

BULLYING:
LEGAL ISSUES & PRACTICAL STRATEGIES

Presented By:

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PART ONE - INTRODUCTION

1. Why is the issue of bullying so important now?

In the past few years, there has been a sharp focus on the issue of bullying, its effects on students, and the manner in which schools respond. As a string of student suicides drew national attention, more and more states began adopting anti-bullying bills in response. In August 2010, the federal government hosted its first ever Federal Summit on Bullying to “launch a sustained commitment to address and reduce bullying.” In October 2010, the Department of Education issued a “Dear Colleague” letter addressing bullying in schools. And in the recent Texas legislative session, a new “bullying bill” was passed that goes into effect next school year.

Federal and state agencies, especially the U.S. Department of Education, have made bullying prevention a major focus and expect school districts to do the same. As the Secretary of Education stated, “Simply put, we think bullying in this country should not exist.”

Further, the issue of prevention of and response to bullying falls to local education agencies. For example, in a recently released report, “School Bullying: Extent of Legal Protections for Vulnerable Groups Needs to be More Fully Assessed,” the GAO recommended that the U.S. Department of Education conduct a one-time study on state civil rights laws and procedures that pertain to bullying, citing ED's previous study of state bullying laws. “When bullying rises to the level of discrimination, federal civil rights laws may be used to provide redress to individuals in legally protected groups,” the report noted. “However, federal agencies generally lack jurisdiction to address discrimination based on classifications not protected under federal civil rights statutes.”

The Department of Education responded, saying “the department has no jurisdiction, nor the appropriate expertise, to interpret and advise on state civil rights laws.” Cooperation among departments is being urged by the GAO.

2. Can schools really be expected to end what seems to be an age-old problem?

Bullying is an issue that has occurred for many years and affects every school district in every state. But not until recently has there been a concerted effort to put an end to it. As Secretary of Education Arne Duncan stated in his opening remarks at the Bullying Prevention Summit:

The problem of bullying has been shrouded in myth and misunderstanding for far too many years. As educators, as state and local officials--and yes, absolutely at the federal level--we simply have not taken the problem of bullying seriously enough. Too often, bullying gets shrugged off.... But the truth is that it doesn't



have to keep going on forever. Bullying is not something that school leaders, teachers, or parents can shrug off.

3. *What constitutes bullying?*

The legal definition of “bullying” and “harassment” are discussed below, but these definitions are subject to change as the laws are expanded or revised. Generally speaking, bullying is something more than the normal give-and-take that occurs when students engage in misconduct or horseplay. Bullying can include name-calling, teasing, threats or actual violence, and almost always includes the intent to hurt or harm the target. Bullying typically involves an imbalance of power between the bully and the victim. Bullying can rise to discriminatory harassment when the basis of the bullying is a protected characteristic such as gender, race, or disability. Secretary of Education Duncan described bullying and its effects as follows:

Bullying is deliberate. The bully wants to hurt someone. Bullying is usually repeated, with the bully targeting the same victim again and again--and the bully takes advantage of an imbalance of power by picking victims that he or she perceives are vulnerable.... A powerful testament to the fact that bullying is not part of the natural order of things is that most people can remember, even decades later, the feeling of being bullied or bullying another individual. Or they may feel haunted by the memory of standing by while a friend or classmate was bullied.

It is important to note that many states also have defined bullying in state laws. For example, in Texas, bullying is defined in Chapter 37, Sec. 37.0832 of the Texas Education Code as follows (*new language in italics*):

(a) “Bullying” means engaging in written or verbal expression, *expression through electronic means*, or physical conduct *that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district* and that:

- (1) has the effect or will have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student’s person or of damage to the student’s property; or
- (2) is sufficiently severe, persistent, and pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student.

(b) Conduct described by Subsection (a) is considered bullying if that conduct:

- (1) *exploits an imbalance of power between the student perpetrator and the student victim through written or verbal expression or physical conduct; and*
- (2) *interferes with a student’s education or substantially disrupts the operation of a school.*

As you can see in subsection (b), the definition of bullying requires that the conduct “exploit an imbalance of power.” This language should help administrators distinguish a typical squabble between peers from an act of bullying. However, whether the conduct “creates an



intimidating, threatening, or abusive educational environment for a student” may be subjective, and depend on the particular sensitivities of the student.

