

No. 16-17327

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J.M., by and through his mother, MARIA MANDEVILLE,
Plaintiffs-Appellants,

v.

KATHRYN S. MATAYOSHI, Superintendent of the Hawaii Public
Schools, **STATE OF HAWAII DEPARTMENT OF EDUCATION**,
Defendants-Appellees.

*On Appeal from the United States District Court for the
District of Hawaii
Case No. 1:15-cv-00405 (Hon. Leslie E. Koboyashi)*

**BRIEF *AMICUS CURIAE* FOR THE COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES AND THE NATIONAL DISABILITY RIGHTS
NETWORK IN SUPPORT OF PLAINTIFFS-APPELLANTS AND
REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of Council of Parent Attorneys and Advocates and The National Disability Rights Network:

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

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STATEMENT OF INTEREST OF AMICI¹

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-three states and the District of Columbia who are routinely involved in special education due process hearings throughout the country. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1) (2006). Children with severe disabilities are among the most vulnerable in our society and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Education Act (IDEA or Act) requires.

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are

¹ Pursuant to Fed. R. App. P. 29(c)(4), *amici curiae* state that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories and include a P&A affiliated with the Native American Consortium which includes the Hopi, Navajo and Paiute Nations in the Four Corners region of the Southwest. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings. The P&A system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities.

NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education cases make up a large percentage of the P&A network's casework. The P&A agencies handled over 10,000 education matters in the most recent year for which data is available.

Amici express their views in this case because the school failed to implement effective responses to bullying of students with disabilities known by the national education community and demonstrated by the academic literature to be effective.

INTRODUCTION

Amici support reversal of the District Court’s decision because it did not require the school district to take adequate steps to prevent bullying as part of its obligation to provide a free appropriate public education (FAPE) to a student who had already been subjected to bullying and was still suffering from that experience. This brief provides the Court with important background information concerning bullying of students with disabilities. The academic literature demonstrates that students with disabilities are far more likely to be victims of bullying than their non-disabled peers. Moreover, while, for many students, the negative effects of bullying can persist long after the specific incident is over, this is of particular concern for students with disabilities, many of whom may lack the necessary social skills to address these incidents. Bullying of a student with a disability can result in the denial of FAPE that must be remedied by the school district under the Individuals with Disabilities in Education Act (IDEA).

Just last week, in a unanimous decision in *Endrew F. v. Douglas County School District RE-1*, the United States Supreme Court unanimously confirmed that the IDEA is no mere paper tiger in ensuring that children with disabilities receive an appropriate education in accordance with their individual needs. 580 U.S. ___, No. 15-827, slip op. (U.S. Mar. 22, 2017). Rejecting the notion that the IDEA requires “merely more than *de minimis*” educational benefit for children

with disabilities, the Court recognized that the IDEA demands that educational programs be “appropriately ambitious” so as to “enable a child to make progress in light of the child’s circumstances.” *Id.* at 14-15. In so holding, the Court reaffirmed that “[a] focus on the particular child is at the core of the IDEA” and that far from a “form document,” an individual education program (IEP) must be developed only after “careful consideration” of the individual needs of the child towards a goal of academic and functional advancement. *Id.* at 11, 12.

Ultimately, the Court recognized that “the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 15-16.

In the present case, the District Court was “troubled” by the fact that Appellant’s IEP minimized the seriousness of, and Defendants’ responsibility for, the prior incidents of bullying Appellant faced, which the District Court described as “horrifying and inexcusable.” District Court Order at 24-25, 29.² Nevertheless, the Court gave “substantial weight” to the Hearing Officer’s 2015 Decision that the IEP did not deny Appellant a FAPE, notwithstanding that it minimized the student’s bullying experience and failed to consider the school environment and any services specifically designed to address the continued harm that this student suffered as a result of the bullying or to develop a program for him that would

² The District Court Order is included in the Excerpts of Record filed by Appellants on March 24, 2017 (Dkt No. 12).

avoid repetition of the harmful and educationally deleterious bullying that he suffered. In short, the IEP proposed returning Appellant into the same environment in which he had been bullied and with the same 1:1 adult supervision that had already been unsuccessful in preventing bullying. *Amici* contend that IEPs for children with disabilities who have been victims of serious bullying must include a plan that adequately and specifically considers all of the individual needs of the student, both academic and non-academic, and provides appropriate services to address them. To this end, the IEP should consider and address the school environment in which the bullying occurred and whether additional services are appropriate to help the bullied student develop the social and emotional skills needed to have positive peer relationships and reduce the likelihood of further bullying in the school's environment.

