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## Reasonable Supervision in the City: Enhancing the Safety of Students with Disabilities in Urban (and Other) Schools

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**REASONABLE SUPERVISION IN THE CITY:  
ENHANCING THE SAFETY OF STUDENTS  
WITH DISABILITIES IN URBAN  
(AND OTHER) SCHOOLS**

*Lynn M. Daggett\**

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### INTRODUCTION

The Hillsborough County Public Schools (HCPS) district educates students in the city of Tampa, Florida and surrounding communities.<sup>1</sup> One of the largest school districts in the country, HCPS serves more than 200,000 students,<sup>2</sup> including more than 29,000 students with disabilities.<sup>3</sup> With a \$1.7 billion operating budget,<sup>4</sup> HCPS operates more than 250 schools<sup>5</sup> and employs a staff of more than 25,000.<sup>6</sup>

In 2012, in this single school district, two students with disabilities suffered accidental deaths. Isabella Herrera was a seven-year-old student living with a neuromuscular disorder that confined her to a wheelchair and made it difficult for her to hold her head upright.<sup>7</sup> Isabella suffocated and died on her HCPS school bus.<sup>8</sup> In a pending lawsuit against HCPS, Isabella's parents claim several wrongful acts by the HCPS.<sup>9</sup> Isabella's parents assert that although they repeatedly expressed concerns, HCPS failed to train bus staff, of which there was a "significant" shortage,<sup>10</sup> to position Isabella properly.<sup>11</sup> They claim that HCPS's failure to properly position and secure Isabella on the bus caused her airway to become obstructed.<sup>12</sup> The parents also assert that when the HCPS bus attendant saw Isabella was not breathing, the attendant did not call 911 or provide CPR assistance, but instead phoned Isabella's mother to come to the bus and deal with her daughter's health crisis.<sup>13</sup>

1. *See HCPS Facts 2013*, HILLSBOROUGH COUNTY PUB. SCH. (May 2013), <http://publicaffairs.mysdhc.org/files2012-13/FactsBrochureFinal2013.pdf> (last visited Dec. 18, 2013).

2. *Id.* (noting an exact attendance of 200,533 students).

3. *Exceptional Student Education Overview*, HILLSBOROUGH COUNTY PUB. SCH., <http://ese.mysdhc.org/overview> (last visited Dec. 18, 2013).

4. *HCPS Facts 2013*, *supra* note 1.

5. *Id.* (noting exactly 266 schools).

6. *Id.* (including 15,638 teachers and 9223 support staff).

7. *See* *Herrera v. Hillsborough Cnty. Sch. Bd.*, No. 8:12-cv-2484-T-30EAJ, 2013 WL 3063721, at \*2 (M.D. Fla. June 18, 2013) (finding sufficient evidence of deliberate indifference to allow disability and constitutional claims to proceed).

8. *Id.* at \*1.

9. *Id.*

10. *Id.* at \*5.

11. *Id.* at \*3 (frequent problems which were noted in Isabella's records and IEP).

12. *Id.* at \*1.

13. *Id.* Apparently, there is a video recording of the bus ride in question. Dalia Dangerfield, *Death of Special Needs Student Brings Lawsuit Against Hillsborough Schools*, BAY NEWS 9 (Nov. 1, 2012), [http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2012/11/1/death\\_of\\_special\\_ne.html](http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2012/11/1/death_of_special_ne.html).

Jenny Caballero, a middle school student with Down Syndrome who had “very limited verbal skills” and was “fascinated by water,” wandered away from her school gym to a nearby pond and drowned.<sup>14</sup> Jenny was at the gym with her class, which consisted of twenty students with intellectual disabilities, along with more than 100 other students attending several general education gym classes.<sup>15</sup> She wandered away while six aides were watching the other special education students.<sup>16</sup> When Jenny wandered out of the building, one aide was taking a smoking break while others rested on the bleachers.<sup>17</sup>

Unfortunately, Isabella and Jenny were not the only students with disabilities injured while attending HCPS.<sup>18</sup> Some injuries were intentional; for example, a video recording shows that in September 2012, a HCPS bus driver “literally kicked off [an eight-year-old] special needs student, breaking her ankle.”<sup>19</sup>

Even more unfortunately, the incidents at HCPS are not an aberration. Students with disabilities are sustaining serious injuries, both accidentally and intentionally inflicted, at schools across the country in large cities (and elsewhere).<sup>20</sup> A young Nashville student with spinal muscular atrophy died after school staff incorrectly performed CPR.<sup>21</sup> On a Chicago school bus, a student with

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14. Tammie Fields, *Body of Jenny Caballero Found in Pond After She Disappeared from Rodgers Middle School*, WTSP 10 NEWS (Oct. 23, 2012), <http://www.wtsp.com/news/topstories/article/279281/250/Riverview-students-body-found-in-school-pond>.

15. *Id.*

16. *Id.*

17. *Florida District Considers Policy Changes After Deaths of Two Special Needs Students*, NAT'L SCH. BOARDS ASS'N. (Dec. 11 2012), <http://legalclips.nsba.org/2012/12/11/florida-district-considers-policy-changes-after-deaths-of-two-special-needs-students> (noting that the county school district lacked training and procedures for dealing with students with disabilities).

18. *Herrera v. Hillsborough Cnty. Sch. Bd.*, No. 8:12-cv-2484-T-30EAJ, 2013 WL 3063721, at \*3 (M.D. Fla. June 18, 2013). In 1999, a student with a disability was dropped off at the wrong bus stop, hit by a car and killed. *Id.* In 2011, another student with a disability had an unexplained fractured leg, and a third young student was left on a school bus for six hours. *Id.*

19. Alison Morrow, *Video Shows Why School Board Members Fired Bus Driver for Literally Kicking Student Off the Bus*, ABC ACTION NEWS (Mar. 20, 2013), [http://www.abcactionnews.com/dpp/news/region\\_hillsborough/video-shows-why-school-board-members-fired-bus-driver-for-literally-kicking-student-off-the-bus](http://www.abcactionnews.com/dpp/news/region_hillsborough/video-shows-why-school-board-members-fired-bus-driver-for-literally-kicking-student-off-the-bus).

20. See *infra* Part I.B.1.c (reviewing case law involving physical injuries at schools to students with disabilities).

21. *Lilly v. Metro. Gov't of Nashville and Davidson Cnty.*, No. M2010-00085-COA-R3-CV, 2010 WL 4670924, at \*1 (Tenn. Ct. App. Nov. 16, 2010) (noting that

disabilities was sexually assaulted by another student.<sup>22</sup> A Los Angeles student with a severe intellectual disability was sexually assaulted by her own aide.<sup>23</sup> Another Los Angeles school maintained a “hiding place” on its premises where a student with a disability was assaulted.<sup>24</sup> In Little Rock, one student sexually assaulted a student with an intellectual disability in the shower.<sup>25</sup> In New York City, students repeatedly bullied a student with a disability in the presence of his personal aide and a teacher.<sup>26</sup> Finally, and shockingly, a Philadelphia substitute teacher watched while some students dragged another student behind a partition in the classroom and raped her.<sup>27</sup> The substitute teacher told the students she did not care what they did.<sup>28</sup> The student victim could not escape because the school had locked the classroom door.<sup>29</sup>

This Article explores what urban (and other) schools can do to minimize injuries to students with disabilities and at the same time serve their own interests by minimizing liability. The Article begins in Part I.A with a brief review of the school’s legal duty to take reasonable steps to protect students with disabilities from harm.

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staff allegedly were neither trained nor given written instructions in the student’s IEP or health plan, and allowed the student to vomit while being placed on his back).

22. *Doe ex rel. Ortega-Piron v. Chi. Bd. of Educ.*, 820 N.E.2d 418, 420 (Ill. 2004) (noting that the student assaulter had been declared a sexually aggressive child with a protective plan that forbade ever leaving him alone with other children; the bus attendant had called in sick but was not replaced by the school).

23. *Ali A. v. L.A. Unified Sch. Dist.*, No. B221099, 2011 WL 72957, at \*1 (Cal. Ct. App. Jan. 11, 2011) (finding that sexual abuse occurred after parents had complained about physical abuse by this aide to the school).

24. *Jennifer C. v. L.A. Unified Sch. Dist.*, 86 Cal. Rptr. 3d 274, 281 (Ct. App. 2008).

25. *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993).

26. *T.K. v. N.Y.C. Dep’t of Educ.*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011) (finding bullying can amount to denial of FAPE and thus violate special education law). In another New York City school, a teacher took sixteen students in a class of intellectually disabled students out to recess, and allowed a twelve-year-old student in that class known to be clumsy to run and chase another student. *Rodriguez v. Bd. of Educ.*, 480 N.Y.S.2d 901 (App. Div. 1984). The student briefly disappeared, then fell and was injured. *Id.* The court upheld a \$400,000 jury verdict because a reasonable teacher would have told the student not to run, and would have looked for the students when they disappeared, and because an expert opined that it is unreasonable to allow intellectually disabled students to run about. *Id.* A third New York City student with intellectual disability and cerebral palsy was sexually assaulted by a classmate in a school bathroom. *P.I. ex rel. R.I., Sr. v. N.Y.C. Bd. of Educ.*, 814 N.Y.S.2d 891 (Sup. Ct. 2006).

27. *Maxwell ex rel. Maxwell v. Sch. Dist.*, 53 F. Supp. 2d 787 (E.D. Pa. 1999) (allowing claim to proceed).

28. *Id.* at 789.

29. *Id.*

Specifically, schools have an affirmative common law tort duty to reasonably supervise their students, including students with disabilities.<sup>30</sup> This duty is a broad one; it extends to all foreseeable risks.<sup>31</sup> For schools, this duty is informed and heightened by their knowledge and expertise about children, individual students, and disability generally.<sup>32</sup>

Part I.B of this Article examines foreseeable safety risks at school for students with disabilities, which are greater in both quality and quantity than for other students.<sup>33</sup> Foreseeable risks for students with disabilities may be ascertained from many sources; one starting point is the nature of the student's impairment and how it manifests itself.<sup>34</sup> Goals and services and in some cases actual safety provisions in the student's individual special education plan also inform what risks are foreseeable for a student.<sup>35</sup> Foreseeable risks can also be recognized through an understanding of the bullying some students with disabilities face in school,<sup>36</sup> and of the school's safety policies and practices.<sup>37</sup> Finally, foreseeable risks may be identified from examination of the case law in which students with disabilities have been injured and have sued their schools.<sup>38</sup>

Part I.B.2 of the Article explains how safety risks for students with disabilities can be further heightened when the student attends an urban school. Urban schools pose greater safety risks than other schools generally.<sup>39</sup> Some risks are well-known, such as those posed by violent classmates.<sup>40</sup> Other risks are less obvious. For example, urban schools tend to be in older buildings which are more difficult to navigate for students with sensory or mobility impairments,<sup>41</sup> may present environmental risks for example to students with asthma and allergies,<sup>42</sup> and may be difficult for some students with disabilities to

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30. *See infra* Part I.A.

31. *See infra* Part I.B (exploring foreseeable risks at school for students with disabilities).

32. *See infra* notes 74–76 and accompanying text.

33. *See infra* Part I.B.

34. *See infra* Part I.B.1.

35. *See infra* Part I.B.1.a.

36. *See infra* Part I.B.1.

37. *See infra* Part I.B.1.b.

38. *See infra* Part I.B.1.c.

39. *See infra* Part I.B.2.

40. *See infra* Part I.B.2.a.

41. *See infra* notes 181–82 and accompanying text.

42. *See infra* notes 185–87 and accompanying text.

evacuate in the event of emergency.<sup>43</sup> Urban schools also have higher teacher absence rates;<sup>44</sup> in several cases, students with disabilities have been injured when their class has a substitute teacher.<sup>45</sup>

This confluence of safety risks which stem from student disability and risks which arise from characteristics of urban schools makes it imperative for urban schools to proactively plan for the safety of their students with disabilities. Part II of the Article suggests how urban (and other) schools can engage in reasonable supervision of students with disabilities. First, the duty to reasonably supervise must be met within the larger context of compliance with federal disability law.<sup>46</sup> In particular, the Article notes that special education teams will need to take care to avoid responding to safety issues by recommending a restrictive placement for the student.<sup>47</sup> Doing so would violate disability law requirements for placing students in the least restrictive environment (LRE),<sup>48</sup> and also would exacerbate the problem existing in urban schools of over-placement of students with disabilities in restrictive settings.<sup>49</sup>

As is required by disability law, students with disabilities typically have Individualized Education Programs (IEPs).<sup>50</sup> A team primarily comprised of special education staff and the parents creates these plans.<sup>51</sup> As *education* plans, IEPs do not typically consider and address safety risks for the student.<sup>52</sup> The IEPs of students which do deal with safety issues often are not shared with school staff members who supervise the student such as bus drivers and playground supervisors.<sup>53</sup> Moreover, general education staff members, who make safety-related policies and who supervise students, are often unaware

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43. See *infra* notes 183–84 and accompanying text.

44. See NAT'L CENTER FOR EDUC. STATISTICS, URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY 95–97 (1996), available at <http://nces.ed.gov/pubs/96184all.pdf>.

45. See *infra* notes 146 and 148 and accompanying text.

46. See *infra* Part II.A.

47. See *infra* Part II.A.2.

48. See *infra* Part II.A.2.

49. See *To Assure the Free Appropriate Public Education of All Children with Disabilities—1996*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/pubs/OSEP96AnIRpt/chap4b.html> (last visited Dec. 18, 2013).

50. See *infra* notes 110–12 and accompanying text.

51. See *infra* notes 117–21 and accompanying text.

52. See *infra* note 113 and accompanying text.

53. See *infra* notes 122–25 and accompanying text.



of the safety risks faced by students with disabilities,<sup>54</sup> and lack of knowledge of safety issues for specific students with disabilities.<sup>55</sup>

Planning for students with disabilities' safety thus appears to have fallen through the cracks between general education and special education. The Article proposes that reasonable supervision of students with disabilities requires that schools, with significant participation by general education staff, engage in both systemic and individual safety planning.<sup>56</sup> At the systemic planning level, schools need to identify generic safety risks for students with disabilities.<sup>57</sup> Schools must conduct training and also create policies and practices that enhance safety.<sup>58</sup> Especially in urban schools, staff practices (such as those involving substitutes) need to be examined.<sup>59</sup> At the individual planning level, schools need to identify and plan for any safety risks for each of their students with disabilities.<sup>60</sup> This individualized consideration and planning may start with the student's IEP but cannot end there.<sup>61</sup> Planning must also involve general education staff with safety and supervisory duties and expertise,<sup>62</sup> and there also must be broad sharing of individual student information with the school staff who supervise the student.<sup>63</sup> Part II of the Article includes specific suggestions for schools in each of these planning areas.

## I. THE SCOPE OF THE DUTY TO REASONABLY SUPERVISE STUDENTS

### A. A School's Duty of Reasonable Supervision<sup>64</sup>

In general the duty of reasonable care requires neither taking affirmative steps to prevent harm nor obtaining assistance for a

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54. *See infra* Part II.B.1.

55. *See infra* Part II.B.1.

56. *See infra* Parts II.C and II.D.

57. *See infra* Part II.C.

58. *See infra* Part II.B.

59. *See infra* Part II.F.

60. *See infra* Part II.D.

61. *See infra* Part II.D.4 and Part II.D.5.

62. *See infra* Part II.D.2.

63. *See infra* Part II.E.

64. This brief survey is adapted from a more extensive examination of the school's duty of supervision in Lynn M. Daggett, *Reasonable Supervision of Special Students: The Impact of Disability on School Liability for Student Injury*, 43 J. LAW & EDUC. (forthcoming 2014) for an examination of the many ways in which disability affects the contours of the legal duty owed by schools to their students.

person who is injured.<sup>65</sup> For example, a person who sees a car about to hit a child and takes no action to prevent the collision or to help the child after the collision is morally reprehensible, but has not failed to use reasonable care. With regard to their students, schools fall within one of the exceptions to this no duty rule.<sup>66</sup> The policy bases for imposing a duty on schools are that pre-K–12 students are in the custody of the school, the school acts in loco parentis, and students lack full ability to care for themselves.<sup>67</sup> Schools thus have a legal duty to take reasonable steps to prevent students from foreseeable risks of injury, and also to assist them if they are injured.<sup>68</sup> This duty specifically includes “reasonable supervision” of students, and of school staff who supervise them.<sup>69</sup> If this duty is breached, causing harm, the student has a basic claim for negligence against the school, and may recover compensatory damages.<sup>70</sup> Thus, for example, HCPS had a legal duty to take reasonable steps to prevent both Isabella Herrera and Jenny Caballero from harm.<sup>71</sup> HCPS was required to provide reasonable supervision in the gym of both Jenny and the

65. *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (2010) (providing the exceptions to this general rule).

66. *See generally* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

67. *See* Allan Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting From Lack or Insufficiency of Supervision*, 38 A.L.R.3d 830 (1971).

68. *See, e.g.*, *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994) (“[S]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.”); *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987) (noting duty to provide reasonable assistance to injured student). For a comprehensive overview of a school’s general duty of reasonable supervision and collection of case law, see Korpela, *supra* note 67.

69. *See* Korpela, *supra* note 67.

70. *See id.* In some cases, schools will have an available defense to claims, but that is of course a separate issue from exercising reasonable supervision in order to prevent injuries (and lawsuits) from occurring in the first place. Schools also rely on these defenses at their peril. For example, where a governmental immunity defense is available, courts may hold that the immunity defense fails, for example because there is no immunity for “discretionary” functions and the duty to reasonably supervise is found not to be discretionary. *See, e.g.*, *Borne v. Nw. Allen Cnty. Sch. Corp.*, 532 N.E.2d 1196 (Ind. Ct. App. 1989) (finding no immunity for claim by an intellectually disabled student molested on a field trip, because the duty of reasonable supervision is not a discretionary function); *Bencic v. City of Malden*, 587 N.E.2d 795 (Mass. App. Ct. 1992) (finding the school’s actions to be exempt from tort liability).

