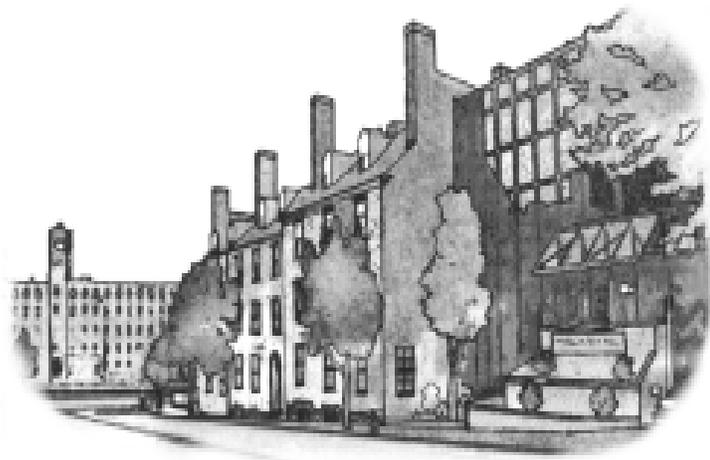


# Identifying, Preventing, and Responding to Disability-Based Harassment

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### A Word of Caution

No two cases are exactly alike. This material is designed to provide Administrators with a broad understanding of the law pertaining to disability-based harassment in the schools. 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**

Disability-based harassment is one of the least recognized and most frequently neglected aspects of discrimination in the school setting. This material is designed to provide Administrators with a better understanding of disability-based harassment in the school setting. The goal of this material is to provide an overview of recent case law pertaining to disability-based harassment, and to leave the Administrator better equipped to identify, prevent, and respond to disability-based harassment in the school setting.

## **II. Brief Overview of Section 504**

Section 504 of the Rehabilitation Act ("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 e.g. Marshall v. Sisters of the Holy Family of Nazareth, 399 F.Supp. 2d 597, 44 IDELR 190 (E.D. Pa. 2005) (Section 504 does not apply to a private religious school that receives no federal funding).

The Office for Civil Rights (OCR), a component of the US Department of Education, enforces Section 504, as well as Title II of the Americans with Disabilities Act 1990 (ADA) which extends the prohibition against discrimination to the full range of state or local government services (including public schools), programs, or activities regardless of whether they receive any federal funding. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. However, the Title II regulations applicable to Free and Appropriate Public Education issues do not provide greater protection than that available under the Section 504 regulations.

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.

OCR does examine the procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are

subjected. For example, OCR will be concerned about the unwarranted exclusion of disabled students from educational programs and services.

OCR defines “disability-based harassment” under Section 504 and the ADA as “intimidation or abusive behavior toward a student based on disability that 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 e.g. OCR Letter, available at <http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> (accessed August 18, 2008).

### **III. The ADA Amendments Act of 2008**

The ADA Amendments Act of 2008 was signed by the President on September 25, 2008. As with most laws, the ADA Amendments Act contains a future date upon which it goes into effect, and the Act will not take effect until **January 1, 2009**.

Section seven of the ADA Amendments Act of 2008 amends two definitions in the Rehabilitation Act of 1973. The amendments are:

- The definition of disability (29 U.S.C. 705(9)(B)) was amended to have “the meaning given it in section 3 of the American’s with Disabilities Act of 1990 (42 U.S.C. 12102)”
- The term “individual with a disability” (29 U.S.C. 705(20)(B)) was amended to state “any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).”

Thus, as of January 1, 2009, for purposes of defining the terms “disability” and “individual with a disability” under the Rehabilitation Act, it will be necessary to look to the definition set forth in the ADA Amendments Act.

Section 3 of the ADA Amendments Act of 2008 contains the following definitions:

- “The term ‘disability’ means, with respect to an individual
  - A physical or mental impairment that substantially limits one or more major life activities of such individual;
  - A record of such an impairment; or
  - Being regarded as having such an impairment (as [defined] in paragraph (3)).”

The following terms, relating to the definition of disability, have also been amended:

- Major Life Activities, means:
  - “For purposes of [the definition of disability], major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping,** walking, **standing, lifting, bending,** speaking, breathing, learning, **reading, concentrating, thinking, communicating,** and working.
  - . . . for purposes of [the definition of disability], a major life activity also includes the **operation of a major bodily function,** including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”
- Regarded as having such an impairment:
  - “An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an **actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.**”
  - For the purposes of defining the term “disability,” an individual is **not “regarded as having such an impairment” if the impairment is “. . . transitory and minor.** A transitory impairment is an impairment with an actual or expected **duration of 6 months or less.**”

(emphasis added).

In addition, the Act also contains several “Rules of Construction Regarding the Definition of Disability,” including the following:

- An impairment that is **episodic or in remission is a disability if it would substantially limit a major life activity when active.**
- The determination of **whether an impairment substantially limits a major life activity** shall be made **without regard to the ameliorative effects of mitigating measures** such as –

- **medication**, medical supplies, equipment, or appliances, **low-vision devices (which do not include ordinary eyeglasses or contact lenses)**, prosthetics including limbs and devices, **hearing aids and cochlear implants or other implantable hearing devices**, mobility devices, or oxygen therapy equipment and supplies;
  - use of assistive technology;
  - reasonable accommodations or auxiliary aids or services; or
  - learned behavioral or adaptive neurological modifications.
- The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
    - The term “‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
    - The term ‘low vision devices’ means devices that magnify, enhance, or otherwise augment a visual image.”