ARGUMENT

POINT I

STUDENTS WITH DISABILITIES ARE VICTIMS OF BULLYING AND ITS ATTENDANT NEGATIVE EFFECTS AT GREATER LEVELS THAN THEIR NON-DISABLED PEERS

Bullying among children has become a highly prevalent problem in schools throughout the United States. Kimberly A. Twyman & Conway F. Saylor et al., *Bullying and Ostracism Experiences in Children With Special Health Care Needs*, 31 J. Developmental & Behavioral Pediatrics 1, 1 (2010). While many students

across the board experience bullying, students with physical, developmental, intellectual or emotional disabilities are at risk of victimization at higher rates than their peers.³ This victimization has severe negative effects on students' health, development, and academic engagement, creating a major impediment to their ability to learn. Tonja Nansel, *Cross-national Consistency in the Relationship Between Bullying Behaviors and Psychosocial Adjustment*, 158 *Archive Pediatric & Adolescent Med.* 730, 733-35 (2004). And while students with and without disabilities suffer adverse consequences from bullying, "students with disabilities are both uniquely vulnerable and disproportionately impacted by the bullying phenomena." John Young & Ari Ne'eman et al., *Bullying and Students With Disabilities*, in *White House Conference on Bullying Prevention*, at 1 (Mar. 10, 2011), available at http://www.stopbullying.gov/references/white_house_conference/index.html.

A. Bullying In American Schools: An Overview

Bullying, also known as peer victimization, is an increasingly pervasive problem in American schools. Twyman & Saylor et al., *supra* at 1. Bullying is generally defined to mean "any unwanted aggressive behavior(s) by another youth or group of youths . . . that involves an observed or perceived power imbalance and

³ Children at heightened risk of being bullied include those with physical differences, with social skill deficiencies, those with special health needs, including food allergies, or insulin-dependent diabetes, and children who stutter. Stopbullying.gov, available at www.stopbullying.gov.

is repeated multiple times or is highly likely to be repeated.” Center for Disease Control, *Fact Sheet: Understanding Bullying* (2016), available at https://www.cdc.gov/violenceprevention/pdf/bullying_factsheet.pdf (“CDC Factsheet”). See also Twyman & Saylor et al., *supra* at 1 (2010) (distinguishing bullying from “peer conflict,” where the parties are “equally matched—physically and/or psychologically”—and noting that bullying involves an imbalance of power “where the target has difficulty to defend him or herself and feels helpless against the aggressor”).

The term “bullying” can connote different things to different people. It can encompass a wide range of behavior, from name-calling, purposefully ostracizing someone from a group, and spreading rumors, to physical threats, contact, and violence. See Gail McCallion & Jody Feder, *Student Bullying: Overview of Research, Federal Initiatives, and Legal Issues*, Cong. Research Serv., Oct. 18, 2013, available at <https://fas.org/sgp/crs/misc/R43254.pdf>.

B. Students With Disabilities Are Especially Vulnerable to Being Bullied

Students with disabilities are among those most at risk of being victimized by bullying. See McCallion & Feder, *supra*, at 2 (“[S]ome students, including those with disabilities . . . are disproportionately subjected to bullying behavior.”). They are two to three times more likely to be bullied than nondisabled students. Martha Banks & Mariah Gover et al., *Disabilities: Insights from across fields and*

around the world, 220 (2009). They are also substantially more likely to worry about school safety and being injured or harassed by their peers. See Conway F. Saylor & John B. Leach, *Perceived Bullying and Social Support in Students Accessing Special Inclusion Programming*, 21 J. Developmental & Physical Disabilities 69 (2008). Students with learning disabilities report being threatened, assaulted, and having their possessions taken away from them with greater frequency than their peers. Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor and Students With Disabilities*, 21 Int'l J. Special Educ. 11, 18 (2006). One study found that one-third of students with learning disabilities experienced physical bullying, and half experienced verbal bullying. See Christopher Maiano & Annie Aime et al., *Prevalence and correlates of bullying perpetration and victimization among school-aged youth with intellectual disabilities: A systematic review*, in *Developmental Disabilities*, 181, 191 (2016).