71. For a discussion of the Isabella Herrera case, see *supra* notes 7–13 and accompanying text. For a discussion of the Jenny Caballero case, see notes 14–17 and accompanying text.

aides and other staff who were with her there.<sup>72</sup> HCPS had to reasonably supervise Isabella and the staff with her on the bus, and also had a duty to take reasonable steps to help Isabella when she had difficulty breathing.<sup>73</sup>

The school's duty of reasonable supervision is heightened by its relevant expertise in child development and behavior as well as in special education, and also by its knowledge of the abilities, limitations, and safety-related issues of individual students.<sup>74</sup> For example, HCPS was required to provide Isabella with the supervision a reasonable school would provide informed by an understanding of Isabella's neuromuscular condition and the risks that would arise if she became unable to hold her head up.<sup>75</sup> HCPS owed Jenny the supervision a reasonable school would provide to a young student with significant cognitive limitations who is "fascinated by water" and attends school adjacent to a pond.<sup>76</sup> The costs and benefits of various options available to the school (for example, assigning an aide to Isabella on the bus, or to Jenny in her gym and other classes) are relevant to reasonableness analysis.<sup>77</sup> Moreover, if the school has its own relevant policies (e.g., a school district or building policy that there will be at least one aide in addition to the driver on school busses), failure to comply may be strong evidence of lack of reasonable care.<sup>78</sup>

### B. Foreseeable Risks

The duty of reasonable supervision extends to all reasonably foreseeable risks; schools have no duty and thus are not liable for injuries resulting from risks that are unforeseeable.<sup>79</sup> In schools,

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72. For a discussion of the Jenny Caballero case, see *supra* notes 14–17 and accompanying text.

73. For a discussion of the Isabella Herrera case, see *supra* notes 7–13 and accompanying text.

74. See *generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 12 (2010).

75. See *Herrera v. Hillsborough Cnty. Sch. Bd.*, No. 8:12-cv-2484-T-30EAJ, 2013 WL 3063721, at \*5 (M.D. Fla. June 18, 2013).

76. See *supra* note 14 and accompanying text.

77. See *generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010).

78. *Id.* § 13 cmt. f. In some states, this will not be the case—for example, some courts recognize that such policies may provide for more than reasonable care and thus do not engage in this analysis. See *id.*

79. *Marshall v. Cortland Enlarged City Sch. Dist.*, 697 N.Y.S.2d 395 (App. Div. 1999) (holding that the school was not liable for the unforeseeable behavior of a student with a disability who had threatened a prior girlfriend, without the school's

foreseeable risks to student safety can include injuries at the hands of third parties, including classmates and school staff.<sup>80</sup> For example, the HCPS bus driver who kicked the student with a disability off her bus,<sup>81</sup> and even the sexual assaults of the students in Chicago, Los Angeles, and Philadelphia, may be considered foreseeable risks.<sup>82</sup> For Isabella, foreseeable risks would seem to include suffocating from being unable to hold her head up because her parents had repeatedly complained to the school about improper head positioning on the school bus.<sup>83</sup> For Jenny, foreseeable risks may include wandering off; because she loved water and her school is adjacent to a pond,<sup>84</sup> it seems foreseeable that she would enter and be injured in the pond.

Foreseeable risks for students with disabilities may be ascertained from many sources. A starting point is the student's impairment and how it manifests.<sup>85</sup> Information in the student's IEP, such as goals and services and in some cases actual safety provisions, is also relevant.<sup>86</sup> Understanding the extent to which students with disabilities are bullied in school<sup>87</sup> and school safety policies and practices<sup>88</sup> also informs foreseeability. Finally, examining the case law involving injured students with disabilities also identifies foreseeable risks for those students.<sup>89</sup> It is clear from review of these sources that safety risks for students with disabilities are qualitatively and quantitatively greater than risks for students without disabilities.

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knowledge, before murdering another student with a disability); *see also* *Guzman v. City of New York*, 909 N.Y.S.2d 721 (App. Div. 2010) (involving a severely disabled student who bit a classmate's finger in a special education class of ten students, a teacher and four aides; the student had not behaved this way in the past; no but-for causation or proximate cause).

80. *See, e.g.*, *Brownell v. L.A. Unified Sch. Dist.*, 5 Cal. Rptr. 2d 756 (Ct. App. 1992) (involving a general education student injured by gang violence after leaving school; school not liable because lack of gang history in the area made the risk unforeseeable). As to school staff, note that in addition to vicarious liability for employee torts, schools can be liable for negligent hiring, retention, or supervision if the school did not use reasonable care in hiring, retaining, and/or supervising an employee, and the employee caused harm to the student. *See infra* note 176 and accompanying text.

81. *See supra* note 19 and accompanying text.

82. *See supra* notes 22–23, and 27–29 and accompanying text.

83. *See supra* notes 7, 11 and accompanying text.

84. *See supra* note 14 and accompanying text.

85. *See infra* Part I.B.1.

86. *See infra* Part I.B.1.a.

87. *See infra* Part I.B.1.

88. *See infra* Part I.B.1.b.

89. *See infra* Part I.B.1.c.

### 1. Foreseeable Risks for Students with Disabilities

The nature of each student's disability, as well as its specific manifestations, inform what risks are foreseeable for that student. For example, a student may live with a cognitive or physical condition (such as Jenny's Down syndrome<sup>90</sup>) that makes the student unable to care for herself in some ways. Perhaps the disability is a health impairment with closely related and specific safety risks (such as Isabella's neuromuscular condition,<sup>91</sup> multiple chemical sensitivities,<sup>92</sup> diabetes,<sup>93</sup> brittle bone disease,<sup>94</sup> very severe allergies,<sup>95</sup> asthma,<sup>96</sup> or

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90. *See supra* note 14 and accompanying text.

91. *See supra* note 7 and accompanying text.

92. *See* South Windsor (CT) Publ. Schs., 37 IDELR 133 (Office of Civil Rights Apr. 19, 2002) (noting the need for air purifiers and daily cleaning with special cleaning agents for student with this condition).

93. *See, e.g.*, Lee Cnty. (FL) Sch. Dist., 46 IDELR 228 (Office of Civil Rights June 30, 2006) (district will resolve complaint by providing training on diabetes to all staff); Prince George's (MD) Cnty. Schs., 39 IDELR 103 (Office of Civil Rights Mar. 12, 2003) (noting the need for monitoring throughout day by health care professionals and administration of insulin as appropriate for students with diabetes); Springboro (OH) Cmty. Sch. Dist., 39 IDELR 41 (Office of Civil Rights Feb. 24, 2003) (noting need for modification of snack policy).

94. *See, e.g.*, Edwards *ex rel.* Edwards v. Baraboo Sch. Dist., 803 N.W.2d 868 (Wis. Ct. App. 2011), *cert. denied*, 808 N.W.2d 716 (Wis. 2012) (noting that IEP provisions for student with brittle bone disease require he be released separately from other students).

95. *See* Pace v. State, 38 A.3d 418 (Md. 2012) (involving claims against state which served kindergarten student with peanut allergy a peanut butter sandwich, causing anaphylactic reaction). For a case in which a general education student's constitutional claims against a school that implemented a school-wide nut ban to accommodate student allergy failed, see Liebau v. Romeo Cmty. Schs., No. 306979, 2013 WL 3942397, at \*1 (Mich. Ct. App. July 30, 2013) (finding school's nut ban has a rational basis).

96. *See generally* DeClouet v. Orleans Parish Sch. Bd., 715 So. 2d 69 (La. Ct. App. 1998) (finding breach of duty by principal responding to security guard report of student illness and need to call 911; principal directed guard to call parents first and had guard walk student to office; student died of severe asthma attack); Victor Valley (CA) Unif. Sch. Dist., 38 IDELR 193 (Office of Civil Rights Dec. 20, 2002) (finding student with asthma needs system to access her medications); Pueblo (CO) Sch. Dist., 60 IDELR 25 (Office of Civil Rights Aug. 27, 2012) (need to train staff on how to administer inhaler to student with asthma). Students with allergies or asthma would not be special education students if they do not need any specialized instruction. Their conditions still may result in injuries at school and potential liability for the school. *See generally* Soter v. Cowles Publ'g, 174 P.3d 60 (Wash. 2007) (public records litigation concerning death of student with known asthma and severe peanut allergy who was given peanut butter cookie on school field trip; school settled wrongful death claim for \$985,000); Heather Martone, Note, *2.2 Million Children Left Behind: Food Allergies in American Schools—A Study of the Food Allergy and Anaphylaxis Management Act*, 18 J. LAW & POL'Y 775 (2010) (discussing the death at issue in *Soter* and suggesting that food allergies are not an ADA

an impairment that forces a student to breathe through a tracheostomy tube<sup>97</sup>). Some such students might also have a health plan (normally prepared by the school nurse)—but a health plan is not legally required, by disability law or otherwise.<sup>98</sup> Perhaps the disability is a condition that makes the student particularly vulnerable to bullying<sup>99</sup> or other inappropriate peer behaviors such as the New York student who was physically bullied.<sup>100</sup> Perhaps the disability makes it difficult for the student to interact appropriately with peers (such as a student with Asperger syndrome who has difficulty with social interaction<sup>101</sup>) and thus makes incidents with peers more likely.

As to bullying, having a disability may make bullying per se foreseeable, as students with disabilities are frequently victims of school bullies.<sup>102</sup> Manifestations of a student's disability (e.g., unusual

disability, and arguing for passage of proposed legislation which would provide food allergy management guidelines to schools).

97. See *generally* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999) (holding continuous nursing services for student who breathes through tracheostomy tube which can be performed by a non-physician are related services which are the school's responsibility under the IDEA).

98. See Dear Colleague Letter, 58 IDELR 79, 429 (Office of Civil Rights Jan. 19, 2012) (referring to health plans and noting that for some students a section 504 plan is also required).

99. For example, a number of cases involve bullied students with Asperger syndrome. See, e.g., Long v. Murray Cnty. Sch. Dist., 522 F. App'x 576 (11th Cir. 2013); Estate of Lance v. Kyer, No. 4:11-cv-32, 2012 WL 584200 (E.D. Tex. Sept. 11, 2012); Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist., 863 F. Supp. 2d 632 (S.D. Tex. 2012); Phillips v. Robertson Cnty. Bd. of Educ., No. M2012-00401-COA-R3-CV, 2012 WL 3984637 (Tenn. Ct. App. Sept. 11, 2012).

100. See T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011).

101. See cases cited *supra* note 99.

102. See Bonnie Carter & Vicky Spencer, *The Fear Factor: Bullying and Students with Disabilities*, 21 INT'L J. SPEC. ED. 11, 20-21 (2006) (reviewing eleven studies on this issue); Kathleen Conn, *Bullying and Harassment: Can IDEA Protect Special Students?*, 239 WEST'S EDUC. L. REP. 789 (2009) (noting greater frequency of bullying of special education students); Christopher Forrest et al., *School Outcomes of Children with Special Health Care Needs*, 128 PEDIATRICS 303-09 (2011). The Office of Civil Rights (OCR) has also noted the "steady pace" of allegations and increasing number of court cases claiming disability harassment. See Dear Colleague Letter, 111 LRP 45106 (Office of Civil Rights July 25, 2000).

For an overview of disability harassment law, see Mark Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079 (2002). Harassment is actionable under civil rights laws. See, e.g., K.M. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343 (S.D.N.Y. 2005) (ADA and section 504 claims arising out of school's alleged mishandling of peer harassment of student with disability causing student to cease attending school). Harassment by school staff may amount to intentional infliction of emotional distress, particularly where the court recognizes that the employee's knowledge of a student's disability and power imbalance enhances the outrageousness of the harassing behavior. See, e.g., Abelove v. Seminole Cnty. Sch. Bd., No. 605CV975ORL31DAB, 2005 WL 3093407 (M.D. Fla. Nov. 18, 2005)

behaviors or limited cognitive ability) may make bullying of that student foreseeable.<sup>103</sup> Specific aspects of a student's IEP (e.g., a behavioral IEP goal focused on appropriate interactions with peers during unstructured school time) may also make bullying reasonably foreseeable to the school.<sup>104</sup> Recent social science research details the long-term effects of bullying: it indicates that one third of students who are repeatedly bullied develop PTSD or experience significant mental trauma.<sup>105</sup>

The student's disability may also affect the scope of foreseeable injury. For example, a student's prior brain surgery worsened the injury when his teacher hit him in the head.<sup>106</sup> Similarly, a deaf student who lost the tip of a finger in a shop class accident was

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(dismissing section 504 claims but sending IED claims to trial after finding a special education teacher knew of the plaintiff autistic student's disability when she allegedly verbally abused him and caused him to witness abuse of other students).

OCR has issued guidance to schools concerning disability harassment. *See* Dear Colleague Letter, 111 LRP 45106 (Office of Civil Rights July 25, 2000). The letter suggests some system-wide steps for schools to take, including discipline of bullies and counseling of victims. *Id.* It does not suggest dealing with these matters in IEPs. In a more recent letter, OCR encourages schools to look beyond discipline and counseling and to take steps to change the hostile school climate such as training, monitoring to prevent retaliation, and perhaps offering additional services to the victim. *See* Dear Colleague Letter, 55 IDELR 174 (Office of Civil Rights Oct. 26, 2010).

Most recently, The Education Department's Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education Programs (OSEP) issued their own joint guidance letter in 2013. *See* Dear Colleague Letter, 113 LRP 33753 (Office of Special Education and Rehabilitation Services Aug. 20, 2013). While the OSERS/OSEP letter focuses on IDEA obligations, noting that bullying can amount to a denial of FAPE, *id.* at 2, it includes a series of suggestions for schools to deal with bullying, *id.* at 4-9 ("Enclosure: Effective Evidence-Based Practices for Preventing and Addressing Bullying"). Notably, the letter also counsels against changing a student's special education placement to protect her from bullying, suggesting that protection in the form of a more restrictive placement cannot be at the expense of FAPE and LRE. *Id.* at 3.

103. For example, students with intellectual disabilities have been bullied. *See, e.g.,* Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742 (S.D. Ohio 2011); R.P. v. Springdale Sch. Dist., No. 06-5014, 2007 WL 552117 (W.D. Ark. Feb. 21, 2007).

104. For example, students with Asperger syndrome have difficulty with social interaction and may engage in unusual behaviors that make them targets for bullies. *See supra* note 99 and accompanying text.

105. Thormod Idsoe et al., *Bullying and PTSD Symptoms*, 40 J. ABNORMAL CHILD PSYCHOL. 901-11 (2012).

106. *See generally* Hatfield v. O'Neill, 534 F. App'x 838 (11th Cir. 2013) (finding that in light of student's prior brain surgery, teacher's frustration-motivated striking of student in the head may be conscience-shocking behavior sufficient to prove a constitutional violation).

awarded \$185,000 in part because this injury limited his ability to communicate effectively by signing.<sup>107</sup>

*a. Foreseeable Safety Risks and Student Special Education Plans*<sup>108</sup>

As discussed more extensively in other commentary,<sup>109</sup> the student's IEP<sup>110</sup> may significantly affect what risks are foreseeable. The IEP is designed primarily to provide the student with a Free Appropriate Public Education (FAPE)<sup>111</sup> tailored to her individualized needs in the LRE.<sup>112</sup> An IEP is not a safety plan, although some students' IEPs include safety provisions.<sup>113</sup> IEPs also often include information that is relevant to the student's safety.<sup>114</sup> For example, certain services set forth in an IEP may present obvious safety risks: health services such as responding to allergic reactions, bladder catheterization, or clearing a tracheostomy tube; using aversives in a behavior plan; vocational placements; and programs in

107. *See generally* Barbin v. State, 506 So. 2d 888 (La. Ct. App. 1987).

108. One commentator argues the IEP creates a contractual relationship between the school and family. *See* Ralph Mawdsley, *Supervisory Standard of Care for Students with Disabilities*, 80 WEST'S EDUC. LAW REP. 779, 790 (1993).

109. *See* Daggett, *supra* note 64.

110. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401(14), 1414(d) (2012).

111. *Id.* § 1401(9). FAPE was construed by the United States Supreme Court in its first case under the major federal special education statute (the IDEA) as providing an individualized program that is in compliance with statutory procedures, and is designed to confer educational benefit on the student. *Bd. of Educ. of the Hendrick-Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

112. The IDEA requires that

*To the maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (2012) (emphasis added). Section 504 regulations for covered pre-K–12 public school students also require LRE, and in fact even seem to put the burden on the school to justify removal from general education. *See* 34 C.F.R. § 104.34 (2013).

113. *See, e.g.*, *T.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011) (finding bullying can amount to denial of FAPE).

114. For example, Isabella's IEP noted that her parents expressed concerns about the need to keep her head positioned properly. *See supra* note 11 and accompanying text.



the community.<sup>115</sup> IEP goals (such as ones focusing on peer interactions), or information about manifestations of a student's disability (for example, limitations stemming from an intellectual disability, or behaviors engaged in by a student with Asperger syndrome) may suggest other safety risks for the student.<sup>116</sup>

When IEPs contain information relevant to safety, which school staff knew or should have known of the IEP becomes relevant. The team creating the IEP normally includes special education staff and the parents.<sup>117</sup> The team is supposed to include one general education teacher in most cases, as "appropriate;"<sup>118</sup> but the general education teacher is not required to be present for the entire meeting.<sup>119</sup> The IEP team is not required to include building administrators, nor other general education teachers who instruct the student.<sup>120</sup> IEP teams also are not required to include noncertified staff members who interact with and supervise the student, such as aides and bus drivers.<sup>121</sup> It is possible that a copy of the IEP is shared with these school employees, who do provide much of the actual supervision of the student and set up supervision policies (such as making gym and

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115. For example, in *Edwards ex rel. Edwards v. Baraboo Sch. Dist.*, 803 N.W.2d 868 (Wis. Ct. App. 2011), *cert. denied*, 808 N.W.2d 716 (Wis. 2012), the IEP for a student with brittle bone disease required release separately from other students.

116. *See supra* note 103 and accompanying text.

117. *See* 20 U.S.C. § 1414(d)(1)(B) (2012). Parents have a right to participate in all IEP team meetings about their child. 34 C.F.R. §§ 300.344(a)(3), 300.345 (2013).

118. 20 U.S.C. § 1414(d)(1)(B)(ii) (so requiring if the student is or may be placed in general education); *id.* § 1414(d)(3)(C) ("Requirement with respect to regular education teacher: A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).").

119. *Id.* § 1414(d)(1)(C); 34 C.F.R. §§ 300.321(a)(2), 300.324 (2013). Previously, the rules explained that a general education teacher need not participate in all decisions, attend all meetings, nor attend entire meetings so long as the teacher participated in discussions and decisions concerning the general curriculum. *See* Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,477 (Mar. 12, 1999).

120. The IDEA requires only the presence of one general education teacher, *see supra* notes 118–19, and not for the entire team meeting. The IDEA requires a team member who sits on the team as the representative of the school district. *See* 20 U.S.C. § 1414(d)(1)(B)(iv). This person must be able to provide or supervise special education, *id.*, and so normally is a special education administrator or trusted special education teacher rather than the school principal.

