Don’t be Intimidated! Understanding How the New Law Responds to Bullies

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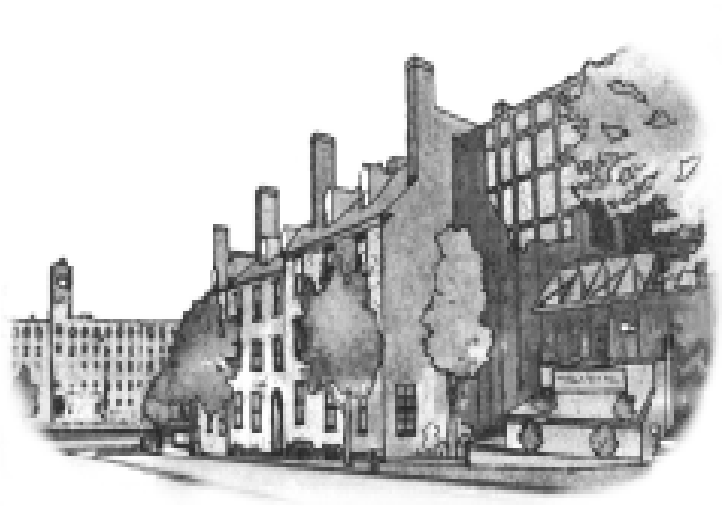

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an overview of New Hampshire's Bullying law, RSA 193-F:1, et seq. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. Overview

The purpose of this material is to assist educators in understanding the State's legal response to the problem of bullying and cyberbullying in our public schools, and to provide tips regarding who the law considers to be a bully, what districts can do about off-campus bullying, and liability for the actions of bullies. This material does not cover every aspect of the law, and you are encouraged to seek an opinion from your district's legal counsel regarding any specific case.

II. The Pupil Safety and Violence Prevention Act

A. Legislative History

In 2000 the state legislature adopted the "Pupil Safety and Violence Prevention Act of 2000." RSA 193-F:1, et seq. The Pupil Safety and Violence Prevention Act was a direct response to incidents of school violence that had occurred throughout our nation. Educators and lawmakers alike observed a persistent theme where the perpetrator of violence had been the victim of bullying in the school setting.

The law was amended in 2004 to mandate that schools provide a tangible remedy to the problem of bullying.

In 2010, the Legislature repealed and reenacted the majority of RSA 193-F, expanding the scope of the bill to include cyberbullying. See N.H. Laws of 2010, Chapter 155 (enacting HB 1523).

B. The Purpose and Intent

With the 2010 amendments, the Legislature expanded the purpose and intent of the Pupil Safety and Violence Prevention Act. It now reads as follows:

i. All pupils have the right to attend public schools, including chartered public schools, that are safe, secure, and peaceful environments. One of the legislature's highest priorities is to protect our children from physical, emotional, and psychological violence by addressing the harm caused by bullying and cyberbullying in our public schools.

ii. Bullying in schools has historically included actions shown to be motivated by a pupil's actual or perceived race, color, religion, national origin, ancestry or ethnicity, sexual orientation, socioeconomic status, age, physical, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other distinguishing personal characteristics, or based on association with any person identified in any of the above categories.

iii. It is the intent of the legislature to protect our children from physical, emotional, and psychological violence by addressing bullying and cyberbullying of any kind in our public schools, for all of the historical reasons set forth in this section, and to prevent the creation of a hostile educational environment.

iv. The sole purpose of this chapter is to protect all children from bullying and cyberbullying, and no other legislative purpose is intended, nor should any other intent be construed from the enactment of this chapter.

See RSA 193-F:2.

C. Definitions

As amended, the Pupil Safety and Violence Prevention Act includes several new definitions. They are as follows:

- Bullying: a single incident or pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
    - Physically harms a pupil or damage the pupil's property; or
    - Causes emotional distress to a pupil; or
    - Interferes with a pupil's educational opportunities; or
    - Creates a hostile educational environment; or
    - Substantially disrupts the orderly operation of the school.
- Bullying also includes "actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs." See RSA 193-F:3, I(a)-(b).

Note: When bullying constitutes a "pattern of incidents" it may give rise to a duty to refer that student for special education and related services. See e.g. N.H. Ed. 1105.02 (discussing child find).

- Cyberbullying: conduct defined in paragraph I of this section [the definition of bullying] undertaken through the use of electronic devices. RSA 193-F:3, II.
- Electronic devices: include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites. RSA 193-F:3, III.

- Perpetrator: a pupil who engages in bullying or cyberbullying. RSA 193-F:3, IV.

- School property: all real property and all physical plant and equipment used for school purposes, including public or private school buses or vans. RSA 193-F:3, V.

- Victim: a pupil against whom bullying or cyberbullying has been perpetrated. RSA 193-F:3, VI.

D. Who Does the Law Consider to be a Bully?

The new law also specifies that bullying or cyberbullying occurs when "an action or communication as defined in RSA 193-F:3:

a. Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

b. Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event."

RSA 193-F:4, I.

E. The Pupil Safety and Violence Prevention Policy

By January 1, 2011, the school board of each school district (and the board of trustees of chartered public schools) must adopt a written policy prohibiting bullying and cyberbullying. The law contains numerous requirements pertaining to the development of the policy and the contents of the policy. RSA 193-F:4, II, IV.

1. Substantive Requirements

At a minimum, the policy must include the following elements:

- The definitions contained in RSA 193-F:3);

- A statement prohibiting bullying or cyberbullying of a pupil;

- A statement prohibiting retaliation or false accusations against a victim, witness, or anyone else who in good faith provides information about an act of bullying or cyberbullying and, at the time a report is made, a process for developing, as needed, a plan to protect pupils from retaliation;

- A requirement that all pupils are protected regardless of their status under the law;

- A statement that there shall be disciplinary consequences or interventions, or both, for a pupil who commits an act of bullying or cyberbullying, or falsely accuses another of the same as a means of retaliation or reprisal; and,

- A statement indicating how the policy shall be made known to school employees, regular school volunteers, pupils, parents, legal guardians, or employees of a company under contract to a school, school district, or chartered public school. Recommended methods of communication include, but are not limited to, handbooks, websites, newsletters, and workshops.

See RSA 194-F:4, II(a)-(e), (n).

2. Procedural Requirements

In addition to the above, the law requires that each policy contain the following procedures:

- A procedure for reporting incidents of bullying or cyberbullying;

- A procedure outlining the internal reporting requirements within the school or school district or chartered public school;

RSA 193-F:4, II(f)-(g).

Each school district is responsible for developing its own set of procedures; we recommend that your procedures include the following minimum components:

- Mandatory reporting for all district employees and a procedure for employee reports.

- A procedure for non-employee (students, parents, and third parties) reports.

- A designated employee who is responsible for receiving reports of bullying (i.e., the Principal or Assistant Principal).

- A requirement that the report be reduced to writing, either by the individual making the report, or the employee who receives the report. To that end, we recommend that districts create a model report form.

- At a minimum, the report forms should contain the following components:
  - Date the report was made
  - Name of the victim
  - Name of the perpetrator(s)
  - A description of the facts that constitute the alleged bullying/cyberbullying.

3. Reporting Requirements: To whom and when am I required to report?

The policy must contain several reporting requirements:

- A procedure for notification, within 48 hours of the incident report, to the parents or guardians of a victim of bullying or cyberbullying and the parent or parents or guardian of the perpetrator of the bullying or cyberbullying. The content of the notification shall comply with the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g;

  - This notice should be in writing, and may contain the name of the alleged victim and perpetrator, a description of the reported event and the circumstances in which the event occurred.

- A provision that the superintendent or designee may, within the 48-hour period, grant the school principal or designee a waiver from the notification requirement if the superintendent or designee deems such waiver to be in the best interest of the victim or perpetrator. Any such waiver granted shall be in writing. Granting of a waiver shall not negate the school's responsibility to adhere to the remainder of its approved written policy;

  - Note: if a waiver is going to be granted, it should be granted for both students.

- A requirement that the principal or designee report all substantiated incidents of bullying or cyberbullying to the superintendent or designee; and,

- A written procedure for communication with the parent or parents or guardian of victims and perpetrators regarding the remedies and assistance, within the boundaries of applicable state and federal law. Under the law, this communication shall occur within 10 school days of completion of the investigation.
  - This communication cannot contain information about any consequences that were given to the other student. It can only contain information pertaining to the student that is the

subject of the letter (i.e., information about the victim can be communicated to the victim's parents, but they cannot be told about any disciplinary consequences or non-disciplinary interventions taken against the perpetrator).

RSA 193-F:4, II(h)-(i), (l)-(m).

4. Investigation Requirements: What is the scope of the duty to investigate?

The policy must contain a written investigation procedure. Policy JICK contains the following investigation procedure:

- The investigation must be initiated by the building principal within 5 school days of the reported incident;

- The investigation may include documented interviews with the alleged victim, alleged perpetrator and any witnesses. All interviews shall be conducted privately, separately and shall be confidential. Each individual shall be interviewed separately and the alleged victim and alleged perpetrator shall not be interviewed together.