(emphasis added).

#### **IV. The Pupil Safety and Violence Prevention Act of 2000**

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 incident school violence which 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.

##### **a. The Purpose of the Act**

The purpose of the Act is to "protect our children from violence by dealing with harassment, including 'bullying,' in our public schools." RSA 193-F:2. Under NH RSA 193-F:3 each local school board is required to adopt a pupil safety and violence prevention policy which addresses pupil harassment and bullying. The policy must include language which details the action that will be taken by a local school board to resolve and remediate occurrences of pupil harassment.

At a minimum, policies should include the following:

- A statement that pupil harassment/bullying are prohibited;
- A definition of pupil harassment/bullying;
- A statement that training will be provided to students and teachers;
- Examples of interventions that will be used to resolve and remediate bullying

The school board's actions to resolve and remediate occurrences of pupil harassment need not be limited to traditional disciplinary action, but could include the following:

- The transfer of the bullying student to another setting;
- Honoring the request of a parent to transfer their victimized child to another setting;
- Creating and implementing a safety plan for the victimized child;
- Referral for special education and related services;
- The development and implementation of a positive behavioral intervention plan;
- The removal of privileges as a consequence of bullying behavior; and
- Mandated counseling

At the beginning of each school year, school districts are required to notify parents, legal guardians or "other persons responsible for the welfare of the pupil" of the district's Pupil Safety and Violence Prevention Policy and the process whereby disciplinary decisions and other actions taken by the school board to resolve and remediate pupil harassment can be appealed at the local and state level.

The local school board is obligated to define the reporting requirement and is permitted to "provide opportunities for educators to have the knowledge and skills to prevent and respond to acts of bullying." The statute also provides a school employee or employee of a company under contract with a school or school district who has reported violations to the principal or has intervened to prevent an incident of bullying with immunity from any cause of action alleging failure to remedy the incident of bullying.

*Practice Pointer: The anti-bullying policies adopted under RSA 193-F should be used as a tool to protect students with disabilities from disability-based harassment.*

The purpose behind the Pupil Safety and Violence Prevention Act of 2000 is not only to ensure that public schools are safe, secure and peaceful, but also to avoid the creation of a persistently dangerous school. In 2003 the legislature adopted NH RSA 193-G:1 which identifies a “persistently dangerous school,” for purposes of school choice under the No Child Left Behind Act.<sup>1</sup> Once a school has been identified as a persistently dangerous school, the school has a duty to notify the parents of that school’s status and to provide the parents or guardians of the pupil attending such school the option to transfer the pupil from the school to a school within the same school district, consistent with local school board policy. NH RSA 193-G:4. In addition, if a student is a victim of certain enumerated crimes, the school district shall, within five days of being notified of the incident, notify the parents or guardians of the pupil of the option to transfer the pupil to another school within the same school district consistent with local school board policy.

In typical legislative fashion, homicide is included as one of the offenses allowing the victim to transfer schools. Obviously a school district cannot transfer the child who has been the victim of homicide. However, the other crimes, first or second degree assault, aggravated felonious sexual assault, arson, robbery or unlawful possession or sale of a firearm or other dangerous weapon, might very well give rise to a victim and the right to transfer. See NH RSA 193-G:4(II). In addition, schools are required to report acts of theft, destruction, or violence to local law enforcement authorities, and to the person(s) responsible for the victim’s welfare. NH RSA 193-D:4(I)(a). “Acts of theft, destruction, and violence,” include but are not limited to, first or second degree assault and simple assault; however, local school boards may adopt a discipline policy setting forth circumstances under which parents will be notified of simple assaults. NH RSA 193-D:1(I)(b).

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<sup>1</sup> A persistently dangerous school is a school in which 3 of the following acts have occurred as separate incidents during the period of one school year for 3 consecutive years:

- a. Homicide under RSA 630;
- b. First or second degree assault under RSA 631:1 and RSA 631:2;
- c. Aggravated felonious sexual assault under RSA 632-A:2;
- d. Arson under RSA 634:1;
- e. Robbery as a class A felony under RSA 636:1, III; or
- f. Unlawful possession or sale of a firearm or other dangerous weapon under RSA 159.

RSA 193-G:1(I)(a)-(f).

**b. The Reporting Requirement**

The law imposes a duty upon any school employee or employee of a company under contract with a school or school district who has witnessed or has reliable information that a pupil has been subjected to insults, taunts or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response to report the incident to the principal or the principal's designee who is in turn obligated to report the incident to the superintendent and the school board. RSA 193-F:3(II)(a) (emphasis added).

The principal or designee shall by telephone and in writing by first-class mail, report the occurrence of any incident of bullying or pupil harassment to the parent or legal guardian of all pupils involved within 48 hours of the occurrence of the incident. The notice shall advise the individuals involved of their due process rights, including the right to appeal to the State Board of Education. RSA 193-F:3(II)(b).

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.

**c. Waiver of the Notification Requirement**

The Superintendent may within 48 hours of the event grant the principal a waiver from the notification requirement if the Superintendent deems such waiver to be in the best interest of the child. Any waiver granted shall be in writing. RSA 193-F:3(II)(b).