121. The team members required by the IDEA do not include any noncertified staff. *See* § 1414(d)(1)(B).

bus supervision assignments).<sup>122</sup> The major federal special education statute requires only “access” (presumably, upon request) to the IEP for “persons providing services” (presumably those services described in the IEP) to the student.<sup>123</sup> Schools are not required to affirmatively provide the IEP to these service providers,<sup>124</sup> nor to provide access upon request to other staff members who interact with the student.<sup>125</sup>

*b. Foreseeable Safety Risks, Safety Laws, and School Policies*

Some safety statutes set a standard of care and thus define reasonable supervision.<sup>126</sup> For example, federal law sets standards for school buses, including transporting students in wheelchairs,<sup>127</sup> which might be relevant to Isabella’s transportation. State law may limit or prohibit certain behavior or disciplinary techniques such as aversives, restraint, or seclusion.<sup>128</sup> Somewhat similarly, if a school has policies concerning supervision of students with disabilities, violation of those policies may be strong evidence of failure to use reasonable care.<sup>129</sup> For example, a school may have a policy authorizing certain staff members to administer medications to students.<sup>130</sup> If that school did not comply with its own policy and allowed unauthorized staff to

122. The IDEA requires only that the IEP be made accessible to staff with responsibility for implementing it. *See infra* notes 124–25 and accompanying text.

123. 34 C.F.R. § 300.323(d) (2013).

124. As to providing a copy of the IEP, the IDEA requires only that the school provide a copy to the parents. *Id.* § 300.322(f).

125. *See id.* § 300.323(d)(1) (requiring that the school make the IEP “accessible” to the persons “responsible for its implementation”).

126. *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010).

127. 49 C.F.R. § 571.222 (2013); *see* Prescott (AZ) Unified Sch. Dist., 29 IDELR 69 (Office of Civil Rights Mar. 6, 1998).

128. *See, e.g.*, WASH. ADMIN. CODE §§ 392-172A-03120 to -03135 (2012) (limiting use of aversive interventions with special education students).

129. *See, e.g.*, Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689 (Iowa 2013) (affirming verdict against school where intellectually disabled student left school before the end of the day and was raped off campus by an older classmate she met up with; school had noted absence but had taken no immediate steps to notify the parents or police as it would normally do in this situation); *cf.* M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673 (Ct. App. 2003) (where other schools in the same district provided supervision to students who arrived early to school, defendant school’s failure to supervise students before school supported verdict in favor of student who was sexually assaulted by classmate before school).

130. *Cf.* A.P. v. Anoka-Hennepin Indep. Sch. Dist., 538 F. Supp. 2d 1125 (D. Minn. 2008) (state law which discourages laypersons from administering injections and suggesting school nurses supervise all injections).

administer medications, causing a student to be injured, that noncompliance may help prove breach of duty.

*c. Foreseeable Safety Risks Revealed by Student Injury Claims*

As discussed more extensively in other commentary,<sup>131</sup> claims by injured students with disabilities against their schools tend to arise from a limited set of high-risk school activities, and their injuries occur primarily in general education settings. One troubling pattern is claims involving sexual or physical abuse of students with disabilities, primarily by other students, aides, transportation providers, and teachers. This pattern can be seen in the Chicago, Los Angeles, Little Rock, New York City, and Philadelphia cases noted earlier.<sup>132</sup>

High-risk activities, unsurprisingly, include accidents in classes that utilize dangerous objects and substances, such as shop classes and science labs.<sup>133</sup> Injuries have also occurred during school activities in which students are physically active, such as physical education classes<sup>134</sup> and athletics.<sup>135</sup> Perhaps somewhat less self-evident, but also more significant, are the safety risks that arise from school activities and times of day that are less structured and/or are supervised by less extensively trained staff, such as coaches or substitute teachers.<sup>136</sup>

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131. See Daggett, *supra* note 64.

132. See *supra* notes 22–29 and accompanying text.

133. Cf. *Ali v. Wayne-Westland Sch. Dist.*, 19 IDELR 511 (E.D. Mich. Mar. 11, 1992) (civil rights claim for damages from chemistry lab accident allegedly due to school's failure to identify student as learning disabled).

134. See *generally* *Farrukh v. Bd. of Educ.*, 643 N.Y.S.2d 118 (App. Div. 1996) (reversing dismissal of claim by student with intellectual disability who was injured in special education gym class when unsecured wooden platform fell on him).

135. See *generally* *Braun v. Bd. of Educ. of Red Bud Cmty. Unit Sch. Dist. No. 132*, 502 N.E.2d 1076 (Ill. App. Ct. 1976) (no liability for injury to epileptic student-manager who had seizure while up on ladder adjusting scoreboard); *Lerner v. Cold Spring Harbor Sch. Dist.*, 56 IDELR 139 (N.Y. Sup. Ct. Mar. 31, 2011) (student with Asperger syndrome injured in handball game when he collided with a classmate in a general education gym class; no negligent supervision where student had been in general education gym for some years, teacher supervised class reasonably, and IEP did not note any relevant physical limits, rejecting contrary opinion of plaintiff's expert, a physical education professor).

136. See, e.g., *Worthington v. Elmore Bd. of Educ.*, 160 F. App'x 877 (11th Cir. 2005) (negligence claim against substitute bus driver); *Collins v. Sch. Bd. of Broward Cnty.*, 471 So. 2d 560 (Fla. Dist. Ct. App. 1985) (allegedly negligent supervision by a substitute teacher in a shop class resulted in a student being sexually assaulted by a peer while the substitute was out of the room); *Robertson v. E. Baton Rouge Parish Sch. Bd.*, No. 2012 CA 2039, 2013 WL 3947124 (La. Ct. App. July 28, 2013) (student choked to death at lunch when long-term substitute teacher failed to provide food-cutting and supervision provided for in the IEP); *Upton v. Clovis Mun. Sch. Dist.*, 115

Risks arising from these types of activities include injuries on the playground,<sup>137</sup> sexual assaults in bathrooms<sup>138</sup> and showers,<sup>139</sup> allowing inappropriate activity during unstructured time,<sup>140</sup> injuries during lunch or other eating times,<sup>141</sup> walking off campus to school activities,<sup>142</sup> passing between classes,<sup>143</sup> injuries at school before the start of the school day,<sup>144</sup> and injuries at or after dismissal at the end

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P.3d 795 (N.M. Ct. App. 2005) (student whose IEP noted her asthma, and whose parent and PE teacher had agreed to modifications for PE class, died after a substitute PE teacher forced her to exercise strenuously).

137. *See generally* Rodriguez v. Bd. of Educ., 480 N.Y.S.2d 901 (App. Div. 1984) (affirming \$400,000 jury verdict where a teacher took sixteen students in a class of intellectually disabled students out to recess, and a twelve-year-old student in that class known to be clumsy chased another student, disappeared briefly, fell, and was injured). That court found that a reasonable teacher would have told the student not to run, and would have looked for the students when they disappeared, relying partly on expert testimony that it is unreasonable to allow intellectually disabled students to run about “freestyle.” *Id.* In another playground injury case, a court looked to the IEP and LRE requirements as a measure of what supervision was required. Brooks v. St. Tammany Parish Sch. Bd., 510 So. 2d 51 (La. Ct. App. 1987).

138. *See, e.g.*, Stewart v. Waco Indep. Sch. Dist., No. 11-51067, 2013 WL 2398860 (5th Cir. June 3, 2013), *vacated as moot*, 711 F.3d 513 (5th Cir. 2013) (incidents of sexual abuse reported in the vacated opinion); Patel v. Kent Sch. Dist., 648 F.3d 965 (9th Cir. 2011) (sexual acts in bathroom involving unaccompanied student with disability whose IEP provided for constant supervision).

139. *See, e.g.*, Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) (student with intellectual disability sexually assaulted by classmate in school shower).

140. One school allowed a fifteen-year-old intellectually disabled student to skip classes and be supervised by a janitor, during which time he was injured. *See* Grooms v. Marlboro Cnty. Sch. Dist., 414 S.E.2d 802 (S.C. Ct. App. 1992). Another school maintained a “hiding place” where a student with a disability was assaulted. *See* Jennifer C. v. L.A. Unified Sch. Dist., 86 Cal. Rptr. 3d 274 (Ct. App. 2008).

141. *See, e.g.*, Mitchell v. Special Educ. Joint Agreement Sch. Dist., 897 N.E.2d 352 (Ill. App. Ct. 2008) (severely disabled student with history of compulsive eating supervised by teacher and aide grabbed, ate, and choked on cupcake); Robertson v. E. Baton Rouge Parish Sch. Bd., No. 2012 CA 2039, 2013 WL 3947124 (La. Ct. App. July 28, 2013) (intellectually disabled student chokes to death in cafeteria); Pace v. State, 38 A.3d 418 (Md. 2012) (kindergarten student with severe peanut allergy sued school which fed her a peanut butter sandwich for lunch).

142. For example, where an intellectually disabled student who was walking to Special Olympics practice with his teammates dashed into the street and was run over, the student’s short attention span and impulsivity was found to make his behavior foreseeable. Foster v. Hous. Gen. Ins. Co., 407 So. 2d 759 (La. Ct. App. 1981).

143. *See, e.g.*, Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999) (applying Michigan law to claim based on school’s failure to create a policy for supervising an intellectually disabled student in between classes).

144. *See, e.g.*, M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673 (Ct. App. 2003) (affirming verdict of more than \$2.5 million for student who was sodomized by classmate in the bathroom before school, where school did not supervise students before classes began).

of the school day.<sup>145</sup> Risks also arise in connection with substitute teachers, who may lack sufficient knowledge to maintain student safety, or who may even deliberately injure students.<sup>146</sup> Leaving classrooms unattended can also render activity unstructured, resulting in accidental or intentional injury.<sup>147</sup> Unfortunately, however, outrageous behavior resulting in student injury has also occurred in classrooms with a teacher or aide present, such as the Philadelphia classroom in which a student was raped in the presence of a substitute teacher.<sup>148</sup>

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145. *See, e.g.*, *Edwards ex rel. Edwards v. Baraboo Sch. Dist.*, 803 N.W.2d 868 (Wis. Ct. App. 2011), *cert. denied*, 808 N.W.2d 716 (Wis. 2012) (school fails to implement IEP provisions requiring student with brittle bone disease be released separately from other students).

146. *See, e.g.*, *Worthington v. Elmore Bd. of Educ.*, 160 F. App'x 877 (11th Cir. 2005) (negligence claim against the substitute bus driver); *Collins v. Sch. Bd. of Broward Cnty.*, 471 So. 2d 560 (Fla. Dist. Ct. App. 1985) (allegedly negligent supervision by a substitute teacher in a shop class resulted in a student being sexually assaulted by a peer while the sub was out of the room); *Upton v. Clovis Mun. Sch. Dist.*, 115 P.3d 795 (N.M. Ct. App. 2005) (student whose IEP noted her asthma, and whose parent and PE teacher had agreed to modifications for PE class, died after a substitute PE teacher forced her to exercise strenuously; successful governmental immunity defense).

147. For example, a teacher in a training program for intellectually disabled students left a class unattended, despite a policy requiring constant supervision, and a student was molested by a peer. *Guidry v. Rapides Parish Sch. Bd.*, 560 So. 2d 125 (La. Ct. App. 1990) (affirming award of \$16,000 in damages largely because it found that the school's policy requiring constant supervision of these students defined reasonableness); *see also D.R. ex rel. L.R. v. Middle Bucks Vocational Tech. Sch.*, 972 F.2d 1364 (3rd Cir. 1991) (student with disability sexually assaulted by a classmate when the student teacher was not present; court rejects § 1983 claims); *Phillips v. Robertson Cnty. Bd. of Educ.*, No. M2012-00401-COA-R3-CV, 2012 WL 3984637 (Tenn. Ct. App. Sept. 11, 2012) (bullied student with Asperger syndrome blinded in one eye by classmate when teacher left the room).

However, having an alternate supervision plan for a brief teacher absence may save the school from liability in the event of injury. In one case, leaving an aide to supervise a class briefly was held not to result in liability unless the school knew that students in that class had a propensity to be violent. *Jackson v. Chi. Bd. of Educ.*, 549 N.E.2d 829 (Ill. App. Ct. 1989). A teacher who left her class for five to six minutes and had the teacher in the adjacent classroom supervise her class was not liable when a student was injured by a classmate in her absence. *McDonald v. Terrebonne Parish Sch. Bd.*, 253 So. 2d 558 (La. Ct. App. 1971).

148. *See Maxwell ex rel. Maxwell v. Sch. Dist.*, 53 F. Supp. 2d 787 (E.D. Pa. 1999) (allowing claim to proceed); *supra* notes 27-29 and accompanying text; *see also Braden v. Mountain Home Sch. Dist.*, 903 F. Supp. 2d 729 (W.D. Ark. 2012) (in a classroom with the teacher present, older classmate forced the head of a student with a disability into his genital area; older student forced student with a disability to perform oral sex on him in the presence of an aide and a classmate); *T.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011) (student with disabilities with an assigned aide was repeatedly physically bullied by classmates in the presence of the aide and the teacher).

As with Isabella's case, a variety of student injuries have occurred on school transportation.<sup>149</sup> These injuries have included a distressing number of claims involving sexual or physical abuse by peers<sup>150</sup> or staff<sup>151</sup> on school transportation, including travel to vocational placements,<sup>152</sup> and walking to and from the school building to the bus.<sup>153</sup> Accidentally inflicted injuries, such as those caused by inadvertently leaving a student on the bus,<sup>154</sup> have also occurred. Isabella and other students with disabilities have also been injured when health crises on school transportation have not been handled properly.<sup>155</sup>

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149. *See, e.g.*, *Turner v. D'Amico*, 684 So. 2d 1161 (La. Ct. App. 1997) (school employee gave suspended student with disability ride home, told him to buckle his seat belt, then locked truck doors when he did not; student "bailed out" of truck and was injured).

150. *See, e.g.*, *Doe ex rel. Ortega-Piron v. Chi. Bd. of Educ.*, 820 N.E.2d 418 (Ill. 2004) (student on bus who had been declared a sexually aggressive child and whose protective plan forbade ever leaving him alone with other children sexually assaulted another student when bus attendant called in sick and was not replaced); *Gooden v. State Dep't of Health & Human Res.*, 546 So. 2d 279 (La. Ct. App. 1989) (during absence of supervision, a student waiting for the bus was hit once by a student with no history of such behavior, nor had there been any past incidents while students waited for the bus). A recent claim asserts that the driver of a bus taking students to a special education facility knew of and did nothing to respond to a group of fifteen-year-olds, who burned a ten-year-old with a cigarette lighter, despite the child's screaming for help. *See Family Files \$8.3 Million Lawsuit Against Virginia District for Bullying Incident, Citing a National 'Pandemic'*, NAT'L SCH. BOARDS ASS'N (May 23, 2013), <http://legalclips.nsba.org/2013/05/23/family-files-8-3-million-suit-against-virginia-district-for-bullying-incident-citing-a-national-pandemic>.

151. *See, e.g.*, *Skinner v. Clark Cnty. Sch. Dist.*, No. 2:12-CV-1730 JCM (NJK), 2013 WL 1501460 (D. Nev. Apr. 10, 2013) (bus driver encouraged aide to strike, shake and scream at a young student with a disability); *Kan. State Bank & Trust v. Specialized Transp. Serv.*, 819 P.2d 587 (Kan. 1991) (six-year-old intellectually disabled student who was molested by a bus driver awarded \$1.8 million); *Tinkham v. Groveport Madison Local Sch. Dist.*, 602 N.E.2d 256 (Ohio Ct. App. 1991) (taxi driver was found liable for \$425,000 for molesting an eight-year-old disabled student he drove to and from school).

152. *See, e.g.*, *Fulbright v. Dayton Sch. Dist.*, No. 13-CV-0030-TOR, 2013 WL 1497388 (E.D. Wash. Apr. 10, 2013) (intellectually disabled student whose aide services were eliminated was molested several times on the public transportation she took to her sheltered workshop).

153. For example, in a case where a student with a disability was raped as she walked from the bus to the school building, a court found potential liability for the school, and ordered a trial. *Hernandez v. Rapid Bus Co.*, 641 N.E.2d 886 (Ill. App. Ct. 1994).

154. *See* Fermin Leal, *Autistic Teen Left on School Bus for 6 Hours*, ORANGE COUNTY REG. (Nov. 5, 2012), <http://www.ocregister.com/articles/bus-376794-student-school.html> (noting school policy requires drivers to inspect busses to ensure all students have disembarked).

155. *See* *Herrera v. Hillsborough Cnty. Sch. Bd.*, No. 8:12-cv-2484-T-30EAJ, 2013 WL 3063721 (M.D. Fla. June 18, 2013) (student's physical condition, which made it

In fact, responding to health crises more generally has been a frequent source of claims. The claims tend to involve school responses to student medical crises, such as the Nashville student's death after incorrectly performed CPR,<sup>156</sup> choking, or other crises.<sup>157</sup> There are, however, some claims that schools did not provide ongoing health services appropriately (such as claims that medication administration or other school health services were incorrectly performed).<sup>158</sup> There are also claims of inappropriate responses to mental health crises such as suicidal ideation.<sup>159</sup> Tragically, several students with disabilities who have been bullied have committed suicide or threatened self-harm.<sup>160</sup>

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difficult for her to hold her head upright, as noted in her IEP, died from suffocation on the bus; school allegedly failed to train bus staff to position the student properly despite numerous reports of problems by her parents); *Lofton v. Detroit Bd. of Educ.*, No. 276449, 2008 WL 4414255 (Mich. Ct. App. Sept. 30, 2008) (wrongful death claim on behalf of student with multiple disabilities including a seizure disorder who had a seizure on the school bus and died).

156. *Lilly v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2010-0085-COA-R3-CV, 2010 WL 4670924 (Tenn. Ct. App. Nov. 16, 2010) (staff allegedly were neither trained nor given written instructions in the student's IEP or health plan, and allowed the student to vomit while being placed on his back).

157. *See, e.g., Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005) (failure to reinsert four-year-old's tracheostomy tube); *Lyons v. Richmond Cmty. Sch. Corp.*, 990 N.E.2d 470 (Ind. Ct. App. 2013) (choking); *Robertson v. E. Baton Rouge Parish Sch. Bd.*, No. 2012 CA 2039, 2013 WL 3947124 (La. Ct. App. July 28 2013) (choking); *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987) (response to student head injury); *Tex. Sch. for the Blind v. Dugosh*, No. 03-07-00681-CV, 2010 WL 1170223 (Tex. Ct. App. Mar. 26, 2010) (choking).

158. *See, e.g., Foote v. Pine Bluff Sch. Dist.*, No. CA 02-806, 2003 WL 1827282 (Ark. Ct. App. Apr. 9, 2003) (claim that school failed to give student his ADD medication for several days).