In Utah, bullying is defined by state law as follows:

CHAPTER 11a. BULLYING AND HAZING

Section 2. 53A-11a-102. Definitions.

As used in this part:

- (1) (a) "Bullying" means intentionally or knowingly committing an act that:
- (i) (A) endangers the physical health or safety of a school employee or student;
 - (B) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements;
 - (C) involves consumption of any food, liquor, drug, or other substance;
 - (D) involves other physical activity that endangers the physical health and safety of a school employee or student; or
 - (E) involves physically obstructing a school employee's or student's freedom to move; and
 - (ii) is done for the purpose of placing a school employee or student in fear of:
 - (A) physical harm to the school employee or student; or
 - (B) harm to property of the school employee or student.
- (b) The conduct described in Subsection (1)(a) constitutes bullying, regardless of whether the person against whom the conduct is committed directed, consented to, or acquiesced in, the conduct.

4. *Why is bullying so harmful?*

The Department of Education cites the following as possible effects of student-on-student harassment and bullying:

- Lowered academic achievement and aspirations
- Increased anxiety
- Loss of self-esteem and confidence
- Depression and post-traumatic stress
- General deterioration in physical health
- Self-harm and suicidal thinking
- Feelings of alienation in the school environment, such as fear of other children
- Absenteeism from school

Sadly, bullying also leads to students taking their own lives.



5. *Are there any special considerations regarding bully and students with disabilities?*

Yes, there are many additional things to consider when bullying claims are made by or against a student with a disability. First, be aware that students with disabilities are often more vulnerable to bullying and harassment because of the disability. Those with special needs are often more likely to be targets, either because their differences single them out in the classroom or because they have difficulty in communicating and in reading social cues. By way of example, the National Autism Society has reported that 40 percent of students with autism and 60 percent of those with Asperger’s syndrome have been victims of bullying. Studies have also shown that people with disabilities are more likely to be victims of harassment or assault than their non-disabled peers, due in part to limited physical or intellectual capabilities.

Second, be aware that bullying based on disability triggers additional obligations because the bullying may constitute peer-on-peer harassment prohibited by Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (ADA). These obligations are discussed in more detail below.

Third, understand that claims of bullying may trigger additional obligations under the Individuals with Disabilities Education Act (IDEA), the federal law that requires school districts to provide a free, appropriate public education (FAPE) to eligible students with disabilities. For example, a student with a disability who has reported bullying may need additional services, revisions to his or her educational program, or a change of educational placement. Decisions regarding a special education student’s identification, evaluation, or placement, or the provision of FAPE to the student, must be made by the student’s IEP Team.

Fourth, the laws, standards, and policies regarding bullying may at times conflict with the laws, standards, and policies regarding students with disabilities. For example, board policy may require discipline for a student accused of bullying, however, the district’s ability to discipline a student with a disability is limited by IDEA and Section 504, as explained later in the handout.

Finally, the manner in which bullying claims should be investigated and the mechanisms for parents and students to file complaints about bullying are different when the alleged bully or victim is a student with a disability. All of these special considerations are discussed in greater detail below.

PART TWO – THE VERY DIFFERENT STANDARD BETWEEN FEDERAL LAW AND THE DEPARTMENT OF EDUCATION’S OFFICE FOR CIVIL RIGHTS (OCR)

6. *Is bullying prohibited by federal law?*

There is no federal law that specifically addresses “bullying.” Currently, students and parents bring “bullying” claims under one or more federal civil rights laws, depending on the circumstances. If the bullying is based on a protected characteristic, it could fall under one of the following federal anti-discrimination laws: Title IX, which prohibits discrimination and



harassment on the basis of sex and gender; Title VI, which prohibits discrimination and harassment on the basis of race, color or national origin; and Section 504 and the ADA, which prohibit discrimination and harassment on the basis of disability. Students could also claim that a school district's failure to protect them from harm violated their constitutional rights, which are brought as Section 1983 claims.

7. How can bullying by peers trigger school district liability for discrimination or harassment under federal anti-discrimination laws?