**d. The Local School Board's Duty to Remediate and Resolve Bullying**

The school board is required to define within its policy the remedies available to respond to bullying. In addition, the school board is required to take specific action when it has been advised of an occurrence of pupil harassment. The board is also required to notify "all parties involved," of its decision. RSA 193-F:3(III).

If the local appeal process has been exhausted or the school board has exhausted its remedies under its local policy, the "aggrieved party," (which could be the victim or the bully) has the right to appeal the decision to the State Board of Education. The State Board of Education is required to notify all parties in writing of its decision. Id.

**e. Training**

The local school board is authorized to provide opportunities for educators to have the knowledge and skills necessary to prevent and respond to acts covered under the subject of bullying or pupil harassment.

NH RSA 193-F:4 specifically states that there is no required curriculum or material with regard to the prevention of pupil harassment and that the failure to use a particular curriculum is not considered a violation of the Act.

**f. Immunity and Liability Protection**

Any school employee or employee of a company under contract with the school or school district who, in good faith, reports violations to the principal or designee “shall be immune from any cause of action which may arise from the failure to remedy the reported incident.” RSA 193-F:5 (emphasis added).

**g. Impact**

RSA 193-F creates an affirmative duty to report violations of the school bullying policy. All employees who know, or should reasonably know, that the policy has been violated are subject to this duty. This duty is similar to the affirmative duty to report suspected incidents of child abuse (RSA 169-C). Thus, failure to report violations of the bullying policy may result in liability, at least for employees with a supervisory relationship over the students involved. Districts may also be liable for foreseeable incidents of bullying, in violation of their bullying policies.

**V. The Duty to Prevent Disability-Based Harassment**

Section 504 prohibits discrimination against qualified individuals on the basis of disability. The Federal Regulations provide that “no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance.” 34 CFR § 104.4. Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE if it decreases the student's ability to benefit from his or her education.

When a district knows, or should know, that disability-based harassment is occurring, it has a duty to take prompt and effective action to end the harassment, eliminate hostile environments, and prevent harassment from recurring. See e.g. Lee County (FL) School District, 47 IDELR 18 (OCR June 1, 2006).

School boards are required to “adopt a rule to ensure that there shall be no unlawful discrimination on the basis of sex, race, age, creed, color, marital status, national origin, or disability in educational programs or activities consistent with local standards,” and to adopt and implement written policies and procedures pertaining to “student harassment, including bullying.” N.H. Ed. R. 303.01(i); NH Ed. R. 306.04(8). In addition, federal regulations require the adoption of certain policies and procedures, such as procedures for responding to complaints and/or grievances. These policies, procedures, and rules should be publicized and should be periodically reviewed to ensure that they remain effective.

**a. Identifying Disability-Based Harassment**

Harassment can take many forms, and may be verbal (name-calling), physical, or nonverbal (written statements). OCR has provided the following non-exhaustive list of incidents that may constitute harassment:

- Repeated name calling or criticism that adversely affects a student’s education (for example, impedes the student’s learning, classroom performance/participation, or causes his or her grades to suffer);
- Repeatedly arranging classroom furniture or placing objects in the path of students who use wheelchairs in such a manner that their ability to enter or maneuver through the classroom is impeded;
- Inappropriately restraining a student because of conduct related to his or her disability, resulting in increased absences to avoid school;
- Preventing students with disabilities from attending field trips, assemblies, school events, and extracurricular activities because of required absences related to the student’s disability.

In certain circumstances, disability-based harassment may result in a denial of a free, appropriate public education.

**b. Reducing Risk Through Application of the Two-Part Test**

Disability-based harassment that is so severe, persistent, or pervasive that it creates a hostile environment may violate a student’s rights under Section 504 and the ADA. In determining whether a school district has subjected a student to discrimination-based harassment resulting in a hostile environment, the Office for Civil Rights determines the following:

- Whether there was conduct by the district based on disability that was hostile, intimidating, abusive, degrading or threatening; and,
- Whether a hostile environment was created.

According to the Office for Civil Rights a hostile environment exists when there is a disability-based harassing conduct that is:

- Sufficiently severe;
- Persistent; or
- Pervasive; as to
- Limit a student to participate in or benefit from educational programs or services.

In Murray County (GA) Public School District, 49 IDELR 260 (OCR April 1, 2007), parents filed a complaint with OCR, alleging that their child's teacher made disparaging and discriminatory comments about students with disabilities to the student's paraprofessional and that the teacher later entered the student's classroom and made offensive comments pertaining to the paraprofessional's sexual orientation. Parents asserted that these two incidents created a hostile environment in violation of Section 504.

The paraprofessional reported both of these incidents to the principal, who requested that the teacher submit a written response to the allegations. The teacher did so, denying that he had made any inappropriate comments. The principal investigated, interviewing the paraprofessional, the teacher, and several students. The parent requested that the principal investigate the second incident, and also filed a complaint with OCR. OCR determined that the investigation was inadequate because the principal did not interview all of the witnesses identified by the complainant; nevertheless, there was insufficient evidence to establish that the student was subjected to a hostile environment.