159. Reasonable supervision for students with disabilities includes taking reasonable steps to intervene when the student appears to be at risk of self-injury. *See, e.g., Eisel v. Bd. of Educ.*, 597 A.2d 447, 456 (Md. 1991) (duty to intervene arises when school has notice of student's suicidal intent; reasonable intervention may consist of notifying the parent). Cases involving students with disabilities include *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253 (10th Cir. 1998) (school sent student with disability home knowing he would be alone and would have access to a gun; student committed suicide) and *Allison C. v. Advanced Educ. Servs.*, 28 Cal. Rptr. 3d 605 (Ct. App. 2005) (overturning jury verdict for student where private special education school knew of student's prior suicide attempts, but could not reasonably foresee student leaving school without permission, being sexually assaulted by another male, never returning to the school, and committing suicide three months later).

160. *See, e.g., Long v. Murray Cnty. Sch. Dist.*, 522 F. App'x 576 (11th Cir. 2013) (bullied student with Asperger syndrome); *Estate of Lance v. Kyer*, No. 4:11-cv-32, 2012 WL 584200 (E.D. Tex. Sept. 11, 2012) (bullied nine-year-old student with disabilities who hanged himself in school bathroom after reporting bullying and being labeled as a "troublemaker" by the school); *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632 (S.D. Tex. 2012) (bullied student with Asperger

Schools' (mis)use of seclusion and restraint techniques (such as time-out rooms and holding down students respectively) to manage the behavior of some students with disabilities have also produced injuries.<sup>161</sup> A recent federal report found "hundreds of cases of alleged abuse and death due to the use of seclusion and restraint."<sup>162</sup> Proposed federal legislation would limit schools' use of seclusion and restraint as well as aversive<sup>163</sup> behavior techniques.<sup>164</sup> Under the guise of discipline, school staff members have also behaved

syndrome); *M.Y. v. Grand River Acad.*, No. 1:09 CV 2884, 2010 WL 2195650 (N.D. Ohio May 28, 2010) (private school expelled student with Asperger syndrome after he complained of physical and other bullying severe enough to make him threaten self-harm).

161. *See, e.g.*, *Muskrat v. Deer Creek Publ. Sch.*, 715 F.3d 775 (10th Cir. 2013) (extensive time in timeout room causing stress-based medical symptoms and a decline in functioning); *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123 (9th Cir. 2010) (autistic student locked repeatedly in isolation room; IEP permitted some placement there); *A.D. v. Nelson*, No. 2:07-CV-116-PRC, 2007 WL 2446729 (N.D. Ind. Aug. 20, 2007) (dismissing claims against school district which isolated student with disability in harness in bathroom stall where the seclusion was a "routine activity for a student" with these disabilities and not disciplinary); *Peters v. Rome City Sch. Dist.*, 748 N.Y.S.2d 77 (App. Div. 2002) (student repeatedly placed in an unsafe time-out room and physically restrained awarded \$75,000 for false imprisonment, NIED, and Fourth Amendment violations); *cf. Rhodes v. Wallace*, No. 1:04 1191 T AN, 2005 WL 2114067 (W.D. Tenn. Aug. 26, 2005) (Fourth Amendment claim against teacher who allegedly strapped student with disability to a cot for hours at a time and hit him).

162. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS (2009), *available at* <http://www.gao.gov/new.items/d09719t.pdf>; *see also* NANCY LEE JONES & JODY FEDER, CONG. RESEARCH SERV., R40522, THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES (2009), *available at* [http://www.spannj.org/information/CRS\\_Report\\_on\\_Legal\\_Issues\\_in\\_Seclusion\\_&\\_Restraints.pdf](http://www.spannj.org/information/CRS_Report_on_Legal_Issues_in_Seclusion_&_Restraints.pdf) (examining constitutional and IDEA claims, but noting state tort claims would also be available); Justin Farrell, *Protecting the Legal Interests of Children when Shocking, Restraining, and Secluding are Means to an Educational End*, 83 ST. JOHN'S L. REV. 395 (2009).

163. Aversive behavior techniques are those that attempt to shape behavior through negative reinforcement. For a sample statutory definition, *see* WASH. ADMIN. CODE §§ 392-172A-03120 to -03135 (2012). For example, aversive behavior management for a student with a spitting problem might involve spraying her with a noxious-smelling liquid each time she spits. In contrast, positive behavioral reinforcement rewards students for good behavior; for example, giving a reward to the student for not spitting in a ten-minute period.

164. Keeping All Students Safe Act, H.R. 4247, 111th Cong. (as passed by House, Mar. 3, 2010). The Act would limit the use of restraints and other aversive measures and ban some techniques entirely. *Id.* The Act was reintroduced in the House on April 6, 2011 as H.R. 1381, and in the Senate as S.2020 on December 16, 2011. *See generally* Sarah Marquez, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 SYRACUSE L. REV. 617 (2010).



inappropriately<sup>165</sup> and in some cases outrageously. This behavior includes punishing a student with an intellectual disability by scalding his hands in hot water,<sup>166</sup> whipping a student with ADD with a belt,<sup>167</sup> slapping a developmentally disabled student with a mental age of two or three in the face and arm, allegedly to calm him,<sup>168</sup> and pepper spraying an autistic student using a cake spatula as a pretend sword.<sup>169</sup>

Unfortunately, there are in fact many cases involving sexual misconduct and other abuse by employees<sup>170</sup> and classmates<sup>171</sup> toward students with disabilities. The problem is such that some courts seem to assume that sexual misconduct on school premises is foreseeable, and hold that schools may be liable if failure to reasonably supervise leads to a sexual assault.<sup>172</sup> As in the case of the rape in the

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165. *See, e.g.*, *Gerks v. Deathe*, 832 F. Supp. 1450 (W.D. Okla. 1993) (student with cerebral palsy and an intellectual disability was ordered to clean up his mess in a school bathroom, even though the school knew the student was afraid of bathrooms and had a limited ability to understand the punishment).

166. *State v. Grant*, 832 S.W.2d 624 (Tex. Crim. App. 1992) (upholding teacher's conviction for failing to report child abuse where the teacher observed aide punishing student in this way).

167. *Haley v. McManus*, 593 So. 2d 1339 (La. Ct. App. 1991) (affirming a \$10,000 verdict in a case where whipping caused seizures and resulted in psychiatric hospitalization).

168. *Musktrat v. Deer Creek Publ. Sch.*, 715 F.3d 775 (10th Cir. 2013) (slapping by both the child's special education teacher and aide).

169. *Atherton v. Norman Publ. Sch. Dist.*, No. CIV-11-1280-M, 2012 WL 5613748 (W.D. Okla. Nov. 15, 2012).

170. *See, e.g.*, *Doe v. Darien Bd. of Educ.*, No. 3:11 CV 1581(JBA), 2013 WL 2047872 (D. Conn. May 14, 2013) (student with disability sexually abused by his personal aide—the nephew of the district special education director—and physically abused by a special education teacher who tripped him and knocked him to the floor); *Ali A. v. L.A. Sch. Dist.*, No. B221099, 2011 WL 72957 (Cal. Ct. App. Jan. 11, 2011) (student with severe intellectual disability sexually assaulted by her aide, even after her parents complained to the school about physical abuse by the aide to the school).

171. *See, e.g.*, *Walton v. Alexander*, 20 F.3d 1350 (5th Cir. 1994) (student at residential school for deaf sexually assaulted by classmate, then assaulted again after school was informed); *D.R. ex rel. L.R. v. Middle Bucks Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1991) (sexual abuse of student with disability by classmates); *R.P. v. Springdale Sch. Dist.*, No. 06-5014, 2007 WL 552117 (W.D. Ark. Feb. 21, 2007) (general education students put student with disability in dog cage, forced him to eat dog excrement, and sexually abused him); *Estrada v. Stamford Bd. of Educ.*, No. FSTCV065002313S, 2010 WL 5095331 (Conn. Super. Ct. Nov. 19, 2010) (school district allowed student with disability to ride bus home with classmate with disability and history of inappropriate sexual behavior who had earlier that day sexually abused her, where further harassment occurred); *Tyler v. Fowlerville Cnty. Sch. Dist.*, No. 295906, 2011 WL 1261828 (Mich. Ct. App. Apr. 5, 2011), *cert. denied*, 802 N.W.2d 43 (Mich. 2011).

172. *See, e.g.*, *Doe v. Escambia Cnty. Sch. Bd.*, 599 So. 2d 226 (Fla. Dist. Ct. App. 1992) (learning and emotionally disabled student was taken from a residential school

Philadelphia classroom, some of the alleged school employee behavior described in these cases is shocking.<sup>173</sup> Some of this outrageous behavior is occurring in relatively isolated self-contained special education classrooms.<sup>174</sup> School staff may also engage in harassing students with disabilities.<sup>175</sup> Misconduct by school staff may trigger claims that the employing school failed to use reasonable care in hiring, supervising, and/or retaining the offending employee.<sup>176</sup>

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and raped); *Collins v. Sch. Bd. of Broward Cnty.*, 471 So. 2d 560 (Fla. Dist. Ct. App. 1985) (allegedly negligent supervision by a substitute teacher in a shop class resulted in a student being sexually assaulted by a peer while the substitute was out of the room); *Duncan v. Hampton Cnty. Sch. Dist.*, 517 S.E.2d 449 (S.C. Ct. App. 1999) (aide who left intellectually disabled students unsupervised while she used the bathroom, and sent her students to use the bathroom alone, where one student was raped).

173. *See Maxwell ex rel. Maxwell v. Sch. Dist.*, 53 F. Supp. 2d 787 (E.D. Pa. 1999); *supra* notes 27–29 and accompanying text.

174. *See, e.g., Hatfield v. O’Neill*, 534 F. App’x 838 (11th Cir. 2013) (student with multiple severe disabilities repeatedly struck by her special education teacher, causing bleeding and vomiting); *H.H. ex rel. H.F. v. Moffett*, 335 F. App’x 306 (4th Cir. 2009) (student was kept in her wheelchair constantly, as proven by her mother’s secret attachment of a recording device to the wheelchair, and was then ignored and verbally abused by her special education teacher and aide); *Roe v. Nevada*, 621 F. Supp. 2d 1039 (D. Nev. 2007) (special education teacher who allegedly hit, slapped, grabbed and shoved four-year-old student with autism in special education setting); *Doe v. Nevada*, No. 02:03CV01500, 2006 WL 2583746 (D. Nev. Sept. 7, 2006) (preschool teacher and aide allegedly threw a three-year-old student with autism against a wall, twisted his arm behind his back, and forced him to hit himself in the head); Matthias Gafni, *Brentwood Superintendent Says ‘Legal Limitations’ Kept Abusive Teacher in District*, *CONTRA COSTA TIMES* (Jan. 16, 2013), [http://www.contracostatimes.com/rss/ci\\_22389672](http://www.contracostatimes.com/rss/ci_22389672) (five-year-old student thrown to the floor and kicked by a teacher).

175. *See, e.g., Covey v. Lexington Pub. Schs.*, 55 IDELR 256 (W.D. Okla. Dec. 7, 2010) (school band director harasses and humiliates students with disabilities).

176. *See, e.g., Vieira v. Honeoye Cent. Sch. Dist.*, 756 F. Supp. 2d 302 (W.D.N.Y. 2010) (negligent hiring, training, supervision, and retention claims against school as to its teacher who came up behind and yelled loudly at blind student); *Ward v. Barnes*, 545 F. Supp. 2d 400 (D.N.J. 2008) (during a special education PE class, the teacher told students to “get” a student with cerebral palsy, and the student was beaten; claims of negligent hiring and retention against school which had not fired the teacher after an earlier physical confrontation with a student); *Kimberly F. v. Ne. Educ. Intermediate Unit*, No. 3:06-cv-01901, 2007 WL 1450364 (M.D. Pa. May 15, 2007) (negligent supervision claim involving teacher of autistic students who physically and verbally abused them; school failed to follow up on reports about this from aides); *Reguera v. Leduc*, No. 012620B, 2005 WL 2461973 (Mass. Super. Ct. Aug. 22, 2005) (negligent hiring/supervision claim against school that contracted with transportation provider that employed “wheelchair” bus driver who was arrested for domestic violence and investigated for assault of a woman with a disability during his term of employment and was criminally convicted of sexual assault of a young female student with a disability); *Farrell v. Transylvania Bd. of Educ.*, 625 S.E.2d 128 (N.C. Ct. App. 2006) (hiring and supervision of aide who allegedly abused student with cerebral palsy by, among other things, force feeding him and pulling his hair). In

## 2. Safety-Related Characteristics of Urban Schools

Urban school students report not feeling safe at school at a rate more than fifty percent higher than that for suburban and rural students.<sup>177</sup> Certain characteristics and challenges typical of urban schools, some well-known and others that are not as high profile, but perhaps more significant, increase the safety risks for students with disabilities specifically.<sup>178</sup>

### a. Premises Issues

*Physical facilities.* Urban schools tend to be in large, older<sup>179</sup> “big box” buildings, often with several stories.<sup>180</sup> Buildings may not be fully accessible to students with physical disabilities; school buildings constructed prior to 1977, and not remodeled since, need not be retrofitted to be accessible.<sup>181</sup> These large, multi-story, and perhaps not fully accessible facilities can be more difficult to navigate for students with sensory or mobility impairments.<sup>182</sup> Buildings may also

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some situations the employee may also face a variety of tort claims including intentional ones. *See, e.g.,* *Stevenson v. Indep. Sch. Dist.*, 395 F. Supp. 2d 1148 (W.D. Ok. 2005) (IIED claim against teacher who allegedly starved autistic student and noting such behavior would be outside the scope of her employment).

177. *See* NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 118–19 (12.6% of urban students report not feeling safe at school, 164% of the 7.8% rate for suburban students and 171% of the 7.5% rate for rural students).

178. Other characteristics of urban schools—large populations of students from ethnic and racial minority groups, large populations of low income students, large populations of students from single parent households, and large populations of parents without advanced formal education—do not seem relevant to safety risks for students with disabilities. For data on these characteristics, see *id.* at 8–11 (racial diversity), 5–8 (poverty), 52–53 (single parent household), 58–59 (parent education levels).

179. William DeJong & Troy Glover, *Urban School Facilities*, SCH. PLANNING & MGMT., Feb. 2003, at 12. A GAO report finds that the “largest percentage of schools that had inadequate environmental and physical conditions were in the western United States and in central cities that served minority and poor students.” U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-96-103, *SCHOOL FACILITIES: AMERICA'S SCHOOLS REPORT DIFFERING CONDITIONS* (1996), available at <http://www.gao.gov/assets/230/222833.pdf>. The same report notes that in urban schools a high percentage of funds are spent on instruction, leaving only funds for emergency maintenance and little if any funds for preventative maintenance. *Id.* at 9.

180. An extensive set of photos of these large, older, multistory buildings can be viewed by running a Google search for “urban school buildings.”

181. For these older buildings, the requirement is that the program (school district) is accessible as a whole. *See* 28 C.F.R. § 35.150 (2013) (ADA); 34 C.F.R. § 104.22 (2013) (section 504).

182. A recent survey of schools in the largest cities indicates that the buildings in these districts “have substantial construction, renovation, modernization, and deferred maintenance needs because of the age and size of their school buildings.”

be difficult for some students with disabilities to evacuate in the event of emergency.<sup>183</sup> In fact, the Justice Department is investigating one school district because during a fire emergency, district employees left two students in wheelchairs in a third floor classroom, unable to navigate the steps to the nearest safe room.<sup>184</sup>

Older urban school buildings may not have air conditioning, may contain mold, may have poor ventilation, or may present other environmental risks.<sup>185</sup> For example, some students have asthma and/or allergies or physical conditions requiring a stable room temperature.<sup>186</sup> The rate of asthma in urban schools can be particularly staggering; in one urban middle school in the Oakland area, forty-three percent of students have asthma.<sup>187</sup>

*Neighborhood environment.* A school's duty of reasonable supervision extends to foreseeable risks in the immediate vicinity of

COUNCIL OF THE GREAT CITY SCHOOLS, *FACILITY NEEDS AND COSTS IN AMERICA'S GREAT CITY SCHOOLS* (2011), available at [http://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/4/Facilities\\_Report.pdf](http://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/4/Facilities_Report.pdf). The Chicago schools report \$1.3 billion needed for ADA facility improvements; Denver reports a \$10 million ADA need. *Id.* at 6-7. HCPS did not itemize its needs, but reported approximately \$450 million in total school facility (construction, repair, and deferred maintenance) needs. *Id.* at 8. Milwaukee reports most buildings were constructed prior to 1930; it notes one building has a cafeteria in the basement and an auditorium on the third floor "that can be difficult for some visitors to access." *Id.* at 14.

In his book, *Savage Inequalities*, Jonathan Kozol writes about one inner city school in East St. Louis with a heating system that does not work and a sewage system that sometimes sends raw sewage into the cafeteria. See JONATHAN KOZOL, *Savage Inequalities* 29, 34 (1991). Pedro Noguera writes of "dilapidated and unsafe" schools in the Oakland area. See PEDRO NOGUERA, *CITY SCHOOLS AND THE AMERICAN DREAM* 3 (2003). The U.S. Department of Education has recognized the problem of urban school facilities, noting that "[a] number of studies have shown that many school systems, particularly those in urban and high-poverty areas, are plagued by decaying buildings that threaten the health, safety, and learning opportunities of students." *Impact of Inadequate School Facilities on Student Learning*, U.S. DEP'T EDUC. (Apr. 31, 2000), [www2.ed.gov/offices/OESE/archives/inits/construction/impact2.html](http://www2.ed.gov/offices/OESE/archives/inits/construction/impact2.html) (reviewing studies demonstrating the impact on student achievement of school buildings in poor condition, including research on the effects of poor climate control and poor air quality inside schools).

183. See *Justice Dept. Looks at Mistreatment of Disabled Students During New Rochelle H.S. Evacuation*, CBS N.Y. (Feb. 26, 2013), <http://newyork.cbslocal.com/2013/02/26/justice-dept-looks-at-mistreatment-of-disabled-students-during-new-rochelle-h-s-evacuation>.

184. *Id.*

185. For example, playgrounds in schools in inner cities or near highways are most likely to contain lead. U.S. CONGRESS OFFICE OF TECH. ASSESSMENT, *OTA-ENV-633, RISKS TO STUDENTS IN SCHOOLS* 122 (1995).

186. *Cf.* Great Falls (MT) Publ. Sch. Dist., 48 IDELR 200 (Office of Civil Rights Nov. 28, 2006) (need for air purifiers, removal of plants, removal of ceiling tiles, use of natural cleaners, warning of construction projects for student with asthma).

