Cases and Issues Involving Suicidal Students with Disabilities

by
Jose L. Martín, Attorney at Law
RICHARDS LINDSAY & MARTÍN, L.L.P.
13091 Pond Springs Rd., Suite 300
Austin, Texas 78729
Tel. (512) 918-0051
Fax (512) 918-3013
jose@rlmedlaw.com

Scope of Presentation Materials

It is well understood that suicide is a current major cause of death for school-age adolescents, and that the problem is escalating across the U.S. Indeed, the Centers for Disease Control state that suicide is currently the third leading cause of death among teens. Experts from a variety of disciplines are engaged in studying the issue to improve our understanding of the causes and dynamics of young persons' suicidal gestures, ideations, attempts, and completed suicides. This set of materials intends only to review the phenomenon from a narrow perspective—the legal implications of students' suicidal gestures with respect to the special education law. Thus, the materials below review mostly recent cases to understand how student suicide is broken down and analyzed by the legal system vis-à-vis schools' duties under the IDEA, in the hope that schools can gain an improved perspective of how to address this growing and, in too many cases, tragic problem.

Deliberate Indifference and Other Legal Theories

The Supreme Court has not addressed school district liability for peer-to-peer disability-based harassment under Section 504/ADA, but it has addressed school district liability for peer-to-peer sexual harassment in violation of Title IX. *Davis v. Monroe,* 103 LRP 20059 (1999). The *Davis* Court held that a school district can be held liable if it is "deliberately indifferent" to peer-to-peer sexual harassment and its response is "clearly unreasonable in light of the known circumstances." In *Davis,* the evidence showed that a school district was aware that one of its male high school students was regularly sexually harassing and even assaulting a fellow female student and did nothing to stop it for five months.

The Court stated that a Section 504/ADA claim against the school district

for a Title IX violation arising out of peer-to-peer harassment could be sustained with proof that (1) the victim was harassed on the basis of her gender; (2) the alleged harassment was so severe, pervasive and objectively offensive that it altered the condition of her education and created an abusive educational environment; (3) the school district had actual notice about the gender-related harassment; and (4) the school district was deliberately indifferent to the harassment. *Davis,* 526 U.S. 640-53.

The Court stated that a school district sued for peer-to-peer harassment is not held liable for the actions of the harassing students; rather, it is held liable for its own "deliberate indifference" to the acts of the harassing students. The *Davis* opinion noted that children in school often act inappropriately, and that a child who refuses to go to school because a bully calls him a "scaredy cat" at recess will not have a claim under Section 504 or the ADA. "Damages are not available for simple acts of teasing and name-calling…, even where these comments target differences in gender." Rather, the conduct must be "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."

Based on this reasoning, a school district's deliberate indifference to pervasive, severe disability-based harassment that effectively deprived a disabled student of access to the school's resources and opportunities would be actionable under Section 504 and Title II. See, e.g. *S. S. v Eastern Kentucky University*, 50 IDELR 91 (6th Cir. 2008); *M.L. v. Federal Way Sch. Dist*., 105 LRP 13966 (9th Cir. 2005); *Mark H. v. Hamamoto*, 110 LRP 48776 (9th Cir. 2010).

The circuit courts of appeal may vary in their application of the deliberate indifference formulation. See, e.g. *K. R. v. School Dist. of Philadelphia*, 54 IDELR 144 (3rd Cir. 2010). Moreover, other legal theories will also come into play in the cases below, usually as the following, singly or in combination:

1. Deliberate indifference action premised on §504 or ADA,

2. Straight §504 claims of discriminatory action (in some jurisdictions may require showing of bad faith, intentional discrimination, or gross misjudgment—*see, e.g. M. P. v. Independent Sch. Dist. No. 721*, 45 IDELR 87 (8th Cir. 2006); *Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998), *cert. denied*, 110 LRP 34108 (1998)),

3. Claims alleging violations of constitutional rights, usually the due process clause of the 14th Amendment or the equal protection clause, activated into legal action through the federal remedial statute, §1983 (42 U.S.C. §1983),

4. Section 1983 actions based on IDEA violations (generally require exhaustion of administrative remedies or application of an exception to exhaustion, such as futility),

5. State law tort claims, which may be limited by states' sovereign immunity laws curtailing lawsuits against governmental entities, including school districts,

6. Tort claims against the actual perpetrators of bullying, which may be unfeasible due to limited financial means of the bullies' families.