Federal anti-discrimination laws prohibit schools from discriminating against students by denying access to school programs, activities or services on the basis of the student's sex/gender (Title IX), race (Title VI), or disability (Section 504 and ADA). In some circumstances, bullying or harassment of a student by his or her peers has been found by the courts to be so "severe or pervasive" that it effectively barred the student's access to school. If the school knew about the peer harassment but failed to reasonably respond or was "deliberately indifferent" to the harassment, the school may have violated federal law.

Thus, a bullying claim may implicate federal anti-discrimination laws where:

- 1) the student suffered peer-on-peer harassment;
- 2) the harassment was based on a protected characteristic (sex/gender, race, or disability);
- 3) the harassment was sufficiently severe, pervasive, and *objectively unreasonable* enough to create a hostile educational environment;
- 4) the school knew of the harassment; but
- 5) the school did not reasonably respond, or was "deliberately indifferent."

This framework originally developed from employment law, and deliberate indifference is a high standard. Federal courts have required plaintiffs to show that school personnel actually knew of the harassment and either completely ignored it, or responded unreasonably.

The Fifth Circuit addressed this standard in the case *Sanches v. Carrollton-Farmers Branch ISD*. The plaintiff, Samantha Sanches, was a high school cheerleader who had an ongoing feud with a fellow cheerleader and ultimately did not make the cheer squad her senior year. Sanches alleged that the fellow cheerleader sexually harassed her by calling her a "ho," spreading a rumor that Sanches had a hickey on her breast, slapping the butt of Sanches's boyfriend while he and Sanches walked down the hall together, and possibly telling others that she was pregnant with Sanches's boyfriend's baby. She sued the school district under Title IX for showing "deliberate indifference" to known sexual harassment.

The court characterized the case as "a petty squabble, masquerading as a civil rights matter, that has no place in federal court or any other court." The court questioned whether the conduct could constitute sexual harassment at all because it did not appear to be "based on sex." Then the court determined that even if the alleged harassment was based on sex, "it was not



severe, pervasive, or objectively unreasonable.” The court acknowledged that Sanches may have genuinely been upset, but the standard is not a subjective one. This appears to be a key difference in how federal courts view these claims as compared to OCR.

The court cited the United State Supreme Court decision, *Davis v. Monroe County Board of Education*, and stated the following:

Courts ‘must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Early on, students are still learning how to interact appropriately with their peers....Were we to find that Sanches’s alleged harassment was severe, pervasive, and objectively unreasonable, no conduct would be beyond the reach of title IX. Dating and relationships are an inescapable part of high school, as is the resulting stress. It is a trying time for young people, who experience a wide range of emotions and often lack the skills to control them.... That is the sort of unpleasant conflict that takes place every day in high schools, and it is not the proper stuff of a federal harassment claim.

In discussing the merits of Sanches’s claim of harassment, the Court mentioned several other cases in which a student successfully sued a school district for being deliberately indifferent to harassment, and made it clear that this case was nothing like those other cases. The other cases involved the following fact scenarios:

- A girl who was raped off-campus endured daily verbal harassment for five weeks following the rape, including being called a “slut,” “liar,” “bitch,” and “whore.” School district personnel knew about the rape, and although they were not held liable for the off-campus crime, the court determined that the verbal taunts were severe, persistent, and objectively unreasonable because of the rape.
- A student was called regularly called “bitch,” “dyke” and “freak”; was taunted as being the “lesbian lover” of another student, and was threatened daily with physical violence.
- A ninth-grade boy was physically, verbally, and sexually assaulted by upperclassmen at football camp.

8. *How can we determine whether bullying might be discrimination based on a protected characteristic?*

Claims of bullying must be investigated pursuant to Board Policy FFI (Local). If it appears that the student was teased or picked on for reasons related to his or her disability or race, that could trigger an investigation into potential disability or racial discrimination.

More commonly, a student may allege conduct that could constitute harassment based on sex or gender. “Sexual harassment” under Title IX is interpreted very broadly and includes harassment based on gender and gender stereotypes. Recent Title IX harassment cases that have made headlines involve students who were bullied because they were gay or perceived to be gay.