187. NOGUERA, *supra* note 182, at 108.

the school as students enter and leave.<sup>188</sup> Some urban schools are in neighborhoods that present their own safety risks for students walking to and from school, and to students on school grounds before and after school.<sup>189</sup> There can be liability for students who have wrongly left school during the day and are injured by third persons<sup>190</sup> or otherwise. As noted earlier, HCPS student Jenny died after wandering away from school and drowning in an adjacent pond.<sup>191</sup>

*b. Student Population Issues*

*Student violence.* Student violence in urban schools is a high profile problem,<sup>192</sup> but in several aspects does not appear to be a significant cause of injury to students with disabilities. Urban school teachers have reported concerns about students having weapons at school.<sup>193</sup> The case law does not appear, however, to reflect injuries to

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188. *Brownell v. L.A. Unif. Sch. Dist.*, 5 Cal. Rptr. 2d 756 (Ct. App. 1992) (holding school was not liable when general education student was injured by gang violence after leaving school because lack of gang history in the area made the risk unforeseeable); *cf. Flores v. City of Berwyn*, No. 1-11-3407, 2012 WL 6963323 (Ill. App. Ct. Sept. 10, 2012) (school not liable for stabbing death of student at the hands of a student with a disability after school several blocks from campus, because the student did not have any known violent history).

189. See Matthew Steinberg et al., *What Conditions Jeopardize and Support Safety in Urban Schools? The Influence of Community Characteristics, School Composition and School Organizational Practices on Student and Teacher Reports of Safety in Chicago* 16 (Dec. 2012) (unpublished manuscript), available at [http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/copy2\\_of\\_dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/steinberg-conditions-support-ccrr-conf-2013.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/copy2_of_dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/steinberg-conditions-support-ccrr-conf-2013.pdf) (noting, however, that student home neighborhoods correlate even more strongly with school safety as perceived by students and teachers); see also NOGUERA, *supra* note 182, at 106–07 (describing dangers students who walk to some urban schools must navigate).

190. See, e.g., *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689 (Iowa 2013) (affirming \$500,000 jury verdict, reduced by thirty percent for comparative negligence, against school where intellectually disabled student left school before the end of the day and was raped off campus by an older classmate she met up with; school had noted absence but taken no immediate steps to notify the parents or police).

191. See *supra* notes 14–17 and accompanying text.

192. For example, the U.S. Department of Education's School Survey on Crime and Safety, which disaggregates results for urban schools, focuses on crime and violence in schools rather than other safety issues. SAMANTHA NEIMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2009-326, CRIME, VIOLENCE, DISCIPLINE, AND SAFETY IN U.S. PUBLIC SCHOOLS: FINDINGS FROM THE SCHOOL SURVEY ON CRIME AND SAFETY: 2007–08 (2009), available at <http://nces.ed.gov/pubs2009/2009326.pdf>. The public's perception of the threat of school violence has increased, even though rates of violence in schools are not rising. See NOGUERA, *supra* note 182 at 103.

193. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 120–21.

students with disabilities from classmates' weapons.<sup>194</sup> Gang violence occurs significantly more often in city schools,<sup>195</sup> but the case law does not appear to reflect injuries to students with disabilities involving gangs.<sup>196</sup> As to violent deaths at school generally, research indicates that violent student deaths at school are rare and are far more likely to occur out of school than in school.<sup>197</sup> Nonlethal violent crimes against students occur at a rate of about 1.5%, and rates of these crimes are statistically similar in school and out of school.<sup>198</sup>

For students with disabilities, the patterns in the case law were of sexual abuse and bullying by classmates.<sup>199</sup> Lower levels of physical aggression by students may also present a significant risk; almost one-third of students reported being in a physical fight in 2009.<sup>200</sup> However, the case law does not reflect many injuries to students with disabilities sustained in fights.<sup>201</sup> More generally, urban school teachers report spending greater time on classroom discipline,<sup>202</sup> suggesting there may be a higher level of safety risks from student misconduct in urban school classrooms. Compounding this problem, city teachers report higher levels of disrespectful behavior towards

194. While of course such injuries may have occurred, cases involving them were not identified by the author's research, which included review of all court cases which included the terms "negligence" and "gun" on LRP's Special Education Connection website on September 15, 2013. See SPECIAL ED CONNECTION, <http://www.specialedconnection.com/LrpSecStoryTool/splash.jsp> (last visited Dec. 18, 2013).

195. See NEIMAN ET AL., *supra* note 192, at 10 tbl.4.

196. While of course such injuries may have occurred, cases involving them were not identified by the author's research, which included review of all court cases which included the terms "negligence" and "gang" on LRP's Special Education Connection website on September 15, 2013. See SPECIAL ED CONNECTION, <http://www.specialedconnection.com/LrpSecStoryTool/splash.jsp> (last visited Dec. 18, 2013).

197. SIMONE ROBERTS ET AL., U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, at 7 (2012), available at <http://nces.ed.gov/programs.crimeindicators/crimeindicators2011/key.asp> (noting only seventeen homicides nationally of students in schools in 2009–2010, and seventeen in 2008–2009; compared with 1562 homicides of students nationally in 2008–2009); see also OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, OTA-ENV-633, RISKS TO STUDENTS IN SCHOOLS 2 (1995) (deaths by motor vehicle or firearm are not common in schools or on school busses).

198. See OFFICE OF TECH. ASSESSMENT, *supra* note 197, at 2 (deaths by motor vehicle or firearm are not common in schools or on school busses).

199. See, e.g., cases cited *supra* notes 99–104, 138–39, 147, and 171–72, and accompanying text.

200. ROBERTS ET AL., *supra* note 197, (reporting thirty-one percent).

201. In one case, a student with Asperger syndrome placed in a private special education school was involved in numerous fights with classmates. Adam C. v. Scranton Sch. Dist., No. 3:07-CV-532, 2011 WL 4072756 (M.D. Pa. Sept. 13, 2011).

202. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 116–17.

them,<sup>203</sup> suggesting that city teachers have relatively less control over the behavior of their students.

*High percentage of special education students.* Urban schools such as HCPS<sup>204</sup> include large numbers of special education students.<sup>205</sup> Urban schools thus have unusually large numbers of students with disabilities to supervise.

*High percentage of students who are not fluent English speakers.* Urban schools educate numerous students who are not fluent in English.<sup>206</sup> These students may be less able to understand written or oral safety rules and signs.

*High percentage of students who do not receive regular medical care.* Urban schools educate great numbers of students who do not enjoy optimal medical care.<sup>207</sup> Almost one-fourth of urban school students get basic health care from an ER, clinic, or health center rather than a private doctor.<sup>208</sup> Urban school students are also less likely to have health insurance or Medicaid to pay for their health care than suburban school students.<sup>209</sup> This likely means that urban schools educate significant numbers of students with chronic health conditions such as diabetes, asthma, and allergies that are not well-managed and are thus more likely to flare up at school.

*Class size.* While there may be some public perception that urban schools are filled with very large classes, research indicates that at the elementary level, average urban school class sizes are between the averages for rural and suburban schools.<sup>210</sup> At the secondary level,

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203. NEIMAN ET AL., *supra* note 192, at 11 tbl.5.

204. Data on the HCPS is provided at *supra* notes 1–6 and accompanying text.

205. In the school districts in the largest U.S. cities, about one in seven students have IEPs. See *Urban School Statistics*, COUNCIL GREAT CITY SCH., [www.cgcs.org/page/75](http://www.cgcs.org/page/75) (last visited Dec. 18, 2013). In addition, many other students have section 504 plans. Nationally, 13.1% of students have disabilities. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, NCES 2012-001, DIGEST OF EDUCATION STATISTICS 2011 ch. 2 (2012), available at <http://nces.ed.gov/pubs2012/2012001.pdf>.

206. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 8 (9.1% of urban school students, as compared with 3.7% of suburban students and 1.9% of rural school students). More recent 2009–2010 data from the “Great City Schools” (67 school districts in the largest cities) reports 17% of students attending school in these districts are English language learners. *Urban School Statistics*, *supra* note 205.

207. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 11–12.

208. *Id.* at 12 (reporting 23.3% of urban school students get their medical case from these entities).

209. *Id.*, at 12, A-14.

210. Dale Ballou, *The Condition of Urban School Finance: Efficient Resource Allocation in Urban Schools*, in SELECTED PAPERS IN SCHOOL FINANCE 61, 72 tbl.4 (1998), available at <https://nces.ed.gov/pubs98/ballou.pdf>. (finding urban school

however, urban school average class sizes (27.0) are somewhat larger than are average class sizes for suburban (25.4) or rural (23.5) schools.<sup>211</sup> So, at the secondary level, urban school teachers have slightly larger numbers of students to supervise.

*c. Staffing Issues*

Staffing patterns typical of urban schools enhance safety risks for students with disabilities in several ways.

*Teacher absenteeism.* Urban schools report higher than usual teacher absence rates<sup>212</sup> and thus relatively greater use of substitute teachers. As discussed earlier, there are many cases in which students with disabilities were injured when their class has a substitute teacher.<sup>213</sup>

*Teacher shortages.* Urban schools report difficulties in hiring teachers,<sup>214</sup> perhaps in part because salaries are lower than in suburban schools.<sup>215</sup> These realities may cause schools to hire teachers without thorough background checks, or to hire less than optimally qualified staff. In particular, it is especially difficult in urban schools to hire special education teachers.<sup>216</sup> As in Isabella's case, there may be shortages of bus attendants or other non-certified staff.<sup>217</sup>

*Teacher experience levels.* Urban school staffs also include relatively large numbers of teachers with lower levels of experience (for example, experience in supervising students and otherwise managing classrooms) compared to staffs in suburban and rural schools.<sup>218</sup>

*Use of police as school security.* Some urban schools have a relatively large police presence. For example, New York City has hired more than 5200 police officers for its schools— far more than

teacher-student ratio at all levels to be in between ratios for rural and suburban schools).

211. *Id.*

212. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 96–97.

213. *See supra* note 146 and accompanying text.

214. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 88–89.

215. *Id.*, at 84–85.

216. *To Assure the Free Appropriate Public Education of All Children with Disabilities—1996*, *supra* note 49 (reporting a forty-two percent vacancy rate for special education teachers in inner cities).

217. *See supra* text accompanying note 10.

218. NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 86–87 (reporting somewhat lower average levels of teacher experience, and significantly greater numbers of teachers with low levels of experience).



the number of its school guidance counselors (3152).<sup>219</sup> Perhaps counterintuitively, recent research suggests increased police presence in schools may not be associated with lower safety levels.<sup>220</sup> Police presence may cause school staff to relax their own efforts toward student safety, on the assumption that police have assumed that responsibility, perhaps heightening safety risks for students.

*Lesser staff supervision in large schools.* Urban schools such as HCPS tend to be large,<sup>221</sup> associated with somewhat less close supervision of staff. As discussed earlier, the case law shows that students with disabilities have been abused by or otherwise injured at the hands of staff when their schools did not follow reasonable hiring and reasonable staff supervision practices.<sup>222</sup> Students with disabilities may also be at somewhat greater risk of peer harassment and bullying because of large student bodies and perhaps less closely supervised staff.

*d. Special Education Delivery Issues*

*Placement patterns of special education students.* Urban schools place students with disabilities in separate special education classes at high rates. The Department of Education reports that “in inner cities, 41.3 percent of students with disabilities are enrolled in . . . programs that remove students from regular classes for 50 percent or more of the school day, compared to 23.4 percent in non-inner-city areas.”<sup>223</sup>

Disability law in fact requires student placement and instruction in the LRE.<sup>224</sup> Non-urban schools’ widespread placement of students

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219. See Complaint, B.H. v. City of New York, No. CV 10-0210, 2010 WL 197606 (E.D.N.Y. Jan. 20, 2010) (asserting Fourth Amendment violations and excessive force); see also *A Look at School Safety: School to Prison Pipeline*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/schooltoprison/lookatsafety> (last visited Dec. 28, 2013).

220. Cf. ANNENBURG INST. FOR SCH. REFORM & N.Y. ACLU, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 10–11, 44 (2009), available at [www.nyclu.org/files/Safety\\_with\\_Dignity.pdf](http://www.nyclu.org/files/Safety_with_Dignity.pdf) (noting that in New York City schools, more than 5200 police are assigned, with school security was assigned to police rather than school officials, but in successful, safer schools, students and school staff have primary responsibility for discipline, recommending reduction of and limited responsibilities for police in schools); Steinberg et al., *supra* note 189 (suggesting a preventative, rather than a penal approach to discipline is associated with school safety and finding that zero tolerance policies do not increase safety and frequent student suspensions actually reduce safety).

221. NAT’L CENTER FOR EDUC. STATISTICS, *supra* note 44, at A-5.

222. See *supra* notes 175–76 and accompanying text.

223. *To Assure the Free Appropriate Public Education of All Children with Disabilities—1996*, *supra* note 49, tbl.4.4.

224. 20 U.S.C. § 1412(a)(5)(A) (2012).

with disabilities in general education classes suggests that inner-city schools can and must do better to comply with LRE requirements. As more students with disabilities are included in general education classes, increased student injuries are foreseeable.<sup>225</sup> When compared with, for example, a self-contained special education class (such as Jenny's special education gym class, which had twenty students, a teacher, and six aides<sup>226</sup>), in general education classes the staff-student ratio is higher, with perhaps thirty students, a teacher, and no aides.<sup>227</sup> Moreover, the general education staff's knowledge level about the student's disability and its specific manifestations is low.<sup>228</sup>

*Impact of placement on safety.* On the one hand, the case law seems to reflect relatively fewer claims from injury in special education settings.<sup>229</sup> On the other hand, placing students with disabilities in separate special education classes, as is common in urban schools,<sup>230</sup> creates greater separations between special education and general education school staffs, and between general education students and students with disabilities.<sup>231</sup> Increased separation also suggests that general education staffs have less experience (and thus less expertise and knowledge gained from experience) supervising students with disabilities when they are in general education settings.<sup>232</sup> Increased separation arguably increases safety risks for students with disabilities when they are not in their special education classrooms. Moreover, integrating students with disabilities in general education less frequently suggests that general

225. This prediction was first made in the apparent first article to address tort liability for students with disabilities. Ralph Mawdsley, *Supervisory Standard of Care for Students with Disabilities*, 80 WEST'S EDUC. L. REP. 779 (1993).

226. See *supra* notes 15–16 and accompanying text.

227. See *supra* note 210 and accompanying text.

228. The IDEA does not require general education staff, beyond one general education teacher, to be on the IEP team, and only requires that the finished IEP be “accessible” to the staff with responsibility for implementing it. See *supra* notes 117–25 and accompanying text.

229. See Daggett, *supra* note 64, pt. III.J for a discussion of this pattern.

230. See *supra* note 223 and accompanying text.

231. See, e.g., Debbie Staub & Charles A. Peck, *What Are the Outcomes for Nondisabled Students?* 52 EDUC. LEADERSHIP, Dec. 1994/Jan. 1995, at 36, available at <http://www.ascd.org/publications/educational-leadership/dec94/vol52/num04/What-Are-the-Outcomes-for-Nondisabled-Students%C2%A2.aspx> (noting that mainstreaming students with disabilities allows nondisabled students to have interactions with them and to experience “increased comfort and awareness” and “reduced fear”).

232. For example, general education staff teachers do not develop expertise in disability in their pre-service teacher training programs. See *infra* note 259 and accompanying text. If teachers do not have students with disabilities placed in their classrooms, they never gain experience in teaching these students.

education students may have less sensitivity about disability, heightening risks of bullying and harassment of students with disabilities.<sup>233</sup> The relative isolation of self-contained special education classes also creates more opportunities for staff abuse in those settings, which unfortunately has occurred.<sup>234</sup> Finally, these placement patterns in urban schools make it particularly challenging to develop a true school community, which recent education research indicates is an important basis for school safety.<sup>235</sup>

In sum, the safety issues for students with disabilities attending urban schools are significant and unique. Minimizing these safety risks requires careful reflection and planning by urban and other schools.

## II. MEETING THE DUTY TO REASONABLY SUPERVISE STUDENTS WITH DISABILITIES IN URBAN (AND OTHER) SCHOOLS

Part I of this Article has shown that students with disabilities not only require special instruction, but often are also members of the school community with special safety needs. Moreover, “reasonable” supervision of students with disabilities involves more and different action than does “reasonable” supervision of other students. Schools, especially urban schools, need to consider how to reasonably supervise their students with disabilities at both systemic and individualized levels. Creating good IEPs and having an expert special education staff is not enough.

Students with disabilities spend significant time in general education settings, not only in general education classrooms, but also on the school bus,<sup>236</sup> and in the cafeteria, the bathrooms, the playground, and the hallways.<sup>237</sup> In these latter settings, students with disabilities are supervised by general education staff, from teachers to bus drivers to cafeteria workers, with, at most, minimal training in student disability and often with little relevant information about specific students with disabilities.<sup>238</sup> Building-wide safety

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233. Dear Colleague Letter, 55 IDELR 174 (Office of Civil Rights Oct. 26, 2010) (suggesting that schools use training to change hostile school climates).

234. See cases cited *supra* note 174.

235. ANNENBERG INST. FOR SCH. REFORM & N.Y. ACLU, *supra* note 220, at 10–11, 44; Steinberg et al., *supra* note 189, at 22–25.

236. See *supra* notes 153–54 and accompanying text. Of course, a limited number of students with disabilities use specialized transportation as a related service. See, e.g., cases cited *supra* notes 149–51.

237. See cases cited *supra* notes 136–44 and accompanying text.

238. See generally John Kessell et al., *Student Teachers’ Knowledge of the Individuals with Disabilities Education Act*, 2 J. ACAD. & BUS. ETHICS 1 (2005)

responsibility likely is assigned to the school principal, who also likely lacks significant training in disability and information about specific students' needs.<sup>239</sup>

Part II.A of this Article explains how reasonable supervision of students with disabilities must be accomplished consistent with federal disability law. Part II.B proposes that effective safety planning first requires training of general education staff<sup>240</sup> about students with disabilities. Part II.C explores how, armed with this training, schools can then engage in school-wide safety planning and create appropriate policies.<sup>241</sup> Part II.D explains that schools must also engage in individualized safety planning for some students. This can be accomplished by reviewing IEPs to identify potential safety issues and then engaging in appropriate planning and information dissemination. Part II.E explains the need to also provide school staff with safety-relevant information about specific students as appropriate. Part II.F proposes that in light of the distressing instances of misconduct by school staff and the vulnerabilities of students with disabilities, schools need to ensure staff, including substitutes, contractors, and volunteers, are thoroughly supervised. Effective staff supervision may include background checks, guidance and oversight of substitute employees, and opening classrooms to observation.