Bullying is often targeted directly at the victim's vulnerability. See Young & Ne'eman et al., *supra*, at 2. Thus, for example, students with life-threatening food allergies are far too often bullied by students threatening them with the deadly allergen. See Eyal Shemesh & Rachel A. Annunziato et al., *Child and Parental Reports of Bullying in a Consecutive Sample of Children With Food Allergy Pediatrics*, 131 Pediatrics 1, e10-17 (2013) (reporting bullying of 35% of children due to food allergies, with the reported method of bullying including waving food

with the allergen at the child, throwing it at the child, and forcing the allergic child to touch the food).

Students with disabilities tend to be more socially isolated than other students; they are less popular, have fewer friends, and struggle more with loneliness and peer rejection, further increasing their risk of becoming targeted victims of bullying. Carter & Spencer, *supra*, at 12-21. Many students with disabilities also suffer from social skills challenges due to their disability and peer rejection, putting them at a particular risk of being bullied and of suffering more harmful consequences of that bullying. Young & Ne’eman et al., *supra*, at 2; *see also* Chad A. Rose & Dorothy L. Espelage, *Risk and Protective Factors Associated with the Bullying Involvement of Students with Emotional and Behavioral Disorders*, 37 *Behavioral Disorders* 133, 134 (2012) (“Literature suggests that poor social skills serve as a common contributing factor for the overrepresentation of students with disabilities within the bullying dynamic[.]”). These students often have difficulty interpreting social cues or recognizing hostile behavior among their peers, exacerbating their tendency to be bullied. *Id.*

Bullying is often directed against children with Autism Spectrum Disorder (“ASD”). Studies overwhelmingly find that students with ASD suffer from higher rates of bullying. *See* Sasha Zeedyk & Geovanna Rodriguez et al., *Bullying of youth with autism spectrum disorder, intellectual disability, or typical*

development: Victim and parent perspectives, 8 *Research in Autism Spectrum Disorders* 1173, 1178 (2014). Indeed, one study found that children with ASD were more than three times as likely to be bullied. Twyman & Saylor et al., *supra*, at 1. Studies show that 40 percent of children with autism and 60 percent of children with Asperger's have experienced at least one instance of bullying. Nat'l Bullying Prevention Center, *Bullying statistics*, available at <http://www.pacer.org/bullying/resources/stats.asp>.

Unfortunately, those students most at risk of bullying too often receive inadequate responses when they report bullying to teachers and other school officials. Even though students in special education reported higher levels of mistreatment based on disability, they “were told not to tattle almost twice as often as youth not in special education.” Stan Davis & Charisse Nixon, *Preliminary results from the Youth Voice Research Project: Victimization & Strategies*, Youth Voice Project (2010), available at <http://njbullying.org/documents/YVPMarch2010.pdf>.

C. Bullying Severely Harms Children's Health and Academic Performance

Bullying is “[i]ncreasingly . . . being recognized as a serious threat to the health and development of our nation's children.” Carter & Spencer, *supra*, at 12. Bullying negatively affects victims' school performance, emotional well-being, mental health, and social development. Nansel, *supra*, at 733-35. *See also* CDC

Factsheet (“Bullying may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm.”). As the U.S. Department of Education (“DOE”) recognizes, “[s]tudents who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feeling of alienation from school, poor relationships with peers, loneliness, or depression.” DOE, Dear Colleague Letter (Aug. 20, 2013) at 2 (“2013 Dear Colleague Letter”). A report released just this week by the DOE, the Institute of Education Sciences, and the National Center for Education Evaluation and Regional Assistance reaffirms that “[u]nderstanding the prevalence of bullying experiences matters because bullying can have lasting effects on students . . . lowering their academic achievement and engagement in school.” Stephen Lipscomb & Joshua Haimson et al., *Preparing for life after high school: The characteristics and experiences of youth in special education*, U.S. Dep’t Education (March 2017), available at <https://www.mathematica-mpr.com/our-publications-and-findings/publications/national-longitudinal-transition-study-2012-vol-1-comparisons-with-other-youth-full-report> (reporting that students with an IEP are more likely to be bullied than students without an IEP).