Suicide and Bullying

A review of recent caselaw reveals the growing relationship between bullying in public schools and cases involving suicidal students. When bullying is severe enough that victimized students begin making suicidal statements, parents can become concerned enough to pull students out of school, place them in private school, or otherwise take legal action against the public school.

In the state complaint matter of ***El Paso County Sch. Dist. 3, Widefield*, 60 IDELR 117 (SEA Colorado 2012)**, the parents of a student with traumatic brain impairment (TBI) reported that he was being bullied in one particular class, and that the school failed to adequately address those allegations to the point that he was not receiving the services set forth in his IEP. After initial attempts to resolve the problem with campus administrators, the parents again met with the assistant principal about their continuing concerns, which led him to investigate the matter more closely. After his investigation, the assistant principal concluded that both the student and the alleged bullies were acting out in class and trying to get each other in trouble, and that the matter was more a case of mutual antagonism than unilateral bullying. After a subsequent spitball incident, the parents again met with the principal, who proposed three options: (1) the student could remain in the class and administration would monitor the classroom more closely, (2) the student could stay in the 78-minute class for half the time and spend the other half in a supervised study hall to receive instruction personally from the principal (a former math teacher), or (3) the student could spend the entire class period in an improvised study hall in the room normally designated for in-school suspension receiving instruction from the principal. The parent, however, wanted the alleged bullies removed from the class and for the principal to monitor the class the entire period. The principal indicated this option was not feasible, but that he would agree to excuse the student's absence from this class when the parents stated they preferred to take him out of school during that period. After the student told his parents that he was contemplating suicide due

to the bullying, which he alleged was continuing in other settings, his parents hospitalized him and withdrew him from school, and did not respond to offers to have him finish out the year in a new school. The State Agency determined that the reason the IEP services were not implemented was the student's withdrawal from school before the school could address their escalating concerns. Moreover, the school was not deliberately indifferent to the student's allegations, but the parents refused to consider the options proposed by the school administrators,

> *Note*—The State Agency correctly states the legal proposition that bullying can amount to a denial of FAPE by negatively impacting the ability of a student to receive special education services, citing *M.L. v. Federal Way Sch. Dist.*, 105 LRP 13966 (9th Cir. 2005). That case also cites the majority caselaw analysis of "deliberate indifference," whereby a school can be liable for student-to-student bullying if it fails to act in response to conduct of which it is aware. But, the case also holds that the school cannot be held liable until the parent gives the school a reasonable opportunity to respond to the allegations and offer solutions. Here, the parents could not legitimately claim that the school administrators were deliberately indifferent to the student's problems when they met with the parents on several occasions and offered a number of proposals and options to address the bullying allegations. See, e.g. *G. M. v. Drycreek Joint Elem. Sch. Dist.*, 112 LRP 45306 (E.D.Cal. 2012) and *Dunfee v. Oberlin City Sch. Dist.*, 47 IDELR 217 (N.D.Ohio 2007)(deliberate indifference requires more than proof of school negligence).

At times the issue of bullying is raised only tangentially in an IDEA case. In ***A. B. v. Waynesboro Area Sch. Dist.*, 56 IDELR 67 (M.D.Pa. 2011)**, the parents of a student with ADHD, speech language impairments, and possible autism disorder alleged that he exhibited suicidal behavior following incidents of bullying. After the student was hospitalized, his parents placed him in a private school and sought reimbursement from the school. Both the hearing officer and district court saw the case purely as a challenge to the appropriateness of the IEP, and did not appear to significantly inquire into how the school addressed the allegations of bullying. Instead, they focused on the testimony of various staffpersons regarding the student's progress under the IEP, and rejected reimbursement, finding the parents failed to prove the IEP was inappropriate

> *Note*—But how did the school address the bullying allegations? It is difficult to ascertain from the decision, but the court's lack of emphasis on the bullying issue in the case may have been influenced by the evidence that the student was "both a victim and perpetrator of bullying while a student in the District." Nevertheless, the lesson for plaintiffs in this type

of case is to work to bring front and center the issue of the school's response to allegations of bullying. That students with disabilities respond to bullying with inappropriate behavior of their own does not minimize the impact the bullying may have on their education. In such situations, schools should address both the initial bullying and the bullied student's behavioral response and role in the dynamic. See, e.g. *Birdville Independent Sch. Dist*., 57 IDELR 60 (SEA Texas 2011)(student who engaged in bullying and threats to hurt himself was eligible as ED and entitled to tuition reimbursement).

Point on suicide prevention protocols—As they develop suicide prevention or intervention protocols, it may be wise for schools to consider the linkage to bullying situations, and make that part of the suicide assessment and intervention process.

