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Immunity Confusion: Why Are Ohio Courts Unable to Apply a Clear Immunity Standard in School-Bullying Cases?

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IMMUNITY CONFUSION: WHY ARE OHIO COURTS UNABLE TO APPLY A CLEAR IMMUNITY STANDARD IN SCHOOL-BULLYING CASES?

Liam H. McMillin

I. INTRODUCTION

When a young student commits suicide because they were bullied at school, who do we blame? Who should be held liable for this student's death? Should it be the student's teacher? The administrators? The school district more broadly? Maybe no one at all? And how do we determine what conduct is blameworthy and what conduct is not?

These questions are purposefully provocative; the subject matter itself is as provocative as it gets. Arising out of these exceptionally terrible moments are necessary questions of law. Legislatively and judicially, Ohio has failed to establish a clear standard to answer these questions. Some aspects *are* clear: Ohio statutes afford immunity from civil liability to individual employees of a political subdivision, which includes a public school, with a few limited exceptions.[1] The policy reasons for these immunity grants are rooted in deep-seated immunity rationales.[2] Until now, Ohio appellate courts have not agreed on a clear standard for when the exceptions should apply to individual educators in cases of bullying leading to injury to the student or the student's suicide.[3]

In the fall of 2020, the Supreme Court of Ohio was presented with a chance to standardize the immunity afforded to educators. In *A.J.R. v. Lute*,[4] the court heard a case where a young student was allegedly bullied by another student. In the suit, the bullied student and her parents argued that the educators should be liable for her injuries.[5] *A.J.R.* is not a case where a bullied student committed suicide, but, as many in the legal

1. OHIO REV. CODE ANN. § 2744 (Lexis 2020).

2. *See generally* Robert J. Schiavoni, *Sovereign Immunity for Political Subdivisions in Ohio: The Past as Present*, 13 OHIO N. U. L. REV. 203 (1986) ("The prominent and fundamental policies supporting immunity are the protection of public funds by avoiding burdensome litigation and costly settlements, and the need to protect the ability of local government to provide services.")

3. This Comment recognizes that the immunity analysis for other potential claims for these cases, such as federal claims brought under 42 U.S.C.S. § 1983, differs considerably from the state law considerations. Anecdotally, applying the "affirmative act" and "state-created danger" analysis, or perhaps the "deliberate indifference" standard, often applied in § 1983 cases would likely result in clearer and more effective standards, but that discussion is beyond the scope of this Comment. *See* Feucht v. Triad Local Schs. Bd. of Educ., 426 F. Supp. 3d 914 (S.D. Ohio 2019); Shively v. Green Local Sch. Dist. Bd. of Educ., 579 Fed. Appx. 348 (6th Cir. 2014) (discussed later in this Comment, but not regarding constitutional claims).

4. A.J.R. v. Lute, 168 N.E.3d 1157 (Ohio 2020).

5. *Id*. at 1158.

profession have heard before, "bad facts can make bad law." In the case presented to the court, undoubtedly a student was injured, presumably as a result of bullying. However, there is a clear contrast between cases with somewhat similar facts, but instead of a poke with a pencil (as in *A.J.R.*), a student commits suicide. In November 2020, the decision in *A.J.R.* did little to clarify the immunity standard for educators in school bullying-suicide cases.[6] The Court only further confused the standard and relied on seemingly contradictory precedent.[7] In order to better understand the decision made by the justices in *A.J.R.*, an investigation into immunity for educators in bullying cases and the standards applied in them is in order.[8]

This Comment provides a general overview of immunity under Ohio state law, as it applies to individual educators, and a brief survey of Ohio cases where appellate districts have ruled on these standards in bullying-suicide cases. Part II discusses immunity generally, addresses the Ohio statutes relevant to immunity, and then discusses the Ohio appellate court cases that apply the immunity analysis to cases of bullying. Part III argues that the standard specified in *A.J.R.* is woefully ineffective, contradictory, and ultimately dangerous, and argues the need to discern a clear standard of conduct that "pierces the shield" of educator immunity in school bullying cases. Lastly, Part IV looks briefly at the ramifications of the standard set by the Court on other individuals granted immunity in Ohio, and the broader problems created by this holding.

II. BACKGROUND

The Eleventh Amendment of the Constitution of the United States reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[9] The common-law doctrine of immunity intends to protect the "'government's ability to perform its traditional functions' by providing immunity where 'necessary to preserve' the ability of government officials 'to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.'"[10] Immunity, in short, is intended to entice

6. *Id.* at 1160.

7. *Id.*

8. For an evaluation of the arguments presented at oral argument in *A.J.R.*, *see* Marianna Bettman, *What's On Their Minds: Are Educators Liable for Bullying Injuries? A.J.R., et al. v. Board of Education of Toledo City School District, et al.*, LEGALLY SPEAKING OHIO (Jul. 13, 2020), https://legallyspeakingohio.com/2020/07/whats-on-their-minds-are-educators-liable-for-bullying-injuries-a-j-r-et-al-v-board-of-education-of-toledo-city-school-district-et-al/.

9. U.S. CONST. amend. XI.

10. Richardson v. McKnight, 521 U.S. 399, 408 (1997) (quoting Wyatt v. Cole, 504 U.S. 158,

people to work for the government and protect the functions of the government by preventing lawsuits that distract officials from their governmental duties. At the state level, there is a broad range of codification and application, often creating confusion between states.[11]

A. Immunity Law in Ohio

In Ohio, the common-law doctrine of immunity is codified in the Revised Code.[12] Ohio immunity law does not provide specific determinations of immunity for schools and their employees. Rather, the broad immunity granted in Ohio Rev. Code Ann. § 2744.03 applies to school employees. The statute, in part, reads:

> In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability. . .[13]

For the purposes of this chapter, a political subdivision means "municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state."[14] Simply put, regional or local governmental organizations or other groups engaged in governmental activities are considered political subdivisions.

Employees of political subdivisions are immune unless:

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167 (1992)).