At a basic level, bullying often adversely affects a victim’s willingness and ability to attend school altogether. These children often feel that they do not belong at school, leading to an increase in school day absences. See Gayle L.

Macklem, *Bullying and Teasing: Social Power in Children's Groups*, 70 (2003) (noting a “strong relationship between victimization and school attendance”).

Because they experience low morale and despair as a result of being bullied, victims are also more likely to skip school. *See Carter & Spencer, supra*, at 12.

Bullying victims often come to dislike school, and some come to fear it as a place where they may be physically abused. *See Macklem, supra*, at 70 (noting study's finding that 15 percent of children with frequent absences from school gave bullying as the reason for their not attending). Thus, bullying may result in school refusal. *See Christopher A. Kearney, School absenteeism and school refusal behavior in youth: A contemporary review*, 38 *Clinical Psychology Rev.* 451, 459 (2008).

Bullying has been shown to adversely impact academic performance. Students victimized by bullying tend to have lower standardized test scores and difficulty concentrating. Gwen M. Glew et. al., *supra*, at 1030. Other studies have found that the overall academic performance of bullying victims decreases significantly. *See Carter & Spencer, supra*, at 12. *See also* Jaana Juvonen & Yueyan Wang et al., *Bullying Experiences and Compromised Academic Performance Across Middle School Grades*, 31 *J. Early Adolescence* 152, 167 (2011) (finding “robust direct associations between peer victimization and compromised academic performance over time.”). As the DOE noted, “[a] student

must feel safe in school in order to fulfill his or her full academic potential.” 2013 Dear Colleague Letter at 3.

Moreover, victims of bullying often develop antisocial behavior, emotional adjustment difficulties, fears, and other health problems, including sleeping problems, anxiety, and depression. *See* CDC Factsheet. Students who are bullied exhibit withdrawal behaviors, experience high degrees of loneliness, and have difficulty acting assertively. *See* Macklem, *supra*, at 68. They may also avoid school activities or programs where bullying incidents are likely to occur. *See, e.g.,* Rebecca Puhl & Joerg Luedicke, *Weight-Based Victimization Among Adolescents in the School Setting: Emotional Reactions and Coping Behaviors*, *J. Youth Adolescence*, at 10 (Sept. 2011) (weight-based bullying during gym class was “strongly related” to avoiding gym class). Victims of bullying tend to feel rejected and face difficulty making new friends. Macklem, *supra*, at 68. Overall, victims reported “significantly higher levels of health problems, poorer emotional adjustment, [] poorer school adjustment[,] [and] significantly poorer relationships with classmates than uninvolved youth” compared to non-bullied students. Nansel, *supra*, at 733–34.

Bullying may also result in students developing other conditions, such as depression and post-traumatic stress syndrome. *See, e.g., Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 196 (3d Cir. 2004) (after having been bullied,

student was diagnosed with depression and subsequently identified as having an emotional disability and provided with an IEP).

The psychological damage caused by bullying is compounded by victims' tendency to self-blame. "Self-esteem drops once a child becomes a victim They blame themselves for being victimized, and give in quickly or respond in a disorganized manner when they are teased or bullied." Macklem, *supra*, at 69.

In extreme circumstances, bullying can lead to suicide attempts and even suicide. The Center for Disease Control ("CDC") has found that youths who report victimization of bullying behavior have an elevated level of suicide-related behavior. CDC, *The Relationship Between Bullying and Suicide: What We Know and What it Means for Schools* (Apr. 2014), available at <https://www.cdc.gov/violenceprevention/pdf/bullying-suicide-translation-final-a.pdf>. Sadly, bullying has led to some students becoming so distraught that they resort to suicide. *See, e.g., Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 987 (5th Cir. 2014) (student who had a speech impairment, ADHD, and emotional disabilities "locked himself inside of the school nurse's bathroom and took his own life" after being bullied); *Long v. Murray Cty. Sch. Dist.*, No. 4:10-CV-00015-HLM, 2012 WL 2277836 (N.D. Ga. May 12, 2012), *aff'd in part*, 522 F. App'x 576 (11th Cir. 2013) (student with Asperger's Syndrome committed suicide after having been subjected to bullying).