The following are examples of conduct that, if sufficiently severe, persistent, or pervasive, may constitute a hostile environment:

- Singling a student out before his peers and stating in a negative manner that the student is receiving an accommodation;
- Providing demeaning responses when a student requests the opportunity to implement a portion of his or her IEP or Section 504 plan;

- Students remarking out loud in class that a student with a disability is “stupid” and does not belong in the class.

## VI. Preventing Disability-Based Harassment in the Schools

### a. Teacher-Student Harassment

#### 1. The Duty

The State of New Hampshire appears to have acknowledged a duty on the part of employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy. In Marquay v. Eno, 139 NH 708 (1995) the New Hampshire Supreme Court indicated that schools share a special relationship with students entrusted to their care which imposes upon them certain reasonable duties of supervision. On the basis of that duty the court held certain supervisory employees liable for failing to prevent sexual abuse and harassment by an educator. The court held that the district employees would be held liable for negligent supervision if they could have reasonably foreseen that their conduct would result in an injury or if their conduct was unreasonable in light of what they could anticipate to be the conduct by the other employee. The court stated “Those employees who share such a relationship with a student and who acquire actual knowledge of abuse, or who learn of facts which would lead a reasonable person to conclude that a student is being abused are subject to liability if their level of supervision is unreasonable and is a proximate cause of a student’s injury.”

Under this holding the court also stated that a school employee may be subject to liability for injuries that occurred off school premises, if the student can show that the employee’s negligent acts or omissions proximately caused the injury to the student.

State v. Drake, a case involving a student search, is also instructive as to the duties owed to students. 139 N.H. 662 (1995). The court noted:

. . . while students bring certain rights with them when they enter a public school, additional rights attach upon that entry. In particular, students are entitled to a safe and healthy educational environment. This is worthy of particular notice because school attendance is mandated by law.

at 664 (emphasis added). The court went on to state that this right “necessarily vests certain responsibilities in those administering public education.” Id. These responsibilities include a duty to protect students from antisocial behavior on the part of “irresponsible classmates.” Id.; see also In re Juvenile 2006-406, 156 N.H. 233, 236 (2007) (citing State v. Drake, above).

## 2. Case Studies: Violations of Section 504 and the ADA

In addition to the duty to prevent and respond to disability-based harassment, districts are responsible for the conduct of their faculty that creates a hostile environment. The following cases illustrate this responsibility:

In Lee County (FL) School District, OCR found that a district had created a hostile environment for a first-grade student with a disability. 47 IDELR 18 (June 1, 2006). Parents alleged that the district had violated Section 504 by failing to respond to complaints and/or demonstrating a lack of sensitivity in comments to the parents and student, and that by the end of the school year, the student was so uncomfortable that she refused to enter the diabetes clinic where she received insulin shots, resulting in one week of home-schooling.

In the complaint, the Parents listed the following examples of inappropriate statements made to them or to the student:

Nurse to Parent: “You know there is another school that has a full-time nurse that could better accommodate the student.”

Nurse to Parent: “Isn’t there anything that makes you happy.”

Nurse to Parent: “Do you think she wants to get out of her work?”

Nurse to Student: “I don’t know what’s the matter with you today, Missy.”

Nurse to Student: “Hurry up and do it then” (student was slow selecting an injection site).

Nurse to Student: “I have other kids to see” (after jabbing a needle into Student’s arm).

Principal to Parent: “Frankly, I’m so tired of it. Maybe the School is not the place for you to be. Either way, the health plan is in place and we can go by that. I do not care what the American Diabetes Association or the Juvenile Diabetes Research Foundation say, you parents always think that something is going to go wrong.”

The nurse and principal responded to each allegation as follows:

Nurse to Parent: “You know there is another school that has a full-time nurse that could better accommodate the student.”

Nurse’s Explanation: the statement was made because the parent was complaining about the school not giving the student proper care and asserting that the student needed a full-time nurse. The statement was not meant to be discriminatory.

Nurse to Parent: “Isn’t there anything that makes you happy.”

Nurse’s Explanation: this statement was made in response to parents request that the nurse demonstrate how she checks the student’s blood-sugar.

Nurse to Parent: “Do you think she wants to get out of her work?”

Nurse’s Explanation: She asked this question because the student was playful in the Clinic and she wanted to make sure that the Student returned to class in a timely manner.

Nurse to Student: “I don’t know what’s the matter with you today, Missy.”

Nurse’s Explanation: The parent objected to the nurse calling the student “Missy”; the nurse considered it a term of endearment, but stopped using it when parent objected.

Nurse to Student: “Hurry up and do it then” (student was slow selecting an injection site).

Nurse’s Explanation: She told the student to hurry up because the student was having trouble deciding which arm to use within the timeframe she needed to receive the insulin.

Nurse to Student: “I have other kids to see” (after jabbing a needle into Student’s arm).

Nurse’s Explanation: The nurse did not recall making this statement.

Principal to Parent: “Frankly, I’m so tired of it. Maybe the School is not the place for you to be. Either way, the health plan is in place and we can go by that. I do not care what the American Diabetes Association or the Juvenile Diabetes Research Foundation say, you parents always think that something is going to go wrong.”

Principal’s Explanation: The principal recalled telling the parent that the student’s Section 504 plan met Student’s needs and that he was done amending it. He told OCR that he did not believe that the statement was discriminatory.