11. For example, under Kentucky state law, "[q]ualified official immunity applies to the negligent performance of a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority." Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001). However, "an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely the execution of a specific act arising from fixed and designated facts." *Id.* (citing Franklin Cnty v. Malone, 957 S.W.2d 195, 201 (Ky.1997)). There is no mention of recklessness instead applies a negligence standard, but limits when that standard can be applied.

Kentucky complicates things further when it comes to immunity for governmental organizations. Counties in Kentucky are protected by sovereign immunity, municipalities are not. Wilson v. Cent. City, 372 S.W.3d 863, 868 (Ky. 2012). Municipalities are liable for negligent acts outside the legislative and judicial realms. Comair v. Lexington-Fayette Urban Cnty Airport Corp., 295 S.W.3d 91, 95 (Ky. 2009). But Kentucky courts are not clear on whether or not municipalities are protected by governmental immunity. In *Yanero v. Davis*, the court holds that a "governmental corporation [or agency] is ordinarily immune from suit while performing a public function." 65 S.W.3d 510, 520 (Ky. 2001) (quoting Keifer & Keifer v. Reconstruction Finance Corp., 83 L. Ed. 784, 804-5, 306 U.S. 381 (1939)).

12. OHIO REV. CODE ANN. § 2744.01 *et seq.*

13. OHIO REV. CODE ANN. § 2744.03(A).

14. OHIO REV. CODE ANN. § 2744.01(F).

> [t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; [or c]ivil liability is expressly imposed upon the employee by a section of the Revised Code.[15]

Therefore, to "pierce the shield" of immunity and survive summary judgment against public school officials, plaintiffs in school bullying cases must be able to sufficiently prove that one of the exceptions listed in R.C. § 2744.03(A)(6) applies.

B. Educators' Conduct Under R.C. § 2744.03

Generally, Ohio courts apply the *O'Toole* definition of recklessness when determining whether an employee of a political subdivision is immune under R.C. § 2744.03:

> an actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[16]

For conduct to be considered reckless under *O'Toole*, a reasonable person would realize that the conduct creates an unreasonable risk.[17] Thus, recklessness is a higher standard than negligence, but lower than intentional.[18] In the context of R.C. § 2744.03(A)(6)(b), Ohio courts have held that "recklessness is a perverse disregard of a known risk."[19] In short, "the actor must be conscious that his conduct will in all probability result in injury."[20]

Despite the purported simplicity of the term, determining whether an educator acted recklessly in a bullying situation is far from straightforward. The Revised Code defines bullying as "[a]ny intentional written, verbal, electronic, or physical act that a student has exhibited

15. OHIO REV. CODE ANN. § 2744.03(A)(6)(a)-(c) (internal numeration omitted).

16. O'Toole v. Denihan, 889 N.E.2d 505, 516-17 (Ohio 2008) (quoting Thompson v. McNeill, 53 Ohio St.3d 102, 104-5 (1990) (quoting Restatement of the Law 2d, Torts (1965), §500)). As discussed later in this Comment, this broad and single use of "reckless" is problematic.

17. *Id.*

18. *Id.*

19. *Id. See also* McGuire v. Lovell, 85 Ohio St.3d 1216, 1219, 709 N.E.2d 841 (1995) (Moyer, C.J., dissenting); Jackson v. Butler Cty. Bd. of Cty. Commrs., 76 Ohio App.3d 448, 454, 602 N.E.2d 363 (1991) ("we recently held that the term `reckless' as used in [OHIO REV. CODE ANN. §] 2744.03(A)(6)(b) means a perverse disregard of a known risk").

20. O'Toole, 889 N.E.2d at 516-17, (quoting Fabrey v. McDonald Village Police Dept., 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994)).

toward another particular student more than once," causing the latter to experience mental or physical harm, and "[i]s sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student."[21] In other words, recurring acts directed toward other students causing them harm serious enough to disrupt the learning environment are considered bullying. In many school-bullying cases, the individual educator's determination of whether or not bullying actually occurred plays an important role in establishing whether their conduct subsequent to that determination rises to a level that defeats immunity.[22]

C. Ohio Cases That Apply the Immunity Analysis to Bullying

1. Pre-A.J.R. Caselaw

Before *A.J.R.*, Ohio courts applied varying standards to individual employee's conduct in school bullying cases. Some courts have applied a recklessness standard,[23] others a wanton misconduct standard,[24] and still others a "willful and wanton" standard.[25] The court used a recklessness standard in *Vidovic v. Hoynes*.[26] In *Vidovic*, the parents of Sladjana Vidovic, on their own behalf and the behalf of their daughter's estate, filed a complaint against the superintendent of the Mentor Public School District and the principal and guidance counselor of Mentor Public High School.[27] The Vidovics alleged that in 2008, their daughter committed suicide following months of bullying and harassment.[28] The Vidovics argue that the defendants knew about the bullying and failed to intervene.[29] The defendants filed a motion for summary judgment, arguing that the Vidovics failed to prove that the educators' conduct rose to the level of wanton or reckless conduct.[30] The district court granted

21. OHIO REV. CODE ANN. § 313.666(A)(2).

22. The Revised Code's definition of bullying as provided here rarely makes its way into the decisions. For the purpose of this Casenote, the focus remains on immunity and not the definition of bullying itself. *See, e.g.*, Aratari v. Leetonia Exempt Vill. Sch. Dist., 2007-Ohio-1567 (7th Dist.); Golden v. Milford Exempted Vill. Sch. Dist. Bd. of Educ., 2011-Ohio-5355 (12th Dist.); and Vidovic v. Hoynes, 2015-Ohio-712 (11th Dist.).

23. Vidovic v. Hoynes, 29 N.E.3d 338 (Ohio Ct. App. 2015).

24. Estate of Smith v. Western Brown Local School District, 26 N.E.3d 890 (Ohio Ct. App. 2015).

25. Mohat v. Horvath, 2013-Ohio-4290 (Ohio Ct. App. 2013).

26. 29 N.E.3d 338 (Ohio Ct. App. 2015).