- If the allegations involve cyberbullying, the Principal may request that the student or parent provide him/her with printed copies of e-mails, text messages, webpages, or other similar communication.

- The investigator may consider the following factors (this is not an inclusive list):

    - Description of the incident, including the nature of the behavior;
    - How often the conduct occurred;
    - Whether there were past incidents or past continuing patterns of behavior;
    - The characteristics of parties involved (name, grade, age, etc.);
    - The identity and number of individuals who participated in bullying behavior;
    - Where the alleged incidents occurred;
    - Whether the conduct adversely affected the student's education or educational environment;
    - Whether the alleged victim felt or perceived an imbalance of power as a result of the reported incident; and
    - The date, time and method in which parents or legal guardians of all parties involved were contacted.

- The investigation must be completed within 10 school days of the receipt of the report, however, the Superintendent may grant a written extension of up to 7 school days, if necessary. The Principal shall provide all parties involved with written notice of the extension.

- Whether a particular action or incident constitutes a violation of policy JICK requires a determination based on all facts and surrounding circumstances and shall include recommended remedial steps necessary to stop the bullying and a written final report to the Principal.

- Students who are found to have violated the policy may face discipline in accord with other board policies.

Policy JICK at Section XI; see also RSA 193-F:4, II(j).

The intent of the investigation is to identify whether the alleged bullying / cyberbullying is substantiated or unsubstantiated.

5. Remediation Requirements: What happens when the investigation is complete?

The policy also contains a provision pertaining to the response to remediate substantiated incidents of bullying. The policy states that:

> "Consequences and appropriate remedial actions for a student or staff member who commits one or more acts of bullying or retaliation may range from positive behavioral interventions up to and including suspension or expulsion of students and dismissal of employment for staff members.
>
> Consequences for a student who commits an act of bullying or retaliation shall be varied and graded according to the nature of the behavior, the developmental age of the student, and the student's history of problem behaviors and performance. Remedial measures shall be designed to correct the problem behavior, prevent another occurrence of the problem, protect and provide support for the victim, and take corrective action for documented systematic problems related to bullying."

Policy JICK at Section XII; see also RSA 193-F:4, II(k).

Policy JICK includes both disciplinary consequences and interventions. See Section XII. In addition to the interventions set forth in the policy, interventions could also include:

- Transferring the perpetrator to another setting

- Transferring the victim to another setting (generally at the request of the victim's parent)
- Creating a safety plan
- Referral for special education
- Referral for a functional behavioral assessment
- Development of a positive behavioral intervention plan
- Removal of privileges
- Participation in a course for victims
- Participation in a course for perpetrators

As discussed below, when a perpetrator or victim is identified as a student with an educational disability, the Principal's response to remediate any substantiated incident of bullying or cyberbullying should be presented to the IEP Team. The IEP Team is permitted to amend or augment the response in a manner necessary to ensure that the perpetrator and/or victim receives a free, appropriate public education, while still taking appropriate measures to remediate bullying.

Please Note: As discussed below, the amendments to the Pupil Safety and Violence Prevention Act do not impact the district's duties under RSA 193-D; thus, if the underlying act involves an act of theft, destruction, or violence in a safe school zone, then the public school employee may also have a duty to make a report in accord with RSA 193-D.

6. Appeal Rights

Policy JICK provides for the following appeal rights:

- For non-disciplinary remedial actions where no other review procedures govern, the parents of the pupils involved in the bullying shall have the right to appeal the Principal's decision to the Superintendent in writing within 5 school days. The Superintendent shall review the Principal's decision and issue a written decision within ten (10) school days. If the aggrieved party is still not satisfied with the outcome, he/she may file a written request for review by the School Board within ten (10) school days of the Superintendent's decision. The School Board will adhere to all applicable NH DOE administrative rules.

- The procedures contained in RSA 193:13, Ed 317, and District policies establish the due process and appeal rights for students disciplined for acts of bullying.

- The School Board or its designee shall inform parents of any appeal rights they may have to the NH State Board of Education.

Section XV of policy JICK.

F. Training

Every school district and chartered public school is required to provide:

- Training on policies adopted pursuant to this chapter, within 9 months of the effective date of this section (by April 1, 2011) and annually thereafter, for school employees, regular school volunteers, or employees of a company under contract to a school, school district, or chartered public school who have significant contact with pupils for the purpose of preventing, identifying, responding to, and reporting incidents of bullying or cyberbullying; and

- Educational programs for pupils and parents in preventing, identifying, responding to, and reporting incidents of bullying or cyberbullying. Any such program for pupils shall be written and presented in age appropriate language. See RSA 193-F:5, I.

The Department of Education is required to provide evidence-based educational programs to support the required training.

RSA 193-F:5 does not require the inclusion of a specific curriculum, textbook, or other material designed to prevent bullying or cyberbullying in any program or activity conducted by an educational institution and the omission of such subject matter from any curriculum, textbook or other material in any program or activity conducted by an educational institution shall not constitute a violation of RSA 193-F. RSA 193-F:5, III.

G. Reporting Requirement

Every school district and chartered public school is required to make an annual report of substantiated incidents of bullying or cyberbullying to the New Hampshire Department of Education. The reports shall not contain any personally identifiable information pertaining to any pupil. RSA 193-F:6.

In accord with policy JICK, the Principal is responsible for completing these forms. A copy of the form must be sent to the Superintendent. See Section VIII of policy JICK.

H. Immunity and Liability Protection

SAU employees, school employees, chartered public school employees, regular school volunteers, pupils, parents, legal guardians, or employees of a company under contract to a school, school district, SAU, or chartered public school, shall be immune from civil liability for good faith conduct arising from or pertaining to the reporting, investigation, findings, recommended response, or implementation of a recommended response under RSA 193-F. RSA 193-F:7.

I. Private Right of Action

RSA 193-F:9 is a new provision in the law; it states:

> Nothing in this chapter shall supersede or replace existing rights or remedies under any other general or special law, including criminal law, nor shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state.

J. Application to Public Academies

The provisions of RSA 193-F are applicable to public academies. RSA 193-F:10.

III. Best Practices in Policy Implementation

A. Are We Saying "Goodbye" to Geography?

The definitions of "bullying" and "cyberbullying" are sufficiently broad that they will encompass acts that occur off school property. See RSA 193-F:3, I, II. Thus, policy JICK is not defined by the four corners of your school property. Instead, a student could be subjected to bullying or cyberbullying off of school grounds; those actions may constitute prohibited bullying or cyberbullying if they: interfered with the pupil's educational opportunities, created a hostile educational environment, or substantially disrupted the orderly operations of the school. Thus, your policy will need to take into account that the investigator(s) may be investigating incidents of reported bullying – or, more likely, cyberbullying – that occurred off of school property.

Recently, courts have struggled with the extent to which school administrators may regulate off-campus conduct. With the advent of instant messages, websites such as Facebook.com, MySpace.com and Friendster, internet communications have substantially increased. Courts are generally holding that schools may discipline students for off-campus conduct, including internet speech, if there is a nexus between the conduct and the school. See Cohn v. New Paltz Central School District, 363 F.Supp.2d 421 (N.D.N.Y. 2005). The inquiry is whether the off-campus conduct caused a serious disruption of the educational process. See Packer v. Bd. of Educ. of the Town of Thomaston, 717 A.2d 117 (Conn. 1998).

While the full extent to which school officials may regulate off-campus conduct, including speech, is unclear, the following cases do shed some light on this issue:

Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995)

Facts: On Sunday, September 18, 1994, a group of 15 students created a 9-page document entitled "The Sh[__] List." The document listed the names of 140 students, with each name "being followed by one or more lines of crude descriptions of

character and/or behavior." A handful of freshman, more than 30 sophomores and juniors, and more than 60 seniors "were characterized by epithets that were not merely insulting as to appearance, but suggestive, often explicitly so, of sexual capacity, proclivity, and promiscuity."

The following Thursday, a high school senior and two other students made copies of the list and put them in a trash barrel. They were delivered to the school and discovered by a faculty member the following day. The Principal informed the school that the list was harmful and degrading and encouraged students to provide information as to the perpetrators. The following Monday, the three boys who had copied the list went to the principal's office and denied any involvement in the matter. The next day, they returned to the principal's office, said they photocopied the list, but denied knowing the contents of the list. They also indicated that they had photocopied the list off-campus. The principal informed them that they would likely face discipline.

In the meantime, the principal had discovered the names of the 15 students who were involved in creating the list. The principal sent a letter to those students and scheduled a meeting with them and their parents. During the meeting, the principal indicated that the list violated the school's rules against harassment and obscenity. After the meeting, the principal met with the high school senior who instituted this case and informed him that he was indefinitely suspended. Shortly thereafter, the principal wrote to the student and his parents and informed them that he was suspended for 10 days and was to be excluded from extracurricular activities.