Parents also alleged that the district failed to respond to at least six complaints regarding the diabetes-related care that the student received from the nurse and Clinic assistant. The district investigated a few of the complaints, but was unable to provide documentation that anyone was coordinating and supervising diabetes medical and clinical care and responding to the parents’ complaints. In addition, the principal informed OCR that he “had no present plan to coordinate and supervise such an effort on a school level.”

OCR found that the evidence indicated “a lack of not only education and training, but also sensitivity to the Student’s condition.” The alleged statements, taken individually as isolated incidents, would not rise to the level of harassment; however, when viewed in conjunction with the lack of training, coordination of medical treatment, and the repeated failures to respond to complaints, the evidence established that the district had created a hostile environment.

Similarly, in Morgan Hill (CA) Unified School District, 46 IDELR 256 (OCR Mar. 15, 2006), a parent filed a complaint with OCR, alleging that the district discriminated against their daughter on the basis of her disability (migraine headaches) by:

- 1) failing to respond to parents’ complaints that the student’s physical education teacher was harassing the student on the basis of her disability and
- 2) failing to excuse absences which were caused by Student’s disability.

With respect to the first allegation, OCR found that, on September 28, 2004, the PE teacher told the student: “I get migraines, I take Excedrin, and I run five miles a day.” This statement was made in front of the class, while the student waited for her mother to bring migraine medication to school. The PE teacher also accused the student of lying about the migraines as a pretext to get out of class. The parents met with the Vice Principal, and believed that he had addressed their concerns by speaking to the PE teacher.

On June 2, 2005, the parents’ attorney sent a letter to the principal alleging “continued and serious verbal harassment, discrimination due to a disability, intimidation and invasion of privacy,” by the PE teacher; the letter requested a Section 504 meeting. This was the first complaint since September 2004. The principal scheduled a meeting with the parents and student, and met with the PE teacher, who denied harassing the student, and informed him that the student had been excused from PE when she had migraines.

On June 15, 2005, parents sent a letter to the Principal, informing him that the PE teacher continued to harass the student on the basis of her disability. The Principal did not respond to the letter because he was scheduled to meet with the parents on the following day. During the meeting, the parents informed the district that the PE teacher had harassed the student by telling her that she did not believe her migraines were disabling, and requested a Section 504 meeting. The district agreed to investigate the allegations and to schedule a 504 meeting. By letter dated June 19, 2005, the parents informed the district that, based on the June 16 meeting, they believed the district would be investigating the complaint during the summer.

On August 29, 2005, the parents wrote to the district, requesting a response to their complaint and asking that the district comply with its policies regarding complaints about employees. On August 31, 2005, the parents informed the district that they were withdrawing the student from school because the district had not responded to the complaint against the PE teacher. On September 1, 2005, the district informed the parents that it would begin investigating the complaint. Parents responded on September 19, 2005, informing the district that they had filed the complaint on June 2, and that the district had agreed to investigate during the June 16 meeting, but that the investigation did not occur. Parents filed a complaint with OCR; in the meantime, the District completed its investigation of the PE teacher and determined that there was no evidence that the teacher had harassed the student on the basis of her disability. Because the district had resolved that issue, OCR did not investigate that allegation; instead, OCR investigated whether the district promptly responded to the June 2 complaint.

OCR found that the district violated Section 504 and the ADA by failing to promptly respond to the June 2 complaint. The district had a duty to investigate the allegations against the PE Teacher, even though the investigation would occur during the summer. The parents believed that a persistent discriminatory action would continue, and that it needed to be addressed before the start of the 2005-06 school year. "Under this circumstance, the term prompt encompasses a duty not to postpone the matter unless it is simply not feasible despite the District best efforts [sic]. Although it is possible that witnesses may not be available during the summer break, in this case, there is no evidence to show that the District attempted to contact the P.E. teacher or any of the witnesses during the summer or determine whether an arrangement could have been made to secure their time."

#### Key Points:

- Districts must investigate complaints alleging harassment as soon as they are received. If you are unable to complete the investigation (because of school vacations or summer breaks) then you must document the steps that were taken to promptly resolve the matter. In addition, it is important to keep the individual who filed the complaint informed about the status of the investigation.
- When investigating complaints of disability-based harassment, it is important to consider the allegations as a whole, rather than focusing on single allegations. A statement that might not rise to the level of harassment when viewed in isolation may be deemed harassment when viewed in conjunction with other events.

### **3. Case Studies: District did not violate Section 504 or the ADA**

In a local case, Salem (NH) School District, 35 IDELR 260 (OCR April 16, 2001) a parent alleged that his son, a student with a disability, was harassed because his car was towed from the school parking lot. The Office for Civil Rights found no evidence that the student's car was towed as a way to harass him based on his disability. The student handbook stated that first priorities for parking permits were given to students with at least a 2.0 GPA, and the student had not obtained a parking permit. The parent also alleged that the presence of a school resource officer at team meetings was intended to intimidate the student. OCR found that the school resource officer's occasional participation did not create a hostile environment based on the student's disability.

Similarly, in Aztec (NM) Municipal Schools, OCR found that the district had not violated Section 504 or the ADA. 47 IDELR 108 (OCR May 22, 2006). In that case, the parents alleged that the district discriminated against their son on the basis of his disabilities (hearing impaired, ADHD, PTSD) by disciplining him for physical activity related to his disability, and that the student's art teacher subjected him to harassment by ridiculing his art work in front of his class and by refusing to display his artwork.