POINT II

WHEN A STUDENT WITH DISABILITIES HAS BEEN BULLIED, THE SCHOOL DISTRICT MUST NOT ONLY END THE BULLYING, BUT MUST ALSO EVALUATE THE ADEQUACY OF THE STUDENT'S IEP TO ADDRESS THE STUDENT'S CHANGED NEEDS

A. The Second Circuit's *T.K.* Decision Provides A Useful Framework for Analysis

Last year, in *T.K. v. New York City Dept. of Educ.*, 810 F.3d 869 (2d Cir. 2016), the Second Circuit, as well as the district court's decision that it unanimously affirmed, required school districts to take affirmative steps to respond to bullying as a potential denial of FAPE.

At the outset, the Court recognized that “a child with a disability who is severely bullied by her peers may not be able to pay attention to her academic tasks *or develop the social and behavioral skills that are an essential part of any education.*” (emphasis added). *Id.* at 876. The Court then found that the school's failure to address the student's bullying in developing her IEP constituted a procedural denial of FAPE. *Id.* at 877. In so finding, the Court rejected the argument that the student suffered no harm because her IEP “already addressed bullying by including goals for improving L.K.'s behavior in a manner that might reduce future bullying.” *Id.* The district court detailed the inadequacy of the IEP:

No anti-bullying plan was developed to ensure that L.K. would receive a FAPE. The IEP team's improper refusal to consider if and how bullying affected L.K.'s needs is reflected in the substance of L.K.'s 2008 IEP and BIP.

Both documents are devoid of any indication that bullying was a problem for L.K. or that harassment by her peers, unless properly addressed, was substantially likely to have a severely negative impact on her educational opportunities during the 2008–2009 school year.

* * * *

No mention is made in this section of her difficulty with bullying, the impact it had on her feelings about self, her ability to concentrate, or her social adjustment. Nor is bullying addressed in any other section of her IEP.

T.K. v. N.Y. City Dep't of Educ., 32 F. Supp. 3d 405, 421 (E.D.N.Y. 2014). In concluding that the IEP was inadequate, the district court held that:

Where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP. An educational plan that fails to acknowledge a serious problem being faced by a disabled child cannot be said to have been reasonably calculated to offer her a FAPE.

Id. at 422.

The *T.K.* decisions are in accord with the DOE's guidelines, which state that when bullying was serious enough to create a hostile environment, "the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects." DOE, Dear Colleague Letter (Oct. 21, 2014) at 4 ("2014 Dear Colleague Letter"). The *T.K.* decisions and the DOE guidelines recognize that bullying can profoundly affect a student and interfere with her academic and non-

academic educational opportunities. The school's response to bullying must be robust, addressing all of the student's individual needs in response to the bullying in order to provide her a FAPE.

B. When a Student Has Been Seriously Bullied, the IEP Must Address the Past Bullying

The first step in fixing a problem is recognizing that one exists. Therefore, where a student has been bullied, the IEP should specifically acknowledge that fact and consider what steps, if any, must be taken as a result. As the District Court recognized, below, the IEP failed to specifically acknowledge the prior bullying, noting only that the mother “voiced a concern regarding **possible bullying.**”

District Court Order at 24 (emphasis in original). The IEP's failure to even admit to the prior bullying stands in stark contrast to the specific findings and conclusions made by the administrative hearing officer, as referenced in the District Court's Order, including that the student had been bullied and that the school district had known of multiple bullying incidents, yet failed to take appropriate steps to “investigate the incidents, or take remedial action.” *Id.* at 23-24. Most significantly, the hearing officer concluded that Appellant's “learning opportunities were ‘substantially restricted’ due to the bullying.” *Id.*

Notwithstanding these findings, the IEP provides no specific plan for addressing the prior bullying, nor one specifically aimed at preventing similar incidents from recurring in the future. In short, there is nothing to suggest that Defendants

engaged in the kind of “fact-intensive exercise” required to craft an appropriate program for Appellant as a result of the bullying he suffered that impaired his ability to learn. *Andrew F.*, slip. op. at 11. In the absence of any consideration having been given to the bullying, its effects on the students, or to specific steps to be undertaken to prevent it from recurring,⁴ it cannot be said that Appellant’s IEP is reasonably calculated to provide him with appropriate educational opportunities under the IDEA.