The student brought suit against the school, seeking injunctive relief, compensatory and punitive damages, and attorney's fees, alleging that the District failed to follow required procedures prior to suspending him, and that the suspension violated state law which prohibited the "suspension of a student for 'marriage, pregnancy, parenthood or for conduct which is not connected with any school-sponsored activities.'"

Held: For the district. The student's due process rights were not violated. The court found that the student's "admitted off-campus conduct led to the distribution of the list on school premises."

Gendelman v. Glenbrook N. High Sch., 2003 U.S. Dist. LEXIS 8508, 2003 WL 21209880 (N.D. Ill. May 21, 2003)

Facts: Plaintiffs, members of the junior and senior classes at Glenbrook N. High School, met for the annual "powder puff" football game, on a Sunday afternoon, off school grounds. All individuals in attendance were students at the High School. During the game, the juniors were "subjected to a variety of offensive and physical contacts, including violence, at the hands of the senior students," described by the court as "hazing and harassment of an extreme sort." The "game" was videotaped, and subsequently, several participants were charged with violations of the school handbook rules prohibiting hazing and harassment. The students, who were brought before several administrators and given the opportunity to respond to the charges against them

and were then suspended for 10 days, filed a complaint seeking an injunction ordering defendants to vacate their suspensions.

Plaintiffs alleged that the district did not have the authority to discipline the students because the event was not sponsored or sanctioned by the school, it did not take place on school property or during school hours, and the school had no interest in what had occurred. The District argued that its handbook prohibited hazing and harassment, and it did not limit that prohibition to school sponsored events.

Held: Plaintiff's request for a temporary restraining order was denied. It was unlikely that plaintiff's would succeed on the merits of their claim. "[G]iven the egregious nature of some of the conduct depicted in the videotapes, the nexus of the event to the . . . High School and the fundamental relationship that all of the participants had to the school, to hold that the school was powerless to act in these circumstances is patently absurd. When one set of students sets to prey upon another set of students in a ritualistic exercise, the consequences of which will necessarily effect the students' relationships while they are all in attendance at the s[a]me school, the ability of school officials to act in the area and discipline those who went beyond the pale of tolerable student behavior is manifest."

Impact: There is a strong public interest in keeping school environments safe and free from persons and events that will impede the learning process. To accomplish this purpose, school districts must be allowed to discipline students when discipline is warranted. The public interest is served when districts are permitted to punish students participating in incidents involving "egregious conduct."

B. Cyberbullying: Balancing First Amendment Rights with your Statutory Duty

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution, Amendment 1.

Not all speech is protected by the First Amendment. For example, "fighting words," which have been defined as "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" and "true threats," defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," are not protected. Virginia v. Black, 538 U.S. 343, 359 (2003).

In the school setting, certain additional categories of speech may be regulated:

- Student may be limited, restricted, or punished provided that there are facts which may reasonably lead school authorities to believe that the speech will substantially disrupt the school environment or materially interfere with school activities. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

- Speech that is "vulgar, lewd, obscene and plainly offensive," may be limited, restricted, or punished by school officials. Bethel School District v. Fraser, 478 U.S. 675 (1986).

- Reasonable restrictions may be placed on school - sponsored speech, such as school-sponsored publications. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

- Schools may punish students who advocate illegal drug use while in school. Morse v. Frederick, 551 U.S. 393 (2007).

Schools may enact policies that are both content and viewpoint neutral, even if those policies result in the suppression of speech. Douglass v. Londonderry School Board, 372 F.Supp.2d 203 (D.N.H. 2005). To withstand constitutional muster, policies pertaining to speech, including harassment and bullying policies, should be limited to speech that is unprotected by the First Amendment (i.e., a "true threat"), and speech that falls into the categories set forth by the Supreme Court in Tinker, Bethel School District, Hazelwood, and Morse.

When determining whether speech may be regulated, ask:

1. Where did the speech occur? (On-campus, off-campus, both)

2. If the speech occurred on-campus, then ask:

    a. what type of speech is it? (Political, lewd, vulgar, offensive, etc).

    b. what is the effect of the speech? (Was there a disruption? Could a disruption be reasonably anticipated)

    c. where was the speech communicated? (Assembly, classroom, hallway, etc.)

    d. is the speech part of a school sponsored activity? (Assembly, newspaper, play)

3. If the speech occurred off-campus, then ask:

a. did it constitute a “true threat”?

b. if not a “true threat”, is there a sufficient nexus between the bullying and the school to consider the speech as occurring on-campus? Did the bullying cause a substantial disruption to the school? Could a substantial disruption be reasonably anticipated?

The following cases illustrate the “true threat” and “substantial disruption” standards.

J.C. v. Beverly Hills Unified School District, 711 F. Supp. 2d 1094 (C.D. Cal. 2010)

Facts: In May 2008, plaintiff was a student at Beverly Vista High School. On the afternoon of Tuesday, May 27, 2008, after students had been dismissed from school, plaintiff and several other students went to a local restaurant. While there, plaintiff recorded a four-minute and thirty-six second video of her friends talking. The video was recorded on equipment owned by the plaintiff, and it showed her friends talking about a classmate, C.C. One of plaintiff’s friends said that C.C. was a “slut,” that she was “spoiled,” and that she was “the ugliest piece of sh[__] I’ve ever seen in my whole life.” In addition, her friend “talk[ed] about boners” and “use[d] profanity during the recording.” During the video, plaintiff could be heard encouraging her friend to “continue with the [C.] rant.

That evening, plaintiff used her home computer to post the video on YouTube. Plaintiff called between 5 and 10 students and told them to look at the video. She also called C.C. and told her about the video. C.C. told her the video was mean, but said that plaintiff could leave the video online. C.C.’s mother told C.C. to tell plaintiff to keep the video online so that they could show the video to school administrators. That night, the video received 90 hits.

The next day, plaintiff heard 10 students discussing the video at school. C.C., who was very upset, came to school with her mother to tell administrators. C.C. was crying and told the school counselor that she did not want to go to class because she was “humiliat[ed] and had hurt feelings.” C.C. spoke with the guidance counselor for approximately 20-25 minutes, and then went to class.

School administrators watched the video and called plaintiff to the office to write a statement. They also demanded that she delete the video from YouTube and from her home computer. Administrators also questioned the other students who were in the video; the student who went on the “rant” was taken home by her father, who was also called to the school to watch the video.

Plaintiff was suspended for two days. No other students were disciplined. Plaintiff had a prior history of videotaping teachers at school. In April 2008, she was suspended for secretly videotaping her teachers, and was told not to make any further videotapes on campus. During the investigation about the video that was posted on YouTube, administrators discovered that plaintiff had also posted a video of two friends talking on campus.

Students cannot access YouTube from school computers, and there was no evidence that any student viewed the video while at school. Plaintiff filed suit against the district, seeking injunctive relief and nominal damages. Both parties filed motions for summary judgment.

Held: For the plaintiff. While the school could discipline the student for off-campus speech, it could not do so in this case, because the speech did not cause, or threaten to cause, a substantial disruption at school. The actual disruption (C.C.'s refusal to go to class and her upset parent) did not rise to the level of a substantial disruption, and the fear that students would gossip or pass notes about the video is not a foreseeable risk of a future substantial disruption.

Emmett v. Kent School District, 92 F.Supp.2d 1088 (W.D. Wash. 2000)

Facts: Nick Emmett, an eighteen-year-old high school senior, with no disciplinary history, created a website from his home computer and without using school resources or time. Although the website was captioned "Unofficial Kentlake High Home Page," it included a disclaimer that warned visitors it was not sponsored by the school and was for entertainment purposes only. The site included tongue-in-cheek "mock obituaries" of two of Emmett's friends, and allowed visitors to vote on "who would be the subject of the next mock obituary." On the evening of February 16, the website was portrayed on the news as featuring a "hit list" of people to be killed. That night, Emmett removed the site from the Internet. The next day, the student "was summoned to the office and was placed on emergency expulsion for intimidation, harassment, disruption to the educational process, and violation of Kent School district copyright." The expulsion was modified to a five-day suspension, which included a prohibition on sporting events. Emmett filed suit, seeking to enjoin the district from enforcing the suspension.

Held: For the student. There was no evidence that the off-campus speech was intended to threaten, had actually threatened anyone, or that the speaker manifested violent tendencies.

Wisniewski v. Board of Education of the Weedsport Central School District, 494 F.3d 34 (2d Cir. 2007), cert. denied, 552 U.S. 1296 (U.S. March 31, 2008)

Facts: Aaron W., a fifteen-year old eighth grader, created, and attached to the instant messaging feature of his family computer, an icon depicting a gun pointing to a head, a bullet leaving the gun, and blood splattering from the head. It bore the words "Kill Mr. VanderMolen," (Aaron's English teacher). The icon circulated from Aaron's

home computer for approximately three weeks, until it was reported to school officials. School officials and a Lieutenant from the Sheriff's Department met with Aaron and his parents; Aaron was suspended for five days for making "threatening icons and language directed towards a teacher over a home computer and sent it to several students." A subsequent disciplinary hearing resulted in a finding that the icon was a "true threat" and that the District's reaction was reasonable, led to Aaron being suspended for one semester.