27. *Id.* at 341.

28. *Id.*

29. *Id.*

30. *Id*. at 341.

summary judgment and the appellate court affirmed.[31]

Sladjana's harassment appeared to have started in middle school and extended into high school.[32] As a sophomore during the 2007-2008 school year, Sladjana complained to her family and friends of being picked on and reportedly informed the school of these instances.[33] Following an incident where Sladjana was allegedly pushed down the stairs at school, Sladjana threatened to kill herself and was admitted to the hospital.[34] After her release and prior to her return to school in the winter of 2008, her mother met with members of the school, including the principal, Spiccia, and guidance counselor, Goss.[35] At this meeting, Sladjana's mother informed them that Sladjana was in the hospital because of trouble at school and asked the educators to protect her. A plan was built to protect Sladjana.[36] Following this meeting, there were very few reported instances of bullying or harassment noted by the court. [37] In the fall of 2008, Sladjana began homeschooling.[38] On October 2, 2008, Sladjana killed herself.[39]

The Eleventh District found that Spiccia, the principal, was unaware of the alleged incidents of bullying and harassment prior to the meeting where the plan was formulated, and even if he were not, the plan put in place at that meeting was "in place for an adequate period of time to address [Sladjana's] issues."[40] Because he "set forth a specific plan, relied on his staff to carry it out, and checked on Sladjana's progress," the court found that he did not act in bad faith, maliciously, or recklessly.[41]

Additionally, the court held that although the guidance counselor, Goss, met with Sladjana multiple times after the meeting to discuss incidents as they occurred, Goss's failure to communicate about Sladjana to other individuals besides Spiccia, such as Sladjana's therapist, did not rise to the level of recklessness.[42] The court noted that even though Goss's "support for Sladjana may ultimately not have addressed her mental health issues or stopped all conflicts . . . this does not mean that Goss'[s] conduct rises to the level necessary to find that her actions were reckless,

31. *Id.* at 341-42.
32. *Id*. at 342.
33. *Id*. at 342.
34. *Id.* at 343-44.
35. *Id.* at 343-44.
36. *Id.* at 344.
37. *Id*. at 349.
38. *Id*. at 346.
39. *Id.*
40. *Id.* at 349.
41. *Id.*
42. *Id*. at 350.

wanton, or demonstrated malice."[43]

The Twelfth District came to similar conclusions in *Estate of Smith v. Western Brown Local School District*, although the court applied both a wanton and a reckless standard to the educators' conduct, rather than just a recklessness standard.[44] In *Smith*, the Twelfth District affirmed the grant of summary judgment to the defendant principal, assistant principal, and superintendent based on their immunity under R.C. § 2744.03.[45] The complaint, brought by the estate of Chance Smith, alleged that the educators should be held liable for Chance's suicide because they failed to exercise care in regard to Chance.[46] Before Chance took his own life, the school was made aware of multiple notes directed at Chance or his friends. All three of the notes contained threats to kill Chance.[47] The principal suspected that Chance was the author of all three notes, and some students corroborated this suspicion.[48] One of Chance's friends, initially suspected of writing the notes, conveyed to the principal that he was worried that Chance was going to kill himself and relayed some strange conversations he had recently had with Chance.[49] The Monday after, Chance did not show up for school and he was found dead that evening.[50] Before they knew about Chance's death, the principal and superintendent had a conversation where they decided that Chance should be "referred for a mental health evaluation and placed in their virtual learning program."[51]

The Twelfth District set out two different standards under which an educator can be liable for conduct related to bullying. First, it held that "[w]anton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances where there is a great probability that harm will result."[52] Second, the Twelfth District held that "[r]eckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct."[53] The court held that "the defendants are immune from liability in this action unless the Estate can show that one of the

43. *Id.* (omitting the court's determination as to the superintendent's immunity, which is based on a general distance from the issue, and a reliance on her employees).

44. 26 N.E.3d 890 (Ohio Ct. App. 2015).

45. *Id.* at 902.

46. *Id*. at 901.

47. *Id.* at 893.

48. *Id.* at 893-4.

49. *Id.* at 894.

50. *Id.* at 894-5.

51. *Id*. at 895.

52. *Id.* at 901 (quoting Anderson v. Masillon, 983 N.E.2d 266).

53. *Id.* (quoting *Anderson*, 983 N.E.2d 266, at 273).

exceptions to immunity identified in [R.C. §] 2744.03(A)(6)(b) applies."[54] To the Twelfth District, the key difference between the wanton and reckless definitions is whether the risk is known. If there is a duty of care owed, and that duty is not exercised, the individual can be liable for wanton conduct. For the conduct to be reckless, the individual must know of the risk and disregard it or act indifferently towards it. Wanton conduct does not require that the risk of harm be known, but rather that no care was given at all. Potentially, in contrast, conduct could be considered reckless if the "conscious disregard" or "indifference" is unreasonable given actual or expected knowledge of a risk of harm.

In *Smith*, the court found that the plaintiffs failed to show the defendants acted in a wanton or reckless manner, and therefore the educators were protected by R.C. § 2744.03.[55] The court found that educators "went to great lengths to gather information, assess the nature of the threats contained in the notes, and ultimately to contact Chance's parents."[56] Although the principal had formulated the suspicion that Chance authored the notes, the court found that the principal "could not reasonably believe that the notes, instigated by Chance to secure the attention of his girlfriend, constituted a real threat that Chance would hurt himself or his girlfriend. . ."[57]

Additionally, as soon as the educators learned that Chance had threatened to kill his friend and then kill himself, they acted immediately by calling Chance's parents.[58] The court did not give weight to the fact that Chance had not been in school in over 48 hours.[59] Because of the investigation and swift action, the court could not find that any of the educators acted recklessly or in a wanton manner.