Facts suggesting that school personnel accepted gay slurs as normal, expected the victim to change his behavior, or did very little to stop the bullying, have been enough to suggest that the district was deliberately indifferent. Courts have also found potential sexual harassment where students engaged in texting explicit words or images (“sexting”), or spread rumors about a student’s perceived sexual activities.

9. *Can a student bring a bullying claim under IDEA?*

The Individuals with Disabilities Education Act (“IDEA”) is the federal law that requires school districts to provide a free, appropriate public education (FAPE) to students with disabilities who require specially designed instruction. The IDEA is not an anti-discrimination law like Section 504 or the ADA, and the IDEA does not mention “bullying” or “harassment.” However, many requests for special education due process hearings include claims related to the District’s response, or lack thereof, to claims of bullying and/or harassment. Some hearing officers and judges have ruled that failure to adequately respond to these claims or protect a child from bullying may result in a denial of FAPE. In response to one parent’s allegation that failure to respond to bullying claims violated IDEA, a former Texas hearing officer held:

The parent does not cite any statutory authority or case law recognizing a cause of action against a school district for allowing an unsafe or hostile educational environment under the IDEA, but it is presumed that such a claim could be cognizable if a student was subjected to such an oppressive educational environment that it hindered the student’s access to an appropriate instruction to such a degree that it denied him a free appropriate public education. However, to the extent that such a claim is a general allegation that a student was bullied or otherwise subjected to hostility from others on a school campus, such a claim would not fall within the IDEA. *Student v. Katy Independent School District*, 108 LRP 2915, (James Holtz, December 15, 2007)

In a recent case from New York, *T.K. v. New York Department of Education*, a federal judge stated that the IDEA requires school districts to address bullying, and seems to apply the Section 504 standard to IDEA cases. In *T.K.*, the parents alleged that the school district denied their daughter FAPE, and sought reimbursement for private placement. The parents raised numerous arguments against the school district, one of which was the school district’s alleged failure to appropriately respond to bullying. The due process hearing officer and State Review Officer found in favor of the school district, and did not spend much time on the “bullying” issues. The parents appealed to federal court, and the federal judge remanded the case back to the hearing officer. The federal judge focused primarily on the parents’ argument about bullying, and wrote a nearly 30-page opinion discussing bullying in schools. The judge relied heavily on the OCR “Dear Colleague” letter and seemed to confuse schools’ duties under Section 504 with a school’s obligations under the IDEA. The judge also seemed to raise the *Rowley* standard by stating that “a child may achieve substantial educational gains despite harassment, and yet she still may have been seriously hindered.” By this standard, a student could show that even though



progress was made, she could have made *more* progress if not for the bullying. (Sounds a lot like maximizing potential, which *Rowley* held was not required under the IDEA.)

While it may be unsettled whether or not IDEA recognizes causes of action related to bullying, it is clear that IDEA requires districts to address a child's needs through an individualized educational program (IEP) and provide FAPE in the student's least restrictive environment. Depending on the circumstances, claims of bullying may trigger the obligation to review and revise a student's IEP and/or consider a change of placement. Thus, a student can claim that failure to respond to the bullying claims, or respond to the student's needs, resulted in a denial of FAPE.

10. *Does the U.S. Department of Education apply the same standard as the federal courts?*

No, the Department of Education's standard for investigating and responding to bullying claims is MUCH higher than the "deliberate indifference" standard applied by the federal courts. Deliberate indifference typically means that the school failed to respond reasonably to known harassment. The Department of Education, by contract, expects districts to prevent harassment from occurring in the first place, eliminate harassment of which it knows or should have known, and remediate its effects. As recipients of federal funds, school districts are subject to the standards enunciated by the U.S. Department of Education.

11. *How does the Department of Education enforce these standards?*

The Department's Office for Civil Rights (OCR) is responsible for enforcing anti-discrimination laws in the school system. OCR has jurisdiction over discrimination and harassment claims under Title IX (sex/gender), Title VI (race, color, or national origin), and Section 504 and Title II of the ADA (disability). Bullying claims could fall under OCR's jurisdiction if the bullying is harassment based on one of these protected characteristics.