C. When a Student Has Been Bullied, An IEP Must Consider Whether Additional Services Are Necessary to Address Prior Bullying and/or Prevent Future Incidents of Bullying

The need to consider the sufficiency of an IEP may be triggered anew when a child has been severely bullied: “Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP.” 2013 Dear Colleague Letter at 3. As noted above, bullying has been shown to inflict lasting psychological, behavioral, social, and academic consequences for the victim. These consequences may result in a denial of FAPE if they are not addressed by services that acknowledge the prior bullying and are designed to prevent bullying and its effects.

⁴ No anti-bullying policy had been implemented at Appellant’s Home School. *See* District Court Order at 12. The DOE guidelines in the 2013 Dear Colleague Letter and its enclosure encourage schools to develop clear policies and procedures to address bullying and to provide ongoing training about such policies as part of a comprehensive framework to achieve positive academic and behavioral outcomes. *See* 2013 Dear Colleague Letter, Enclosure at 4-5. *See also* Point II.D.3, *infra*.

Almost two decades ago, the DOE recognized that bullying may constitute disability harassment that may result in a denial of FAPE. *See* DOE, Dear Colleague Letter (July 2000). Since then, the DOE has consistently recognized that schools may need to address the social and emotional effects of bullying of a child with a disability. In October 2000, the DOE noted that in responding to harassment, the school may need to provide counseling to both the victim and perpetrator and “may be required to provide additional services to the student who was harassed in order to address the effects of the harassment.” DOE, Dear Colleague Letter (Oct. 2000) at 3. More recently, the DOE cautioned that “bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of [FAPE].” 2013 Dear Colleague Letter. Recognizing that “a student must feel safe in school in order to fulfill his or her full academic potential,” the DOE instructed schools to consider whether “as a result of the effects of bullying, the student’s needs have changed . . .” and to determine the extent to which additional educational or related services may be required to meet the student’s needs. *Id.* DOE also provided an enclosure entitled *Effective Evidence-based Practices for Preventing and Addressing Bullying* (2013 Enclosure), which provided peer-reviewed research on bullying and bullying prevention and intervention programs. *Id.*

Again in 2014, the DOE emphasized that schools have an “ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE . . .” 2014 Dear Colleague Letter at 5. Recognizing that a student’s needs may change as a result of bullying, the DOE counseled schools to convene the student’s IEP team to determine “the extent to which additional or different IDEA FAPE services are needed to address the student’s individualized needs and then revise the IEP accordingly.” *Id.*

Of course, not all students will respond to bullying in precisely the same way and there is no one-size-fits-all response to a bullying incident that a school can employ to discharge its obligations to the child. Rather, the school must assess the particular services that may be required in response to bullying based on each child’s individual needs. To be sure, however, consideration of such additional services requires, as a first step, that the prior bullying be fully acknowledged by the school and its effects on the student be considered. Thus, while the District Court, below, noted that the specific responses to bullying outlined in the 2014 Dear Colleague Letter were suggestive only and not mandatory, *see* District Court Order at 26-27, it is indisputable that a school district cannot simply choose to not respond to bullying that jeopardizes the student’s receipt of FAPE. Thus, a child adversely affected by bullying cannot simply be returned to the very same

environment in which the bullying occurred without considering what is needed to prevent a recurrence.

Even an IEP that is designed to try to prevent future incidents of bullying may not go far enough to provide FAPE. This might be the case, for example, where bullying is addressed only by increasing adult supervision. While increased adult supervision can be an important step to deter future bullying, it is unlikely to provide any help to a child who is suffering from the effects of the prior incidents, nor will it facilitate the development of social skills that are necessary for the child to have appropriate peer interactions and to buffer against further bullying incidents. *See Point II.D, infra.*

Here, the District Court held that the IEP adequately addressed bullying for purposes of FAPE because it provided for a 1:1 aide as well as increased adult supervision to address both possible and perceived bullying. District Court Opinion at 29-32. Yet, the District Court did not explain whether and how this approach would address the effects of the prior bullying on the child, nor how it would improve the student's social experience with his peers, either by providing programs or training to his peers to reduce their bullying behaviors, or by providing him with social skills training so he would better be able to develop relationships with his peers. Indeed, no consideration appears to have been given

to whether Appellant's individual needs made these additional services necessary as part of his IEP to ensure his access to FAPE.