Child-find

A previously nondisabled student's suicidal gestures, ideations, or statements may serve as a significant factor indicating that the student should be identified for special education evaluation under schools' child-find obligations pursuant to the IDEA. 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(c). The cases below help illustrate this particular implication of suicidal behavior with respect to school's duties under the IDEA.

A New Mexico hearing officer found that a district failed in its child-find obligations when it neglected to evaluate and address a student's emotional disturbance (ED). ***In re: Student with a Disability*, 112 LRP 5256 (SEA New Mexico 2012)**. The 8th-grade student, who was previously identified and later dismissed from special education, again started having problems in the 6th grade, including refusing tasks and problems with peers. In the 7th grade, the student made a suicidal threat and expressed suicidal ideations, which led to the school conducting a suicide intervention. The student stated that everyone hated him, that he was upset over his parents' divorce, and that he wanted to kill himself. He also scratched himself, although not to the point of drawing blood. A month later, he again threatened suicide, for which police and emergency service providers responded. The school's suicide interventionist found that the student had pressure at school from bullies, teachers, and his parent, that he was concerned with his parents' divorce, that he neglected his school work, and that he self-mutilated by scratching. Private evaluators had diagnosed the student with emotional and behavioral disorders, including ADHD and oppositional defiant disorder. The student, moreover, was missing classroom instruction by frequently going to the nurse's office. The school district, however, had not evaluated the student for potential ED. The hearing officer found that the school

had failed in its child-find obligation with regard to the potential for ED in the student, as there were ample behaviors and symptoms raising a suspicion of ED. Moreover, the hearing officer held that the failure to identify ED served to deny the student a FAPE, as an appropriate IEP that would have addressed his emotional conditions was not put in place. He ordered the student qualified as ED and provided an appropriate IEP. The hearing officer denied compensatory education services, however, as the parent failed to offer evidence to prove what services the student should have received under an appropriate IEP that recognized his ED, finding that "subsequent placement may remedy the prior violation."

> *Note*—While the case makes clear that the district's suicide prevention/intervention protocol was both in place and implemented, its activities took place without apparent coordination with the special education program. The persistent and recurring nature of the suicidal threats, together with the obvious impact the student's stressors were having on his functioning at school should have led the school's suicide intervention team and the special education personnel to put two and two together. Thus, the lesson for schools is to link their suicide prevention protocols to the special education child-find system, so that special education personnel could make cogent child-find decisions in a timely fashion with the information gleaned from the suicide intervention process.

But, not every suicidal gesture is an indication that the student is IDEA-eligible. Ultimately, the totality of the circumstances and data must determine whether a suspicion of ED arises, and at what time such suspicion accrues. In ***Northwest Independent Sch. Dist.*, 59 IDELR 118 (SEA Texas 2012)**, a student had been privately diagnosed with depression, and he complained of bullying, had excessive absences, had a drop in grades, and had increased disciplinary actions. In addition, the student had been admitted into a hospital following a "suicidal incident." The school, however, determined that the student did not meet criteria for ED or LD. Despite the depression diagnosis, the school staff reported that the student appeared happy at school, had friends, and maintained passing grades. The bullying allegations were investigated, and school officials found that the student himself instigated most of the incidents. His drop in grade was in one class, which was a rigorous elective, while his grades were good in all other classes, which included advanced curriculum courses. The disciplinary incidents were never in the classroom, but rather on the bus or in the halls, and thus did not impede his learning. Classroom behavior, in fact, was both socially and academically satisfactory. The hearing officer first noted that more than a diagnosis is required for IDEA eligibility, as the qualifying disability must be exhibited to the degree that it interferes with the child's ability to benefit from

the general education setting. Moreover, the hearing officer noted that the eventual evaluation was delayed in part by the parent's delay in executing consent form for the initial evaluation, although she had requested the evaluation.

> *Point on suicide prevention protocols*—As part of suicide prevention or intervention protocols, schools should address the child-find implications of suicidal gestures. For unidentified students that express suicidal ideations, the protocol should call for participation by special education personnel, so a determination can be made with respect to the need for IDEA evaluation in light of the degree of risk, distress presented, and impact on educational functioning.

Residential and Private Placement Reimbursement Disputes

Not surprisingly, a significant number of cases involving students who have made suicidal gestures or attempts involve requests for placements in residential facilities or reimbursement for those costs or for private school tuition. In these cases, the well-worn issues of the intertwining of students' psychiatric/medical needs as opposed to educational needs make frequent appearances.