Following the meeting, the Sheriff's department determined that Aaron did not constitute a realistic threat to Mr. VanderMolen or any other school official and closed their investigation. In addition, a psychologist concluded that the student did not pose a threat to the teacher or other school officials.

Parents filed suit against the district, seeking damages under § 1983. The district court dismissed their suit on the basis that the icon was a true threat, and therefore, was not protected speech under the First Amendment.

Held: For the district. It was reasonably foreseeable that the student's communication would cause a disruption within the school environment. The fact that the icon was created and transmitted off of school property did not insulate the student from discipline because it was reasonably foreseeable that the icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. "The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of [the plaintiff's] classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment." Thus, the school was permitted to discipline the student, regardless whether he intended the icon to be communicated to school authorities.

Key Points:

- In order to discipline a student for off-campus internet speech, there must be a reasonable belief that the speech will substantially disrupt or interfere with the educational environment.

- Speech that originated off-campus may be considered "on-campus speech" when "the speech is aimed at a specific school and/or its personnel [and it] is brought onto the school campus or accessed at school by its originator"

- Speech that constitutes a "true threat" requires an immediate response from school officials. Allowing a student to attend class and extracurricular activities, and failing to commence disciplinary proceedings

until the school year has ended, will undermine the position that the speech constitutes a "true threat."

- If the speech does not constitute a "true threat" or cause a substantial disruption, then the only way that you can address the conduct is through remediation.

It is important to keep in mind that the cases discussed above have all involved internet speech that originated off-campus. School officials may regulate on-campus internet usage and they may prohibit students from accessing websites such as Facebook.com and MySpace.com while they are on-campus. Each district should have an Internet-use policy that sets forth the on-campus internet policy and gives students and parents notice of the consequences of violating the policy.

C. Policy Integration

Your district's bullying policy should be integrated with other policies pertaining to student and employee conduct. These policies may include, but would not be limited to:

- Student code of conduct/discipline policies (ex: JI, JIC, JICD)
- Student transportation policies (ex: EEA, EEAE, JICC)
- Employee code of conduct policies (ex: GBEB)
- Employee orientation policies (ex: GCH)
- Sexual Harassment policies (ex: JBAA)
- Disability discrimination/harassment policies (ex: Section 504/ADA grievance procedures)
- Other anti-discrimination/harassment policies
- Policies pertaining to off-campus conduct/discipline (ex: JICDD)
- Policies pertaining to volunteers (ex: ABA, IJOC)
- Policies pertaining to internet use (ex: EGA, IJNDB)

D. One Set of Facts, Multiple Issues

The New Hampshire Legislature acknowledged that bullying is frequently motivated by a pupil's "race, color, religion, national origin, ancestry or ethnicity, sexual orientation, socioeconomic status, age, physical, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other

distinguishing personal characteristics." RSA 193-F:2. In addition, individuals are also protected from discrimination on the basis of many of these personal characteristics. As discussed in this section, conduct that constitutes bullying may also rise to the level of discrimination in violation of any number of statutes, such as Section 504 and Title IX. Thus, depending on the alleged bullying conduct, the scope of your bullying investigation may be broader than the four corners of Policy JICK.

1. The IDEA and Section 504

a. Brief Overview of the IDEA

Districts are required to offer a free, appropriate public education ("FAPE") to all children with disabilities. 34 C.F.R. § 300.101(a). A FAPE is defined as special education and related services that:

a. Are provided at public expense, under public supervision and direction, and without charge;

b. Meet the standards of the State Educational Agency;

c. Include an appropriate preschool, elementary school, or secondary school education in the State involved;

d. Are provided in conformity with an IEP that meets the requirements of the IDEA; and,

e. Are provided in the least restrictive environment, with special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurring only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Ed 1102.01(s).

i. Bullying and a Free, Appropriate Public Education

The duty to provide students with a FAPE cannot be compromised by State law. Thus, the investigation and response to bullying must be consistent with your duty to offer FAPE under the IDEA and Section 504. As a general premise, all changes to a child's IEP and placement will need to be made by the IEP Team, with consent of the parents.

A victim of bullying may be denied a FAPE if the bullying adversely affects the victim's education. See Harrisburg City Sch. Dist., 55 IDELR 149 (Pa. SEA 2010) (no

denial of FAPE where the student's poor grades and limited progress were due to attendance problems and not bullying, and where the district took steps to respond to bullying when it received notice of the same; however, the Hearing Officer noted that the district should have considered conducting a functional behavioral assessment and/or implementing a behavioral intervention plan to address the student's behaviors); see also T.K. v. N.Y. City Dep't of Educ., 2011 U.S. Dist. LEXIS 44682, 111 LRP 30408 (E.D. N.Y. April 25, 2011) (reversing and remanding a hearing officer's decision that an IEP was appropriate, on the basis that the hearing officer did not apply the following test: under the IDEA "the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities"; such conduct must be "sufficiently severe, persistent, or pervasive that it creates a hostile environment. . . . When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred[, and i]f harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination").

Where an IEP and placement are otherwise appropriate, a district may not be required to prove that a student will not face future bullying at a proposed placement. J.E. v. Boyertown Area Sch. Dist., 111 LRP 10319, 2011 U.S. Dist. LEXIS 12555 (E.D. Pa. Feb. 4, 2011) (rejecting the parents' argument that the proposed IEP and placement were inappropriate because the placement would expose a student with difficulty in social situations to bullying; parents' argument was based in large part on the student's experience at a different public school, and the proposed placement – in a different public school – was equipped to respond to claims of bullying).

A perpetrator may also be denied a FAPE if the response to the bullying deprives the perpetrator of educational benefit, or if a procedural violation of the IDEA (i.e., failing to provide notice of a manifestation meeting or failing to conduct a manifestation meeting) significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child, or impedes the child's right to a FAPE. 34 C.F.R. 300.513(a).

b. Brief Overview of Section 504

Section 504 applies to the recipients of grants from the federal government. Essentially, all public school districts are covered by Section 504 because they receive some form of federal financial assistance. See Marshall v. Sisters of the Holy Family of Nazareth, 44 IDELR 190 (E.D. Pa. 2005) (Section 504 does not apply to a private religious school that receives no federal funding).

Fundamentally, Section 504 is an anti-discrimination statute. In the educational system, it prohibits districts from discriminating against qualified students with disabilities on the basis of disability. This includes a duty to respond to disability-based harassment.

Public schools are required to provide students with disabilities with a free, appropriate education at public expense. 34 C.F.R. § 104.33(a). Section 504 defines an "appropriate education" as "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 104.34, 104.35 and 104.36." 34 CFR 104.33(b)(1). Schools are also required to provide students with disabilities with an "equal opportunity for participation" in "non-academic and extracurricular services and activities." 34 C.F.R. § 104.37(a).

It is important to note that the definition of FAPE under Section 504 is broader than under the Individuals with Disabilities Education Act. While the IDEA defines FAPE to include the provision of special education and related services, the Section 504 definition includes the provision of <u>regular or special education</u> and related aids and services. However, the implementation of an IEP developed in accord with the IDEA is one means of meeting the "appropriate education" standard. 34 CFR 104.33(b)(2). Thus, as a general premise, a district can assume that meeting its obligations under the IDEA to an identified child will constitute compliance with Section 504's FAPE requirement. As with the IDEA, the duty to provide students with a FAPE cannot be compromised by State law.

The Office for Civil Rights (OCR) enforces several federal civil rights laws, including Section 504 of The Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The primary vehicle for OCR enforcement is through the process of complaint investigation and resolution.

OCR becomes involved in disability issues within a school district when it receives complaints from parents, students or advocates. In addition, OCR provides technical assistance to school districts, parents and students on request. As a general rule, OCR does not review the result of an individual placement or other educational decisions, so long as the school district has complied with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of those students and due process. It is rare that OCR will evaluate the contents of a Section 504 plan or an IEP in light of the fact that any disagreement can be resolved through a due process hearing.

i. <u>How Does the Law Define Disability-Based Harassment?</u>

Disability harassment under Section 504 and the ADA is defined as "*intimidation or abusive behavior* toward a student based on disability that is *sufficiently severe,*

persistent, or pervasive that it *creates a hostile environment* by *interfering with or denying* a student's *participation in or receipt of benefits, services, or opportunities in the institution's program*." See Dear Colleague Letter, (OSEP, July 25, 2000), available at: http://www2.ed.gov/print/about/offices/list/ocr/docs/disabharassltr.html (accessed Feb. 24, 2011) (emphasis added).