With respect to the alleged harassment by the Art teacher, OCR found that the student was treated in the same manner as other students in the class: not all students' artwork was displayed, and the art teacher routinely critiqued students' art projects. OCR also found that the student was disciplined in accord with his behavior intervention plan, was disciplined because he acted out (slammed books, yelled in class, etc), and was not subjected to a change of placement or disciplined because of his disability. Thus, OCR found that the district did not violate Section 504 or the ADA.

#### **b. Peer-to-Peer Disability-Based Harassment**

There have been a number of cases alleging that districts had a duty to protect a student from injury and harassment by other students. Unfortunately, children with disabilities are sometimes identified by other students for harassment. The theory alleged by the aggrieved parents is that the educators assumed a duty to protect the student from injury by another student and that the educator knew or should have known that the offending student had a propensity for violent behavior and that knowing such, should have taken steps to protect the victim. Civil Rights statutes have been used to support allegations that the district and its administrators were indifferent to recurrent harassment.

In order to be liable for peer-on-peer disability-based harassment, the conduct must be severe or pervasive and be related to the victim's disability. Werth v. Board of Directors of the Public Schools of the City of Milwaukee, 472

F.Supp. 2d 1113 (E.D. Wis. Jan. 22, 2007). In that case, the student, Joseph Werth, was subjected to verbal attacks and mocked by other students because of his severe physical disabilities. This harassment began when the student was in first grade and continued through seventh grade. In eighth grade, he attended a private school. Werth's parents decided to return him to public school, and prior to the start of his ninth grade year (2001-02), his mother met with the Assistant Principal and informed him of the difficulties her son had experienced in previous years. The Assistant principal explained that the school was safe and that nothing would happen to Joseph.

During the 2001-02 school year, Joseph was enrolled in a woodshop class. At some point prior to October 16, 2001, Mrs. Werth met with the woodshop teacher, Mr. Kruzel, and informed him about Joseph's disabilities and told him that Joseph was very sensitive to pain. On October 16, 2001, Larry W., a student in the woodshop class, was working on a project at a machine located about two feet from Werth. Larry W. posed a safety risk to other students "because he would run and push and did not observe safety rules." During class, Larry picked up two pieces of wood and threw them, one at a time, at Werth; both pieces of wood hit Werth in the back. Mr. Kruzel saw this occur; however, when Werth complained, he informed him that he did not see the incident and told Werth to return to his seat.

Shortly thereafter, another student, Joe F., threw another piece of wood at Werth, who again complained to the teacher, who again instructed him to return to his seat. Larry threw two more boards at Werth, who complained yet again. This time, the teacher wrote a discipline slip and both students were suspended.

Following those incidents, Werth suffered numbness in his legs and swelling in his spine, and was out of school until January 2002. Prior to his return, his IEP Team agreed to a number of modifications and accommodations to ensure Werth's safety at school. On January 14, 2002, a student, Roberto S., began teasing Werth about his woodshop project and threw a pair of safety goggles at Werth, striking him in the head, giving him a concussion and cracking three teeth. Werth complained to Mr. Kruzel, who sent Roberto to the office; Roberto was suspended for three days. Werth's parents filed suit against the District alleging, among other things, violations of Section 504 and the ADA.

The court first noted that a "[s]chool district's liability for peer-to-peer disability-based harassment under § 504 and the ADA has not been addressed directly by the United States Supreme Court." *Id.* However, at least three other courts "have found that an inadequate response to peer-to-peer disability discrimination is actionable under § 504 and/or the ADA." *Id.* (citing M.P. v. Indep. Sch. Dist. No. 721, 326 F.3d 975 (8th Cir. 2003) (administrator disclosed a student's paranoid schizophrenia to the school community, which resulted in his verbal and physical abuse by other students over a period of several months; denying district's motion for summary judgment because of a dispute with regard

to the effect of the administrator's disclosure, the resulting harassment, and the school's failure to address and remedy the discrimination); K.M. v. Hyde Park Central Sch. Dist., 381 F.Supp. 2d. 343, 358-60 (SD NY 2005) (over a two year period, a student with a disability was subjected to verbal and physical abuse in school and on the school bus; each incident was reported to school officials but no action was taken to protect him from further harassment; denying district's motion for summary judgment); Biggs v. Bd. of Educ., 229 F.Supp.2d 437 (D. Md. 2002) (granting the district's motion to dismiss on the basis that the district was not deliberately indifferent to peer-on-peer harassment because, after each complaint, the school took appropriate action, such as providing counseling for the victim, sending letters to parents, threatening suspension, and alerting teachers of the incidents)).

The court dismissed the case, holding that the parents had presented insufficient evidence that Werth was harassed because of his disability, or that the harassment that Werth suffered was severe or pervasive. The court did note that the school appropriately addressed the incidents by suspending the offenders and ensuring that they were not in Werth's classes.