D. Social Skills Training and Anti-Bullying Programs Should be Considered When Students with Disabilities Have Been Subjected to Bullying

1. Schools Play an Important Role in Teaching Social Competency for all Students

That a school's role in teaching its students is not limited to academics has long been recognized: "schools have an important role to play in raising healthy children by fostering not only their cognitive development but also their social and emotional development." Joseph A. Durlak & Allison B. Dymnicki et al., *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of School-Based Universal Interventions*, 82 *Child Development* 405, 406 (2011). Attaining social competence is one of the primary functions of schooling. Kathryn R. Wentzel, *Social Competence at School: Relation Between Social Responsibility and Academic Achievement*, 61 *Rev. Edu. Research* 1, 1 (1991) ("social and intellectual competence [are] concurrent but separate goals for students to achieve while at school"). Indeed, the social skills regarding consideration of others, interpersonal abilities, and moral development have been deemed even more significant than academic achievement by parents, students and teachers alike. *Id.* at 4.

Such non-academic education has multiple benefits. It not only provides valuable life lessons regarding social responsibility and behavioral skills and promotes character development, but also directly contributes to learning and performance. *Id.* “Extensive developmental research indicates that effective mastery of social-emotional competencies is associated with greater well-being and better school performance whereas the failure to achieve competence in these areas can lead to a variety of personal, social, and academic difficulties.” Durlak, *supra*, at 406. Consequently, acceptance by and positive relationships with peers “have been consistently related to positive academic outcomes.” Wentzel, *supra*, at 10. Such relationships also provide emotional security and motivation to succeed. *Id.* Conversely, peer rejection and isolation are correlated to “low levels of achievement.” *Id.* In short, “[b]ecause relationships and emotional processes affect how and what we learn, schools and families must effectively address these aspects of the educational process for the benefit of all students.” Durlak, *supra*, at 405.

2. Schools Must Teach Socialization Skills to Children with Disabilities Who Lack Them

Socialization skills can be particularly important for children with disabilities, who may already feel socially vulnerable because of their disability, or who may lack social and interpersonal skills as a component of their disability, such as children with ASD. *See Zeedyk & Rodriguez et al., supra*, at 3 (noting that

social skills and interpersonal communication deficits are “central features of ASD”). Consequently, “teaching social skills is a common educational objective for school-age children who have autism.” Christina C. Licciardello & Alan E. Harchik et al., *Social Skills Intervention for Children with Autism During Interactive Play at a Public Elementary School*, 31 *Education & Treatment of Children* 27, 27 (2008). The school setting provides a unique opportunity to teach these essential life skills in a controlled, safe, and familiar environment.

Congress has codified these broader, non-academic educational objectives into the IDEA. Thus, the IDEA mandates that students with disabilities be provided with “special education and related services” in order to “prepare them for further education, employment and independent living.” 20 U.S.C. § 1400(d)(1)(A). For this reason, an IEP must address the child’s unique academic *and non-academic* needs. *See* 20 U.S.C. § 1414(d)(3) (IEP must consider “the academic, developmental, and functional needs of the child” and “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior”). *Andrew F.*, slip op. at 11 (noting that “the essential function of an IEP is to set out a plan for pursuing academic and functional advancement”). *See also Cty. of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996) (“educational benefit is not limited to

academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.”); *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (“The term ‘unique educational needs’ [shall] be broadly construed to include the handicapped child’s academic, social, health, emotional, communicative, physical and vocational needs” (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106)).

Moreover, social skills training can be especially important for a child with a disability who has been bullied. The academic literature makes clear that “poor social skills serve as a common contributing factor for the overrepresentation of students with disabilities within the bullying dynamic.” Rose & Espelage, *supra*, at 134. By contrast, students who “maintain close friendships and are provided with the appropriate educational supports may report lower levels of victimization when compared to students who do not feel a sense of belonging.” *Id.* at 145. Indeed, studies have found that peer actions are more helpful than educator and self-actions. David & Nixon, *supra*, at 18. Thus, helping students develop socialization and interpersonal skills to form stronger relationships with their peers may itself help protect a child from future bullying incidents and enable him to engage in student life without fear.

