist.¹⁸⁸ Successful lawsuits against universities have been based on a business-invitee relationship if the harmful act by the third person was foreseeable.¹⁸⁹ In addition, some courts have found a duty based on a landlord-tenant relationship or a protector-protectorate relationship.¹⁹⁰ Not all states, however, recognize these duties with uni-

183. *See id.* at 7-8. An often cited case for this proposition is a Third Circuit case, where the court stated:

College students today are no longer minors; they are now regarded as adults in almost every phase of community life. . . . There was a time when college administrators and faculties assumed a role [i]n loco parentis. . . . But today students vigorously claim the right to define and regulate their own lives.

Bradshaw v. Rawlings, 612 F.2d 135, 139-40 (3d Cir. 1979).

184. *See Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1093 (Vt. 1999) (finding that university owed duty of reasonable care to avoid harm to plaintiff); *see also* Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" to Bystander to Facilitator*, 23 J.C. & U.L. 755, 780 (1997)

185. *See Bradshaw*, 612 F.2d at 141-142; *see also* *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993); *Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 364 (Md. 2005).

186. *See Furek v. Univ. of Del.*, 594 A.2d 506, 517 (Del. 1991) (stating that custodial relationship is not possible because students are adults). *See also* Aliza M. Milner, *Cause of Action Against College or University for Injury Inflicted on Student by Third Party*, 31 CAUSES OF ACTION 2D 675, §§ 7-8 (2007) (stating that student may rely on custodian charge relationship for tort liability but, thus far, plaintiffs have not been successful on these grounds).

187. *See id.* § 12. For a further discussion of the extent to which universities owe their students duties, *see* Bickel & Lake *supra* note 184, at 780.

188. For an example of when a court imposed a duty on universities, *see infra* notes 195-201 and accompanying text.

189. *See* Milner, *supra* 186, § 9 (stating that courts will discern if university should have foreseen harm by deciding whether it punished or tried to prevent similar harm in past).

190. *See id.* § 10 (stating that landlords will be held liable for harmful conduct if they knew or should have known about third parties' actions).

versities and students; therefore, no bright line rule can be articulated regarding a college or university's tort liability.¹⁹¹

The rise of hazing litigation has given courts the opportunity to revisit the question of whether a university or college ever undertakes a duty to protect a student's safety. Some courts have found colleges and universities liable for student injuries resulting from third party action when such conduct was reasonably foreseeable by the university,¹⁹² when the university failed to investigate hazing incidents,¹⁹³ and when the university's hazing policy was not enforced.¹⁹⁴ This area is highly fact-specific, although a few courts recognize that colleges and universities owe a duty of reasonable care as to a student's safety, and use traditional tort principles when evaluating the college or university's acts or omissions.¹⁹⁵

In one case, the Delaware Supreme Court found the University of Delaware owed a duty to one of its students, Jeffrey Furek, who was permanently injured during his fraternity's "hell night."¹⁹⁶ During the course of the evening, a fraternity member poured lye-based liquid oven cleaner on the pledge's body resulting in permanent scarring.¹⁹⁷ The court held "where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control."¹⁹⁸ Evidence existed that the university knew of the fraternity hazing rituals and the dangers associated with them, and had officially reminded the fraternities of the university's prohibition of hazing several times.¹⁹⁹ The court based its decision on *Restatement of Torts* Section 323, which addresses the duty owed by one who assumes direct responsibility for the safety of another through the rendering of services in the area of protection.²⁰⁰ The court rejected the university's argument that it had not assumed a duty, instead finding the university's policy against hazing the basis for the duty.²⁰¹ The court also ruled that the university's liability could be premised on a landowner's obligation to keep the premises safe from known dangerous conditions because the plaintiff's injuries would be foreseeable to university officials based on their knowl-

191. *See id.* § 20.

192. *See* Knoll v. Bd. of Regents, 601 N.W.2d 757, 762 (Neb. 1999).

193. *See* Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1117 (La. Ct. App. 1999).

194. *See* Furek v. Univ. of Del., 594 A.2d 506, 518 (Del. 1991).

195. *See* Bickel & Lake, *supra* note 184, at 761.

196. *See* Furek, 594 A.2d at 509.

197. *See id.* at 510.

198. *Id.* at 520. "The University's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'" *Id.* (quoting Mullins v. Pine Manor Coll., 449 N.E.2d 331, 336 (Mass. 1983)).

199. *See id.*

200. *See id.* at 518-19.

201. *See id.* at 520.

edge that hazing occurred on campus.²⁰² In sum, although the court agreed that colleges and universities were not insurers of a student's safety, it refused to relieve them of a duty to regulate and supervise foreseeable, dangerous activities occurring on campus property.

Bullying cases remain a relatively new phenomenon and few published settlements or verdicts of bullying cases exist. Based on the hazing cases it would appear that colleges and universities could be held liable if courts can find a duty and the injury is foreseeable. Student handbooks prohibiting bullying behavior may provide the basis for the duty, much like the anti-hazing policy did in the *Furek* case. A victim would also need to prove the university knew about the bullying, similar to its knowledge of hazing activities.

The holding in *Furek*, however, should not be overstated because it appears to limit the duty to "those instances where [the university] exercises control."²⁰³ Arguably, a difference exists between hazing in the context of a sanctioned university organization, which the university has more control over, than a random bully that attends the university. Perhaps courts will not yet extend the duty outside of the hazing context, but that does not mean that they will not one day find such a duty. Culturally, society may be shifting in that direction. The court in *Furek* specifically noted that changes in "societal attitudes toward alcohol use and hazing" seriously eroded previous decisions finding universities not liable for third party actions against students.²⁰⁴ The court had no issue requiring universities to comply with self-imposed standards (for example, the anti-hazing policy), unlike many previous cases which specifically found school policies did not create a duty upon the university to keep students safe from third parties.²⁰⁵ As society deepens its understanding of bullying and its detrimental impact, courts may more often find the existence of a duty if universities and colleges publish codes and policies prohibiting harassment. Hazing and bullying produce some of the same damage to the victim, and courts may determine "the likelihood of injury. . . is greater than the utility of university inaction."²⁰⁶

Recent cases seem to imply juries are willing to hold schools liable at least at the elementary and high school level. For example, a Florida jury awarded a victim of bullying four million dollars against his private school.²⁰⁷ In that case, a known bully broke a seventh grader's arm, which

202. *See id.* at 520-21.