Similarly, in the case of Jenison (MI) Public School District, the parents filed a complaint, alleging that the district discriminated against a student with a disability by failing to take appropriate action to address student-on-student disability harassment during the first semester of the 2005-2006 school year. 47 IDELR 81 (OCR May 31, 2006). Parents alleged that the student, a fourteen-year old ninth grader with Asperger's Syndrome, was called "retard," "psycho," and "stupid bitch," and that she was called these names because her disorder caused her to behave strangely. Parent reported the harassment to the student's guidance counselor and her special education teacher, and in October 2005, the student informed the guidance counselor. The guidance counselor informed the vice-principal; he spoke with the student, who told him that the harasser did not want to be her friend any longer. The student did not mention disability-based harassment. Following these reports, the Student was allegedly falsely accused by one of her harassers of writing a death threat on the bathroom wall, and was suspended for school for 10 days. However, the student was seen leaving the bathroom immediately before the threat was discovered, was absent from her class at the time the threat was written, and, when the matter was referred to the Sheriff's department, she failed a polygraph test about the incident and was found to be the culprit.

Based on the weight of the evidence, and the student's own admissions that the harassment reflected an on-going feud between former friends, rather than disability based harassment, OCR found that the District had not violated Section 504 or the ADA.

Key Point:

- These cases illustrate the importance of promptly responding to allegations of harassment. Appropriate responses to harassment allegations may include counseling, communication with parents and teachers, suspensions and changing schedules.

In the recent case of S.S. v. Eastern Kentucky University, a student identified under Section 504 filed suit against his school district, alleging (in part) that the district 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. 50 IDELR 91, 532 F.3d 445 (6th Cir. 2008). The student asserted that the district 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 district failed to adequately protect him from.

The Sixth Circuit Court of Appeals held that the district did not discriminate against the student because it was not deliberately indifferent to the student's complaints. The district 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 the student's classmates not to tease him, 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, and called parents of students.

Key Point:

- This case illustrates the intersection between Section 504 and harassment claims. Children with disabilities who are victims of bullying or harassment may have separate damage discrimination or retaliation claims under Section 504 or the ADA.
- 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 child's disability.

*Practice Pointer: Peer mediation is often a valuable tool to avoid the escalation of peer-on-peer harassment.*

In Scruggs v. Meriden Bd. of Ed., Plaintiff brought suit on behalf of her son, a student with a learning disability, claiming the district violated his rights by, in part, failing to adequately supervise and protect her son from known

harassment, bullying and assaults. 44 IDELR 59, 2005 U.S. Dist. LEXIS 19296 (D. Conn. Aug. 26, 2005). Plaintiff sought, in part, to hold defendants liable for discrimination under Section 504 and the ADA, and under § 1983 for refusing to establish necessary procedures, adequately train school employees to deal appropriately with learning disabled children, and establish anti-bullying and harassment policies. Defendants moved to dismiss.

The court held that the plaintiffs' allegations that defendants' failed to address student's special education needs and the ongoing bullying situation supported an inference that defendants' were deliberately indifferent to student's rights. Plaintiff sufficiently alleged deliberate indifference to the need for training and supervision by the defendants.

At a later stage in the proceedings, the District filed a Motion for Summary Judgment, which was granted as to this court. The court noted that although "the record provides evidence from which a reasonable jury may infer that there is a history of school teachers and administrators mishandling [student's] special education needs, . . . the record does not show that the Board's inadequate training of its employees is 'closely related' to any injury to [the student]." Scruggs v. Meriden Bd. of Educ., 48 IDELR 158, 2007 WL 2318851 (D. Conn. Aug. 10, 2007). The court also granted summary judgment for the District as to the Section 504 and ADA claims, noting that the record did not establish that the district was deliberately indifferent to the student. Instead, the record established that the district provided the student with some services to address his problems, and that school personnel "constructively intervene[d] at certain times to involve [the student] in a school play, assign him a mentor, refer him to [DCYF], a truant officer, and ultimately refer him to the [school within a school] program and to a [planning and placement team]."

Key Point:

- Failure to train employees, when "deliberately chos[ing] from among various alternatives not to provide adequate training" may amount to deliberate indifference, and thereby give rise to a violation of § 1983.

In Las Virgenes (CA) Unified School District, parents alleged that the district failed to respond to their ongoing complaints that a student's peers were subjecting him to taunts, threats, physical attacks, and ostracism on the basis of his disability. 49 IDELR 231 (OCR March 8, 2007).

OCR found that the parent had informed the district that the student had been subjected to incidents of bullying, taunts, teasing and physical attacks during the school day. In making these complaints, however, the parents did not specifically indicate that the incidents were related to the student's disability. The District informed OCR that it did not believe that the allegations constituted

disability-based harassment, but that it considered the allegations to be reports of harassment, bullying and concerns for the student's safety. After each complaint, the district attempted to identify the bully and to determine whether the student was safe. The district also convened meetings and IEP meetings, offering to change the students schedule and proposing amendments to his IEP.

OCR determined that the parents did not inform the district that they believed that the harassment was based on the student's disability, and that they did not provide the district with facts that would make it reasonable for the district to assume that the harassment was based on the student's disability. OCR also noted that the district had a formal complaint process pertaining to disability-based harassment, and the parents did not utilize that process. In addition, even though the District did not view the allegations as disability-based harassment, it did investigate each complaint that the parents made, and took steps to address the parents' concerns and the student's safety. Thus, OCR concluded that the District did not violate Section 504.