Unlike the standards in *Vidovic* or *Estate of Smith*, the Eleventh District's analysis focused on "willful and wanton," and interpreted a "grossly negligent standard" to fall under the immunity exceptions as well.[60] In *Mohat v. Horvath*, the Eleventh District affirmed a trial court's denial of a motion to dismiss based on immunity under R.C. § 2744.03.[61] In *Mohat*, the parents of E.M. filed a complaint against E.M.'s high school teacher, Horvath, alleging that E.M. committed suicide as a result of his

54. *Id*. at 900.

55. *Id.* at 902.

56. *Id.* at 901.

57. *Id.*.

58. *Id.* at 902.

59. *Id*.

60. Mohat v. Horvath, 2013-Ohio-4290, ¶23 (Ohio Ct. App. 2013). Judges Cynthia Westcott Rice, Timothy P. Cannon, and Colleen Mary O'Toole heard this case. Judges Cannon and O'Toole also heard *Vidovic*, which was decided differently.

61. *Id*.

failing to protect E.M. from bullying in his class by other students.[62] E.M.'s parents alleged in their complaint that E.M. was subjected to "unrelenting name-calling, teasing, and verbal harassment," including "vile and degrading names that were sexual in nature, such as 'fag,' 'queer,' and 'homo.'"[63] Additionally, E.M. was repeatedly pushed, shoved, and hit.[64]

The Mohats alleged that Horvath "knew about this bullying and harassment directed against E.M." because most of it took place in his classroom, and E.M. complained to him about it.[65] Additionally, the Mohats alleged that on the day E.M. committed suicide, another student told E.M., in Horvath's class and in front of Horvath, "Why don't you go home and shoot yourself? No one would miss you."[66] Further, the Mohats alleged that Horvath knew or should have known that another student at Mentor High School had committed suicide as a result of bullying.[67] Despite his intimate knowledge of these incidents, Horvath allegedly did nothing to stop the bullying and never reported it to school officials.[68]

The Mohats alleged that Horvath's actions were "grossly negligent."[69] Horvath argued this claim should be barred by his immunity because "a claim for gross negligence does not require a showing of malice, bad faith, or wanton or reckless conduct" as required by R.C. § 2744.03(A)(6)(b).[70] The Eleventh District, however, found that "Ohio Appellate Districts have held that 'gross negligence is evidenced by *willful and wanton* conduct,'" and therefore falls under the immunity exceptions.[71]

The Eleventh District found that the Mohats had sufficiently alleged facts that, if proven, would plausibly allow them to recover.[72] The court held that the Mohats' allegations that the repeated bullying and harassment occurred in Horvath's classroom with him present and that Horvath had actual knowledge of E.M. being bullied and failed to do anything about it were enough to overcome a motion to dismiss.[73]

In 2014, the Sixth Circuit held that educators who made a deliberate decision not to enforce school policy acted reckless and therefore were

62. *Id.* at ¶2.
63. *Id.*
64. *Id.*
65. *Id.* at ¶3.
66. *Id.* at ¶4.
67. *Id.* at ¶5.
68. *Id.* at ¶6.
69. *Id.* at ¶7.
70. *Id.* at ¶23.
71. *Id.* (quoting Harsh v. Lorain Cty. Speedway, Inc., 675 N.E.2d 885 (8th Dist. 1996)).
72. *Id.* at ¶29.
73. *Id.* at ¶32-4.

not protected by immunity under R.C. § 2744.03.[74] In *Shively*, student T.S. was subject to gender- and religion-based bullying at school for several years.[75] T.S. and her parents brought suit in federal court against the district and individual educators and administrators under substantive due process, equal protection, and state-law tort claims.[76] The district court denied qualified immunity to all of the individual educators.[77] The Sixth Circuit affirmed this decision, writing: "[t]he question of recklessness turns on whether Defendants knew of and could foresee harm to a student and whether they took actions in response to the harassment."[78]

There is no clear agreement between Ohio appellate courts as to what the appropriate standard for determining whether an individual educator's conduct constitutes an exception to R.C. § 2744.03(A)(6)(b). A broad and ambiguous interpretation of the statute thus far has led a variance in subjective standards applied by Ohio courts to determine whether immunity applies to educators in school bullying cases.[79] Thus, it is no surprise that the holdings of Ohio appellate districts run the gambit.[80] In many cases where immunity was granted to the individual employees, the court relied solely on a determination that the employee's conduct did not rise to "the high standard of being described as reckless, wanton, or with malice" without providing a clear application of the individual terms used in that standard.[81]

2. A.J.R., et al., v. Lute, et al.[82]

In the fall of 2020, the Supreme Court of Ohio heard argument in *A.J.R. v. Lute*.[83] Plaintiffs, the child A.R. and her parents, brought suit against the Toledo City School District and individual educators.[84] They alleged that A.R. was bullied and poked in the face with a pencil by her fellow students, and the educators acted recklessly and should have protected

74. Shively v. Green Local Sch. Dist. Bd. of Educ., 579 Fed. Appx. 348, 360 (6th Cir. 2014).

75. *Id.* at 350.

76. *Id.*

77. *Id.*

78. *Id.* at 359-60.

79. *See* cases discussed *supra* Part II(C)(1).

80. These holdings nearly all come on motions for summary judgment, which limits the factual evaluation. To answer immunity questions, the court stands on a basis of presumption, dealing with many "presuming [blank]"s and "even if"'s. *See*, *infra*, Part II(D).

81. O'Toole v. Denihan, 889 N.E.2d 505 (2008).

82. A.J.R. v. Lute, 168 N.E.3d 1157 (Ohio 2020).

83. *Id.*

84. *Id.* at 1158. Throughout the briefs filed by the plaintiffs and defendants, they switch back and forth between using "A.J.R." and "A.R." to identify the child. The appellate court and Supreme Court of Ohio both use "A.R.," as will this Comment.