203. *See id.* at 522.

204. *See id.* at 523.

205. *See id.* at 517 (discussing *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986), which refused to find university liable for student's alcohol-related injury at university-sponsored event even though she was with faculty member and university had policy prohibiting alcohol use).

206. *Id.* at 523.

207. *See* Colleen Jenkins, *Bullying Costs School \$4M*, ST. PETERSBURG TIMES, Oct. 23, 2007, at 1A, available at <http://www.sptimes.com/2007>.

resulted in paralysis and trouble controlling his fingers.²⁰⁸ As a ranked tennis player, this had a lasting and detrimental impact on his life.²⁰⁹ Previously, the victim's parents had complained to the principal of prior assaults and asked that their son be protected.²¹⁰ The school district appealed the verdict and the parties reached a confidential settlement.²¹¹

In a similar case, a jury in Tonganoxie, Kansas awarded a bullying victim \$250,000, with interest and costs.²¹² The case eventually settled for \$440,000 in January 2006 after the school district appealed the verdict.²¹³ The boy filed Title IX and Section 1983 actions, as well as a negligent supervision claim for the constant sexual harassment he endured for three years.²¹⁴ The bullies called him a faggot and continually spread rumors about the boy masturbating in the restroom.²¹⁵

Other suits have settled before reaching a trial. For example, five girls in Casey County, Kentucky settled their bullying lawsuit during the summer of 2008.²¹⁶ The settlement is confidential, but it did include monetary damages and required the school to change its procedures and rules.²¹⁷ The girls alleged that they were verbally and physically abused and that school officials discounted or downplayed the bullying.²¹⁸ In fact, one school official purportedly told a victim she needed to "toughen up."²¹⁹

Additional suits have been recently filed by more children in other Kentucky counties.²²⁰ Parents who filed one of the suits blame the school

208. *See id.*

209. *See id.*

210. *See id.*

211. *See* E-mail from David Tirella, Adjunct Professor of Law, Stetson Univ. Coll. of Law, to Susan H. Duncan, Associate Professor of Law, Louis D. Brandeis Sch. of Law: Univ. of Louisville (Feb. 19, 2009 11:08:00 EDT) (on file with author).

212. *See* Verdict and Summary, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, No. 04-2195-JWL, 2005 WL 2716272 (D. Kan. Aug. 11, 2005), *available at* <http://www.bensonlaw.com/bully/verdict.pdf> (last visited May 17, 2010).

213. *See* Benson & Associates, *School Bullying Case*, <http://www.bensonlaw.com/bully/index.html> (last visited May 17, 2010).

214. *See* Complaint, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, No. 04-2195-JWL, 2005 WL 2716272 (D. Kan. Aug. 11, 2005), *available at* <http://www.bensonlaw.com/bully/complaint.pdf> (last visited May 17, 2010).

215. *See id.*

216. *See* Todd Kleffman, *Settlement Reached in Casey Bullying Lawsuit*, AMNEWS.COM, <http://www.amnews.com/stories/2008/06/27/cas.41952.sto> (last visited May 17, 2010) (free log-in required).

217. *See id.*

218. *See id.*

219. *See* Bill Estep, *Casey County School Officials are Sued Over Alleged Bullying*, LEXINGTON HERALD-LEADER, July 26, 2006, at A1.

220. *See* Connie Leonard, *Three Families File Suit Over School Bullying*, WAVE3, <http://www.wave3.com/> (search website for "Three Families File"; then scroll down search page for hyperlink to article).

for their child's suicide.²²¹ Suicides that result from bullying have become common enough to be referred to as "bullycide."²²² As evidenced by the many bullying lawsuits filed across the country, Kentucky parents are not the only ones angry about how their child's school deals with bullying.²²³

As the public becomes more aware of the nature and dangers of bullying, there is no reason why colleges will not also be named in bullying lawsuits. For example, the Georgia Court of Appeals reversed the district court's dismissal of a claim, which alleged that Morehouse College fostered an atmosphere of hatred and violence towards homosexuals.²²⁴ This case received national attention because of its potential to expand a university's duty to its students.²²⁵ Morehouse admits it owes a duty of safety to its students but not "a heightened duty or responsibility for matters of morals and virtues."²²⁶ This is not the only case trying to push the envelope. In fact, in a New Hampshire case filed in November 2007, a student asked the court to recognize a duty requiring colleges to protect students from bullies.²²⁷ The case, set for trial in August 2009, specifically involves tort causes of actions arising from various instances of bullying.²²⁸

Even if the college owes a duty to the student and breaches that duty, sovereign immunity in many states bars an action against a college or university, unless consent to sue has been expressly granted.²²⁹ Lawsuits may be dismissed because the universities are instrumentalities of the state and are therefore immune from suit.²³⁰ Some states attempt to limit the application of sovereign immunity by applying a distinction between governmental and discretionary functions versus proprietary and operational

221. *See id.* (reporting that one student shot himself as result of school bullying).

222. *See generally* Bullycide in America, <http://www.bullycide.org/> (last visited May 17, 2010).

223. *See generally* Raad Cawthon, *Parents of Bullies' Victims Fight Back by Suing Schools*, PHILADELPHIA INQUIRER, Feb. 27, 1999, at A1; Jeff Holtz, *Worth Noting: Parents File Lawsuit Over Bullying of Daughter*, N.Y. TIMES, Jan. 9, 2005, at CT2; Martha Neil, *Bullied at School for Years, Billy Wolfe Brings Suit, with His Parents' Help*, Mar. 24, 2008, http://abajournal.com/news/bullied_at_school_for_years_billy_wolfe_brings_suit_with_his_parents_help/; Tatiana Zarnowski, *Parents Sue Over Bullying*, THE SENTINEL (Harrisburg, Pa.), Dec. 23, 2003, <http://www.cumberlandlink.com/articles/2003/12/23/news/news03.txt>.