A District may be held liable under Section 504 and Title II for student-on-student disability harassment if it was aware of the harassment, or in the exercise of reasonable care should have been aware of the harassment, but failed to take immediate and appropriate action to address the harassment and prevent its recurrence. OCR Investigation, July 12, 2010, 56 IDELR 84.

12. *What guidance has OCR provided to school districts regarding investigation and response to bullying claims made by students?*

In October 2010, OCR issued a "Dear Colleague" letter to school districts that addressed the problem of bullying in schools. The letter reminded school districts that "bullying" may constitute prohibited harassment which could trigger additional responsibilities under one or more of the federal antidiscrimination laws enforced by OCR. The letter set forth a high standard and provided guidance to school districts on how to meet that standard.



OCR's Dear Colleague letter states that "bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning." OCR indicates that it expects school personnel to "understand their legal obligations to address harassment," and that by doing so, schools can "prevent harassment from occurring and respond appropriately when it does."

Having a clear anti-discrimination policy in the school, along with curriculum focused on character/respect, is one method of meeting the prevention standard. Schools are further instructed to promptly investigate bullying or harassment claims, follow up with students when harassment or bullying is suspected, take measures beyond disciplining the bullies, and ensure students have a safe environment in which they can report harassment. Schools should ensure the victim has counseling and other remedial measures, as needed, and that measures beyond discipline (such as education and/or counseling) are put in place with those found to have been involved in the bullying.

Follow these steps to ensure compliance with OCR Guidelines:

1. Have well publicized policies prohibiting harassment and procedures for reporting and resolving complaints.
2. Address harassment incidents about which the school knows or reasonably should have known.
3. Take immediate and appropriate action to investigate or otherwise determine what occurred.
4. If an investigation reveals that discriminatory harassment has occurred, take prompt and effective steps reasonably calculated to
 - a. end the harassment,
 - b. eliminate any hostile environment and its effects;
 - c. and prevent the harassment from recurring.

Steps to eliminate any hostile environment and its effects:

- (depending on extent) provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond
- provide counseling for the target and/or harasser
- provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment.



- include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment

Steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses:

- make sure that the harassed students and their families know how to report any subsequent problems,
- conduct follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and
- respond promptly and appropriately to address continuing or new problems.

NOTE: OCR has recently stepped up its investigative efforts in cases involving “gender-based” harassment. Recent investigations by OCR have made clear that OCR expects school districts’ policies and procedures to clarify that harassment or teasing based on gender (in other words, because a student does not fit the gender stereotype, i.e., a male who is effeminate or a female who is seen as too “masculine”) can be a form of prohibited Sexual Harassment and must be investigated and responded to accordingly.

PART THREE – COMPLYING WITH POLICIES REGARDING BULLYING AND DISCRIMINATION

13. What is required under Policy?

Let’s review the attached model policy promulgated by USOE.

14. How can we ensure that we are complying with policy as well as OCR guidelines?

Every staff member should be aware of adopted policies and should be able to refer students and parents to the proper policy. If staff members are not aware of these policies, it is likely that they are not following them.

Unfortunately, a common complaint made by parents in recent lawsuits and grievances is that while school districts have anti-bullying policies, the policies are ineffective because school personnel “failed to put these policies into practice...only gave these concerns ‘lip service,’ and turned a ‘blind eye’ to the problem.”

Here are some common pitfalls to avoid:

- Amy is being picked on and called names by Brittany every day in the lunch room and during sixth period. Amy starts going to the nurse’s office during lunch and the counselor’s office during sixth period in order to avoid Brittany. If Amy tells the nurse



or counselor that she is trying to avoid Brittany, or indicates in any way that she is being bullied, the nurse and counselor must report the incident to the principal or designee.

- Victor’s mother tells the IEP Team that she thinks her son is being bullied by boys in P.E. The IEP Team says that “bullying” is not a special education issue, and the matter is dropped. However, Victor’s mother has reported bullying, and the report should be forwarded to administrators and investigated.
- Alex’s mother emails the Assistant Principal and tells him that Alex was called names and teased by a classmate on the bus. The Assistant Principal reads mom’s email and determines that the conduct described does not “rise to the level” of bullying, so he responds back “I’ll look into it,” but never does. The Assistant Principal must investigate the allegation before determining whether it “rises to the level” of bullying.