The definition of bullying and disability-based harassment both refer to the creation of a "hostile educational environment." This term is not defined in RSA 193-F, but the definition utilized by OCR – interference with or denial of a student's participation in or receipt of benefits, services, or opportunities in the institution's program – is consistent with the purpose behind RSA 193-F, to protect students from bullying and to provide them with a peaceful educational environment. See RSA 193-F:1, I.

c. The Dichotomy Between Disability-Based Harassment and Bullying Investigations

As discussed above, there are similarities between the definitions of disability-based harassment and bullying. However, some conduct that constitutes bullying will not constitute disability-based harassment, while some conduct that constitutes disability-based harassment will not constitute bullying. For example, only a student can be a perpetrator of bullying; however, a student may be subjected to unlawful disability-based harassment from a peer or an adult. See RSA 193-F:3, IV (defining a "perpetrator" of bullying); see Irvine (CA) Unified School District 110 LRP 49179 (OCR Dec. 8, 2009) (discussed below, involving peer-on-peer disability based harassment and teacher-student disability-based harassment).

In addition, there are differences in the investigation and reporting requirements, depending on whether the conduct constitutes bullying or disability-based harassment.

d. Investigating Disability-Based Harassment: Case Studies

OCR recently issued an opinion illustrating the intersection between a bullying investigation and an investigation into disability-based harassment. As the following case illustrates, where the underlying conduct involves disability-based harassment, the investigation must follow the procedures of the Section 504 policy, rather than the bullying policy.

Irvine (CA) Unified School District 110 LRP 49179 (OCR Dec. 8, 2009).

Facts: During the 2008-09 school year, the Student was enrolled in 6th grade. He was diagnosed with Autism, and received services under the IDEA. Parent filed a complaint with OCR, alleging that the Student was subjected to: 1) harassment by another student (Student 2); 2) intimidation by the speech-language pathologist ("SLP");

and 3) that the District failed to respond appropriately and effectively to notice of the alleged harassment.

During the 2008-09 school year, the District had two relevant policies and a "Uniform Complaint Procedure" ("UCP"): a "Harassment and Hate Violence Policy" and a Bullying/Cyberbullying policy. The UCP pertained to complaints alleging discrimination on several bases, including disability. It contained timelines and a requirement that the District issue a decision in writing to the grievant within 60 days of receiving the complaint. The harassment and bullying policies did not require that the District provide the complainant with notice of its final determination.

Allegation 1: Harassment by Student 2:

On June 5, 2009, the Student's parent emailed the Student's principal and informed him that Student 2 had been "hitting, tripping, and calling the Student demeaning names on a daily basis." She also said that a speech language pathologist "had inappropriately responded to an incident that occurred" on June 4, 2009.

The principal investigated these allegations in accord with the District's bullying policy. He interviewed the Student, Student 2 and the classroom teacher.

The principal interviewed Student 2 and found that during a softball game "Student 2 'wanted to see if anyone on the other team was stupid enough to stop' at 3rd base and get tagged out. The Student was one of the students Student 2 was trying to stop. Student 2 was sent to the principal's office by the PE teacher." After the incident, several students in the class told their classroom teacher what Student 2 had said; the teacher engaged the class in a discussion regarding the incident. Student told the principal that he felt that the PE teacher and classroom teacher had adequately addressed the situation.

During the investigation, Student told the principal that he left the classroom to get a snack and Student 2 slammed the door on his face. Student 2 said that he had shut the door at the teacher's request because it was noisy outside; Student 2 said that he did not see Student when he closed the door. The teacher confirmed that she had instructed her students that they could close the door whenever it was too noisy outside.

Allegation 2: Intimidation by the SLP:

The principal also investigated the parent's allegation that the Student's SLP was harassing the Student by intimidating him. The principal found that the SLP had spoken to the Student while he was in the hallway on June 4. The Student was supposed to be working on a group project, but he was not sitting with his group. The SLP asked the Student what he was supposed to be doing, and she told him to use his social skill strategies to join the group. The Student moved his chair and joined the group. The SLP observed for a moment, then left. Shortly thereafter, another teacher heard a chair hitting the floor; students in the group said that the Student had thrown a chair. The

Student confirmed this and said he was angry with the SLP. After school, the SLP and the Student met with the principal. The principal and the SLP "counseled the Student about which behaviors were inappropriate . . . and the consequences for continuing it." The Student was not disciplined, and the SLP did not have contact with the Student for the remainder of the year.

Allegation 3: Failure to respond appropriately and effectively to notice of the alleged harassment:

After completing the investigation, the principal made "many [unsuccessful] attempts" to contact the parent about his findings. However, since it was the end of the school year, he did not provide a written or oral response or report to the parent regarding his investigation findings.

Held: For the parent in part, and for the district in part. OCR found "that the three incidents described above were not sufficiently severe, persistent or pervasive to create a hostile educational environment for the Student on the basis of his disability."

With regard to allegations 1 and 2, OCR found that Student 2's behavior was inappropriate, but was not directed exclusively at the Student. In addition, there was insufficient evidence to establish that Student 2 intentionally slammed the door on the Student's face because of his disability. OCR also found that the SLP was not intimidating the Student, and that after the incident, the district minimized contact between the SLP and the Student for the remainder of the year. Thus, the Student was not subject to disability-based harassment.

However, with regard to the District's response to the parent's complaint, OCR found for the parent. Although the Principal promptly investigated the parent's allegations, he processed the allegations through the bullying policy rather than through the UCP as a disability-based discrimination complaint. OCR stated that it

> recognizes that districts are advantaged when they have anti-bullying programs and procedures. Moreover, it is not always easy to distinguish between the two kinds of adverse conduct. Indeed, both may be present at the same time. Nonetheless, Federal law accords rights and protections against discrimination that are not present against bullying as an independent matter. When a district is on notice that an individual wishes to assert these Federal rights, an anti-bullying program may not serve to diminish these civil rights. The bullying policy, unlike the District's UCP, provides no timeframes, no notice of the District's determination, no anti-retaliation provision, and no appeal process – all elements required under Section 504 when responding to complaints of disability discrimination.

Thus, the District violated Section 504 by failing to provide the parent with notice of its findings.

Practice Pointer: The policy requirements contained in RSA 193-F are similar but not identical to OCR's suggested requirements for a Section 504 investigation. One key difference is that under RSA 193-F, only a student may be a perpetrator of bullying; this limitation does not exist in Section 504. See e.g. RSA 193-F:3, IV. In addition, the Section 504 policies/procedures may contain greater rights and/or different procedures than those that are required by RSA 193-F. Thus, as this case illustrates, it may be necessary to tailor your response to a bullying investigation to ensure that it also complies with relevant Section 504 policy requirements.

i. When Bullying Does Not Constitute Disability-Based Harassment

Jenison (MI) Public School District, 47 IDELR 81 (OCR 2006).

Facts: Parents filed a complaint with the Office for Civil Rights ("OCR"), alleging that their child, who had ADHD and a learning disability in math, was called "retard, psycho," and "stupid bitch" by other students during the first semester of her freshman year. Parents alleged that the harassment was reported to the student's resource room teacher on two occasions, and to the guidance counselor. However, the student did not indicate that she was being harassed based on her disability. The guidance counselor told the student that she would refer her to the school's social worker and refer the harassers to the vice principal. However, the complaint alleged that the vice principal never followed up on the allegations. Subsequently, in November 2005, one of the harassers falsely accused the student of writing a death threat on the bathroom wall. After an investigation (which included a polygraph test, which the student failed), the student was suspended from school for 10 days beginning on January 3, 2006. The student's parents withdrew her from the school on January 4, 2006 and filed a complaint, alleging that the district violated Section 504 by failing to take appropriate action to address disability-based harassment.

OCR interviewed the student who indicated that she had been friends with a group of students since 3rd grade, and at the beginning of their freshman year, the students began calling her names and posting statements about her on the Internet.

Held: For the district. OCR found that the student had been called names that might be construed as relating to her disability, but that she never reported that she was being harassed based on her disability, and the staff members who received the reports from the student believed that they were based on an ongoing feud between two students who had formerly been friends, not based on the student's disability. The student's interview with OCR supported the teacher's interpretations. Thus, the district did not violate Section 504 because it did not have notice that the student was allegedly being harassed on the basis of disability. See also Austin (TX) Indep. Sch. Dist., 38 IDELR 163 (OCR Dec. 10, 2002) (a parent report that her child was "being subjected to physical and verbal attacks by gang members," was insufficient to put the district on notice that the student was being harassed on the basis of his disability and the district's

investigation into the alleged report revealed no evidence that the incident occurred based on the student's disability).

Query: If the district had notice that the student was allegedly being harassed on the basis of disability, would its response have been sufficient under Section 504?

Racial insensitivity may also rise to the level of harassment or discrimination, and provides another example of conduct that could constitute bullying under the Pupil Safety and Violence Prevention Act as well as discrimination. See 42 U.S.C. § 2000(c). Thus, it is important that districts promptly respond to claims of racial insensitivity. For example, the case of Malcolm W. v. Novato Unified School District, No.: A094563, 2002 Cal. App. Unpub. LEXIS 11443, 2002 WL 31770392 (Cal. App. 1st Dist. Dec. 11, 2002), involved a discrimination claim based in part on racially insensitive remarks made by students.