#### **A. Considering Student Safety While Complying with Disability Law**

Schools planning for student safety and supervising students must also comply with disability law, which requires special education placements in the LRE and prohibits disability discrimination.

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(finding that students teachers were not prepared to include special education students in their classroom, consistent with the body of other research reviewed in the study).

239. See Donna Cooner et al., *Preparing Principals for Leadership in Special Education: Applying ISLLC Standards*, 6 CONNECTIONS: J. PRINCIPAL PREPARATION & DEV. 19 (2004), available at <http://www.nassp.org/portals/0/content/49135.pdf> (noting that “almost no state[s]” require even one course in special education for certification as a school principal).

240. The proposed training would include administrators, teachers, and bus drivers and other non-certified staff. See *infra* Part II.B.

241. For example, creation or adjustment of policies for conducting fire drills, for staff supervision in the hallways between classes, for aide supervision of Jenny and other students in class, for bus attendant supervision of students like Isabella, for preventing and responding to bullying, and adoption of best practices for high-risk activities such as student transportation.

### 1. *Avoiding Illegal Disability Discrimination*

Both the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act prohibit disability discrimination in schools.<sup>242</sup> With regard to student safety, this means providing students with disabilities with equal opportunities to participate in school activities<sup>243</sup> such as lunch with other students in the cafeteria, recess on the playground, field trips and athletics.<sup>244</sup> Hence, schools cannot, for example, keep a student with a disability inside for recess in an attempt to maximize safety when that student can be made reasonably safe on the playground, perhaps with appropriate supports like an assigned aide.<sup>245</sup> Similarly, students with disabilities must participate in fire drills and other safety protocols to the extent feasible.<sup>246</sup> Providing equal participation may require affirmative steps in the form of modifications as needed to make participation as safe for students with disabilities as it is for general education students.<sup>247</sup>

Schools also cannot transfer the burden of keeping children safe at school to the parents. To do so without imposing equal burdens on parents of students who do not have disabilities is a form of disability

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242. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12213 (2012); *see also* 29 U.S.C. § 794 (2012) (section 504).

243. *See* 34 C.F.R. §§ 104.34(b), 104.37 (2013).

244. OCR recently issued a letter reiterating the requirements as to equal opportunity to participate in athletics. U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, DEAR COLLEAGUE LETTER (2013), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>.

245. *Cf.* Dear Colleague Letter, 113 LRP 33753 (Office of Special Educ. & Rehabilitative Servs. Aug. 20, 2013) (advising against changing a student's special education placement to protect her, suggesting that protection in the form of a more restrictive placement cannot be at the expense of FAPE and LRE).

246. OCR has for example noted that students with disabilities should participate in evacuation drills to the extent they are able, and perhaps with modifications. *See* Allegheny (PA) Intermediate Unit, 20 IDELR 563 (Office of Civil Rights July 9, 1993). Moreover, schools need to develop emergency protocols (e.g., fire response) that allow students with disabilities the same opportunity to be safe as other students. *See* San Diego (CA) City Unified Sch. Dist., 32 IDELR 264 (Office of Civil Rights Oct. 12, 1999). For example, the protocols may need provisions for deaf students who cannot hear alarms or instructions, for escape of students whose mobility is limited, and for students with cognitive disabilities who may not understand risks or are unable to get themselves to safety.

247. *See, e.g.*, U.S. DEP'T OF EDUC., *supra* note 244 (suggesting visual cues for deaf athletes, assistance getting to the mat for a blind wrestler, allowing a one-handed swimmer to substitute a one-hand touch and other arm outstretched as modification of two-hand touch requirement to finish races if that did not provide an advantage, allowing an athlete with asthma to use an inhaler, and providing for glucose testing and insulin administration for an athlete with diabetes as possible required modifications in athletics).

discrimination.<sup>248</sup> For example, schools cannot condition participation of students with disabilities in school dances and other extracurricular activities on their parents chaperoning their children unless parents of other students are also required to do so.<sup>249</sup>

## 2. *Special Education Law LRE Requirements*

Reasonable supervision of students with disabilities must occur within the context of providing appropriate special education placements.<sup>250</sup> This includes the obligation of schools under special education law to educate students with disabilities in the LRE.<sup>251</sup> The IDEA specifically provides that students with disabilities are to be placed in separate classes (or separate schools or facilities) “only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids or services cannot be achieved satisfactorily.”<sup>252</sup> Thus, meeting LRE requirements for a student with a disability may involve taking affirmative steps aimed at safety. For example, some students may need aide support at lunch or on the bus or the playground for safety reasons.<sup>253</sup> Schools should also consider the long term; students with disabilities will eventually leave the relative cocoon of the school environment for the larger world and need to have developed skills and strategies for living safely in the world.<sup>254</sup> They are not well served by restrictive placements which may keep them safe, but do not prepare them for adult life.

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248. *See* Charlotte-Mecklenburg (NC) Schools, 113 LRP 18233 (Office of Civil Rights Feb. 13, 2013) (middle school that for safety reasons required parents of students in a self-contained special education class to chaperone their children at a dance engaged in illegal disability discrimination).

249. *Id.* (noting availability of dance at nearby school for special education students is no substitute for giving students opportunity for equal participation in their own school’s dance).

250. *See, e.g.*, Fontenot v. State, 635 So. 2d 627, 628 (La. Ct. App. 1994).

251. *See* Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1412(a)(5) (2012); 34 C.F.R. § 104.34 (2013) (section 504). The OSERS letter, discussed *supra* note 102, reminds schools that they cannot make protective placements of students at the expense of LRE.

252. 20 U.S.C. § 1412(a)(5)(A).

253. For example, perhaps Jenny needed an assigned aide on the school bus trained in correctly positioning her to allow her to breathe easily, and also trained in responding to foreseeable health crises that Jenny might experience on the bus.

254. *See* 20 U.S.C. § 1400(c)(5), (14) (2012) (noting the goal of adult self-sufficiency).

As discussed earlier, urban schools disproportionately place students with disabilities in self-contained classes,<sup>255</sup> and need to move toward placement decisions that consider safety but also meet the LRE requirements. As urban (and other) schools with a history of extensive self-contained placements move toward more inclusion in general education classes, with their larger size, and fewer and less disability-trained staff, an increase in student injuries can be expected.<sup>256</sup> Schools must consider transition needs of various constituencies. Special education staff and IEP teams may need training in supporting the safety of students with disabilities in general education settings. For example, IEPs can include provisions for special education teachers to provide indirect consultation support to general education teachers and other staff. General education staff will presumably lack experience when it comes to keeping students with disabilities safe and thus need significant training and support. Students with disabilities who start spending more time in general education may need support in safety-related ways; for example, they may need help developing skills and strategies for interacting with general education peers. Finally, general education students who are not used to learning and interacting with students with disabilities may need support (perhaps, for example, sensitivity training<sup>257</sup>) to facilitate appropriate interaction with their new peers.

Schools concerned about making placements in conformance with LRE and nondiscrimination requirements that risk some injury have some cause for comfort. In the event of injury in general education, the decision to place a child with a disability in mainstream classes should be reviewed in the context of the IDEA's LRE requirement<sup>258</sup>

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255. *To Assure the Free Appropriate Public Education of All Children with Disabilities—1996*, *supra* note 49, tbl.4.4.

256. This prediction was first made in the first article to address tort liability for students with disabilities. See Ralph Mawdsley, *Supervisory Standard of Care for Students with Disabilities*, 80 WEST'S EDUC. L. REP. 779, 779 (1993). Professor Mawdsley's article appears in an updated version in Ralph Mawdsley, *Standard of Care and Students with Disabilities*, 148 WEST'S EDUC. L. REP. 553, 553 (2001) and most recently in Ralph Mawdsley, *Standard of Care for Students with Disabilities: The Intersection of Liability Under the IDEA and Tort Theories*, 252 WEST'S EDUC. L. REP. 527, 527 (2010).

257. See *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1402 (9th Cir. 1994) (noting that significant cost differences between placements are part of LRE analysis; school unsuccessfully argued mainstreaming single student would require \$80,000 for sensitivity training for entire school).

258. See *Colchester Bd. of Educ.*, 111 LRP 5954 (Conn. State Educational Agency, Nov. 23, 2010) (finding school had adequately considered impact of bullying on LRE requirements in making placement decision).

and presumably in the larger context of the ban on disability discrimination.

### **B. Disability Training and Access to Disability Resources for General Education Staff**

Schools must recognize that general education staff (both teachers and noncertified staff such as bus drivers) lack training and experience about disability, and provide appropriate training to them.

#### *1. Current (Lack of) Disability Training of General Education Teachers and Staff*

General education teacher training includes little or no coursework on disability, because general education teacher certification laws do not require it.<sup>259</sup> Nonetheless, general education teachers are expected to instruct students with disabilities, and often to supervise them in the hallways, at lunch, on the playground, at assemblies, in afterschool activities, and while waiting for the bus.<sup>260</sup> Isabella's bus staff,<sup>261</sup> the aides who failed to notice Jenny wander off,<sup>262</sup> and other noncertified general education staff, such as security staff, cafeteria workers, and office staff, also have student supervisory duties. These staff members typically do not have either special education or general education training.<sup>263</sup> In fact, disability training should not only include permanent employees, but also other agents of the school (such as volunteers and substitutes) as well as independent

259. See generally P.J. POWERS, *THE EFFECT OF SPECIAL EDUCATION COURSEWORK UPON THE PREPARATION OF PRE-SERVICE TEACHERS* (1992), available at <http://www.eric.ed.gov/fulltext/ED377183.pdf> (noting many states recently enacted a requirement that persons seeking general education teaching certificates take one course in special education; finding improvements in attitudes and instructional competencies after such coursework; and suggesting this training is insufficient).

260. Cf. *Educator for a Day Fact Sheet*, NAT'L EDUC. ASS'N, <http://www.nea.org/grants/34882.htm> (last visited Nov. 11, 2013) ("The visiting educator performs all the duties of a regular school employee in a normal work day—teaching class, performing lunch and corridor duty, recess supervision, working in the cafeteria, among other responsibilities")

261. See *supra* note 10 and accompanying text.

262. See *supra* notes 16–17 and accompanying text.

263. The No Child Left Behind Act (NCLB) requires only that paraprofessionals (aides) who perform instructional and other duties have two years of college or demonstrate knowledge of content such as reading and ability to assist in instruction through a formal assessment. 20 U.S.C. § 6319(c)–(d) (2012); cf. *Nilson v. Castle Rock Educ. Ass'n* (Wash. Pub. Empl. Relations Comm'n June 9, 1994) available at <http://www.perc.wa.gov/databases/ulp/04722.htm> (noting that because state law does not require coaches to have teaching certificates, they must be in a separate bargaining unit from teachers).



contractors like school bus drivers the school uses for student transportation. Training is a cost-efficient way to prevent student injuries from occurring, which means failure to train is likely a part of the legal duty of reasonable supervision. Lack of training like that claimed by Isabella's parents has specifically been found actionable.<sup>264</sup> The large number of inexperienced urban school teachers<sup>265</sup> makes the need for training in urban schools especially acute.

## 2. IDEA Personnel Training Requirements

The IDEA contains requirements for personnel development to ensure that personnel are "appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities."<sup>266</sup> These requirements explicitly extend to aides.<sup>267</sup> IDEA requirements focus on special education staff. Training should be considered for all general education staff (both certified and noncertified) about students with disabilities' varied needs and abilities so that the staff has the knowledge necessary to reasonably supervise students with whom they work.

## 3. Training on Bullying

Training should include strategies for preventing, identifying risk factors for, and recognizing signs of bullying and abuse given that students with disabilities are particularly vulnerable to this misconduct.<sup>268</sup> With respect to bullying prevention, research indicates that a school-wide system of positive behavioral interventions and supports (PBIS) can reduce bullying behaviors.<sup>269</sup> As to risk factors,

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264. See, e.g., *Atherton v. Norman Publ. Sch. Dist.*, No. CIV-11-1280-M, 2012 WL 5613748 (W.D. Okla. Nov. 15, 2012) (finding triable § 1983 claim against school for failure to train or supervise); *Lilly v. Metro. Gov't of Nashville and Davidson Cnty.*, No. CIV-11-1280-M., 2010 WL 4670924, at \*1 (Tenn. Ct. App. Nov. 16, 2010).

265. See NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 44, at 87-87.

266. Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1412(a)(14) (2012); 34 C.F.R. § 300.156 (2013).

267. 20 U.S.C. § 1412(a)(14)(B); 34 C.F.R. § 300.156(b).

268. See *supra* notes 99-104 and accompanying text. For employees with responsibility for interviewing students about suspected bullying and abuse, training should also cover effective communication methods for students whose disabilities limit their communicative abilities. For example, a student who does not speak or write may be able to draw a picture or use dolls to show what occurred.

269. See generally GEORGE SUGAI ET AL., OSEP CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, REDUCING THE EFFECTIVENESS OF BULLYING BEHAVIORS IN SCHOOLS (2011), available at [http://www.pbis.org/common/pbisresources/publications/PBIS\\_Bullying\\_Behavior\\_Apr19\\_2011.pdf](http://www.pbis.org/common/pbisresources/publications/PBIS_Bullying_Behavior_Apr19_2011.pdf).

case law suggests that students with intellectual disabilities and those with Asperger syndrome or other conditions on the autism spectrum may be at special risk of being bullied,<sup>270</sup> and students with limited communication skills may be at special risk of staff abuse.<sup>271</sup>

#### 4. *Training on Response to Student Health Crises*

Training should also include appropriate response to student health crises, such as Isabella's inability to breathe when her head is not properly supported.<sup>272</sup> Other students could have seizures in school<sup>273</sup> or choke on food.<sup>274</sup> Schools cannot simply assume that the school nurse will take care of any such problems. Many schools do not have a full-time school nurse,<sup>275</sup> and schools that do may have other tasks that occupy the nurse. Appropriate response to a student health crisis does not necessarily mean that school staff must provide emergency medical care; it may mean instituting a protocol of calling the school nurse and/or 911, not moving the student, and clearing the

270. For cases in which students with intellectual disabilities have been bullied, see *Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.*, 837 F. Supp. 2d 742 (S.D. Ohio 2011); *R.P. ex rel. M.P. v. Springdale Sch. Dist.*, No. 06-5014, 2007 WL 552117, at \*1 (W.D. Ark. Feb. 21, 2007). For cases in which students with Asperger syndrome have been bullied, see cases cited *supra* note 99.

271. In fact, in one case, a parent of a student with multiple severe disabilities resorted to placing a hidden recorder on her child's wheelchair to document abuse by her child's special education teacher and aide. *H.H. ex rel. H.F. v. Moffett*, 335 F. App'x 306, 309 (4th Cir. 2009).

272. See *supra* notes 7–13 and accompanying text.

273. See, e.g., *Braun v. Bd. of Educ. of Red Bud Cmty. Unit Sch. Dist. No. 132*, 502 N.E.2d 1076 (Ill. App. Ct. 1976) (involving an epileptic student/team-manager who had a seizure while on ladder adjusting scoreboard); *Lofton v. Detroit Bd. of Educ.*, No. 276449, 2008 WL 4414255, at \*1 (Mich. Ct. App. Sept. 30, 2008) (involving a student with multiple disabilities, including a seizure disorder, who died after seizure on the school bus).

274. See, e.g., *Mitchell v. Special Joint Agreement Sch. Dist.*, 897 N.E.2d 352 (Ill. App. Ct. 2008) (involving a disabled student with a history of compulsive eating who choked on cupcake); *Lyons v. Richmond Cmty. Sch. Corp.*, 990 N.E.2d 470 (Ind. Ct. App. 2013) (involving the death of a disabled student from choking on a sandwich); *Robertson v. E. Baton Rouge Parish Sch. Bd.*, No. 2012 CA 2039, 2013 WL 3947124, at \*1 (La. Ct. App. July 28, 2013).

275. The National Association of School Nurses (NASN) reports that in 25 states, school nurses' caseloads averaged more than 1000 students. See *Healthy Children Learn Better! School Nurses Make a Difference*, NAT'L ASS'N OF SCH. NURSES, [https://www.nasn.org/portals/0/about/press\\_room\\_faq.pdf](https://www.nasn.org/portals/0/about/press_room_faq.pdf) (updated August 2011). NASN recommends a school nurse-to-student ratio of "1:750 well students[,] 1:225 in the student populations that may require daily professional school nursing services or interventions such as Special Ed inclusions[,] 1:125 in student populations with complex health care needs[, and] 1:1 may be necessary for individual students with multiple disabilities." *Id.*

area of other nearby persons and objects. An appropriate response to choking may mean having a cadre of staff (likely including some cafeteria staff and employees assigned to supervise lunch, because choking is most likely to occur in the cafeteria) with basic training in the Heimlich maneuver, and a protocol for getting a trained person to the scene. The recent Nashville case illustrates the ways a school can fail in this area, and the dire consequences of failure.<sup>276</sup> A young student with spinal muscular atrophy died after receiving incorrectly performed CPR by school staff,<sup>277</sup> apparently resulting from failure to train staff, a lack of written instructions in the student's IEP or health plan, and inappropriate placement of the student on his back where he vomited.<sup>278</sup>

### 5. *Training for School Security Personnel*

School security personnel (whether non-law enforcement employees of the school, police department employees assigned to the school, or others<sup>279</sup>) also need training in dealing with students with disabilities, including behaviors of students with disabilities and professionally evaluating when they do (not) present a security threat. With appropriate training, the school security guard likely would not have responded to the autistic student who was using a cake spatula as a pretend sword with pepper spray.<sup>280</sup>

### 6. *Training About High-Risk Activities*

Training should include review of the high-risk activities for students with disabilities discussed previously.<sup>281</sup> While science teachers likely understand the risks in conducting laboratory experiments, it may not be apparent to all staff that, for example, students with disabilities have often been bullied, abused, and even molested in school bathrooms and showers.<sup>282</sup> Armed with this knowledge, school staff can both monitor high-risk activities more

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276. *See Lilly v. Metro. Gov't of Nashville and Davidson Cnty.*, No. M2010-00085-COA-R3-CV, 2010 WL 4670924, at \*1 (Tenn. Ct. App. Nov. 16, 2010).

277. *Id.*

278. *Id.*

279. For an overview of traditional and modern school/police arrangements, see generally BETTY COX ET AL., *THE CHALLENGES OF SCHOOL POLICING* 11–19 (2012).

280. *See Atherton v. Norman Publ. Sch. Dist.*, No. CIV–11–1280–M., 2012 WL 5613748, at \*1 (W.D. Okla. Nov. 15, 2012).