In ***Munir v. Pottsville Area Sch. Dist.*, 59 IDELR 35 (M.D.Pa. 2012)**, evidence that a 17-year-old with severe depression and eligible as ED made progress in a residential facility was not enough to prove that the public school was responsible for its costs. The student had engaged in suicide attempts, leading his parents to place him in a residential placement. After a hearing officer found that the public school was not liable for the costs of the residential placement, the matter proceeded to court. The court first noted that unlike in a variety of cases where the student's educational and medical needs are "inextricably intertwined" beyond segregation, here the student was achieving average grades for a significant period of time. "Testimony presented at the administrative hearing demonstrates that O.M.'s parents feared for his personal safety, and that he posed a physical threat to himself." The court noted that upon arriving at the residential facility, the student was put on suicide watch. "Although O.M. undoubtedly benefitted from the educational opportunities offered by the residential placements, these educational benefits were subsidiary to the therapeutic and emotional benefits O.M. received in an effort to prevent another suicide attempt." The court thus found that the "clear purpose" of the student's residential placement was to receive mental health treatment to prevent his suicide, not for him to receive a FAPE. In cases seeking residential or private placement at public expense where both educational and psychiatric purposes are at work, wrote the court, "the critical element of the analysis should be to

determine whether the primary purpose of the placement is for special education or mental health treatment." Finally, the court held that the parents were not entitled to reimbursement for the private school placement they unilaterally made after the student was discharged from the residential facility, finding that the public school's IEP was appropriate, and the parents and the student essentially preferred the smaller classes and more supportive environment of the private school.

> *Note*—Modern residential placement cases are more closely scrutinizing the root causes for a residential placement, and insisting that the evidence show such a placement is necessary primarily for educational reasons, and not for mental health treatment. See, e.g. *Richardson Independent Sch. Dist. v. Leah Z.*, 109 LRP 52635 (5th Cir. 2009)("In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education"). The Fifth Circuit's analysis in *Leah Z.* appears to shift the focus of the analysis to the nature of the residential program, its immediate and long-term objectives, its component parts, and the degree to which it focuses on education. The traditional "inextricably intertwined" formulation instead focuses on the student's deficits and needs. The Fifth Circuit's concern with that analysis is that a child's problems may be primarily non-educational, and to a lesser degree educational, but nevertheless intertwined to the point that public funding for the residential placement is still afforded under the IDEA, and thus public schools are required to bear the full costs of the student's mental health treatment even where the educational needs are notably secondary in priority.

Another example of the modern residential placement analysis is the case of ***Shaw v. Weast*, 53 IDELR 313 (4th Cir. 2010)**. There, a 20-year-old with ED and PTSD was hospitalized multiple times for suicidal ideation and attempts, including walking in front of traffic and cutting herself. The public school offered placement at a private day school, but the parents placed the student in a residential facility that provided clinical therapy, assistance getting up in the morning, and making sure the student ate meals and maintained proper hygiene. The court held that "the Shaws' decision to place E.S. in a residential treatment facility was based on their desire to ensure E.S. did not hurt herself, that she took her medicine, and that she was in a safe environment." Thus, the court found that the reasons for the placement were primarily to access mental health care, and that those issues were "distinct and segregable" from her educational needs. "That E.S.'s emotional and mental needs required a certain level of care beyond that provided at Foundation does not necessitate a finding that the state should

fund the extra care when it can adequately address her educational needs separately."

> *Note*—The 4th Circuit is attempting to fit the modern analysis of residential placement cases within the framework of the traditional "inextricably intertwined" analysis, but some tension surfaces. If a student is suicidal to the point of multiple suicide attempts can we satisfactorily say her educational needs can be addressed "separately," even if she remains at risk for death? It may simply be that the analysis is moving away from examining the student's multiple needs and toward analyzing what is being primarily provided at the residential setting, as in the 5th Circuit's formulation in *Leah Z.*, which plainly abandons the "inextricably intertwined" analysis.