15. *How can school personnel improve their efforts to comply with OCR’s guidance on bullying?*

The best thing school districts can do is to ensure that every bullying claim is taken seriously, and that staff that get reports of bullying (or believe bullying is occurring) take action, rather than assume someone else is responsible. For special education students especially, some staff members may believe that “someone else” is in charge of handling the bullying claims, and therefore, the staff member may neglect to inform the proper individuals. Any staff member who receives a report of bullying (including teachers, counselors, nurses, coaches, etc.) should contact the campus principal or designee, and follow up to ensure that the report has been investigated.

Remember to follow these steps when bullying is reported or suspected:

- 1. Take the report seriously.**
- 2. Immediately respond.**
- 3. Promptly investigate.**
- 4. Take appropriate and effective action.**
- 5. Recognize when bullying may constitute prohibited discrimination based on race, sex, gender, or disability.**

And remember that schools can take corrective action or remedial measures even if the conduct did not amount to bullying or harassment.

PART FOUR – SPECIAL CONSIDERATIONS WHEN BULLYING CLAIMS ARE MADE BY, OR AGAINST, A STUDENT WITH A DISABILITY

BULLYING CLAIMS AGAINST A STUDENT WITH A DISABILITY

16. *What should we consider when the student with a disability is the accused “bully?”*

First, understand that just because a student has a disability, that does mean the student is incapable of bullying or harassing others. In fact, some students with disabilities may be more



likely to engage in perceived “bullying” or aggressive behavior *because of* their disabilities. For example, students with Asperger’s syndrome may lack the social skills or communication skills to engage appropriately with their peers. Their differences may be seen as “bullying” by fellow students who do not understand the nature of the disability. Additionally, students with diminished intellectual capacity may engage in aggressive behaviors with their peers that could be labeled as bullying or harassment.

The important thing to remember is that every student’s bullying claim must be taken seriously, immediately responded to, and promptly investigated. Even if staff members know that the accused “bully” did not mean to intimidate or harm his fellow student, corrective action or discipline may need to be taken, as appropriate. Before certain discipline can be imposed, however, a meeting may need to be held to review the conduct in question. Furthermore, if the student’s behavior is impeding his or other students’ ability to learn, additional obligations are triggered under the IDEA.

17. *What should we consider when deciding whether or not to discipline the student?*

Disciplining students who bully or harass others is typically required under OCR guidance, FFI (Local), and Chapter 37 of the Education Code. However, the IDEA and Section 504 impose certain limitations on school districts when disciplining students with disabilities.

Under the IDEA, a disciplinary removal for more than 10 school days is considered a “change of placement” that requires a manifestation determination review. Members of the IEP Team must review the conduct that resulted in the removal to determine if the conduct was:

- 1) a manifestation of the student’s disability, or
- 2) the direct result of the school’s failure to implement the student’s IEP or BIP.

If so, the IEP Team must return the student to the placement from which he was removed, conduct a Functional Behavioral Assessment (FBA) unless one has already been conducted, and develop or revise the Behavior Intervention Plan (BIP). If the conduct is determined not to be a manifestation of the student’s disability, the student can be disciplined in the same manner as a non-disabled student. However, the IEP Team must ensure that the student’s IEP can be implemented in the disciplinary setting and that the student can continue to receive FAPE.

18. *What if the accused student doesn’t understand the nature of his/her actions, or the IEP Team determines the conduct was a manifestation of the disability?*

In this situation, the student should not have a disciplinary change of placement. However, other forms of corrective action may be appropriate. For example, the student may require a more restrictive placement or additional services (such as counseling or social skills training) to ensure that the prohibited conduct does not reoccur. Additional supervision may be required, and the victim may require counseling or support, as well.



If the accused student engaged in prohibited conduct, and the victim is also a student with a disability, more precautions may need to be put in place to ensure the safety of all students. These precautions could include additional supervision, counseling with the victim to ensure he or she understands what conduct is “inappropriate” and how to report any additional inappropriate or prohibited conduct.