224. *See* *Love v. Morehouse Coll., Inc.*, 652 S.E.2d 624, 624 (Ga. Ct. App. 2007).

225. *See generally* Steve Sanders, *Should Colleges Be Sued for Harboring Intolerance?*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 22, 2008, at A31.

226. *Id.*

227. *See* Complaint, *Vilardo v. Daniel Webster College*, *supra* note 180. This case was scheduled for trial Aug. 3, 2009.

228. *See id.*

229. *See* *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006).

230. *See* *Setrin v. Glassboro State Coll.*, 346 A.2d 102, 106 (N.J. Super. Ct. App. Div. 1975).

functions, only allowing suits for the latter.²³¹ The governmental/proprietary distinction is essentially a question of fact, which makes a bright line test for its application nearly impossible, resulting in a confusing body of law.²³² In addition, some states cap damages further curtailing recovery for plaintiffs. Finally, some attorneys may be reluctant to file a suit unless a permanent injury exists.

2. *Breach of Contract*

In addition to traditional tort claims, students may also file breach of contract claims based on promises made by the college prior to and during a student's enrollment. This option may be the only available remedy in jurisdictions where sovereign immunity bars tort suits. Case law supports the proposition that student handbooks can form a contract between students and universities.²³³ Most of those cases focus on academic issues such as decisions involving grades, degrees, or disciplinary matters.²³⁴ As one scholar notes, "[c]ourts will intervene if the student provides evidence of a breach of a specific promise made or the non-performance of a specific service purported to be available to the student."²³⁵

Students victimized by bullies at colleges may start to bring breach of contract suits based on broad policies prohibiting all types of harassment contained in student handbooks or student codes. The contract prohibiting bullying may give rise to an action between the bully and the university, but not the victim, unless the victim is somehow a third party beneficiary of the contract prohibiting the bullying. Otherwise, the university would have to make a contract with the victim directly that involves keeping the victim sheltered from bullying. These promises could be based on implied or expressed terms. Although an express promise protecting students from bullying may not exist, handbooks and other documents may include broad enough provisions to serve as the basis for a breach of contract claim. In fact, a student in Massachusetts recently sued his college for breach of contract for failing to provide a safe environment for students with proper supervision, reasonably disciplined students, and properly trained staff and supervisors as promised by its handbook.²³⁶

Although most cases utilizing a contract theory turn on academic issues, a few courts have examined this theory in relation to injury by a third party. A New York district court denied Cornell University's motion for

231. See *Autry v. W. Ky. Univ.*, No. 2004-CA-000216-MR, 2005 WL 497193 (Ky. Ct. App. Mar. 4, 2005), *aff'd in part and rev'd in part*, 219 S.W.2d 713 (Ky. 2007).

232. See *Avallone v. Bd. of County Comm'rs of Citrus County*, 493 So. 2d 1002 (Fla. 1986).

233. See *Smith v. Ohio State Univ.*, 53 Ohio Misc. 2d 11, 14 (Ohio Ct. Cl. 1990).

234. See 15A AM. JUR. 2D *Colleges and Universities* § 25 (2009).

235. Kerry Brian Melear, *Contracts with Students*, in CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 228 (Joseph Beckham & David Dagley eds., 2005).

236. For a discussion of this case, see *supra* note 180 and accompanying text.

summary judgment holding that a genuine issue of material fact existed as to whether either the university or the victim failed to meet obligations under an implied contract governing dormitory security.²³⁷ In this case, the parents of a student who was murdered in her dormitory room by her roommate's disappointed suitor argued a series of pamphlets, brochures, and other documents supplied by Cornell to prospective and enrolled students, constituted part of a contract which made promises about certain safety procedures.²³⁸ In denying Cornell's motion for summary judgment and allowing the case to continue, the court refused to accept Cornell's argument that these materials failed to create an implied contract.²³⁹ Other courts, however, refuse to allow contract claims to proceed when the complaint actually seeks recovery for a tort.²⁴⁰

Additionally, mental anguish and emotional distress damages are usually more difficult to recover in contract actions because they must be a foreseeable consequence of a particular breach of contract.²⁴¹ A person must allege specific suffering above the ordinary trauma a broken contract causes a reasonable person.²⁴² Mere generalizations about trauma are insufficient to establish liability.²⁴³

3. *State Generic Anti-Bullying Laws*

In addition to anti-bullying statutes that focus on schools, several states are considering passing healthy workplace bills, which would prohibit generic bullying in employment situations.²⁴⁴ Generic bullying or "status neutral harassment" is different from harassment because it is not directed towards a person who is a member of a protected class; therefore, "status neutral harassment" is not currently prohibited by federal or state statute. Recognizing the real and substantial harm this type of bullying produces at the workplace and the failure of current laws to regulate it,

237. *See* *Nieswand v. Cornell Univ.*, 692 F. Supp. 1464, 1468 (N.D.N.Y. 1988).

238. *See id.* at 1469-70.

239. *See id.* at 1470.

240. *See, e.g.*, *Crow v. State*, 222 Cal. App. 3d 192, 206 (Cal. Dist. Ct. App. 1990) (dismissing contractual claims because student failed to properly identify them in administrative complaint but acknowledged "duck-rabbit" question when student was actually suing in tort); *Delaney v. Univ. of Houston*, 792 S.W.2d 733, 739 (Tex. Ct. App. 1990) (dismissing contract claims because claim arose out of intentional tort).

241. *See* *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 172 (Miss. 2004) (discussing difficulty of being awarded mental anguish damages in breach of contract actions).

242. *See id.* at 173.