In ***Linda E. v. Bristol Warren Regional Sch. Dist.*, 55 IDELR 196 (D.R.I. 2010)**, the court found that the public school was responsible for the costs of a 17-year-old's residential placement. The student had a long history of behavioral problems, including stealing, threatening classmates, and disruptive behavior. She first threatened suicide in elementary school. Later, the student exhibited self-mutilation behavior, more suicidal and homicidal thoughts, and threats to peers. She also exhibited severe behavioral outbursts at home, including threatening her mother with a knife, physically assaulting her, and threatening to kill her. Her private attending psychiatrist believed that due to the severity and duration of her mental illness, as well as her lack of response to treatment, she was incapable of making emotional or academic progress in any setting other than residential placement. The school consistently determined that the student was not IDEA-eligible and proposed §504 plans. By the time of litigation, the student was unable to attend school and was failing her academic courses. The court disagreed with the school's assertion that the student's problematic behavior was primarily occurring in the home setting, finding such a claim to be unsupported by the evidence, as there was a long history of behavior problems at school including self-mutilation, theft, and threats against peers. While the student clearly had problems with her mother, the difficulties and troubling conduct were not limited to the home. The evidence also showed, moreover, that the public school was not able to provide a FAPE to the student.

> *Point on suicide prevention protocols*—As part of suicide prevention or intervention protocols, schools should address the IEP and placement implications of students' suicidal gestures. For IDEA-eligible students that express suicidal ideations, the IEP team should meet to review the student's status and determine whether additional evaluation is warranted, or what changes to the IEP should be considered in response to the student's suicidal gestures and underlying emotional or psychiatric.

A proper, coordinated, and meaningful response to the student's crisis is key to help avoid the need for residentialization.

Post-Suicide Cases

Tragically, the legal system must address the aftermath of situations where a student has committed suicide. The cases below show the range of claims that are raised, the way the courts apply the existing legal framework to the facts, and the significant legal obstacles to obtaining monetary recovery. The interplay of the applicable legal theories and statutory remedial schemes can prove confusing and complex, and the various circuit courts of appeal adopt variations of formulations of the relevant legal analyses, leading to a legal landscape that is both difficult to understand and navigate. As in some of the previous cases, the questions of whether the school was deliberately indifferent in its conduct, and the degree to which it was aware of the student's potentially suicidal behavior, feature prominently in the courts' analyses. At times, the legal theory rests on application of Section 1983 (42. U.S.C. §1983), which allows a private cause of action for violations of a person's rights under other federal statutes or the U.S. Constitution.

The legal road is precarious, however, and many cases do not survive motions to dismiss or for summary judgment before they proceed to trial. In fact, in most of the cases below, the issue being decided is whether the claim should be dismissed on the pleadings or after motions for summary judgment. Generally, motions to dismiss are granted if based simply on the allegations in the original complaint, the claims do not state the facts necessary to compose the fundamental elements of a valid and viable legal action. Motions for summary judgment are granted if the complaint, together with preliminary evidence, fails to raise a material issue of fact that would allow the case to proceed to trial. If the case proceeds beyond these stages, the likelihood of a pre-trial settlement becomes much higher.

In the matter of ***Long v. Murray Sch. Dist.*, 59 IDELR 76 (N.D.Ga. 2012)**, a student with Asperger Syndrome committed suicide after he and his parents reported harassment based on his disability. The parent sued, claiming that the school was deliberately indifferent to the harassment. The court found, however, that after the harassment was reported, the school disciplined the perpetrators and developed a safety plan for the student, which allowed the student to avoid crowds in the halls, be walked to the bus, and sit near the bus driver. Numerous cameras and teachers monitored the hallways during the school day. Although the parent alleged that the school's decision to convene a meeting with the student and the perpetrators together was inappropriate, the court did not find it unreasonable. Moreover, although the parents claimed the harassment continued

after these efforts, there was no evidence that any single harasser repeated his conduct once the school addressed it through its efforts. The parent's argument was that there was a "culture of harassment," as evidenced by offensive bathroom messages (e.g., "we won't miss you") and students wearing nooses to school after the student's suicide. While the court noted that the school never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate, including requiring staff to review its anti-bullying policies, and conducting a program where teachers met with small groups of students to discuss peer relationships and review the local code of conduct. In addition, the school held a tolerance program and implemented a district-wide behavior improvement program. The court noted that the deliberate indifference standard is a difficult standard—it requires that the school's response be clearly unreasonable in light of the known circumstances, and neither negligence nor mere unreasonableness is enough. "This is an emotionally charged case with very difficult facts. There is little question that Tyler was the victim of severe disability harassment, and that Defendants should have done more to stop the harassment and prevent future incidents. To establish a claim under §504 and the ADA, however, Plaintiffs must demonstrate that Defendants' response to disability harassment constitutes deliberate indifference. Deliberate indifference is a difficult, exacting standard, and there is simply no evidence of an existence of a clear pattern of inaction or abuse by any school employees." Thus, the court granted summary judgment to the district.