A.R. from her injury.[85]

The educators asserted that they took "various steps" to address the reports of bullying they received from A.R.'s parents.[86] The principal, Schade, spoke to the students, including the student who eventually hurt A.R., after being informed that A.R. was being teased.[87] Schade also stated that he would frequently visit A.R. during lunch, and A.R. had always told him that "things were going okay."[88]

The acting assistant principal, Skaff, stated that she spoke to A.R. after the initial report from A.R.'s father and would check in periodically.[89] Each time, Skaff stated that A.R. seemed fine.[90] A.R.'s teacher, Lute, asserted that once she was informed of the teasing, she "monitored A.R. and the other students," and "would have intervened" if the student who injured A.R. would have attempted to tease her.[91]

The trial court granted the school's motion for summary judgment, holding that the educators were immune under R.C. § 2744.03 and that A.R. and her parents failed to demonstrate an issue of fact as to whether the educators disregarded a "known or obvious risk of physical harm to A.R."[92] On appeal, the Sixth District found there was a genuine issue of material fact as to whether the educators' conduct was reckless and held that the trial court had erred in granting the motion for summary judgment.[93]

The main issue before the Supreme Court of Ohio was whether or not the educators acted recklessly.[94] Settling this issue would determine whether they should be granted immunity under R.C. § 2744.03.[95] The Court accepted jurisdiction over a sole proposition of law raised in the appeal:

> There can be no finding of reckless conduct or perverse disregard of a known risk where the record establishes that in response to reports of student teasing, educators promptly speak with the students about the teasing, frequently ask how they are doing, and regularly monitor the students in the lunchroom and classroom. Under these circumstances, if a student with no history of violence later pokes another student with a pencil, [Ohio Rev. Code Ann. §] 2744.03(A)(6) shields these educators

85. *Id*.
86. *Id*. at 1159.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1159.
93. *Id.*
94. *Id.* at 1157.
95. *Id.*

from liability.[96]

The Court was persuaded by this proposition.[97] It held that the educators "did not act in perverse disregard of a known risk," and therefore "their conduct was not reckless."[98] Because the educators "took steps to address the reports of bullying" and "paid special attention to [A.R.] and the situation," the court held that "they neither consciously disregarded any risk nor were indifferent to any risk."[99]

The *A.J.R.* court paid special attention to two cases when determining the standard for recklessness: *O'Toole v. Denihan*[100] and *Anderson v. Massillon*.[101] The *O'Toole* definition of recklessness, as included in the opinion, is "a perverse disregard of a known risk."[102] Writing that "[t]his court has further explained [since *O'Toole*] that 'reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances . . .'"[103] Despite the difference in language ("perverse" versus "conscious" disregard), the Court treated *O'Toole* and *Anderson* as equivalent.[104] Throughout the analysis, however, the Court applied the *O'Toole* standard of recklessness and quoted *O'Toole* in its holding.[105]

D. The Three Standards

The text of R.C. § 2744.03 is straightforward: for an employee of the government to be immune, their conduct must not be "with malicious purpose, in bad faith, or in a wanton or reckless manner."[106] In school-bullying cases, courts rarely apply the former two clauses of this provision, and instead focus on the "wanton or reckless" standard.[107] But the difference between wanton and reckless conduct is unclear. The Sixth Circuit distinguishes the two by noting that "[a] person acts wantonly if that person acts with a complete 'failure to exercise any care whatsoever.' One acts recklessly if one is aware that one's conduct 'creates an

96. *Id.* at 1160.

97. *Id.* at 1161.

98. *Id.* at 1163.

99. *Id.* at 1162.

100. 889 N.E.2d 505 (Ohio 2008).

101. 983 N.E.2d 266 (Ohio 2012).

102. A.J.R. v. Lute, 168 N.E.3d 1157 (Ohio 2020), *quoting* O'Toole, 507.

103. *Id.* (*quoting* Anderson, 268).

104. *See, e.g.*, *id.* at 1162.

105. *Id.* at 1163.

106. OHIO REV. CODE ANN. § 2744.03(A)(6)(b).

107. In a situation where the educator was the bully, there likely would be an application of "malicious" or "in bad faith." That is not the case for the purposes of the cases highlighted in this Comment.

unreasonable risk of physical harm to another.'"[108] This suggests that wanton conduct is more along the lines of non-conduct, and reckless conduct is more affirmative conduct.[109]

However, the *O'Toole* definition of recklessness applied in *A.J.R.* does not reflect the Sixth Circuit's approach. Instead, the *O'Toole* court explained:

> an actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[110]

Under this definition, conduct is considered reckless if (1) the conduct recklessly disregards the safety of others, or (2) the actor has a duty to another and the failure to perform that duty creates an unreasonable risk of harm.

Effectively, these definitions conflate wantonness and recklessness to the point of utter confusion. A simple understanding of the terms would lead to three potential standards of conduct that fall under wanton and reckless:

Standard 1:	a failure to exercise any care (wanton).
Standard 2:	a failure to perform an existing duty to another, creating an unreasonable risk of harm (reckless).
Standard 3:	conduct that disregards the safety of others (reckless).

These standards, however, become not-so-simple as courts continue to conflate them with each other.

Some Ohio courts, such as that in *Vidovic*, hold that because *some* action was taken, the conduct was not reckless, but does not mention "wanton" in the paragraph at all, despite using reasoning that would likely fall under Standard 1.[111] In *Smith*, the court held that "[w]anton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances where there is a great probability that harm will result," which effectively conflates Standards 1 and 2.[112] The *Smith* court did recognize "reckless" and "wanton" as separate determinations but then conflated the definition of the two into one

108. *Shively*, 579 Fed. Appx. at 359 (*quoting* Spears v. Akron Police Dep't, 2010-Ohio-632 (Ohio Ct. App. 2010)) (internal citations omitted).

109. This is not a direct allusion to the term "affirmative action" applied in § 1983 cases, but perhaps a tertiary one.

110. O'Toole v. Denihan, ¶73 (2008) *(quoting* Thompson v. McNeill, 53 Ohio St.3d 102, 104-5 (1990) *(quoting* RESTATEMENT (SECOND) OF THE L. OF TORTS, §500) (Am. L. Inst. 1965)).