Facts: In February 1998, school A (located in the Novato School District) hosted a basketball game against school B. Plaintiffs, both African-American, were members of the School B basketball team. Prior to the game, approximately 15 students from school A arrived at the game dressed in costumes. "Though the exact description of the costumes varies, at least one student was wearing a 'black afro wig' and some had on face paint." Id. During the team warm-ups, plaintiffs overheard some of the students chanting racial slurs; they reported the chants to their coach, who instructed them to return to the locker room. The coach reported the incident to the school B vice principal, who reported the incident to the principal of school A. The principal discussed the incident with the group of students, and the chanting stopped. After the game, school A conducted interviews with students who were at the game, held an emergency staff meeting to discuss the incident, sent a letter of apology to school B, met with school B and the basketball team on two separate occasions to apologize, and issued announcements to the student body at school A regarding the importance of sportsmanship and respect. Plaintiffs filed suit, alleging (among other things) racial discrimination.

Held: For the district. Despite a history of racial hostility at school A, the district was not deliberately indifferent when it responded to the incident at the basketball game. The district took active efforts, before and after the basketball game, to develop racial sensitivity and eliminate racist behavior among students, parents, faculty, and administrators.

Similarly, sexual or disability-based harassment could constitute both bullying and actionable harassment under Title IX or Section 504. The United States Department of Education recently issued guidance pertaining to the intersection of bulling and antidiscrimination laws. See U.S. Dep't of Educ., Letter to Colleague, available at: http://www2.ed.gov/about/offices/list/ ocr/letters/colleague-201010.html (Oct. 26, 2010).

ii. Deliberate Indifference

As indicated above, compliance with RSA 193-F does not provide immunity from claims alleging violations of other statutory duties. The S.S. case illustrates the intersection between bullying and Section 504 harassment, while the Patterson case provides greater detail about the "deliberate indifference" standard. As these two cases illustrate, not all bullying conduct will rise to the level of unlawful harassment.

S.S. v. Eastern Kentucky University, 50 IDELR 91, 532 F.3d 445 (6th Cir. 2008)

Facts: A student identified under Section 504 filed suit against his middle school, which was operated by Eastern Kentucky University, alleging (in part) that the school discriminated against him in violation of the ADA, Section 504 and Section 1983 by failing to adequately respond to and stop peer-on-peer harassment.[1] The student asserted that the school failed to respond to and investigate his complaints of disability discrimination and harassment, and that the peer-to-peer harassment he experienced created a hostile learning environment, which the school failed to adequately protect him from.

The student alleged that from 2000 until 2003, he was involved in numerous physical and verbal altercations with other students, leading him to believe that he was being bullied and harassed. The student had several disabilities, including cerebral palsy, ADHD, dyslexia, pervasive developmental disorder, and PTSD.

Held: There was no discrimination because the school was not deliberately indifferent to the student's complaints. In reaching its decision, the court utilized the five-part test outlined above.

The court noted that the parties did not dispute that plaintiff could prove the first and fourth elements of the test, and found that it was not necessary to address whether plaintiff could establish the second and third elements because it could not establish that the defendant was deliberately indifferent.

The court found that the school responded to all incidents involving the student, as soon as it learned about the incidents. It conducted individual and group interviews with the student's classmates, instructed his classmates not to tease the student, arranged for outside speakers to talk to the students about name-calling, identified topics for discussions at school assemblies and in small groups, monitored the student, separated the student from other students involved in the altercations, conducted a mediation with the complaining student and another student, disciplined students who were at fault, called the police, had the police speak with an offending student, and called parents of students.

[1] The plaintiff's lawsuit was initially dismissed without prejudice, for failure to exhaust administrative remedies. The plaintiff simultaneously appealed that decision and requested due process. The administrative hearings officer found that the student had not been denied a free, appropriate public education under the IDEA. The plaintiff then refilled suit in Federal Court; however, he did not appeal the administrative order.

Impact: This case illustrates the intersection between Section 504 and bullying claims. Children with disabilities who are victims of bullying or harassment may have a separate claim for damages based on discrimination or retaliation under Section 504 or the ADA. In addition, as discussed below, the response to a bullying claim may give rise to a duty to convene a manifestation meeting, to determine whether the bullying behavior is a manifestation of the bullying child's disability.

This case also illustrates the limitations of the immunity provision in RSA 193-F. That provision limits immunity to "good faith conduct *arising from or pertaining to the reporting, investigation, findings, recommended response, or implementation of a recommended response* under this chapter." RSA 193-F:7. It does not grant immunity from liability under other federal and state statutes, including Section 504.

Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009), cert denied, Hudson Area Schools v. Patterson, 130 S.Ct. 299, 2009 WL 2390235, 2009 U.S. LEXIS 5941 (U.S. Oct. 5, 2009)[2]

Facts: During the plaintiff's sixth and seventh grade years, he was teased, pushed, and shoved by students on a daily basis. The plaintiff reported several of these incidents to school staff, and who initially responded by indicating that "kids will be kids, it's middle school." As time progressed, students were given verbal reprimands; once a student received a verbal reprimand, the plaintiff did not raise any subsequent complaints about that student. However, the plaintiff was teased so frequently that he eventually began eating lunch by himself in the band room to avoid the harassing students.

During the summer between the student's seventh and eighth grade year, he was referred for special education services. The team determined that the student had an emotional impairment and the student was assigned to a resource room for one period of the day. The resource room teacher assisted the plaintiff in coping with his peers. As a result, the plaintiff's 8th grade year was successful and he made progress.

When the student entered 9th grade, the District refused to place the student in a resource room. That year, the harassment began again, and the student was teased,

[2] This case involves a claim that the district violated Title IX, which prohibits discrimination on the basis of gender. However, courts have used the same five-part test (above) to analyze claims alleging harassment/discrimination under Section 504; thus, we have included this case as it is illustrative of the deliberate indifference standard. Although sexual harassment is generally outside the scope of this seminar, it could also constitute bullying and actionable harassment under Title IX. See U.S. Dep't of Educ., Letter to Colleague, available at: http://www2.ed.gov/about/offices/list/ ocr/letters/colleague-201010.html (Oct. 26, 2010).

The First Circuit Court of Appeals has also used the same five-part test in a Title IX case. See Fitzgerald v. Barnstable School Committee, 504 F.3d 165 (1st Cir. 2007), reversed on other grounds by 129 S.Ct. 788 (U.S. 2009).

pushed and shoved on a daily basis. As with the 6th and 7th grade years, students were given verbal reprimands, and the plaintiff did not raise any subsequent complaints about a student who received a verbal reprimand.

However, the harassment worsened during the second half of the school year – in March, students broke into the plaintiff's gym locker, removed his clothes and urinated on them, and threw his sneakers in the toilet; later that spring, the student's regular locker was vandalized and numerous derogatory and sexual phrases were written on the locker with permanent marker; in May, the student was sexually assaulted by one of his baseball teammates in the locker room. The individual who assaulted the student was permitted to attend school while the district investigated; he was ultimately suspended for 8 days (the remainder of the school year), but was permitted to attend the sports banquet, one week after the assault. During the summer, the student who committed the assault was expelled.

During his 10th grade year, the plaintiff began receiving instruction at a preschool through sixth grade elementary school. Plaintiff's teachers would visit periodically to discuss his assignments. For his 11th grade year, the District allowed the student to enroll in courses at a local college. Initially, the District agreed that one semester of college would equal one semester of high school. However, after receiving a tuition bill, the District determined that one semester of college would equal one year of high school. The student graduated at the end of this 11th grade year. Plaintiff filed suit alleging, among other things, violations of Title IX.

Held: For the student. There was a genuine issue of material fact with regard to whether the District acted with deliberate indifference towards the student. The District was aware of what didn't work (verbal reprimands) and what did work (resource room support), but it discontinued the resource room support when the student entered high school, and began responding by verbally reprimanding alleged harassers. Since the District knew that those methods were ineffective, but did not change them, a jury could conclude that the District's response to the harassment was "clearly unreasonable."

Although the verbal reprimands stopped individual harassers from continuing, it did not prevent the overall and continuing harassment of the student, and the District was aware that the harassment remained ongoing. In addition, the harassment did not stop despite the District's school-wide programming dealing with harassment and bullying.

Note: Ultimately, this case went to trial, and the jury's verdict was favorable to the plaintiff. Following the trial, the district filed a motion for judgment as a matter of law. See Patterson v. Hudson Area Schools, 724 F. Supp. 2d 682 (E.D. Mich. 2010). This motion was granted by the court. The court found that the plaintiff had failed, as a matter of law, to state a claim of sexual harassment under Title IX. The court noted that school districts are not required to "remedy" harassment; instead they are required to "respond to known peer harassment in a manner that is not clearly unreasonable." In addition, districts are not required to "expel every student accused of misconduct."

Instead, when districts are aware of peer harassment, they must "take reasonable, timely, age appropriate and effective corrective action."