243. *See id.*

244. *See* New York Healthy Workplace Advocates, *Healthy Workplace Bill Legislative History in the United States*, <http://www.nyhwa.org/7.html> (last visited May 17, 2010); *see also* Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 *MINN. J. INT'L L.* 247 (2008); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for a Status-Blind Hostile Work Environment Protection*, 88 *GEO. L.J.* 475 (2000).

legislators in at least thirteen states have introduced anti-bullying healthy workplace bills.²⁴⁵ Similar laws exist in several countries in Europe.²⁴⁶

Many employment lawyers and company officials strongly object to proposed healthy workplace bills. Opponents of the bills argue it is already difficult to manage existing illegal workplace harassment and these bills would open the door too wide.²⁴⁷ They fear an avalanche of lawsuits would result from people complaining about tough bosses instead of legitimate abuse. Finally, defending such suits would be costly to companies and clog the courts. Legislatures appear to be listening to these concerns, as all healthy workplace bills have died or are languishing in state legislatures. Nevertheless, proponents of the bills vow to continue to advocate their adoption. Universities should therefore be aware of this emerging employment issue and monitor its potential applicability to college campuses.

IV. HOW SHOULD COLLEGES AND UNIVERSITIES DEAL WITH BULLIES?

Colleges and universities need to adopt a multifaceted approach of intervention, prevention, and enforcement to address bullying on their campuses. Ideally, colleges should adopt these procedures voluntarily, but legislation much like the K-12 anti-bullying statutes may be necessary for some institutions. In particular, the legislation may be necessary for those institutions that refuse to address the bullying problem either because they still do not fully understand the problem or the consequences that result from ignoring bullying. This multifaceted approach of intervention, prevention, and enforcement on campuses would include:

- Conducting empirical research on the prevalence, nature, and impact of college bullying;
- Initiating programs and providing resources that increase the knowledge and understanding of the nature, causes, and history of harassment and bullying;
- Implementing bullying prevention policies and procedures;
- Creating procedures for reporting and investigating acts of harassment, intimidation, or bullying; and

245. See New York Healthy Workplace Advocates, *supra* note 244.

246. See Rebecca Morris, "Healthy Workplace Bill" Would Protect Employees Who Feel the Bite of a Tormenting Boss, SEATTLE TIMES, Jan. 20, 2008, at K1 (listing England, France, Norway, and Sweden as all protecting bullied employees); see also Sarah Morris, *The Anti-Bullying Legislative Movement: Too Quick To Quash Common Law Remedies?*, 65 BENCH AND B. MINN. 22, 23 (2008) (describing various anti-bullying workplace bans in Sweden, France, the Netherlands, Belgium, Denmark, Finland, and Quebec).

247. See Carolyn Said, *Bullying Bosses Could be Busted/Movement Against Worst Workplace Abusers Gain Momentum With Proposed Laws*, S.F. CHRON., Jan. 21, 2007, available at http://articles.sfgate.com/2007-01-21/business/17227991_1_bullying-workplace-domestic-violence.

- Providing support for victims of bullying and appropriate consequences and remedial action for those (a) committing harassment or bullying, (b) falsely reporting, or (c) retaliating against someone who reports.

A. *Research*

To adequately answer the question of how colleges and universities should deal with this problem, the first thing institutions need to do is conduct more social science research on the prevalence, nature, and impact of college bullying. Although this may not sound like a strong solution, research and data are vital in determining the steps necessary to adequately address the problem. This information already exists for children in K-12 and should be evaluated to determine its relevance in the university setting.²⁴⁸ Without concrete data concerning the prevalence of the problem, designing a solution becomes problematic. Researching this Article exposed a huge gap in the literature about bullying, especially regarding college bullying. Administrators need to give an equivalent level of attention that currently exists for K-12 and workplace bullying to college bullying to ascertain the nature of the problem. The only way colleges and universities will be able to address the problem in a truly meaningful way is with this concrete evidence.

In addition to this global research, colleges and universities should engage in climate assessments of their own campuses. Specifically, colleges should investigate whether students and employees know the different types of behavior that constitute bullying and its long-term effects.²⁴⁹ In addition, colleges need to ascertain whether students and employees know how to report bullying incidents and whether they are familiar with the policies and procedures regarding bullying.²⁵⁰ Finally, although more difficult than in K-12 settings, colleges should review how they identify bullies and victims.²⁵¹

B. *Anti-Bullying Programs*

Experts in the K-12 setting stress the importance of prevention and, therefore, recommend developing anti-bullying programs and initiatives.²⁵² These are particularly important because drafting anti-bullying policies that pass constitutional muster remains very difficult. As a result,

248. See U.S. Dep't of Educ., *supra* note 3.

249. See MARY A. LENTZ, LENTZ SCHOOL SECURITY § 6:10 (2008) (discussing how to "identify, stop, [and] prevent" bullying in school settings).

250. See *id.* (same).

251. See Bryan Coplin, *Bullying Presents Nationwide Problem: Little Research Exists for College-Level Violence, Harassment*, JOURNAL, Sept. 27, 2007, available at <http://media.webujournal.com/media/storage/paper245/news/2007/09/27/News/Bullying.Presents.Nationwide.Problem-2993236.shtml>.

252. For a discussion of the most widely proven program, see *infra* note 254.

developing a positive school culture and climate of mutual respect and tolerance may be a better approach than using student conduct codes to punish offenders. Such programs require staff training and support, as well as a financial commitment. Consequently, programs for colleges and universities should be designed carefully to ensure that they justify the financial and personnel investment colleges must make using their scarce resources.

Although K-12 bullying prevention strategies, anti-bullying policies, and anti-bully prevention programs may provide colleges and universities with some guidance, the unique nature of the college environment—with its residential components and the more advanced age of students—will most likely require a different type of approach. The following are some of the common criteria used by federal agencies to review and identify effective drug and violence prevention programs that have equal applicability to any program designed for use in colleges and universities:

Quality of Program Design

- Program goals and objectives are clear and appropriate for the target population.
- Program content and methods address the needs of and effectively engage the target population.
- The program's underlying rationale is well-articulated, and its content and methods are aligned with its goals.
- The program is a complete intervention, rather than a single component (e.g., a video, an assembly, a book in the library).