111. Vidovic, 29 N.E.3d 338, 349 (Ohio Ct. App. 2015).

112. 26 N.E.3d 890, 901 (quoting Anderson v. Masillon, 983 N.E.2d 266, 273).

definition of "wanton."[113] In *Mohat*, the court held that the conduct was not "willful and wanton," because the teacher failed to take any action after being given notice of bullying, but did not speak to duty, effectively combining Standards 1 and 3.[114] The Sixth Circuit in *Shively* focused their analysis on "whether [d]efendants knew of and could foresee harm to a student and whether they took actions in response to the harassment," which conflates Standards 1 and 2, placing its analysis firmly in the first half of Standard 2 and then substituting Standard 1 for the latter half of Standard 2.[115] These differences are not subtle, and the variance between the discernible standards and the application of those standards forges an opaque, and dangerous, lens through which courts view educators' conduct.

III. DISCUSSION

The use of different legal standards for immunity under R.C.§ 2744.03 leaves courts confused with how to proceed in these cases. How are plaintiffs expected to understand whether or not they have a claim? How are defendants to know what conduct is expected from them? And, most importantly of all, how should Ohio courts determine immunity in cases of school-bullying-caused-suicide cases?

Each of the discernible standards—(1) a failure to exercise any care; (2) a failure to perform an existing duty to another, creating an unreasonable risk of harm; and (3) conduct that disregards the safety of others—fall short of providing a clear answer to these questions. Courts are so bent on upholding immunity in broad policy strokes that they neglect the seriousness of the issue at hand, which is that children are killing themselves. Opaque standards and inconsistent application yield unclear expectations of conduct for educators, which in turn results in inconsistent actions taken to provide adequate support for students who are subjected to bullying or to prevent bullying in the first place.

A. O'Toole and Anderson

Anderson v. Masillon, the other case relied on by the court in *A.J.R.*, should have clarified this discrepancy. The first line of the syllabus in *Anderson* reads, "'[w]illful,' 'wanton,' and 'reckless' describe different and distinct degrees of care and are not interchangeable."[116] The *Anderson* court, writing after *O'Toole*, defines these three terms in the context of

113. *Id.*
114. Mohat v. Horvath, 2013-Ohio-4290 (Ohio Ct. App. 2013).
115. *Id.* at 359-60.
116. Anderson, 983 N.E.2d 266, Syllabus 1.

R.C. § 2744.03 clearly and distinctly:

> Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.[117]
>
> Wanton misconduct is the failure to exercise any care toward those whom a duty of care is owed in circumstances in which there is a great probability that harm will result.[118]
>
> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.[119]

These three categories of conduct are distinct and separate and are not interchangeable under *Anderson*.[120] R.C. § 2744.03(A)(6)(b) lists two of these categories specifically: "wanton" and "reckless."[121] The *Anderson* court clarified explicitly that "wanton" and "reckless" denote different categories of conduct, either of which is sufficient to "pierce the shield" of immunity given their specific inclusion in R.C. § 2744.03(A)(6)(b).[122]

Yet, despite this purported clarity, the Supreme Court of Ohio in *A.J.R.*, eight years after *Anderson*, still used the terms "wanton" and "reckless" interchangeably when deciding whether individual employees should be granted immunity.[123] The Court was presented with a proposition of law in *A.J.R.* that read, in part, that "[t]here can be no finding of reckless conduct or perverse disregard of a known risk . . ."[124] The attorneys for the educators themselves separated the (incorrect) definition of "perverse disregard" from the category of recklessness, seemingly to follow *Anderson*. Further, their proposition of law states that under the circumstances of this particular case, "[R.C. §] 2744.03(A)(6) shields these educators from liability."[125]

But, in deciding *A.J.R.*, the Court only analyzed the conduct under a recklessness standard pulled from *O'Toole*. This indicates one of two things: (1) the court is conflating, or using interchangeably, the terms "wanton" and "reckless" as one single exception to R.C. §

117. *Id*. at 273 (citing Tighe v. Diamond, 149 Ohio St. 520, 527, 80 N.E.2d 122 (1948)).
118. *Id.* (citing Hawkins v. Ivy, 50 Ohio St.2d 114, 117-8, 363 N.E.2d 367 (1977)).
119. *Id.* (citing Thompson v. McNeill, 53 Ohio St.3d 102, 104-5, 559 N.E.2d 705 (1990)).
120. *Id.* at 274.
121. OHIO REV. CODE ANN. § 2744.03(A)(6)(b).
122. Anderson v. Masillon, 2012-Ohio-5711, ¶23.
123. A.J.R., 168 N.E.3d 1157, 1160, 1161, and 1163.
124. *Id*. at 1160.
125. *Id.*

2744.03(A)(6)(b), or (2) the court requires a plaintiff attempting to pierce the shield of immunity to specifically categorize the conduct as "wanton" or "reckless," and the analysis is limited to whichever is alleged specifically. The former is considerably more likely than the latter, especially given the conflicting and mangled definitions the court used to decide *A.J.R.* The court continually used the *O'Toole* phrasing of a "perverse disregard," which, when analyzed through an *Anderson* lens, does not fit into any of the categories.

Even more confusing, the Supreme Court of Ohio clearly has read the opinion in *Anderson*, as they quote it directly in *A.J.R.*[126] The opinion in *Anderson* is not very long,[127] and is very explicit: wanton and reckless are not interchangeable and each describe a separate category of conduct that can pierce the shield of immunity.[128] But rather than follow this clear delineation—which, as discussed later, would likely yield the same result—the Court appears to agree with the dissent in *Anderson*, although without explicitly doing so.

The dissent in *Anderson* argued that "wanton" and "reckless" should be used interchangeably because the goal of the immunity statute is to protect employees of political subdivisions from liability for negligent conduct.[129] The dissent notes that "[a]lthough there may be subtle differences among 'reckless,' 'wanton,' and 'willful,' in the context of the immunity statute the three words all function to describe conduct greater than negligence."[130] In other words, the statute should read instead that the employee is immune from liability if the employee's conduct was negligent. The words "wanton" and "reckless" in R.C. § 2744.03(A)(6)(b) are not separate categories of conduct but simply indicators that conduct rises to a level above negligence.