Particularly given the adverse effects bullying can have on a student’s peer relationships and academic performance, the IEP of a student who has been bullied

should also address the social and interpersonal skills the student needs to cope with prior incidents and make him less vulnerable to victimization. Based on the social or communication skill deficiencies of many students with disabilities, a study published in December 2016 specifically recommends that “IEP teams and special education service providers should make an increased effort to . . . prioritize[e] the functional and behavioral skill acquisition in the IEP.” Chad A. Rose & Nicholas A. Gage, *Exploring the Involvement of Bullying Among Students With Disabilities Over Time*, *Exceptional Children* 13 (2016). *See also id.* at 14 (“Perhaps the most effective approach to reducing bullying involvement among youth with disabilities is direct instruction interventions focused on social and communication skill acquisition”); Rose & Espelage, *supra*, at 145 (“[b]ased on the current findings and foundational literature, it is critical for schools, administrators, and teachers to value social-emotional and academic outcomes equally”). “Ignoring or not being able to ‘afford’ to address social-emotional issues, such as bullying, may be a very short-sighted view of educational progress. . . . [T]he connection between students’ peer relationships and their academic performance is irrefutable.” Juvonen & Wang et al., *supra*, at 170.

3. Anti-Bullying Programs Should Be Considered to Prevent Bullying

In addition to providing additional services for the student who has been bullied, schools that lack effective anti-bullying programs should consider

implementing such a program to reduce the incidents of bullying at school. Research has found that school-wide bullying prevention programs can be effective in changing “the knowledge, attitudes, and self-perceptions of those targeted by bullying, engaging in bullying, and bystanders.” August 2013 Letter Enclosure; Kenneth W. Merrell et al., *How effective are school bullying intervention programs? Meta-analysis of intervention research*, 23 Sch. Psychology Q. 26, 38 (2008); *see also* Jose Antonio Jimenez-Barbero et al., *Effectiveness of anti-bullying school programs: A meta-analysis*, 61 Children and Youth Services Rev. 165, 173 (2016) (finding evidence of effectiveness of anti-bullying programs at “reducing the frequency of victimization and bullying and improving attitudes towards school violence.”). Particularly when incidents of bullying have already occurred, school districts should consider adopting anti-bullying programs designed to prevent school violence and bullying.

The 2014 Dear Colleague Letter also recommends additional strategies to address bullying, including training staff to recognize and respond to bullying. 2014 Dear Colleague Letter at 10. To this end, it is important that school staff understand that any number of factors—physical vulnerability, social skill challenges, or intolerant environments—may increase the risk of bullying for children with disabilities, including developmental, intellectual and emotional disabilities. *See* Zupito Marini, Louise Fairbairn & Robin Zuber, *Peer harassment*

in individuals with developmental disabilities: Towards the development of a multi-dimensional bullying identification model, 29 *Developmental Disabilities Bulletin* 170-195 (2001); Richard Lieberman, Katherine C. Cowan, *Bullying and Youth Suicide: Breaking the Connection*, *Principal Leadership*, Vol. 12, Issue 2, October 2011. Children with autism and Asperger's syndrome suffer higher rates of peer rejection and higher frequencies of verbal and physical attacks due to difficulties with social interaction and inability to read social cues. *See AbilityPath, Walk A Mile In Their Shoes - Bullying and the Child with Special Needs*, available at <http://www.abilitypath.org/search.jsp?query=walk+a+mile+in+their+shoes>; *see also*, Connie Anderson, Ph.D, *Interactive Autism Network Research Report: Bullying and Children with ASD* (March 26, 2012), available at https://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying (educators and providers must be aware that bullying is extremely common for children with ASD and be prepared to intervene).

CONCLUSION

Amici urge the Court to hold that a school's response to bullying of a student with a disability must address all of the child's educational needs, both academic and non-academic, so as to provide her with a meaningful educational opportunity and allow her to progress in school. For children with disabilities who are victims

of bullying, schools must acknowledge the bullying so that they can ensure an appropriate response, including consideration of systemic programs that address bullying in schools and the provision of the skills necessary for the child to cope with prior bullying and to protect against similar incidents in the future. The Court's decision in this case should, consistent with the academic literature, ensure that an IEP for a child with a disability who was the victim of bullying include all of the services necessary to provide the child with an appropriate education.

Dated: New York, New York
March 31, 2017

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 31, 2017

/s/ Bruce H. Schneider

Bruce H. Schneider

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I hereby certify that on March 31, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Dated: March 31, 2017

/s/ Bruce H. Schneider

Bruce H. Schneider

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