> *Note*—Notice that while the conduct of the offending students is outrageous and even shocking, the legal focus is on the actions of the school. Moreover, the issue is not whether the actions of the school in attempting to address bullying or harassment are in fact fully effective, but whether they indicate that the school was deliberately indifferent to the victim's plight.

In the case of ***Moore ex rel. Estate of A. M. v. Chilton County Bd. of Educ.*, 60 IDELR 274 (M.D. Ala. 2013)**, the court allowed the case to proceed past the dismissal stage, holding that the parent had at least alleged sufficient facts to state a viable claim of deliberate indifference against the school. There, a young lady with Blount's Disease, a growth disorder that causes persons to become overweight, committed suicide after being harassed by being subjected to what were termed "pic races" and a game whereby male students grabbed "ugly" and "fat" girls and kissed them in front of jeering peers. The parents alleged that some of the harassment occurred in front of the school office and in plain sight of school staff, with no response, and that when the student complained, teachers told her she had a "bad attitude." The court held that the allegations sufficiently pled a case of disability discrimination based on deliberate indifference by the school, at least to proceed beyond the motion to dismiss stage of the case. Thus,

the case could proceed to the summary judgment stage, at which the parents must show sufficient preliminary evidence to indicate an issue of material fact that the claim may be valid.

The parent in ***Lance v. Lewisville Independent Sch. Dist*., 57 IDELR 168 (E.D.Tex. 2011**), however, was able to fend off the District's motion to dismiss on the pleadings, which alleged civil rights violations. The parent alleged that the District's failure to investigate reported acts of bullying against her 9-year-old son with severe depression, LDs, and a speech impairment, who hung himself in a school bathroom. The court held that the allegations of the boy's vulnerability, together with claims that the District exacerbated the bullying by placing him in a disciplinary alternative program after he tried to defend himself. Moreover, the parent alleged that the school failed to inform her of the boy's suicidal threats and allowed him to use the bathroom in the nurse's office although he had previously locked himself in that same bathroom (and the nurse did not have a key). Thus, at this stage at least, the case survived the initial challenge.

On appeal before the Fifth Circuit, the case focused on whether there was sufficient preliminary evidence for the case to move forward to the jury. ***Lance v. Lewisville Ind. Sch. Dist*., 62 IDELR 282 (5th Cir. 2014)**. The parent alleged that the school was deliberately indifferent to the harassment and bullying to which her son had been subjected. The Fifth Circuit first noted that he deliberate indifference standard did not mean the school had to eliminate all instances of bullying in order to avoid liability. Adding that "judges make poor vice principals," the court indicated it would refrain from second-guessing the decisions made by school administrators, unless they were clearly unreasonable under the circumstances. Focusing on the actions of the school, the court noted that the uncontested facts showed the school responded in various ways to the student's behavioral and bullying incidents, including investigating incidents, punishing other students, talking with the parents, counseling with the students, promoting improved relationships between the student and his peers, separating him from certain peers, maintaining an appropriate anti-bullying policy, providing staff with training on bullying and harassment, and involving the school counselor. While the court agreed that there could be differences of opinion as to how effective those measures were, there could be no argument that they were "clearly unreasonable." Thus, the court held that there was not sufficient evidence that the school acted with deliberate indifference to allow the case to proceed to a jury.

> *Note*—The "deliberate indifference" burden is a difficult to meet, even in situations involving horrific facts, if the school in fact took reasonable actions in response to the harassment of the student. When the school and or disability committee engages in a real response to the student's plight,

there may be arguments about whether other responses may have been more effective, and experts in hindsight may differ on the strategies employed, but it will be difficult to claim there was true "deliberate indifference" on the part of the school.

Similarly, in ***Scruggs v. Meridien Board of Educ.*, 48 IDELR 158 (D.C.Conn. 2007)**, the parents of a 7th grader who committed suicide after a series of bullying incidents was able to maintain a suit against the school under Section 1983 based on the school's failure to provide a FAPE under IDEA and §504. The allegations that the student was exited from special education two years earlier without evaluations or notice to the parent, as well as the delay of a year and a half in referring the student despite problems with behavior, attendance, and academic performance, were sufficient allegations of "irregularities" to allow the case to proceed. The claim, moreover, could proceed directly in federal court under Section 1983 (the federal remedy statute that provides a cause of action for violation of rights under other federal laws) without the need for exhaustion of administrative remedies before an IDEA hearing officer since the student's death rendered administrative remedies futile.