Quality of Research Design

- Program evaluation includes pre- and post-testing with a control or comparison group.
- Program evaluation includes relevant, reliable, valid, and appropriately administered outcome measures.
- Data analysis was technically adequate and appropriate.
- Evaluation studies had low rates of participant attrition.

Evidence of Program Efficacy

- The intervention produced positive change in scientifically established risk and protective factors.
- The intervention reduced or delayed the onset, prevalence, and/or individual rates of risk behaviors.
- Follow-up measurement provides evidence of sustained program impact.

Capacity for Replication and Dissemination

- The program includes high-quality program materials (e.g., manuals), training, and technical assistance.

- The program includes tools and procedures to monitor the fidelity of implementation and evaluate program outcomes.
- The program has been replicated and produced similar positive results, and these replications have been documented.
- Evaluation findings have been published or accepted for publication by a peer-reviewed journal.²⁵³

The most proven and widely replicated anti-bullying program remains the Olweus Bullying Prevention Program, named after its founder, Dan Olweus.²⁵⁴ The program begins with a survey to determine the prevalence of the problem. Training follows the survey, which helps raise awareness among specific teachers, students, and parents. At the start of the school year, rules are established and teachers closely supervise areas where bullying likely occurs. Finally, interventions are regularly held with bullies, victims, and their parents. Studies have reported a reduction in the incidents of bullying and other anti-social behavior after schools implement the Olweus Bullying Prevention Program, thereby earning the respect of many educators and agencies.²⁵⁵

Several logistical challenges exist with designing a similar approach for college students. Part of the Olweus program involves class meetings and teachers setting positive and negative consequences for certain anti-bullying and bullying behaviors respectively. The expansive nature of a college campus makes adapting such a model very difficult.

C. *Anti-Bullying Policies*

Anti-bullying policies are another common K-12 response adopted by schools as required by anti-bullying statutes. Besides setting the tone for the school that bullying will not be tolerated, it also serves as proof that school officials are not deliberately indifferent to the problem. Schools need to be careful when drafting a policy because courts often invalidate them on overbreadth or vagueness grounds. Recent litigation concerning the regulation of anti-homosexual and anti-racist speech in the K-12 setting should be carefully followed to determine whether courts might be softening their approach to schools attempting to curb derogatory and demeaning speech.

Traditionally, courts have been skeptical of speech regulations rigidly guarding First Amendment liberties. In perhaps the most often quoted case involving an anti-harassment policy, the Third Circuit found that a

253. U.S. Dep't of Educ., EXPLORING THE NATURE AND PREVENTION OF BULLYING: FEDERAL CRITERIA FOR IDENTIFYING EFFECTIVE PROGRAMS, http://www.ed.gov/admins/lead/safety/training/bullying/bullying_pg22.html (last visited May 17, 2010).

254. See Olweus, The Olweus Bullying Prevention Program Overview, http://www.olweus.org/public/bullying_prevention_program.page?menuheader=2 (last visited May 17, 2010).

255. See Olweus, Research and History, http://www.olweus.org/public/bullying_research.page?menuheader=2 (last visited May 17, 2010).

Pennsylvania public school district violated students' First Amendment rights when the district adopted an anti-harassment policy.²⁵⁶ The policy sought to eliminate disrespectful behavior to help meet its goal of "providing all students with a safe, secure, and nurturing school environment."²⁵⁷ The policy prohibited harassment defined as:

verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.²⁵⁸

Prohibited conduct included:

any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any characteristics described above . . . [including] unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written materials or pictures.²⁵⁹

Punishments for the harassment included "warning, exclusion, suspension, expulsion, transfer, termination, discharge, . . . training, education, or counseling."²⁶⁰

A guardian of two public school students brought a lawsuit alleging the policy was unconstitutional on its face.²⁶¹ The students, avowed Christians, believed their religion required them to "speak out about the sinful nature and harmful effects of homosexuality."²⁶² The students requested that the court declare the policy unconstitutionally vague and overbroad.²⁶³

The federal district court dismissed the case, holding that the policy was facially constitutional.²⁶⁴ The court read the policy as mirroring the standard already codified in Pennsylvania's Human Relations Act, Title VII, and Title IX.²⁶⁵ The court read the second paragraph defining harassment as prohibiting "language or conduct which is based on specified

256. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

257. *Id.* at 202.

258. *Id.*

259. *Id.* at 202-03.

260. *Id.* at 203.

261. *See id.*

262. *Id.*

263. *See id.* at 203-04.

264. *See* Saxe v. State Coll. Area Sch. Dist., 77 F. Supp. 2d 261, 267 (M.D. Pa. 1999).

265. *See id.* at 626.

characteristics and which has the effect of ‘substantially interfering with a student’s educational performance’ or which creates a hostile educational atmosphere.”²⁶⁶ This language is virtually the same standard used by Title IX, and therefore, only prohibits actions that are already illegal.²⁶⁷ The court also refused to accept the plaintiff’s vagueness argument as it determined that defining harassment any more precisely may be impossible.²⁶⁸ Finally, the district court opined that the First Amendment did not protect harassment.²⁶⁹

In reversing the district court, the Third Circuit refused to accept a “harassment exception” to the First Amendment.²⁷⁰ Furthermore, the harassment policy extended beyond the scope of the anti-discrimination laws.²⁷¹ Though Title VII and Title IX cover discrimination based on sex, race, color, national origin, age, and disability, the policy in question covered “other personal characteristics” such as “clothing,” “appearance,” “hobbies and values,” and “social skills.”²⁷²

The court determined that the policy was too broad to survive constitutional scrutiny, and could not satisfy the Supreme Court’s test to determine when student speech can be permissibly regulated.²⁷³ As the policy extended to non-vulgar, non-school sponsored speech, the proper test the court must use was set out in *Tinker v. Des Moines Independent Community School District*.²⁷⁴ The policy failed *Tinker*’s test because it included speech that did not actually cause disruption, but merely intended to do so.²⁷⁵ The court stated:

[A]s *Tinker* made clear, the “undifferentiated fear or apprehension of disturbance” is not enough to justify a restriction on student speech. Although [State College Area School District] correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.²⁷⁶

Adopting anti-harassment, anti-bullying, or other speech code has proved to be equally difficult in the collegiate setting. Several student

266. *Id.* at 625.