19. *What are the other things to consider when the student with a disability is the accused bully?*

Depending on the circumstances, there are a number of considerations. Remember that each special education student is required to have an IEP that addresses the student’s needs and is designed to ensure progress toward the student’s goals & objectives. If the student is engaging in behaviors that impede his or other student’s learning, the IDEA requires the IEP Team to consider the use of positive interventions and supports, and may consider conducting a FBA and implementing a BIP.

If we’re getting reports that the student is bothering others or engaging in unwanted behaviors, whether we label it as “bullying” or “harassment” or “horseplay” doesn’t matter. We need to address it and possibly revise the student’s IEP or placement. Some suggestions for addressing behaviors include:

- Goals and objectives related to social skills, communication, behavior
- Determining whether a more restrictive placement is appropriate
- Implementing counseling or other services

Additionally, it is not uncommon for students to engage in bullying-type behaviors as a “defense” to being bullied or picked on themselves. The student or parent may assert that the student was only acting in self-defense, for example. Again, the student’s needs may be need to be addressed through review and revision of the IEP. And if the student is reporting bullying, even if only by claiming self-defense in response to disciplinary action, we must respond and investigate.

Finally, be mindful of the student’s privacy rights under FERPA. When a student is accused of bullying or harassment, the parent of the victim may demand that the accused student be punished, and demand to know what the district has done in response. School staff typically cannot answer these types of questions because it would require divulging confidential student information in violation of FERPA and the IDEA.

BULLYING CLAIMS BY A STUDENT WITH A DISABILITY

20. *What additional obligations might be triggered when a student with a disability reports bullying?*

First, remember that districts are obligated to take bullying complaints seriously, immediately respond, promptly investigate, and take appropriate action. If the investigation



reveals that misconduct occurred, and that the misconduct amounted to discrimination based on a protected characteristic, the district must respond in accordance with OCR Guidance and Board Policy FFH. Failure to do so may result in the district's violation of Section 504, the ADA, or other anti-discrimination laws. For example, OCR found that a school district violated Section 504 when it failed to adequately address teasing for a student with an emotional disturbance:

The Student is a fourteen-year-old with visible physical disabilities who has been enrolled in District schools since kindergarten. She suffered severe burns as a toddler, which continues to affect her appearance significantly. Portions of her face and hair are missing, as is her right hand. She has had numerous reconstructive surgeries and is scheduled for additional surgery in August or September 2008....The Student and her mother informed OCR that the Student was subjected to frequent teasing in elementary school about her appearance and the visible effects of her burns....During an assessment conducted while she was in third grade, the Student reported that other students frequently made fun of her and that her teachers did nothing to stop them. *Fairfield-Suisun (CA) Unified School District*, 51 IDELR 139 (OCR 2008).

21. *What if a student with a disability reports bullying, but not on the basis of disability?*

Districts must investigate bullying claims regardless of the nature or subject matter of the bullying. A student with a disability doesn't have to report disability-based harassment to prompt an investigation into the bullying claims. When bullying is reported or suspected, the district should take it seriously, immediately respond, promptly investigate, and take appropriate action.

Remember, however, that federal anti-discrimination laws cover more than disability discrimination. OCR guidelines may be implicated if the bullying was based on sex, gender, race, color or national origin. Many of the bullying claims that school districts are seeing involve sexual harassment of some kind, even if it doesn't appear to be "sexual" in nature. OCR and federal courts have determined that the following types of conduct could constitute sexual harassment in violation of Title IX:

- teasing a student based on real or perceived sexual orientation (using gay slurs, teasing a student for not conforming to gender stereotypes)
- making references to a student's sexual activity (calling a student a "slut" or spreading rumors about perceived promiscuity)
- forwarding text messages or pictures of a sexual nature

22. *What does the law require if the investigation reveals that bullying or harassment occurred?*

OCR's Guidance states that "if an investigation reveals that discriminatory harassment has occurred, districts must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." These steps could include the following:



- separate the accused harasser and the target
- provide counseling for the target and/or harasser
- take appropriate disciplinary action against the harasser
- provide training to students, staff, and parents to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond.
- provide additional services to the student who was harassed in order to address the effects of the harassment
- include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment
- make sure that the harassed students and their families know how to report any subsequent problems,
- conduct follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and
- respond promptly and appropriately to address continuing or new problems.