The following older case shows how just 15 years ago, our collective awareness of the phenomenon and prevalence of teen suicide was significantly lower. In ***Armijo v. Wagon Mound Pub. Schs.*, 29 IDELR 593 (10th Cir. 1998)**, a 16-year-old special education student made a threat to harm a teacher, the teacher's child, and the teacher's car. The student had LDs, but also psychological and emotional problems, including impulsivity and depression, and had previously made a suicidal statement to a school aide. In response to the threats of the day in question, the school principal suspended the student, and arranged for a counselor to drive the student home, where he was dropped off without checking if his parents were there. In fact, his parents were not home and the student committed suicide by shooting himself with a rifle in a bedroom, where his parents later found him. The parents were never notified of the suspension, and district policy did not allow a suspended student to be left home alone (policy required in-school suspension in such a situation) The parents filed suit against several individuals and the school under Section 1983, claiming violations of IDEA, due process violations, and failure to adequately train personnel. The lower court granted summary judgment to the district on the IDEA and failure-to-train claims, but allowed the claims against individuals to proceed. On appeal, the Circuit Court upheld the grant of summary judgment on the IDEA and failure-to-train claims, but also upheld the denial of summary judgment on the claims against the individuals. While state agency officials are generally responsible for their own acts, not the violent acts of third parties, there may be liability if the official creates the danger that harms the individual. In turn, the creation of the danger must be such that it "shocks the conscience." In

light of the fact that Armijo was a special education student that had threatened suicide, together with the fact that the school staff had put him at substantial risk of harm by suspending him in his emotional state and leaving him alone at home with access to guns, the actions were "in conscious disregard of the risk for suicide," and could be construed as conscience-shocking.

> *Note*—In the current era, with the awareness of the increased prevalence of teen suicide, it seems difficult to believe that a school would leave an upset student who had previously threatened suicide alone in a home where some staff knew he had access to weapons. The case, however, helps provide an example of the various mistakes that a school can make in attempting to prevent a student's suicide.

The cases reviewed above are not intended to provide a blueprint for the various legal theories and remedies that are commonly applied in student suicide cases. Rather, they are intended to emphasize the straightforward and general point that schools are scrutinized on whether they know what is going on in their campuses with their students, whether they take prudent actions, whether those actions are proportionate to the degree of risk presented, and whether the actions are timely. Ultimately—and paradoxically—these complex legal cases reduce to those basic questions.

Miscellaneous Related Issues

In ***C. C. v. Arlington Central Sch. Dist.*, 59 IDELR 134 (S.D.N.Y. 2012)**, the parents of a high school student with Asperger's Syndrome filed a §504 and ADA claim against a school and school staff because they questioned and removed him when they believed that he was suicidal. After a special education teacher noticed that he "looked sad" on a particular day, he was questioned by a counselor and assistant principal about whether he was suicidal, which he denied. Within an hour, staff had contacted the parent to inform her they thought her son was suicidal, and also called the Sheriff's office. When a deputy arrived, the student was told he could either go to the hospital or be arrested, to which he opted for the hospital. When the parent learned that an ambulance had been called, she asked to be allowed to pick up her son, but staff refused, indicating that the ambulance was on its way. The deputy told her, moreover, that if she tried to interfere, she would be arrested. At the hospital, the student was dismissed as "negative for suicide." The court first found that a constitutional due process claim could not be maintained, as the school's decision to question the student about his purported suicidal tendencies and

send him to the hospital did not rise to the level of "conscience-shocking." ADA and §504 claims likewise could not survive a motion to dismiss, as there was no exclusion from school programs (the removal was for less than one day) or indication of bad faith or gross misjudgment, which are required to maintain a claim for money damages under §504. "Even if Defendants were wrong about C.C.'s suicidal tendencies and questioned him in an inappropriate manner, there is no indication that they acted in bad faith or with gross misjudgment or because of hostility based on disability." Therefore, the court dismissed the case, concluding that "in fact, if Defendants truly believed CC to be suicidal, it is hard to see how their conduct does not amount to prudent behavior." And, the parents did not argue that the staff did not believe him to be suicidal, only that they were wrong.

> *Note*—The case appears one of curious "overaction." In retrospect, there was little or no indication that the student was suicidal. Although a teacher thought he "looked sad," he denied any suicidal thoughts or ideations, and was not behaving in a manner that would be indicative of suicidal tendencies. It is certainly a stretch to conclude, based on this information, that the student is suicidal to the point of requiring immediate arrest or hospitalization. The lesson for schools is to include provisions in suicide prevention protocols designed to minimize the possibility of "false positives" that would trigger significant action without a pre-established minimum standard of data indicating a potential for suicide.