If the *A.J.R.* opinion applied this interpretation of R.C. § 2744.03(A)(6)(b), then there is at least a discernible, logical holding: the specific definitions of "wanton" and "reckless" need not be clarified or separated, because as long as the educators conduct does not rise above negligence, the educators are protected.

The problem with the *A.J.R.* holding, however, is that although the logic may be discernible, it is by no means structurally sound. Beyond seemingly relying on a dissent in a case where the majority is cited to in their own opinion, a simple, plain reading of the statute indicates the opposite. In *Anderson*, the court addresses the three different categories of conduct—willful, wanton, and reckless—because different sections of

126. *Id*. at 1161.

127. The opinion is only ten pages, with an additional a two-page dissent.

128. Anderson v. Masillon, 983 N.E.2d 266, 274.

129. *Id*. at 276 (Lanziger, J., concurring in part and dissenting in part).

130. *Id.* (Lanzinger, J., concurring in part and dissenting in part).

the Ohio immunity statute, R.C. § 2744, use those words distinctly. R.C. § 2744.02(B)(1)(b) affords immunity to political subdivisions from liability for injuries caused by a fire-department vehicle as long as the operation of the vehicle does not constitute "willful or wanton misconduct;" R.C. § 2744.03(A)(6)(b) affords liability to political-subdivision employees for "acts or omissions not committed in a wanton or reckless manner."[131] The word choice is particular, careful, and important.

Further, if the legislature's intention was to solely protect political-subdivision employees from their negligent conduct, why not simply do so? "Wanton" and "reckless" are specific terms with specific meanings. If only one of the words were used, then it would be read specifically. Logically, it is unsound to argue that, because two specific words were used, they each lose their particular meaning in service of a basic separation between negligent conduct and conduct greater than negligent.

Yet, this is what the Supreme Court did in *A.J.R.*. Rather than acknowledge and apply the clarity of *Anderson*, the Court chose instead to apply the *O'Toole* recklessness standard, which is both outdated and only half of the analysis required for an immunity analysis under R.C. § 2744.03(A)(6)(b). The question remains: why not just follow *Anderson*?

B. An Application of Anderson

The simplest explanation for the holding in *Anderson* is that the Court sought to broaden immunity afforded to employees of political subdivisions. At first glance, it may appear that conflating "wanton" and "reckless" into one concept of "not negligent" would lead to the exception in R.C. § 2744.03(A)(6)(b) being applied more often, and therefore there being *less* immunity granted. However, this is unlikely. Instead, the Frankenstein standard adopted by the Court in *A.J.R.* takes the most restrictive aspects of "wanton" and "reckless" and combines them into a new standard that is even harder to satisfy.

But what if the Court did decide to follow and apply *Anderson*? Rather than conflate two terms into one concept, following *Anderson* would treat the analysis of whether or not to afford immunity as it is written in R.C. § 2744.03(A)(6)(b): the employee is afforded immunity unless their acts or omissions were in a wanton *or* reckless manner. *Anderson* is clear that the terms cannot be used interchangeably.[132] Using the definitions provided by the *Anderson* court, the *A.J.R.* court could have derived clear standards for each term, including:

131. *Id.* at 268.

132. *Anderson*, 274.

> Wanton:
> (1) the failure to exercise any care
> (2) toward those whom a duty of care is owed
> (3) in circumstances in which there is a great probability that harm will result.
>
> Reckless:
> (1) the conscious disregard of or indifference
> (2) to a known or obvious risk of harm to another
> (3) that is unreasonable under the circumstances and
> (4) is substantially greater than negligent conduct.[133]

If the conduct of the employee can be categorized as either wanton *or* reckless, they are not immune. Necessarily, if the conduct rises to the level of wanton or reckless, the conduct will not be considered negligent.

The importance of this delineation cannot be overstated: wanton and reckless describe different types of conduct, each of which is enough to pierce the shield of immunity. An employee who acts wantonly has a duty of care towards a person, fails to exercise any care at all, and there is a great probability that harm will result. There has to be a "great probability" that harm will result, not simply the existence of a known or obvious risk of harm. Recklessness, in contrast, requires that a risk of harm be known or obvious, and the employee consciously disregards or is unreasonably indifferent to that risk.

Each term is balancing two concepts: the risk of harm and the level of action required. The wanton standard only applies if there is an existing duty of care. The rest of the analysis puts more weight on the risk of harm and less on the action because the risk has to be likely to occur and the employee took no action whatsoever. The reckless standard, on the other hand, puts more weight on the action and less on the risk of harm because the risk of harm need only be known or obvious, and then the employee consciously disregarded that risk. These concepts denote completely different types of conduct. The balancing of risk and action is different under each category because each category is meant to protect individuals from different types of conduct. By conflating the categories, the Supreme Court was able to pick and choose which elements of each to apply, thereby creating a hybrid standard that is neither wanton nor reckless.

The Supreme Court should have applied *Anderson* to the facts of *A.J.R.* to determine whether each educator should have been protected by R.C. § 2744.03(A)(6)(b). Their individual conduct should have been analyzed for wantonness or recklessness. Employing that analysis, the court in *A.J.R.* would likely have come to the same conclusion but without confusing the law.

133. *Id*. at 273 (formatting and numbering added).

For example, under *Anderson*, applying the wanton analysis to the principal, Schade, and assistant principal, Skaff, it is clear that they both exercised *some* care by checking in on A.R. after receiving reports of bullying. The analysis would stop there, but *arguendo*, turning to the third prong, there was little to no indication that there was a "great probability" that A.R. would suffer harm. There was some indication that A.R. was subject to teasing and some minor pushing, but the circumstances did not create a "great probability" that A.R. would suffer harm. As for recklessness, it would be difficult to argue that, even if the risk was known and obvious, Schade and Skaff "consciously disregarded" the risk. Instead, they took reasonable steps to check in on A.R. once being made aware of the teasing. Had the Supreme Court followed *Anderson*, they likely would still have granted summary judgment for Schade and Skaff.