Note: these steps should not punish the victim or deny his or her right to FAPE. For example, removing the victim from a class or campus against the student's wishes would wrongfully punish the victim and may implicate FAPE.

23. What does IDEA require?

If a student with a disability has been the victim of bullying or harassment, it may be best to convene an IEP Team meeting to review and revise the IEP to address any needs. For example, the student may need additional counseling or psychological services to deal with the effects. It may be appropriate to implement social skills training, self-advocacy training, in-home training to help the parents, or communication goals and objectives to ensure the student knows how to identify and report any additional behavior. Depending on the nature of the claims and the student's physical or intellectual limitations, the student may require closer supervision, additional support staff, or a change of placement to ensure the student's safety. It may also be necessary to conduct additional evaluations if there are any other areas of suspected disability.

24. What if the investigation reveals that the conduct was not bullying or harassment, but the parent and/or student disagree?

First, follow your school policy. Some policies allow for an appeal of the investigation. Parents and students may also have the following options if they believe their child was discriminated against, or denied a FAPE:

- Grievance or complaint lodged directly with the school under Board Policy
- Grievance or complaint filed with the State Education Department
- Grievance or complaint filed with the Office of Civil Rights
- Request for Due Process Hearing under the IDEA
- Request for impartial hearing under Section 504



- Lawsuit filed in state or federal court

Remember that schools can take corrective actions even if the conduct was not bullying or harassment. Depending on the circumstances, a student's IEP may need to be reviewed and revised; a BIP may need to be developed, we may need to offer counseling, etc.

You may see a situation where a student alleges bullying, but is actually misperceiving uncomfortable peer interactions as "bullying" based on the student's lack of social skills or communication skills. The student could require additional services to address these deficits.

25. *What if the student was not identified as disabled, but now asserts that the alleged bullying has resulted in a disability?*

It is not uncommon for a student who has reported bullying to also report that the bullying has resulted in social anxiety, depression, school phobia, or some other condition. The student and parent may request Homebound services or request to change schools. If the student is reporting these conditions, it is best to convene a Section 504 meeting to determine if the student qualifies as "disabled" and if so, whether an accommodation plan needs to be developed. Depending on the circumstances, this could trigger Child Find obligations under the IDEA. Be aware, however, that OCR has cited school districts for placing a child on Homebound as a method of "dealing" with bullying.

**ADDITIONAL FAPE CONSIDERATIONS WHERE BULLYING CLAIMS
ARE MADE BY OR AGAINST A STUDENT WITH A DISABILITY:**

- 1. Address the behavior.** If the student's behavior is impeding his/her learning OR the learning of others, we must consider a FBA and BIP.
- 2. Consider additional evaluations and services.** We must evaluate in all areas of suspected disability, and address a student's needs related to the disability. This may include social skills training, counseling, self-advocacy, understanding appropriate versus inappropriate behaviors.
- 3. Balance transfer requests with LRE and placement obligations.** A parent may request a transfer under state law, and may even request that the other student be transferred. However, we are obligated under the IDEA to provide an appropriate placement in a child's LRE, which may prevent affect a requested transfer.
- 4. Focus on the effect of the conduct, not the "label" of the conduct.** Whether or not we label the behavior as "bullying," "harassment," teasing or none of the above, we should focus on the effect it has on the child. This is a SUBJECTIVE, rather than objective, standard.
- 5. Consider a Student Safety Plan.** If a student has been victimized, or feels that he or she has been victimized, consider a Student Safety Plan. The plan should identify where the undesired conduct is likely to occur, how to avoid the conduct, who the parents and student should report conduct to, and possibly include "check-ins." This may be similar to your district's FOCUS or ReDirect program, but with additional focus on bullying.



*The information in this handout was created by Walsh, Anderson, Gallegos, Green & Treviño, P.C.
It is intended to be used for general information only and is not to be considered specific legal advice.
If specific legal advice is sought, consult an attorney.*