281. *See supra* Part I.B.1.c.

282. *See supra* notes 138–39 and accompanying text.

closely and also engage in practices to prevent harm in these activities.<sup>283</sup>

### 7. *Identifying Internal School Resources for Staff*

Finally, training should identify resources within the school for staff to go to with student safety-related questions. For example, an aide supervising the playground may have questions about how to supervise students with behavioral issues, seizure disorders, autism, sensory impairments or mobility impairments, and should know where to go to get these questions answered.

## C. Systemic Safety Planning

Schools must identify and plan to minimize systemic safety risks for their students with disabilities. Schools must also recognize and plan for safety risks faced by individual students with disabilities.

### 1. *Conducting a Safety Audit*

Schools should consider auditing school safety for students with disabilities collectively. Auditing school safety involves identifying general risks to students with disabilities from the school premises and neighborhood, other students, and school staff. The audit may also review the high-risk school activities described earlier,<sup>284</sup> creating and implementing a plan to minimize those risks.<sup>285</sup> In essence, such an audit means proactively foreseeing risks and planning to minimize them, rather than the retroactive foreseeability analysis courts perform in personal injury cases.

### 2. *Creating a Safety Audit Team*

School districts could task a team of school staff with performing a safety audit. The team could include, perhaps, building administrators, special education coordinators, persons with intimate knowledge of premises (such as maintenance staff), and persons with special expertise such as the school nurse (health expertise) and school psychologist (bullying and abuse expertise). Urban and other

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283. Perhaps, for example, sending some students with disabilities alone to use the bathroom or to travel in unmonitored hallways while class is in session is unsafe; a buddy system or other approach may be needed.

284. *See supra* Part I.B.1.c.

285. Some technical assistance is available from the National School Safety Center. *See* NAT'L SCH. SAFETY CENTER, <http://www.schoolsafety.us> (last visited Nov. 23, 2013).

school districts with many schools like HCPS could perform an initial audit at the district level, or have schools within the district share audits with one another to identify any gaps as well as helpful safety practices. However, because some risks are facility- and neighborhood-specific, at least some of the audit needs to occur in each school building. While the appropriate parameters of systemic school safety planning is better left to such persons with expertise rather than legal commentators, the case law<sup>286</sup> and the characteristics of urban schools<sup>287</sup> suggest areas for consideration.

3. *Examples of Premises- and Neighborhood-Related Areas for Audit*

Regarding premises and neighborhoods, for example, urban school buildings are often older “big box” type facilities with multiple stories.<sup>288</sup> The school needs to plan for safe evacuation of students with mobility impairments to avoid scenarios such as the recent case in which students in wheelchairs were left on a high floor during a fire.<sup>289</sup> Schools also need to avoid isolation of special education and other classrooms; several cases involve student abuse by special education staff and classmates in classrooms.<sup>290</sup> When feasible, schools should have policies requiring open classroom doors, and periodic and unannounced monitoring of classrooms through open doors, and/or windows into the hallway. However, urban and other school buildings may have long hallways with many classrooms, necessitating closed classroom doors to keep noise levels down. Classrooms may not have windows onto the hallway, or any such windows may be covered to reduce distractions in the hallway. In this event, the school may want to consider removing window coverings or other means of monitoring such as frequent and unannounced drop-

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286. *See supra* Part I.B.1.c.

287. *See supra* Part I.B.2.

288. *See supra* notes 179–80 and accompanying text.

289. *See supra* note 184 and accompanying text.

290. *See, e.g.*, D.R. *ex rel.* L.R. v. Middle Bucks Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1991) (involving a student raped in darkroom off of self-contained special education classroom); Doe v. Darien Bd. of Educ., No. 3:11 CV 1581(JBA), 2013 WL 2047872, at \*1 (D. Conn. May 14, 2013) (involving a student physically and sexually abused by a special education teacher and aide); Maxwell *ex rel.* Maxwell v. Sch. Dist., 53 F. Supp. 2d 787 (E.D. Pa. 1999) (involving a student raped in a special education classroom).

ins by school staff, placing volunteers in the classrooms to assist staff, or even electronic classroom surveillance.<sup>291</sup>

Some urban and other schools have areas in their buildings that could be dangerous for students with disabilities, perhaps such as boiler or HVAC rooms, or the “hiding place” on a Los Angeles school’s premises where a student with a disability was assaulted.<sup>292</sup> Schools with such areas need to keep them locked up or take other appropriate steps to prevent injury. Finally, urban and other schools in neighborhoods that present safety challenges need to craft appropriate responses. For example, a school in an unsafe neighborhood likely should consider whether it is appropriate to allow students to arrive on the premises before the school staff is present and supervising students. One school that allowed students to arrive at the premises earlier than staff were on duty was found liable for more than \$2.5 million to a student with a disability who was sexually assaulted by another student before school.<sup>293</sup>

#### 4. *Examples of High-Risk Activities as Areas for Audit*

Case law suggests that transportation, unstructured times such as passing in the hallways, and bullying are among the highest-risk activities for students with disabilities.<sup>294</sup> Regarding transportation, urban schools may contract with private providers, or have students use public carriers (for example, city buses or subways for travel to vocational placements, or for training in community skills).<sup>295</sup> In this

291. Note, however, that surveillance recordings created by school staff may be records of the students in the classroom under FERPA to which parents have a right of access. *See, e.g.,* *Lewin v. Cooke*, 28 F. App’x 186, 193–94 (4th Cir. 2002) (finding tape recording of the medical school committee hearing and deliberations which resulted in the plaintiff’s academic dismissal “appeared” to be a FERPA record); *M.R. ex rel. R.R. v. Lincolnwood Bd. of Educ.*, 843 F. Supp. 1236, 1239 (N.D. Ill. 1994) (finding that a video recording of classroom is a FERPA record), *aff’d*, *Rheinstrom v. Lincolnwood Bd. of Educ.*, 56 F.3d 67 (7th Cir. 1995).

292. *Jennifer C. v. L.A. Unified Sch. Dist.*, 86 Cal. Rptr. 3d 274 (Ct. App. 2008); *see also D.R. ex rel. L.R.*, 972 F.2d 1364 (involving the sexual abuse of a disabled student by classmates in darkroom which was part of classroom).

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

294. *See supra* notes 149–54 and accompanying text (transportation injuries); 137–45 and accompanying text (injuries during unstructured times); 102–04 and accompanying text (bullying of students with disabilities).

295. *See, e.g.,* *Fulbright v. Dayton Sch. Dist.*, No. 13–CV–0030–TOR, 2013 WL 1497388, at \*1 (E.D. Wash. Apr. 10, 2013) (student molested repeatedly on public transportation taken to sheltered workshop); *Reguera v. Leduc*, No. 012620B, 2005 WL 2461973, at \*1 (Mass. Super. Ct. Aug. 22, 2005) (negligent hiring/supervision claim against school whose contracted transportation provider employed

latter event, schools must consider and plan for safety risks on public transportation.<sup>296</sup> Schools must work with any contracted-for private transportation provider to have appropriate safety policies and practices. At a minimum this includes sufficient supervision while traveling on the bus, providing staff who transport students or supervise them on transportation with safety training, a sufficient staff presence while students wait after school for the bus, appropriate safety rules, and enforcement of those rules. To deal with difficulties during unstructured time, schools may want to arrange staggered arrival and departure times and class ending and beginning times for some students,<sup>297</sup> or keep students with prior bullying interactions or other interpersonal conflicts in separate areas of the school.

### 5. Follow-Through

Once a systemic school safety plan including safety policies is developed, it is essential to actually implement it. For example, if the policy developed is to have at least four teachers present in the cafeteria at lunch, the school must ensure that this actually happens. If a student chokes or is otherwise injured at lunch on a day when fewer than four teachers are present in the cafeteria, that event is potentially strong evidence of a lack of reasonable supervision by the school.<sup>298</sup>

#### D. Individualized Safety Planning for Some Students with Disabilities

For some students with disabilities, school-wide safety planning and training will not be enough; individualized planning will be required.<sup>299</sup> While creating an IEP<sup>300</sup> for a student can inform the

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“wheelchair” bus driver who had been arrested for domestic violence and investigated for assault of a woman with a disability during his term of employment, and was criminally convicted of sexual assault of a young female student with a disability).

296. See generally, e.g., *Fulbright*, 2013 WL 1497388.

297. See generally, e.g., *Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.*, 837 F. Supp. 2d 742 (S.D. Ohio 2011) (safety plan for bullied student with intellectual disability provided for bullied student to leave class early, and to have assigned aide, as well as informing bullied student’s teachers of his history and of the plan).

298. See sources cited *supra* notes 129–30 and accompanying text.

299. In essence, this means proactively foreseeing risks to an individual student and planning to contain them, as opposed to the retroactive foreseeability analysis a court performs in a personal injury case.

300. This may include an IEP or section 504 plan; the Article will refer to IEPs for the sake of simplicity.

school's duty of reasonable supervision for that student, the IEP can only be a first step in identifying supervisory needs for the student. For students with disabilities who present safety risks, the school needs to use the IEP<sup>301</sup> to ascertain any safety risks and if appropriate create an individual plan for supervising the student. For example, Isabella's neuromuscular condition<sup>302</sup> likely made her a good candidate for such a plan, to include provisions such as how to evacuate her in her wheelchair in the event of emergency, how to supervise her on the bus, and how to maintain and monitor proper head positioning. Similarly, Jenny's fascination with water and the presence of a pond adjacent to her school<sup>303</sup> might have been managed in an individual plan for her.

1. *Looking Beyond the Student's Label to the Contents of the IEP to Ascertain any Individual Safety Needs*

In many cases, students will not need individualized safety planning. However, merely reviewing the student's diagnosed condition is not sufficient to rule out needs for individualized safety planning. For example, a diagnosis of a mild speech impediment does not facially appear to suggest special safety measures are needed for a student with this diagnosis. The IEPs of some such students, which include annual goals, services to be provided, and modifications to general education,<sup>304</sup> will reveal the need for individualized planning. For example, the IEP of a student with a speech impediment might include behavioral goals reflecting past bullying by classmates, or emotional issues developed secondary to the speech impediment (perhaps, for example, low self-esteem or frustration in speaking) that suggest there are in fact safety risks for this student.

2. *Responsibility for Individualized Planning*

Schools should assign responsibility for reviewing IEPs to identify any special safety risks to (or from) the student and adopt appropriate plans<sup>305</sup> and strategies to minimize those safety risks.<sup>306</sup> Ideally, one or

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301. The school should also use any health plan. See Cedar Rapids Cmty. Sch. Dist. v. Garrett F., 526 U.S. 66 (1999).

302. See *supra* note 7 and accompanying text.

303. See *supra* note 14 and accompanying text.

304. For these and other required components of IEPs, see 20 U.S.C. § 1414(d)(1)(A) (2012).

305. See *generally, e.g.*, Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742 (S.D. Ohio 2011).



more IEP team members and a building administrator would jointly perform this task in order to involve the combined disability and general education knowledge and authority needed for optimal safety planning. Assigning this task to the student's IEP team is a possibility. When a student's disability, like asthma, is closely related to specific safety risks, it may be appropriate for the IEP team or related service providers such as a school nurse identify and plan for those safety risks.<sup>307</sup> If an IEP team that includes the parents takes on this task, a parent who agrees with the safety precautions outlined in an IEP may be hard pressed later to convince a court that those precautions are unreasonable.<sup>308</sup> Using the IEP team for individualized planning also has the benefit of involving the student's parents, who are required members of the IEP team<sup>309</sup> and who often have developed great knowledge about their child's safety risks as well as expertise in keeping their child safe outside of school. Courts have found parent safety instructions to be highly relevant when determining reasonable supervision.<sup>310</sup> However, when the IEP team assumes responsibility for individual safety planning and incorporates the plan in the IEP (as has sometimes occurred<sup>311</sup>), the safety plan can be challenged through the IDEA<sup>312</sup> and cannot be changed except by the IEP team at a meeting with prior notice to the parents.<sup>313</sup> Such an approach also raises the troubling possibility that a parent who exercises the right under the IDEA to revoke consent to special education<sup>314</sup> also then would have revoked consent to any safety plans

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306. This duty could be assigned to the student's IEP team, or to the required member of the IEP team with authority to speak for the school, *see* 34 C.F.R. § 300.321(a)(4), (d) (2013), or IEPs could be sent for review by a building administrator.

307. Many students with disabilities (perhaps, for example, most speech impaired and learning disabled students) do not on their face present special safety risks.

308. Earlier commentary suggests that whether parents exercised their right to challenge an IEP may be particularly important when they propose safety supports and services, which are not adopted in the IEP, then claim reasonable supervision requires those supports and services. Mawdsley, *supra* note 108, at 785–86.

309. *See* 34 C.F.R. § 300.322 (2013).

310. *See generally, e.g., Bertetto v. Sparta Cmty. Sch. Dist.*, 544 N.E.2d 1140 (Ill. App. 1989) (school's disregard of parent instruction to use seat belt on student's wheelchair may defeat immunity where student was thrown from chair and injured).

311. *See, e.g., Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.*, 837 F. Supp. 2d 742 (S.D. Ohio 2011); *D.C. Pub. Schs.*, 111 LRP 26020 (D.C. State Educational Agency Mar. 29, 2011) (safety plan developed by IEP team providing for full time aide, staff monitoring of student's behavior, class scheduling to avoid certain classmates).

312. For IDEA due process hearing rights, *see* 20 U.S.C. § 1415(f) (2012).

313. For IDEA parent notice requirements, *see id.* § 1415(b)(3).

314. *See id.* § 1414(a)(1)(D).

contained in the IEP. Schools cannot challenge a parent's revocation of consent under the IDEA.<sup>315</sup>

### 3. *Identification of Risks for an Individual Student in Certain School Activities and Compliance with Disability Law*

Any individualized safety review should include assessment of any special premises liability risks,<sup>316</sup> any needed modifications to school safety protocols such as fire drills,<sup>317</sup> evacuations, and school shooting or other threats, and any safety risks posed by peers. Disability law also imposes requirements concerning some of these activities; for example, students must be allowed to participate in safety protocols to the extent feasible.<sup>318</sup>

### 4. *The Role of IEP Contents in Individualized Safety Planning*

As discussed more extensively in other commentary,<sup>319</sup> specific information in IEPs can be relevant to that student's safety issues in a myriad of ways. The IEP goals, current levels of achievement, special education services to be provided, accommodations to general education,<sup>320</sup> evaluation results, the student's disability, and any safety issues suggested by this information, may all be relevant in determining what supervision of that student is "reasonable."<sup>321</sup>

315. See 34 C.F.R. § 300.300(b)(4) (2013).

316. For example, risks on the playground for mobility impaired students.

317. For a case in which a student with bone disease and impairment of vision was injured in a bus fire drill for which she was not provided any assistance, see generally *I.R. v. Peirce*, No. 3:10-cv-398, 2012 WL 6681807 (M.D. Pa. Dec. 21, 2012) (bus driver was unaware of the student's disability and instructed students to jump three to four feet down to evacuate the bus, and the student broke her leg); see also *Moses v. Minneapolis Publ. Sch.*, No. C4-98-1073, 1998 WL 846546 (Minn. Ct. App. Dec. 8, 1998) (student with muscular disability who tripped and was hurt during fire drill; IEP provided for use of helmet during gym and for aide during gym and playground). The Justice Department is investigating a school district that left two students in wheelchairs in a classroom during a fire. *Justice Dept. Looks at Mistreatment of Disabled Students During New Rochelle H.S. Evacuation*, *supra* note 183.

318. See *supra* note 246 and accompanying text.

319. See Daggett, *supra* note 64.

320. See generally, e.g., *Upton v. Clovis Mun. Sch. Dist.*, 115 P.3d 795 (N.M. Ct. App. 2005) (student whose IEP noted her asthma, and whose parent and PE teacher had agreed to modifications for PE class, died after a substitute PE teacher forced her to exercise strenuously).

321. See generally, e.g., *Gerks v. Deathe*, 832 F. Supp. 1450 (W.D. Okla. 1993) (intellectually disabled student's fear of bathrooms and limited ability to understand must be considered in assessing reasonableness of school's disciplinary methods); *Greider v. Shawnee Mission Unif. Sch. Dist.*, 710 F. Supp. 296 (D. Kan. 1989) (IEP and the student's special education condition and needs were relevant to deciding what appropriate safety precautions are for that student); *Guidry v. Rapides Parish*

To the extent they exist and apply, IEP provisions and school supervision practices and policies<sup>322</sup> may act as a sword or shield. IEP requirements for supervision (or lack thereof) may be strong evidence of what supervision is legally reasonable.<sup>323</sup> Hence, failure to conform to safety or supervision practices in an IEP or school policy or written or unwritten school practice may result in liability.<sup>324</sup> Conversely, following the safety provisions of an IEP may be strong evidence of reasonable supervision as against a parent claim that more was required of the school.<sup>325</sup> For example, a student with brittle bone

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Sch. Bd., 560 So. 2d 125 (La. App. 1990) (reasonableness of supervision of older students with intellectual disabilities to be determined in light of the fact that their “bodies are developed beyond their ability to understand or control their [sexual] urges”); *Brooks v. St. Tammany Parish Sch. Bd.*, 510 So. 2d 51 (La. App. 1987) (disability, IEP, and IDEA LRE requirements inform what supervision is required); *Payne v. N.C. Dep’t of Educ.*, 382 S.E.2d 449 (N.C. App. 1989) (student’s deafness is a factor in determining what supervision is reasonable).

322. *See supra* Part I.B.1.b.

323. *Cf. Nicholson v. Freeport Union Free Sch. Dist.*, 902 N.Y.S.2d 192 (App. Div. 2010) (school that allegedly improperly used electric shocks and other aversives on student; parent’s agreement to use of shock device in student’s BIP estops her from asserting school’s use of device was battery); *Ancewicz v. W. Suffolk BOCES*, 730 N.Y.S.2d 113 (App. Div. 2001) (no liability to student with disability injured playing basketball with doctor’s authorization and whose parent had allowed him to “go as far as he felt he could go” with such activities, and no amount of supervision would have prevented the injury). *See generally, e.g., Brooks v. St. Tammany Parish Sch. Bd.*, 510 So. 2d 51 (La. Ct. App. 1987).