In the recent case of Greenport (NY) Union Free School District, parents alleged that the district failed to respond appropriately to complaints of disability based harassment. 50 IDELR 290 (OCR May 12, 2008). The parent alleged that her sons (Students 1 and 2), fifth and sixth grade students, were harassed by their peers on the basis of their disabilities (peanut allergies). Specifically, parents alleged that on October 25, 2007, Student 1 told the principal that Student 3 had called him "a peanut butter boy," and said "I have peanut butter, want some?" OCR determined that the guidance counselor verbally reprimanded Student 3 and contacted Student 3's parents about the incident.

Parents also alleged that on November 17, 2007, Students 1 and 2 were harassed at a tree lighting ceremony that involved the school's chorus. Parents alleged that prior to the start of the ceremony, Students 1 and 2 were threatened and harassed by other District students. Parents reported the incident to the principal on November 19, 2007. OCR found that after receiving the report, the principal met with the teachers for the 5<sup>th</sup> and 6<sup>th</sup> grades and asked them to collect written statements from the students who were involved in (Students 4, 5, 6, and 7) and/or witnessed the incident. The principal met with each student to review their written statements, and also met with Students 1 and 2. The principal's investigation revealed that the incident began when Student 1 teased Student 6; Student 6 then punched Student 1. Student 4 became involved because Student 2 made fun of him and other students. Student 5 then told Student 2 that she would go to the grocery store, get peanut butter and smear it all over Student 2. The principal disciplined each student based on their level of involvement in the incident. Student 6, who punched Student 1, received the most severe punishment, while all other students, including Students 1 and 2, received 2 days extended study time and parent conferences. Student 5, the only student who made a disability-related comment, was required to meet with the guidance counselor for one-to-one counseling, and with the principal to

discuss the seriousness of the threat. In addition, the principal met with the 5<sup>th</sup> and 6<sup>th</sup> grade classes to speak with students about threats and teasing related to peanut butter, and the guidance counselor spoke with all students about teasing and bullying. Ultimately, OCR determined that the evidence established that the District had responded appropriately to the complaints regarding harassment.

The case of Georgetown (MA) Public Schools, 34 IDELR 65 (OCR Sept. 8, 2000) illustrates the importance of anti-bullying policies. In that case, the parents of a child with a disability filed a complaint with the OCR, alleging that the District discriminated against their son on the basis of his disability (Tourette's Syndrome) by denying him a free and appropriate public education, and that in between classes, their son was subjected to teasing and hostility because of his disability. The District had provided training on disability harassment to its staff, and noted that it was difficult to prevent or correct peer-on-peer harassment while students were passing through crowded hallways. OCR found that the student was subjected to harassing remarks by at least one student, but that the district had disciplined that student. The District agreed to review its training plans to determine whether additional staff training was necessary, and agreed to inform students and parents of its "student Diversity Club," the club's mission and activities. The District also agreed that the club would include issues pertaining to disabilities, including Tourette's Syndrome, agreed to review its curriculum offerings, student organizations and activities, and agreed to consider offering an outside speaker from an organization knowledgeable about disabilities such as Tourette's Syndrome. Based on these actions, OCR closed the complaint.

Key Points:

- These cases illustrate the importance of procedures for reporting complaints of bullying and disability-based harassment/discrimination. Those procedures should be in writing and distributed to parents and students at least annually.

**VII. Responding to, and Reducing the Risk of, Disability-Based Harassment**

The case of San Juan (Ca.) Unified School District, 36 IDELR 135 (OCR 2001) provides some guidance as to measures a district can take to reduce its risk of disability-based harassment. In this particular case, the parent alleged that a teacher allowed other children in her son's special education classroom to ridicule and humiliate him. The district entered into a voluntary resolution agreement where it agreed to develop and distribute a policy prohibiting disability harassment and affirmed its commitment to providing an educational environment free from disability discrimination, including harassment. The district also agreed to provide training to administrators, teachers and staff that would be designed to instruct employees to recognize, respond to, and prevent

disability harassment in the educational environment. The district further agreed to provide the Office for Civil Rights a plan to furnish age appropriate training to students in the school system concerning disability harassment as well as specific training for administrators, teachers and staff who are involved in the provision of services to students with disabilities which would include information to increase awareness of social and behavioral issues associated with specific disabilities.

This voluntary consent agreement in the San Juan case provides guidance as to how a district can reduce the risk of disability-based harassment. Educators and districts should consider the following:

- Review of their policies to ensure that they explicitly prohibit disability harassment and affirm the district's commitment to provide an educational environment free from disability discrimination including harassment;
- Training to administrators, teachers and staff on how to recognize, respond to and prevent disability harassment;
- Age appropriate training to students concerning disability harassment.

In addition, the following measures may also reduce the risk of disability-based harassment:

- Encourage students to report disability harassment to their teachers or administrators;
- 
- Promptly investigate and follow-up on reported disability-based harassment;
- - As part of the investigation, interview the alleged victim as well as the alleged harasser, and any witnesses.
- Establishing grievance procedures that can be utilized to address disability harassment, and disseminating and posting these procedures in accessible locations.

## **VIII. Conclusion**

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

- Does the district's harassment policy explicitly prohibit disability-based harassment?
- Does the district take reasonable steps to investigate allegations of harassment?
  - Were the steps that you took reasonably likely to prevent future harassment?
- Did the district respond to the allegations in an appropriate timeframe?

Asking these questions, and taking steps to ensure that students are protected from disability-based harassment, should assist in reducing exposure for the district.