Here, the court found that the district "responded to each and every incident of harassment of which they had notice," and the evidence established that the district "responded to known peer harassment in a manner that was not clearly unreasonable." The district's actions included: providing the student (plaintiff) with additional resource room support (as part of his IEP); promptly investigating each incident of alleged harassment; imposing discipline on the perpetrator(s), when appropriate; requiring the perpetrator(s) to apologize to the student; cooperating with the police in a criminal investigation of an assault against the student; expelling the student who assaulted the plaintiff and denying his request for re-admission to the school; adopting anti-discrimination policies and promoting activities that addressed harassment;

Thus, the court found that the plaintiff established that the student was subjected to bullying throughout his time at the district; however, the plaintiff failed to establish that the student was subjected to harassment on the basis of gender, sexual orientation, or perceived sexual orientation. As a result, there was no violation of Title IX, which prohibits harassment and discrimination on the basis of sex.

2. Reports to local law enforcement

In certain instances a report of bullying may give rise to a duty to report to the local police department, or, in the alternative, could constitute criminal activity such that the victim or his/her parents could report the perpetrator to local law enforcement agencies.

Under the Safe School Zone Act, RSA 193-D, districts are required to report any act of theft, destruction or violence in a safe school zone to local law enforcement. RSA 193-D:4. An act of theft, destruction, or violence includes any of the following acts:

- Homicide
- Assault (simple assaults may be excluded, in accord with district policy)
- Felonious or aggravated felonious sexual assault
- Criminal mischief
- Unlawful possession or sale of a firearm or other dangerous weapon
- Arson
- Burglary
- Robbery
- Theft
- Illegal sale or possession of a controlled drug
- Criminal threatening

RSA 193-D:1, I. Districts also have a duty to report hazing to local law enforcement. RSA 631:7.

Recently, the New Hampshire Supreme Court had occasion to interpret RSA 644:4, a criminal harassment statute. In re Alex C.,161 N.H. 231 (2010).

Facts: On February 27, 2009, Rachel K.'s daughter ran away from home. The next day, Rachel logged into her daughter's AOL Instant Message account, in an effort to locate her daughter. At 10:30 a.m., Alex sent an instant message to Rachel (through her daughter's account). At 11:00 a.m., Alex, believing he was speaking to Rachel's daughter, sent another message to the account. When Rachel asked who he was, Alex realized he was not speaking to Rachel's daughter, and he began using profanity. Rachel and Alex communicated for approximately 30 minutes.

Between 12:14:59 p.m. and 12:15:36, a period of 37 seconds, Alex typed the phrase "fats***" and sent it to Rachel's daughter's IM account 17 separate times. At 12:16:00 p.m., Alex typed the phrase "stuppppid c***" and sent it to Rachel's daughter's IM account. For approximately four more minutes, Alex sent an additional 21 instant messages. Rachel responded with 7 messages of her own. Alex logged off of his account at 12:23:00 p.m.

A delinquency petition was filed against Alex. The petition alleged that he made "repeated communications to [Rachel's] house in offensively coarse language." The trial court, over Alex's objection, found the petition to be true, and he appealed.

Held: The trial court's decision was affirmed. The instant messages constituted "repeated" communications, and not one communication. The Court stated: "[W]e consider the process of instant messaging, not necessarily as some monolithic entity – a single conversation, but as a series of discrete electronic messages between two or more individuals."

Impact: Conduct that constitutes cyberbullying may also constitute unlawful harassment. A victim may have the ability to press criminal charges against the perpetrator. Note that depending on the facts, other conduct constituting bullying may also rise to the level of a crime (ex: assault).

E. Practical Waiver Considerations

Each policy must contain a provision authorizing the Superintendent, or his/her designee, to grant a waiver of the parental notification requirement. A waiver may be granted if the Superintendent/designee believes that the waiver is in the best interest of the victim or the perpetrator. Thus, if the Superintendent determines that a waiver is in the best interest of either the victim or the perpetrator, neither parent will be notified of the report.

F. Balancing FERPA with Parent Expectations

As indicated above, all policies must contain several reporting requirements, which include: notification to the parents/guardians of the victim and perpetrator that a

report has been made and, after completion of the investigation, a procedure for communication with the parents/guardians of the victim and perpetrator as to the available remedies and assistance. RSA 193-F:4, II.

It is important to remember that the statute expressly states that the content of these notices must comply with the Family Education Rights and Privacy Act, FERPA, 20 U.S.C. 1232g. Thus, the notices cannot contain any information from a student's education records.

The reports can contain:

- The name of the (alleged) victim
- The name of the (alleged) perpetrator
- A description of the reported event and the circumstances in which the event occurred
- A statement that the matter will be investigated
- A description of the remedial measures/non-disciplinary interventions that were provided to that student
- A description of any disciplinary action that was taken against that student

However, the reports cannot contain information about any disciplinary action that was taken against the other student, and they cannot contain any other information obtained from the other child's educational records (such as that the other child is a child with an educational disability).

IV. Limitations on the Scope of the Principal's Response to Bullying

A. The Duty to Remediate

When the principal or his/her designee responsible for investigating a report of bullying or cyberbullying (the "investigator") determines that the report is substantiated, the principal must develop a response to remediate the bullying. This includes imposing discipline, where appropriate, to reduce the risk of future incidents and also to offer assistance, in the form of non-disciplinary interventions, to the victim or perpetrator. RSA 193-F:4, II(k).

Thus, the response to a substantiated incident of bullying can be discipline and non-disciplinary interventions, or non-disciplinary interventions without discipline.

Non-disciplinary interventions could include:

- Transferring the perpetrator to another setting
- Transferring the victim to another setting (generally at the request of the victim's parent)
- Creating a safety plan

- Referral for special education
- Referral for a functional behavioral assessment
- Development or amendment of a positive behavioral intervention plan
- Removal of privileges or positive rewards
- Counseling for the victim
- Counseling for the perpetrator
- Participation in a course for victims
- Participation in a course for perpetrators
- Referral to the IEP Team for review of the IEP, and amendment, as appropriate
- Adding negative consequences for future behavior

B. The Principal's Response and the Duty to Provide a FAPE

When either the perpetrator or victim are a student with an educational disability, the Principal's response to remediate any substantiated incident of bullying or cyberbullying will be limited by the requirements of the IDEA and/or Section 504.

When a principal is contemplating discipline, the principal may remove a perpetrator from his/her placement for a total of ten school days per school year, without referral to the IEP Team. As discussed below, when a principal wishes to remove a student from his/her placement for more than 10 school days, the Team must make a manifestation determination prior to the removal.

Often times, the principal's response with regard to non-disciplinary interventions will be a recommendation or referral to the IEP Team. The IEP Team would then discuss the Principal's recommendation and amend or augment the same in a manner necessary to ensure that the perpetrator and/or victim receives a free, appropriate public education, while still taking appropriate measures to remediate bullying.

The Principal can impose certain non-disciplinary interventions without a referral to the Team. For example, a principal could suggest that the perpetrator and victim participate in peer mediation. In addition, a principal may be able to transfer a student from one class to another (unless expressly prohibited by the student's IEP or 504 plan).

When a principal is contemplating discipline and/or non-disciplinary interventions for students with educational disabilities, his/her first step should be to meet with that student's case manager to determine whether the discipline or intervention is consistent with that student's IEP/Section 504 plan, or whether it will be necessary to make a recommendation to the Team. As a general premise, whenever a principal contemplates removal in excess of 10 school days, a change in placement, or a change that would impact a student's IEP (including the creation or amendment of a behavioral intervention plan), then the principal's recommendation should be referred to the IEP team.

1. The IEP Team and the Duty to Investigate

While it may be appropriate for the IEP Team to address bullying in the context of the Team setting, relying solely on the Team setting may result in a violation of Section 504. See Santa Monica-Malibu (CA) Unified Sch. Dist., 55 IDELR 208 (OCR 2010).

Facts: The parent alleged that the District discriminated against his son by failing to appropriately respond to a complaint that his son was being harassed on the basis of his disability. While the student was in 7th grade, the student was involved in several incidents with other students.

On May 11 of that year, the student's parent wrote to the district and indicated that the student was being subjected to harassment by other students. The student's IEP Team discussed the letter at a meeting on May 15, and amended the student's IEP to include a self-advocacy goal. However, for unknown reasons, the district failed to promptly implement this IEP goal. In addition, the district did not take any steps to investigate the allegations in the letter, nor did it respond to the letter in any other fashion. In June 2009 and again in August and September 2009, the student's parents submitted additional emails to the district, indicating that the harassment was ongoing.

Holding: For the parent. OCR found that as of May 11, the District had notice that the parents believed that the student was being harassed based on his disability, and therefore, it was obligated to investigate and take action to ensure that the harassment did not occur in the future. OCR found that the district "should have undertaken efforts to document the incidents, speak with the potential witnesses to whom the Student had made prior reports, identify the other student(s) responsible for the harassing actions (and take whatever disciplinary action that may have been warranted), and take necessary action to ensure that the harassment did not occur in the future."