267. *See id.* at 626.

268. *See id.* at 625.

269. *See id.*

270. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001).

271. *See id.* at 210-11.

272. *Id.* at 210.

273. *See id.* at 216-17; *see also Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001) (holding that school district’s policy was overbroad and vague).

274. 339 U.S. 503 (1969); *see also Saxe*, 240 F.3d at 216 (referencing *Tinker*).

275. *See id.*

276. *Id.* at 217.

speech and anti-harassment codes have been struck down. The Eastern District of Michigan struck down the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment because it was overbroad and vague.²⁷⁷ Although laudable goals existed for the policy, the court found the policy "swept within its scope a significant amount of 'verbal conduct' or 'verbal behavior' which is unquestionably protected speech under the First Amendment."²⁷⁸ The policy specifically prohibited individuals from "'stigmatizing or victimizing' individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status."²⁷⁹

Challenging the constitutionality of the policy, a psychology graduate student filed suit and argued that the policy prevented him from discussing certain controversial theories in his discipline concerning differences between sexes and races because others might be offended.²⁸⁰ In upholding the challenge, the court distinguished pure speech, which cannot be regulated, from discriminatory conduct, which is unprotected by the First Amendment.²⁸¹ Recognizing the importance of "free and unfettered" discussion in a learning environment, the court made clear that speech could not be regulated solely because it is offensive to many people or because the university disagrees with the ideas or message being communicated.²⁸² The Supreme Court has also stated that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of 'conventions of decency' alone."²⁸³

Subsequent courts followed the same analysis and subsequently struck down university speech and anti-harassment codes.²⁸⁴ This trend has continued since the late 1980s with the Middle District of Pennsylvania striking down Shippensburg University's speech code in 2003.²⁸⁵ Before analyzing the particular code, the court noted that elementary and second-

277. *See Doe v. Univ. of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989).

278. *Id.* at 853.

279. *Id.*

280. *See id.* at 858.

281. *See id.* at 861.

282. *See id.* at 863.

283. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 669 (1973).

284. *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1993) (overturning statute for being vague and broad); *Booher v. Bd. of Regents of N. Ky. Univ.*, No. 2:96-cv-135, 1998 U.S. Dist. Lexis 11404 (E.D. Ky. July 22, 1998) (finding university's harassment policy unconstitutional because it was vague and overbroad); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisc. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down code that would prohibit students from demeaning others based on certain categories such as race, gender, and religion); *Corry v. Leland Stanford Jr. Univ.* (Cal. App. Dep't Super. Ct. 1995), available at <http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm> (overruling speech code unconstitutional).

285. *See Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003).

dary schools have more leeway in regulating student speech than universities do.²⁸⁶ Similar to the previous cases involving collegiate speech codes, the court ruled the code's prohibition on "acts of intolerance" violated the Constitution because it was overbroad.²⁸⁷

Interestingly, after these court decisions, some colleges have not disregarded their policies and others have adopted policies.²⁸⁸ This does not insinuate that administrators are not concerned about the policies' constitutionality, however, because many colleges and universities do not actively enforce the policies.²⁸⁹ Yet administrators still consider the policies valuable because they act as a powerful symbol that actually affects behavior on campus and increases civility.²⁹⁰ Surveys also illustrate that students are willing to accept this regulation concerning their free speech rights, with over two-thirds of incoming freshman approving hate speech prohibitions.²⁹¹

The general population also mirrors the students' willingness to regulate hate speech.²⁹² Additionally, some legal commentators question the existing absolutist approach to the First Amendment and urge a balance between freedom of speech and other democratic values.²⁹³ Commentators contend that the courts and civil libertarians underestimate the horrible effect insulting words have on classes of people.²⁹⁴ Recent cases involving K-12 policies reveal that the judiciary's previous hostility toward speech regulations is softening, specifically in cases that involve efforts to regulate anti-homosexual or anti-racist speech. Judges deciding several recent cases permitting regulation of anti-homosexual speech and other demeaning speech in high schools and elementary schools seem to understand the dangers associated with permitting such offensive speech in the educational system.

These holdings, however, have been limited to secondary schools.²⁹⁵ For example, the Ninth Circuit upheld a school's decision to forbid a stu-

286. *See id.* at 369.

287. *See id.* at 370 (finding statute overbroad, and court did not analyze whether statute may also suffer from vagueness).

288. *See* JON B. GOULD, *SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION* 150 (2005).

289. *See id.* at 175.

290. *See id.*

291. *See id.* at 176.

292. *See id.* at 177.

293. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 53, 53-58 (Mari Matsuda et al. eds., 1993).

294. *See id.* at 57.