324. *See, e.g., Hernandez v. Rapid Bus Co.*, 641 N.E.2d 886 (Ill. App. Ct. 1994) (school potentially liable for student rape after not following usual practice of escorting students with disabilities from bus to school building); *Lyons v. Richmond Cmty. Sch. Corp.*, 990 N.E.2d 470 (Ind. Ct. App. 2013) (student’s plan provided that an assigned aide would supervise her at lunch and cut her food into pieces; school failed to follow through, and the student died after choking on a sandwich); *cf. Martinez v. Moroldo*, 553 N.Y.S.2d 751 (App. Div. 1990) (school potentially liable to seven-year-old intellectually disabled student hit by car because policy required students with disabilities to be dropped off to care of adult); *Edwards ex rel. Edwards v. Baraboo Sch. Dist.*, 803 N.W.2d 868 (Wis. Ct. App. 2011), *cert. denied*, 808 N.W.2d 716 (Wis. 2012) (school failure to implement IEP provisions requiring student with brittle bone disease be released separately from other students); *Guidry*, 560 So. 2d at 125 (school liable for sexual assault to student left unsupervised in violation of policy).

325. *See generally, e.g., C.N. v. Willmar Publ. Schs.*, 591 F.3d 624 (8th Cir. 2010) (claim for improper restraint rejected because the school had followed IEP provisions concerning restraint); *Worthington v. Elmore Bd. of Educ.*, 160 F. App’x 877 (11th Cir. 2005) (seven-year-old student with disability sexually assaulted by another student on a five-seat school bus of students with disabilities which had no aide; affirming judgment as a matter of law on negligence claim against school where school policy provided aides on busses only when required by IEPs, and no students on the bus had such IEPs); *Carter v. Davenport Cmty. Sch. Dist.*, 801 N.W.2d 628 (Iowa Ct. App. 2011) (student who used a walker and had IEP providing for “standby” assistance injured in fall; parent claim that reasonable supervision required

disease injured while alone in a school lab<sup>326</sup> had an IEP that did not provide for constant aide support.<sup>327</sup> The court relied on this evidence to grant summary judgment for the school.<sup>328</sup>

5. *Using IEPs to Identify and Plan for Any Safety Risks Posed by the Student*<sup>329</sup>

When appropriate, schools should also use IEPs as a starting point to ascertain any safety risks posed *by* the student with a disability. Schools may also be liable where a failure to reasonably supervise results in an injury caused by a student with a disability.<sup>330</sup> As an obvious and very serious example, some students are sex offenders who pose grave risks to others, as one Chicago case illustrates.<sup>331</sup> For students whose information does not suggest the student poses risks to others, schools are not likely to be liable for injury caused by the student.<sup>332</sup>

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“hands on” assistance rejected); D.C. Pub. Schs., 111 LRP 26020 (D.C. State Educational Agency Mar. 29, 2011) (safety plan developed by IEP team providing for full time aide, staff monitoring of student’s behavior, class scheduling to avoid certain classmates was followed). Of course, courts and juries are free to decide that reasonable supervision involves more than what is in the IEP.

326. *See* Parent v. Lapeer Cmty. Schs., No. 297656, 2011 WL 2555719 (Mich. Ct. App. June 28, 2011) (student injured when his shirt caught on a joystick on his wheelchair).

327. *Id.* at \*1.

328. *Id.* The substitute teacher, who had been instructed on the student’s IEP, also had given permission to go to the lab only if an adult was present, but the student had decided to go alone. *Id.*

329. For an overview of case law and discussion of issues involving injuries caused by students with disabilities, see Ralph Mawdsley, *Standard of Care and Students with Disabilities*, 148 WEST’S EDUC. L. REP. 553, 564–68 (2001).

330. *Cf.* Cohen v. Sch. Dist., Civ. A. No. 91-4484, 1992 WL 78825 (E.D. Pa. Apr. 9, 1992) (school may be liable if it knows student with disability is violent, places him in general education without appropriate supervision, and student attacks a peer).

331. *See generally* Doe *ex rel.* Ortega-Piron v. Chi. Bd. of Educ., 820 N.E.2d 418 (Ill. 2004) (bus ridden by student who had been declared a sexually aggressive child and whose protective plan forbade ever leaving him alone with other children who sexually assaulted another student when the bus attendant called in sick and was not replaced). More generally, parents may also be liable for injuries caused by their child’s dangerous propensity known to the parents. *See generally, e.g.*, Niewendorp v. Am. Family Ins. Co., 529 N.W.2d 594 (Wis. 1995) (parents’ decision to discontinue medication for child with ADHD was not negligent but parents’ failure to so inform school was negligent cause of student injury to teacher).

332. *See generally, e.g.*, Flores v. City of Berwyn, No. 1-11-3407, 2012 WL 6963323 (Ill. App. Ct. Sept. 10, 2012) (student with an emotional disability stabbed a classmate; school not liable in absence of information suggesting the student was violent).

### 6. *Gathering and Use of Safety Information from Parents*

To support and inform individualized and systemic safety planning, schools should also develop a system for parents to raise safety concerns, such as those raised by Isabella's parents about her safety needs on the bus,<sup>333</sup> and for follow up on those concerns. Isabella's and several other cases involved student injuries even after schools were put on repeated notice by parents of safety problems.<sup>334</sup>

### 7. *Implementation of Individualized Safety Plans*

Schools must faithfully execute any individualized safety provisions they create. Reasonable supervision of students with disabilities may be breached where development or implementation of their IEP or safety plan is impaired.<sup>335</sup> For example, an intellectually disabled student's sexual abuse by peers caused the school to modify her IEP to provide for her separation from male students and for close supervision.<sup>336</sup> Unfortunately, the student was then allowed to go the restroom alone, where over a ten-month period she was sexually abused by classmates on three separate occasions.<sup>337</sup> This failure to implement the IEP's close supervision requirements exposed the school to potential liability under section 504.<sup>338</sup> Similarly, failure to follow another intellectually disabled student's plan requiring an aide

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333. *See supra* note 11 and accompanying text.

334. *See generally, e.g.,* T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011) (parents sent notes to school about bullying and asked to meet with the principal; principal refused to meet and told parents to leave or security would be called; principal also dismissed parents' safety concerns at IEP meeting as "inappropriate topic").

335. In a well-known case involving failure to implement disability-based accommodations, albeit non-safety ones, a court awarded a learning disabled student \$15,000 in damages (including \$10,000 punitive damages) against a teacher who refused to provide oral testing as required by the student's IEP and belittled him in front of the class. *Doe v. Withers*, 20 IDELR 422 (W.Va. Cir. Ct. June 16, 1993). The school district was found not liable, and the teacher was held personally liable. *Id.* In some cases of failure to deliver promised safety or other services, there may be actionable fraud. *Cf. Helbig v. City of New York*, 622 N.Y.S.2d 316 (App. Div. 1995) (principal and school board who allegedly falsified test scores in order to make a student ineligible for special education potentially liable for fraud).

336. *See generally* *Stewart v. Waco Indep. Sch. Dist.*, No. 11-51067, 2013 WL 2398860 (5th Cir. June 3, 2013), *vacated as moot*, 711 F.3d 513 (5th Cir. 2013). Facts are taken from the vacated opinion.

337. *Stewart*, 711 F.3d at 516, 525-27 (also noting failure to train staff, further modify the IEP or take other steps to prevent the abuse).

338. *Stewart*, 2013 WL 2398860, at \*1 (vacating the district court's dismissal of the section 504 claim).

to supervise eating and cut her food into pieces, who then died after choking on a sandwich, exposed her school district to liability.<sup>339</sup>

## E. Sharing Individual Student Safety Information

### 1. *Sharing Information Beyond IDEA Requirements*

The IDEA itself requires that all of the student's teachers and related and other service providers who have responsibility for implementing any part of the IEP have "access" to the IEP.<sup>340</sup> Compliance with this IDEA requirement is not enough to prevent injury or avoid liability. Reasonable supervision of students with disabilities also involves informing all staff members who supervise or work with a student of any relevant provisions of the student's IEP, safety plan, and any additional supervisory issues and information.<sup>341</sup> Any school employee or agent involved in supervising or delivering instruction or any educational services (not just those in the IEP) to the student should be informed of relevant IEP provisions and safety information. For example, Isabella's bus staff<sup>342</sup> and the aides in Jenny's classroom<sup>343</sup> should have had IEP and safety information about Isabella and Jenny. Access to the IEP should be available to all school staff members who work with the student.<sup>344</sup> Because many IEPs are lengthy documents filled with technical information, schools should consider creating a short and nontechnical IEP summary, and share it with appropriate staff.<sup>345</sup> Student privacy law permits these disclosures.<sup>346</sup>

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339. *See generally* Lyons v. Richmond Cmty. Sch. Corp., 990 N.E.2d 470 (Ind. Ct. App. 2013).

340. 34 C.F.R. § 300.323(d) (2013).

341. Earlier commentary advises this information sharing, and specifically suggests making building principals responsible. *See* Mawdsley, *supra* note 108 at 784–95; *see also, e.g.*, Doe v. Big Walnut Local Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742 (S.D. Ohio 2011) (plan that provided for informing bullied student's teachers of his history and of the plan); Small v. Shelby Cnty. Sch., No. W2007-00045-COA-R3-CV, 2008 WL 360925 (Tenn. Ct. App. Feb. 12, 2008) (upholding \$130,000 verdict against school that failed to inform PE teacher of student's asthma, documented in the IEP, in violation of its own policy; PE teacher refused student access to his inhaler and he ended up hospitalized for six months; parent was found twenty percent at fault for not informing school her son could not run, and not further investigating his enrollment in a large general education PE class).

342. *See supra* note 10 and accompanying text.

343. *See supra* notes 16–17 and accompanying text.

344. For a discussion of what limited sharing of IEP information the IDEA requires, *see supra* notes 117–25 and accompanying text.

345. One school's failure to create a summary of a student's section 504 plan, which allegedly resulted in inappropriate discipline and criminal charging of a student for

## 2. *Responsibility for Information-Sharing*

Schools should also assign responsibility for this information sharing to someone on the IEP team<sup>347</sup> or someone responsible for the student's safety plan in appropriate cases.

## F. Staff Supervision

Reasonable supervision of students with disabilities requires the school to carefully supervise its staff. Schools have, for example, faced claims by students with disabilities that a special education teacher negligently supervised an aide,<sup>348</sup> or that an unqualified person supervised a student.<sup>349</sup> Staffing patterns in urban schools<sup>350</sup> make scrupulous supervision of their staffs essential.

### 1. *Background Checks*

School staff<sup>351</sup> who supervise or work with students with disabilities must themselves be well supervised. Their backgrounds should be checked both pre- and post-hire. Background checks should include not only criminal database searches for arrests and convictions, but

fighting during a dodgeball game, which was supervised by a substitute PE teacher, was recently found not to amount to a denial of FAPE. New Lothrop (MI) Area Publ. Sch., 59 IDELR 51 (Office of Civil Rights Mar. 9, 2012).

346. FERPA explicitly permits internal sharing of school records for legitimate educational reasons. 20 U.S.C. § 1232g(b)(1)(A) (2012) (permitting disclosure without consent to "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required"); *see also id* at §1232g(h) (explicitly permitting disclosure without consent of "appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student").

347. Perhaps, for example, this responsibility could be assigned to the (special education) administrator who sits on the team as the representative of the school district. *See* 20 U.S.C. § 1414(d)(1)(B)(iv) (2012).

348. *See generally* Allen v. Crawford, 438 S.E.2d 178 (Ga. Ct. App. 1993) (aide allegedly beat student in bathroom; teacher found not negligent).

349. *See generally* Greening v. Sch. Dist. of Millard, 393 N.W.2d 51 (Neb. 1986) (due to shortage of qualified staff, aide performed physical therapy exercises on student with disability, injuring him).

350. *See supra* Part I.B.2.c.

351. "Staff," for purposes of this Article, includes not only permanent employees but also other persons such as volunteers and contractors, and at least regular or long-term substitutes.

also checks with current and past employers,<sup>352</sup> Internet searches, and review of social media accounts to the extent legally permitted. Checks should be repeated periodically for long-term employees and volunteers to identify any post-hiring events of concern. The school should supervise any student transportation provider or other entity with which the school is contracting for student services. These entities should be investigated and required to background check their employees. Chronic staff shortages at some urban schools,<sup>353</sup> such as the bus staff shortage at HCPS,<sup>354</sup> cannot be allowed to affect doing thorough background checks at those schools before hiring employees in areas of shortage.

## 2. *Appropriate Supervision of Substitute Staff*

A number of students with disabilities have been injured when there was a substitute teacher, substitute aide, or a student teacher.<sup>355</sup> In addition to background checks for at least some substitutes, schools must give substitute employees sufficient guidance to supervise students with disabilities. This guidance must reflect limits in the substitutes' education and training. While in a few states substitute teachers must have a teaching certificate,<sup>356</sup> in others neither teacher training nor formal education beyond high school is required.<sup>357</sup>

Schools should consider having teachers and aides leave standing instructions about student supervision issues for their substitutes, as well as providing access to the IEP or an IEP summary<sup>358</sup> to substitutes.<sup>359</sup> Instructions and summaries for substitutes should include general information, such as what classroom management

352. In the author's experience, checking with persons not on the applicant's reference list can be especially fruitful in uncovering negative information.

353. *See supra* notes 214–17 and accompanying text.

354. *See supra* note 10 and accompanying text.

355. *See, e.g.*, *D.R. v. Middle Bucks Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1991) (sexual abuse of student with disability by classmates in darkroom which was part of classroom where student teacher taught graphics class alone); *see also* cases cited *supra* note 146.

356. *Requirements for Substitute Teachers by State*, STEDI.ORG, <http://stedi.org/subs/resources/how-to-become-a-substitute-teacher/requirements-for-substitute-teachers-by-state> (last visited Dec. 18, 2013) (noting two states, Iowa and Washington, require teaching certificates).

357. *Id.* (noting fifteen states require a college degree, seven states require some college, and twenty require only a high school diploma or GED).

358. *See* discussion *supra* Part II.E.1.

359. *See* discussion *supra* Part II.E.1. IEP summaries could also be shared with general education certified and non certified staff who work with the student.



techniques the regular teacher employs, and information on any supervision issues for individual students. Instructions and IEP summaries should be supplemented with instructions regarding who to call with questions or concerns. Schools could assign substitutes to an experienced teacher as a personal resource. Schools should consider including substitutes who are long-term or frequently used in the disability training<sup>360</sup> provided to permanent education staff.

In urban and some other schools there may be a pool of staff performing the same tasks for students with disabilities (like aides or related services providers, for example), in contrast to a smaller school where the same person provides continuity of service. In this scenario, schools must ensure that all persons providing a service to a student with a disability are up to speed. One student choked to death when her usual aide was not present at lunch to cut up her food and the aide who was assigned to the student that day was unaware of the student's needs.<sup>361</sup>

### 3. *Supervision of Employees of Bus Companies and Other Contractors*

Schools may contract with private providers for student services such as transportation,<sup>362</sup> school security, facilities cleaning and maintenance, as well as some related services such as physical therapy. In urban and some other schools, city employees may provide some of these services.<sup>363</sup>

Any contracting entity should be investigated as to safety history and required to background check its employees. The school's contract with any such entity should require that the entity have and enforce appropriate policies for policing its employees where the school cannot feasibly do so, such as for privately employed school bus drivers, or cleaning staff who work at night or in the early morning. For on-site contract employees such as school security or physical therapists, the school must exercise supervision as it does for

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360. *See supra* Part II.B.

361. *See generally* Lyons v. Richmond Cmty. Sch. Corp., 990 N.E.2d 470 (Ind. Ct. App. 2013).

362. A number of injuries have occurred on student transportation, as discussed *supra* at notes 149–54 and accompanying text. For an example of a claim involving a contracted for transportation provider, see Reguera v. Leduc, No. 012620B, 2005 WL 2461973 (Mass. Super. Ct. Aug. 22, 2005).

363. In fact, a number of school districts in large cities such as Boston, Chicago and New York are now mayorally controlled. *See Local School Boards*, EDUC. COMMISSION STATES, <http://mb2.ecs.org/reports/Report.aspx?id=170> (last visited Dec. 18, 2013).

its own employees. The entity and the school cannot assume the other will conduct appropriate supervision and training, but must together work out arrangements delineating responsibilities.

#### 4. *Active Monitoring of Staff*

In addition to conducting regular staff background checks, school administrators must be proactive in monitoring staff, both to detect any ill-informed, unsafe or inappropriate behavior, and to deter staff from engaging in bad behaviors. For example, school principals should consider walking the hallways and dropping by classrooms unannounced. Schools must also establish systems so that students, parents and others feel welcome to report concerns about staff. Schools must investigate concerns brought to their attention and take appropriate action.

#### 5. *Supervision of Self-Contained Special Education Classrooms*

Some students with disabilities spend most or all of their time in self-contained special education classes. This is disproportionately true for students with disabilities attending urban schools.<sup>364</sup> These classes can be somewhat isolated from the rest of the school.<sup>365</sup> Students placed in these classes may have conditions, such as severe intellectual disabilities, that limit their ability to prevent or report staff abuse or other inappropriate behavior. Several cases in fact allege horrific treatment of such students in these classes.<sup>366</sup> Aide support is not a panacea for this problem. In some instances, aides were present and actively participated in misconduct;<sup>367</sup> in others, aides may feel cowed into silence. This problem may be heightened by the chronic shortage of special education teachers in urban schools.<sup>368</sup>

In addition to making special education placement decisions in conformance with disability's laws requirements for placement in the

364. See *To Assure the Free Appropriate Public Education of All Children with Disabilities—1996*, *supra* note 49, tbl.4.4.

365. See cases cited *supra* notes 174 and accompanying text.

366. See cases cited *supra* notes 173–75 and accompanying text.

367. See generally, e.g., *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775 (10th Cir. 2013) (special education teacher and aide both slapping a child with severe intellectual disability); *Doe v. Nevada*, No. 02:03CV01500LRHRJJ, 2006 WL 2583746 (D. Nev. 2006) (preschool teacher and aide threw three-year-old student with autism against a wall, twisted his arm behind his back, and forced him to hit himself in the head).

368. See *To Assure the Free Appropriate Public Education of All Children with Disabilities—1996*, *supra* note 49.

LRE,<sup>369</sup> schools need to take steps to ensure that inappropriate staff behaviors cannot and do not occur in self-contained classes. Self-contained special education classrooms might be required to keep doors open, or to remove window coverings to provide views into the classroom from the hallway, or to welcome classroom observations by parents of the students in the classes, among other options.

#### CONCLUSION

Among the many challenges faced by urban schools is how to reasonably supervise their many students with disabilities. No school wants students in their custody to be injured or die, as did Isabella Herrera and Jenny Caballero while attending the Hillsborough County Public Schools. In an attempt to avoid or at least reduce future tragedies, and within the larger context of disability law, this Article has identified some of the safety risks to students with disabilities in urban and other schools, and made recommendations to schools for dealing with those risks.

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369. *See supra* Part II.A.