OCR also noted that the parent "was entitled to have the District perform a prompt and equitable investigation of the complaints and to receive a written response to the complaints that provided him with details of the investigation and its results along with any remedial action taken in the event that harassment was found to have occurred. The District, however, did not undertake these actions."

Finally, OCR pointed out that although the district took steps "to address the harassment and prevent any future incidents of it by writing specific items into the Student's IEP, it failed to ensure that the items it developed were implemented until after the Student had been subjected to further incidents that were reported as harassment. Thus, even the District's attempt to address the harassment through an IEP team meeting fell short of its obligations to properly respond to allegations of harassment."

2. Amendments to the IEP and Changes in Placement

A principal may not unilaterally change a student's IEP, Section 504 Plan or placement. Thus, the Principal's response to remediate a substantiated incident of bullying may be limited, at least to some extent, by the four corners of the student's IEP or 504 plan.

Several of the non-disciplinary interventions listed above could potentially conflict with the IDEA and/or Section 504. For example, transferring either the victim or perpetrator to another setting could constitute a change in placement. Such a change can only be made by the student's IEP or Section 504 team. Similarly, the removal of privileges or positive rewards, or the imposition of negative consequences for future behavior could conflict with the provisions of an existing behavioral intervention plan. By definition, in New Hampshire, a behavioral intervention plan is "incorporated in the student's IEP." N.H. Ed 1102.01(n).

Of course, the student's Team may agree to amend his/her IEP/Section 504 plan or change his/her placement; absent agreement, however, the remediation may be limited to conducting a functional behavioral assessment and/or implementing or modifying a behavioral intervention plan.

3. The Role of the Manifestation Determination: Where Does it Fit in and When?

When a principal is contemplating disciplinary action as a means to remediate bullying, he/she must also be mindful of the manifestation determination requirements in the IDEA and Section 504.

A Principal may remove a perpetrator or victim from his/her placement for a total of up to ten school days, without referral to the IEP Team. As a general rule, all disciplinary removals in the same school year will count towards the ten days.

When a district is contemplating a change in placement[3] for a child with a disability because of a violation of a code of student conduct, the student's IEP or Section 504 Team must meet to conduct a manifestation determination. 34 C.F.R. 300.530(e); 34 C.F.R. 104.35.

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[3] A change in placement occurs when a child is subjected to a series of removals that constitute a pattern:

- Because the series of removals total more than 10 school days in a school year;
- Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- Because of such additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 C.F.R. 300.536(a)(2).

Thus, if a perpetrator of bullying is a student with a disability under either the IDEA or Section 504, the principal may not remove that student from his/her current educational placement for more than 10 school days, without the student's Team first conducting a manifestation determination.

If the Team determines that the bullying behavior was a manifestation of the student's disability, then the Team must conduct a functional behavioral assessment and implement a behavioral intervention plan, or review and modify an existing behavioral intervention plan. 34 C.F.R. 300.530(f).

If the Team determines that the behavior was not a manifestation, then the principal may discipline that student. However, it is important to remember that under the IDEA, the district will need to continue to provide the student with educational services. In addition, under the IDEA and Section 504, the student has a right to appeal the Team's decision that the behavior was a manifestation of his/her disability.

In addition, students who are not yet eligible for special education and related services, and who engage in behavior that violates a code of student conduct, may assert the IDEAs protections, including the right to a manifestation determination, if the district had knowledge that a child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 34 CFR 300.534(a). A district has knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the educational agency, or a teacher of the child, that the child is in need of special education and related services;

2) the parent of the child requested an evaluation; or,

3) the teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the district, or to other supervisory personnel of the agency.

34 CFR 300.534(b). However, a district does not have knowledge if the parents of the child have refused a request for an evaluation, or have refused services, or if the child has been evaluated and determined to not be a child with a disability. 34 CFR 300.534(c). When the district is deemed to have knowledge, it will be required to conduct a manifestation determination prior to disciplining such a child for more than 10 days.

Recently, the Illinois State Educational Agency had occasion to hear a case involving a dispute over a manifestation determination. The conduct underlying the manifestation determination proceeding involved a Facebook posting that occurred when the student was at home, during a time period when the student was attending an interim-alternative placement. See Township High School District 214, 110 LRP 14705 (Ill. SEA Feb. 4, 2010).

Facts: At the time of the complaint, the student was a 17-year old enrolled as a junior in public school. He was eligible for special education and related services due to a specific learning disability and an other health impairment, as a result of bipolar disorder and ADHD.

At the beginning of the 2009-10 school year, the student was involved in several bullying incidents: his car was egged during a football game, his car was keyed with the words "f___ you,"[4] he was called "daisy" by other students, he was hit in the head with balls during a dodge ball game in PE (after he had already been disqualified from the game), he was pushed into a locker and a urinal, and had garbage smeared on him and his backpack after PE. The day of the garbage incident, the student was involved in an altercation with another student; the conduct was found to be a manifestation of his disability, but his team agreed to a 45 day interim alternative placement.

By November 23, 2009, the student had been placed at the interim setting; however, on that particular day, he was home. The student used Facebook to send the following private message to another public school student, C.C.: "when I come back to school I'm going to look for u and kill u." C.C. responded via Facebook: "dude you keep saying that sh__ u aren't coming back to school." C.C. also used Facebook's instant message feature to ask Student "Why did u say that on Facebook." Student responded to the instant message by telling C.C. to call him and giving him his cell phone number.

When C.C. called the student, he was at the grocery store with his mother, who listened to the conversation. Mother reported that the student asked C.C. why he bullied him, and C.C. said "I don't know man, I'm sorry." C.C. subsequently reported the entire incident to school officials and told them that during the telephone conversation, the student said "I should have beat your ass"; mother denied hearing the student say that. The school accessed C.C.'s Facebook page and printed out the messages.

Following this incident, the student was recommended for expulsion for violating school policy, which prohibited conduct that interfered with, disrupted, or adversely affected the school environment, school operations, or an educational function, including conduct that may reasonably be considered to be a threat or an attempted intimidation of a staff member or endanger the health or safety of students, staff or school property. The code of conduct also stated that the school was authorized to discipline students for disobedience of misconduct, including but not limited to "[e]ngaging in hazing or any kind of aggressive behavior that does physical or psychological harm to another or any urging of other students to engage in such

[4] There was no evidence that car was keyed on school grounds.

conduct. Prohibited conduct includes any use of violence, force, noise, coercion, threats, intimidation, fear, harassment, bullying, hazing or other comparable conduct."

The student's team conducted a manifestation determination on 12/17/09 and again on 1/5/10. An expulsion hearing was scheduled for 1/5/10, immediately after the manifestation meeting. Parents presented evidence from an independent evaluation, indicating that the student's behavior (with regard to the Facebook postings) was a manifestation of his disability. However, the District team members believed that the student's conduct was intentional – he had to log in to Facebook, search for the person with whom he wanted to communicate, indicate that he wanted to send a private message, and type and send the message. The student's team determined that his conduct was not a manifestation of his disability; ultimately, the student was expelled for the remainder of the 2009-2010 school year, and for the entire 2010-2011 school year.

Parents filed a request for an expedited due process hearing on January 5, 2010.

Issues:

1. Whether the student's behavior resulting in the recommendation of expulsion was a manifestation of his disability; and

2. Whether expulsion was proper as a result.

Holding: For the parents. When conducting a manifestation determination, the team must answer two questions: 1) was the student's conduct caused by, or did it have a direct and substantial relationship to his/her disability and 2) was the student's conduct a direct result of the district's failure to implement his/her IEP? If the answer to either of these questions is yes, then the conduct is deemed to be a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(E)(i)-(ii).

The Hearing Officer found that the testimony from the parents' independent evaluator – that the behavior was a manifestation of the student's disability - was credible, and that the testimony of the District witnesses ran counter to their assertions that the student planned the threat and intended the consequences. In particular, District witnesses testified that the student had difficultly paying attention, poor organizational skills, was easily distractible, could experience severe ups and downs in moods with an inability to self regulate, and exhibited poor executive functioning, including difficulty with, or an inability to plan.

Thus, the Hearing Officer reversed the determination that the student's behavior was not a manifestation of his disability, and ordered that the student return to the public school placement. The student's IEP Team was ordered to convene to determine an appropriate plan, and the expulsion was reversed and ordered to be expunged from the student's record.

V. Conclusion

As a general rule, when courts are confronted with allegations pertaining to peer-to-peer bullying or cyberbullying, the district will be judged based on the reasonableness of its actions. Thus, to prevent bullying and cyberbullying, and when responding to bullying or cyberbullying, you should consider the following:

- Are the district's bullying policies reasonable?
- Once you (the district) have received a report that bullying has occurred, did you respond in an appropriate timeframe?
    - Were the steps that you took reasonably likely to prevent future bullying?

Asking these questions, and taking steps to ensure that students are protected from bullying and cyberbullying, should assist in reducing exposure for the district.