295. *See, e.g.,* *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005) (granting injunction forbidding school from preventing student from wearing his anti-gay T-shirt that read "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1069 (D. Minn. 2001) (enjoining school from prohibiting student from wearing "Straight Pride" sweatshirt).

dent from wearing an anti-gay T-shirt to school because it violated others' rights.²⁹⁶ The court stated:

Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development. To the contrary, the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.²⁹⁷

The court heavily weighed sources that demonstrated the detrimental academic and psychological effects of student speech that demeaned gay and lesbian students or other protected classes.²⁹⁸ The court specifically limited its decision to conduct that occurs in public high schools and in elementary schools—not colleges and universities. The court justified this distinction by noting that “young adults acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years.”²⁹⁹ In another case that upheld a school's restriction of anti-homosexual speech, the Northern District of Illinois specifically noted that the only appropriate context to regulate the speech would be in the high school setting.³⁰⁰

Courts are also appearing more lenient with restrictions prohibiting racist speech. The Tenth Circuit upheld a racial harassment and intimidation policy that prohibited district employees and students from “racially harass[ing] or intimidat[ing] another student(s) by name calling, using racial or derogatory slurs, wearing or possess[ing] . . . items depicting or implying racial hatred or prejudice.”³⁰¹ The lawsuit followed after a middle school student was suspended for drawing the Confederate Flag during math class.³⁰² In upholding the school's disciplinary actions, the court refused to find the policy overbroad because the court concluded that no substantial danger existed that the policy would be applied to limit students' First Amendment rights.³⁰³ Moreover, the student's vagueness claim failed because evidence showed that the student knew and understood the school policy.³⁰⁴

296. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006).

297. *Id.* at 1179-80.

298. *See id.* at 1179.

299. *Id.* at 1183.

300. *See Zamecnik v. Indian Prairie Sch. Dist.* 204 Bd. of Educ., No. 07 C 1586, 2007 WL 1141597, at *11 (N.D. Ill. Apr. 17, 2007).

301. *West v. Derby Unified Sch. Dist.* No 260, 206 F.3d 1358, 1361 (10th Cir. 2000).

302. *See id.*

303. *See id.* at 1368.

304. *See id.*

Although these cases are encouraging in that they indicate that First Amendment jurisprudence may be beginning to change to balance free speech concerns with the protection of other rights, the most recent speech code case involving a sexual harassment policy at Temple University indicates that courts are not yet willing to extend this approach to colleges and universities.³⁰⁵ In this case, a graduate student sought injunctive relief against a sexual harassment policy that he claimed chilled his speech about “social, cultural, political and/or religious views” regarding women in the military.³⁰⁶ Temple’s policy provided that:

All forms of sexual harassment are prohibited, including . . . expressive, visual or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual’s work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.³⁰⁷

In holding that the policy was facially overbroad and therefore unconstitutional, the Third Circuit began its analysis with a statement that explained free speech’s fundamental importance on college campuses.³⁰⁸ The court specifically contrasted speech in the college environment to speech in the elementary and high school settings by finding that administrators have substantially more leeway to regulate speech in the K-12 setting because of the “special needs of school discipline” with younger students.³⁰⁹ Additionally, the Court reaffirmed that no “harassment exception” to the First Amendment’s Free Speech Clause exists.³¹⁰

Turning to the specific language of Temple’s policy, the court took particular issue with the language focusing on the motives of the speaker.³¹¹ The specific language from the policy prohibited conduct that had the *purpose or effect* of unreasonably interfering with an individual’s work, educational performance, or status.³¹² Under *Tinker*, speech can only be constitutionally regulated when it substantially disrupts the school operations or creates a true threat to an individual’s educational experience; purpose alone cannot be the basis for regulating speech.³¹³ The court questioned whether the policy’s language of “unreasonably interfer-

305. See *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

306. *Id.* at 305.

307. *Id.*

308. See *id.* at 315.

309. See *id.*

310. See *id.* at 316.

311. See *id.* at 317.

312. See *id.* at 316.

313. See *id.* at 317.

ing” satisfied *Tinker’s* standard of “substantially interfering,” which incorporates a severe and pervasive requirement.³¹⁴

The court also found the policy’s use of “hostile,” “offensive,” and “gender-motivated” problematic because the terms were too subjective and broad. The court suggested that the general terms would need to be coupled to a “requirement akin to a showing of severity and pervasiveness . . . a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual’s work.”³¹⁵ Without such a requirement, the policy unconstitutionally regulated protected speech.³¹⁶ Furthermore, the use of the term “gender-motivated” created its own set of issues, including determining whose gender must serve as the motivation and what gender exactly means.³¹⁷

This case effectively illustrates that drafting a constitutional code of conduct or speech code remains very difficult for universities and colleges. Its difficulty causes some universities and colleges to forgo passing any policy due to fear that it will violate the First Amendment. Nonetheless, this is a mistake because policies send a strong message to students regarding tolerance and civility and can be drafted to the extent allowed by law.³¹⁸ Conducting a study of 100 colleges with enacted speech codes, Professor Jon B. Gould—an Associate Professor at George Mason University and the Director of the Center for Justice, Law & Society—accurately identified the current dilemma colleges face concerning speech codes.³¹⁹ On the one hand, they fear lawsuits challenging the constitutionality of their speech codes.³²⁰ Failing to have policies and procedures in place, however, may be evidence of a hostile or intimidating environment that could result in liability under Title VII or Title IX.³²¹ Gould argues that colleges and universities can draft policies that withstand constitutional scrutiny, and should do that as a matter of social policy.³²² The fact that colleges and universities can withstand constitutional scrutiny is evidenced by the fact that only 9% of the 100 colleges he studied had unconstitutional hate-speech codes.

Until current First Amendment jurisprudence changes to reflect a more thoughtful balance between freedom of speech rights and other rights protecting the dignity of individuals, colleges, and universities must be mindful of the strict parameters courts have developed concerning col-

314. *See id.* at 319-20.

315. *Id.* at 317-18.

316. *See id.* at 318.

317. *See id.*

318. *See* Jon B. Gould, *Returning Fire*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, at 13.