As for A.R.'s teacher, Lute, even if the Court found that "monitoring" was not enough to satisfy the first element of wanton conduct under *Anderson*, then it would still be unlikely that the Court would find that there was a "great probability" of harm. Given the allegations in the record, the Court would presumably find that it was unlikely that A.R. would suffer harm and therefore the educators' conduct would not have risen to the level of wanton. Further, Lute's conduct would likely not have been considered reckless because, even if Lute knew about some risk and was indifferent to it, the Court would likely find that she did not act unreasonably.[134] Perhaps even placing the two students at the same table would not be unreasonable if Lute had known that the other student who stabbed/poked A.R. with the pencil had teased A.R.—evidence in the record showed thar A.R. often sat with the students reported to have teased her.

If the Court had followed *Anderson* directly, its decision in *A.J.R.* would almost certainly remain the same. The two-part analysis under R.C. § 2744.03(A)(6)(b)[135] yields the same result as the Frankenstein-standard employed by the Court. However, following *Anderson* would have avoided the almost certain future confusion the actual holding will cause.

134. This part of the analysis is the closest to changing under an *Anderson* analysis, but even still, would not likely change the outcome.

135. OHIO REV. CODE ANN. § 2744.03(A)(6)(b) actually has a four-part test for conduct. Was the conduct (1) with malicious purpose, (2) in bad faith, (3) in a wanton manner, or (4) in a reckless manner?

> "In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless . . . [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner . . ."

OHIO REV. CODE ANN. § 2744.03(A)(6)(b). This Comment has focused on the latter two, as do most courts. Rarely are courts asked to determine whether an educator acted maliciously or in bad faith.

IV. CONCLUSION

When a bullied student commits suicide, who should be liable, and when? Under *A.J.R.*, the answer is even more unclear than it was before. Instead of providing guidance and clarifying the three standards from appellate courts, the Supreme Court created yet another standard to apply.

As was noted above, "bad facts can make bad law." In *A.J.R. v. Lute*, there was no deviation from this maxim. The case brought by the plaintiff was so weak that it essentially gave the Supreme Court a chance to choose whatever standard it pleased to determine whether the individual educators should be afforded immunity and to cement that as the standard for R.C. § 2744.03(A)(6)(b) going forward. Presented with that chance, the Court did just that: flying in the face of their own decision in *Anderson*, the Court instead cobbled together a Frankenstein of a standard, relying on the out-of-date *O'Toole* and carefully isolated phrases and sentences from *Anderson*. Rather than embrace the clarity of the distinct categories of conduct drawn and defined in *Anderson*, the Court instead mashed together "wanton" and "reckless" into one simple concept: not negligent. This loose reading of the statute, seemingly built on the lone dissent in *Anderson,* was not only unnecessary to rule in the manner the court wanted to in *A.J.R.* but will only further confuse the already befuddled Ohio appellate courts.

A student getting poked in the face with a pencil is considerably different from a student committing suicide because they were bullied at school. As many courts noted in cases where students did commit suicide, the immunity analysis should be devoid of emotion.[136] But that is exactly why the Supreme Court should have taken advantage of the opportunity presented by *A.J.R.*—bad facts could have made *clear* law.[137] Instead, the Supreme Court further confused the issue by conflating "wanton" and "reckless." As it stands now, the precedent created by *A.J.R.* reads more like a first-semester law student's midterm definition of recklessness.

The consequences of the *A.J.R.* decision are not limited to the already horrific instances where a student commits suicide. R.C. § 2744.03(A)(6)(b) is an immunity exception for *all* individual employees of political-subdivisions in Ohio. This includes firefighters, correctional staff, police officers, and anyone else employed by the government. *A.J.R.* states that "[b]ecause appellants did not perversely disregard a known risk, appellants could not have been reckless, and the trial court correctly

136. *See, e.g.*, Vidovic v, Hoynes, 29 N.E.3d 338, 351 (Ohio Ct. App. 2015) ("We recognize that Sladjana's death is tragic. However, we are required to evaluate the matter under the appropriate standard of law . . ."); and, Estate of Smith, 26 N.E.3d 890, 901 (Ohio Ct. App. 2015) ("Although Chance's death was tragic and an immense loss, that tragedy does not mean the standard for showing wantonness or recklessness is any less.").

137. This Comment is hesitant to say, "bad facts make *good* law."

granted appellants' motion for summary judgment."[138] This means that to pierce the shield of a police officer's immunity under R.C. § 2744.03(A)(6)(b), the standard as of November 2020 is that the officer must perversely disregard a known risk. As discussed above, this is neither the definition of wanton nor reckless. The word "perverse," a holdout from the outdated *O'Toole*, broadens immunity far beyond the language of the statute and the clear holding in *Anderson*.

Will this lead to broader grants of immunity in cases of increasing severity? Potentially. Will appellate courts continue to apply various standards? Most likely. Will the Supreme Court of Ohio need to address this question again in the future? Hopefully. Presented with a case where an eight-year-old committed suicide after being bullied,[139] the court likely would not have been so cavalier in the creation of its Frankenstein-standard. Had the Supreme Court followed its own decision in *Anderson*, the immunity standard would have been clarified and distinct, not only providing lower courts with the correct standard, but also giving clarity to the employees themselves regarding the conduct for which they should expect to be liable.

But that is not the law. Instead, plaintiffs, defendants, judges, teachers, officers, and citizens are left with an unclear, ambiguous standard. As more students commit suicide after being bullied at school, fewer and fewer people will be held responsible.

138. A.J.R., 168 N.E.2d 1157, 1163.

139. Melissa Iati, *An 8-year-old killed himself after being bullied, lawsuit says. The school wants immunity*, WASH. POST. (Dec. 5, 2019), https://www.washingtonpost.com/education/2019/12/05/an-year-old-killed-himself-after-being-bullied-police-say-school-district-wants-immunity/.