Another case dealing with schools' responses to students who express suicidal ideations is the matter of ***Boston (MA) Public Schs.*, 53 IDELR 199 (OCR 2009)**. There, a 16-year-old student with neurological delays expressed a suicidal ideation to school personnel. School officials notified the parent that the student would have to be evaluated by a psychologist before he could return to school. The suicide prevention policy required the student to obtain a letter from a medical or mental health provider indicating that the student could function in the school setting. The student missed 17 days of school before returning to school, and then, the school did not hold a team meeting to discuss his needs until several weeks after he returned. OCR concluded that although the district complied with its local suicide prevention policy, its actions did not comply with §504, as any removal of longer than 10 consecutive days constituted a change in placement that required a prior evaluation. The district thus agreed to revise its policy to no longer require a "clearance" letter prior to the return to school of a student with suicidal ideation. Instead, the district would assign a liaison to monitor the situation, collect data, and convene a team meeting if the student missed more than 10 consecutive school days.

Note—Any local suicide intervention or prevention policy must be implemented in a manner that also complies with IDEA and §504 requirements. Thus, such policies are best developed in coordination with special education staff and §504 coordinators. This is necessary due to the child-find implications of suicidal gestures, as discussed above, and to ensure that IDEA and §504 requirements are observed for eligible students who express suicidal ideations as the local policy is implemented. Thus, for example, for eligible students, the policy must respect the decision-making roles of IEP teams and §504 committees, the need for provision of services during periods of exclusion, the need to review IEPs and 504 plans promptly upon return to school or before.

A Massachusetts hearing officer ordered an updated evaluation of a teen special education student despite the parent's refusal to consent with respect to a student with a suicide risk in ***Duxbury Public Schs.*, 48 IDELR 85 (SEA Massachusetts 2007)**. Although the parent alleged that the evaluation would disrupt his relationships with his therapists and interfere with his current treatment, the hearing officer found that the student's depression, absences, anxiety, impaired social functioning, and most importantly, his risk of suicide, rendered the district's request for a psychiatric reevaluation reasonable and necessary to the continued provision of a FAPE. "While the mother has consistently requested modifications and services in the regular education program to address Ishmael's difficulties, she has equally consistently refused to share unfiltered information about Ishmael's health condition, treatment, prognosis, or intervention recommendations. No reasonable basis was established for this lack of transparency." Moreover, the hearing officer ruled that should the parent or student fail to cooperate with the ordered evaluation, "Duxbury cannot reasonably be held responsible for any alleged failure to design or deliver fully appropriate special education programming to Ishmael."

Note—This case can serve as a reminder to schools, as part of their suicide prevention protocol, to request any records from private psychiatric or medical providers or counselors that may contain information that could assist the school in coordinating efforts on behalf of the student.

SAMHSA Toolkit—The Substance Abuse and Mental Health Services Administration (SAMHSA), which is part of the Department of Health and Human Services, has published an outstanding free resource to help schools and their partners prevent suicide, promote behavioral health, and establish sound suicide intervention and prevention policies. See *Preventing Suicide: A Toolkit for High Schools*, at the following address: http://store.samhsa.gov/product/Preventing-Suicide-A-Toolkit-for-High-Schools/SMA12-4669).

Summary of Practical Points for Schools

- Schools should develop and implement thoughtful suicide prevention and intervention policies and procedures. See, for example, *Model School District Policy on Suicide Prevention: Model Language, Commentary, and Resources*, published jointly by The American Foundation for Suicide Prevention (AFSP), American School Counselor Association (ASCA), National Association of School Psychologists (NASP), and The Trevor Project (2012).

- A key component of a suicide prevention/intervention procedure is a risk assessment metric to help schools ascertain, in fact-specific situations, the degree of risk that a student may in fact attempt suicide.

- The policy and procedure must address the child-find implications of students' suicidal ideations or gestures under both the IDEA and §504. As the procedure is put into action in a particular situation, school staffpersons knowledgeable of child-find criteria under both statutes should consider whether a referral is warranted.

- For students already identified under IDEA or §504, the procedures should call for IEP Team or §504 Committee meetings to address the implications of a student's suicidal ideations or gestures from a services standpoint.

- While it is important for local policies to address referrals to, and linkages with, outside agencies, the policies must emphasize the measures and steps that the school will take to address the situation.