319. *See id.*

320. *See id.*

321. *See id.*

322. *See id.*

legiate speech codes. Policies can regulate certain categories of speech and conduct without violating the constitution. These categories include:

- Lewd and obscene speech;
- Profane speech;
- Libelous speech;
- Insulting or fighting words that by their very utterance tend to incite an immediate breach of peace;
- Actions that “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school;”
- Threats of violence.³²³

Phrases to be avoided unless they are connected with a severe or pervasive requirement include:

- Speech that “stigmatizes” or “victimizes;”
- Speech that creates an “intimidating, hostile or demeaning environment;”
- Speech that “tends to disturb” or “offend;”
- Speech that “demeans” a person.³²⁴

D. *Creating Procedures for Reporting and Investigating Acts of Harassment, Intimidation, or Bullying*

College students need to know what to do if they encounter harassment, intimidation, or bullying, especially because students are entering into a new phase of independence and may be unsure how to report or even be hesitant to report such victimization. Reporting incidents is even more important on a college campus because campus employees have more limited opportunities to observe bullying as opposed to teachers and parents in the K-12 setting. Students need these procedures to get the help they require, and universities need this information to help them track the number of problematic instances occurring on their campuses. This information will aid universities in identifying the nature and extent of the problem to provide administrators with the data they need in designing appropriate and effective action plans.

Universities may consider implanting a twenty-four-hour hotline.³²⁵ Officials should encourage bystanders, in addition to victims, to report incidents because bystanders can serve a very valuable role in stopping a culture of bullying.³²⁶ Whatever mechanisms colleges and universities choose to adopt for reporting and investigating, they must be widely dis-

323. See Richard Kirk Page & Kay Hartwell Hunnicutt, *Freedom for the Thought that We Hate: A Policy Analysis of Student Speech Regulation at America's Twenty Largest Public Universities*, 21 J.C. & U.L. 1, 31-34 (1994) (internal citations omitted).

324. See *id.* at 34-37 (internal citations omitted).

325. See LENTZ, *supra* note 249, at 330.

326. See *id.*

seminated to the campus community. Repeated awareness campaigns should be regularly scheduled and various vehicles should be utilized to inform the campus community.

E. *Providing Support for Victims of Bullying and Appropriate Consequences and Remedial Action for Those Committing Harassment or Bullying, Falsely Reporting, or Retaliating Against Someone Who Reports*

Support for victims can be multifaceted. Counseling services should be available and offered to a victim when appropriate.³²⁷ Additionally, certain protective measures could be implemented, including changes in class sections or living arrangements to make the victim feel safe. Younger children are often paired with a “buddy” and this solution should be explored to determine if it could be tailored to fit a college environment.³²⁸

When dealing with the perpetrator, colleges and universities must vigilantly involve law enforcement when the conduct involves illegal behavior. Normally, bullying conduct involves more than protected speech and colleges and universities should be familiar with the laws, so they can advise their students on possible avenues of relief. For example, laws provide protection from stalking, telephone harassment, unlawful restraint, assault, hazing, hate crimes, and menacing.³²⁹ Colleges need to plan how to coordinate with law enforcement and when to involve them.

In addition to formal legal proceedings, colleges and universities can develop their own individual interventions and positive disciplinary techniques. Colleges may consider conflict resolution measures. Peer mediation may not be particularly helpful because bullying centers upon a power struggle and any mediation may further victimize the target.³³⁰ Finally, false reporting and retaliation should not be tolerated. Colleges and universities need to develop policies detailing the consequences for engaging in such behavior and communicate this to the campus community.

These recommendations may require a college to appoint a compliance coordinator. A compliance coordinator could be the lead person for an integrated school safety and violence prevention plan that would include efforts to combat bullying. Although bullying may be low on the spectrum of school violence, if unfettered it can easily lead to more extreme behaviors that can erupt into a crisis situation or result in a toxic

327. *See id.* at 326.

328. *See id.*

329. *See, e.g.,* Anti-Defamation League, Hate Crime Laws (2001), <http://www.adl.org/99hatecrime/provisions.asp> (compiling states' hate crime statutes); Kappa Alpha Psi Fraternity, Inc., Anti-Hazing Statutes, <http://www.kappaalphapsi1911.com/fraternity/laws1.asp> (compiling list of states' anti-hazing statutes); National Center for Victims of Crime, Criminal Stalking Laws By State (2010), http://www.ncvc.org/src/main.aspx?dbID=DB_State-byState_Statutes117 (compiling states' criminal stalking laws). An example of a menacing statute can be found in the Ohio statutes. *See* OHIO REV. CODE ANN. § 2903.22 (LexisNexis 2010).

330. *See* LENTZ, *supra* note 249, at 326.

school environment. Proactively dealing with bullying is an important and often ignored step in making campuses safe.

V. CONCLUSION

Mechanisms to deal with bullying on college campuses have not been uniform and systematic. This may be in part because little research exists exploring the nature and frequency of college bullying. However, the research documenting bullying in the K-12 school environment and the workplace provide sufficient data about the detrimental effect bullying has on the bully, the victim, and the bystanders to warrant similar investigation into bullying on college campuses.

Assuming research will confirm that bullying does not disappear between high school and the workplace, college and university administrators might still tend to ignore the issue because traditionally they have been insulated from liability when a third party injures a student. Federal statutes' requirements of severe and pervasive harm coupled with deliberate indifference by the institution makes Title IX and 1983 remedies illusory for most plaintiffs. Additionally, the establishment of duty has proven difficult in traditional tort actions against a university because no duty exists simply based on the university-student relationship. First Amendment concerns may also make colleges and universities reluctant to promulgate any type of speech codes for fear of being sued.

Nevertheless, both legal and social reasons exist for addressing bullying on campus. Recent cases hint that courts may be willing to revisit their reluctance in finding colleges liable for injuries by third parties especially when colleges exercise control and have undertaken a duty. Cases involving bullying are so novel that it is difficult to advise colleges and universities, but many of these cases are surviving motions to dismiss. Furthermore, courts analyzing speech restrictions have been more lenient when K-12 schools have sought to curb anti-homosexual and anti-racist speech. To date, courts have not been willing to extend this analysis to colleges and universities, yet as societal attitudes harden against bullying and soften toward restrictions on speech, this may change. Colleges and universities should pay careful attention to current legal developments in this area.

Even more important than avoiding lawsuits, colleges and universities should develop a multifaceted approach to bullying in order to foster an environment that is safe and respectful. Bullying may be the precursor to more harmful and violent behavior, but even if it is not, bullying negatively affects both the victim and the bystanders in very real and concrete ways.

