Integrating New Hampshire's Anti-Bullying Laws with the IDEA, Section 504 and FERPA

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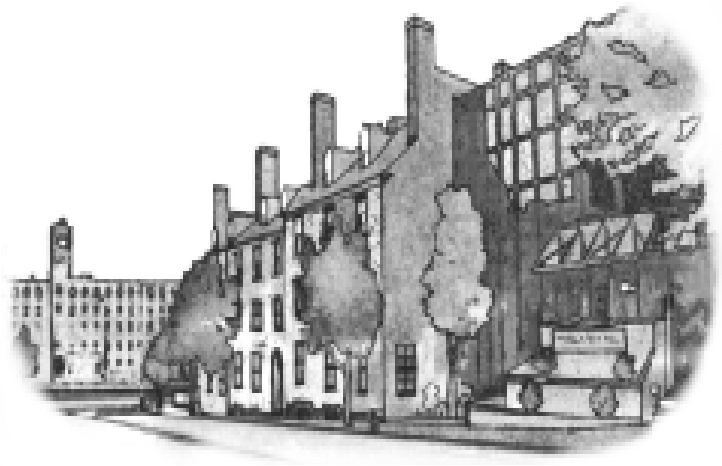

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A Word of Caution

No two cases are exactly alike. This material will explore and offer solutions to the unique challenges presented to special educators as they seek to comply with their federal special education, anti-discrimination and privacy duties within the context of New Hampshire's new anti-bullying legislation. 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

> *Children with disabilities are two to three times more likely to be the victims of bullying than their nondisabled peers.*[1]
>
> *"[D]istricts are advantaged when they have anti-bullying programs and procedures . . . [however,] 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. . . ."*[2]

The purpose of this material is to assist special educators as they seek to comply with their federal special education, anti-discrimination and privacy duties within the context of New Hampshire's new anti-bullying legislation. 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.

This material begins with a brief overview of RSA 193-F, the State law which imposes a duty to develop an anti-bullying policy. As discussed below, the required policy components include an investigation procedure and a duty to respond to substantiated incidents of bullying. The material then discusses the federal obligations imposed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. 701 et seq. These laws require districts to provide students with disabilities with a free, appropriate public education ("FAPE") and prohibit districts from discriminating on the basis of disability. The material then discusses the intersection between New Hampshire's anti-bullying law, disability-based harassment, and the duty to provide FAPE.[3]

In the Pupil Safety and Violence Prevention Act, 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,

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[1] Walk a Mile in Their Shoes Bullying and the Child with Special Needs, AbilityPath.org, p. 12, available at http://www.abilitypath.org/areas-of-development/learning--schools/bullying/articles/walk-a-mile-in-their-shoes.pdf (accessed March 4, 2011).

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

[3] This material focuses on disability-based harassment and bullying. However, conduct that constitutes bullying could also constitute unlawful discrimination if the conduct is based on race, color, national origin, or sex. 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). Thus, all reports of alleged bullying should be analyzed to determine whether the conduct could constitute unlawful harassment; if so, then the report should also be investigated in accord with the appropriate grievance procedure.

physical, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other distinguishing personal characteristics." RSA 193-F:2. The definition of bullying also makes clear that bullying may be "motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics . . ." RSA 193-F:2, II.

Individuals are also protected from discrimination on the basis of many of these personal characteristics. Thus, conduct which constitutes bullying may also rise to the level of discrimination in violation of any number of statutes, including, but not limited to, Section 504 and Title IX. Conduct that constitutes bullying can also violate the IDEA or Section 504 if it results in a denial of FAPE to the victim or the perpetrator.

As a general principal, it is important to remember that in accord with the Supremacy Clause of the United States Constitution, where Federal and State law conflict, the requirements contained in the Federal law will prevail over those in the State law. U.S. Const. art. VI, para. 2.

II. The Pupil Safety and Violence Prevention Act: A Brief Overview

By January 1, 2011, the school board of each school district (and the board of trustees of chartered public schools) in New Hampshire was required to have adopted a written policy prohibiting bullying and cyberbullying. The law defines when bullying or cyberbullying occurs and contains numerous requirements pertaining to the development of the policy and the contents of the policy. RSA 193-F:3, I-II; RSA 193-F:4, I, II, IV.

A. Defining Bullying[4]

In New Hampshire, bullying is defined as:

A single significant incident or a 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 damages the pupil's property;
- Causes emotional distress to a pupil;
- 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.

[4] Unless otherwise noted, throughout this material, references to bullying include cyberbullying.

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 is defined as "bullying" through the use of "electronic devices," which include, but are not limited to "telephones, cellular phones, computers, pages, electronic mail, instant messaging, text messaging, and websites."

RSA 193-F:3, I-III.

B. Required Policy Components

RSA 193-F:4 contains a list of 14 required components of each anti-bullying policy. These policy requirements include, but are not limited to:

1. Notice to Parents

a. Upon receipt of a report of bullying or cyberbullying

Each policy must contain "[a] procedure for notification, within 48 hours of the receipt of a report of bullying or cyberbullying, 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 must comply with the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g." RSA 193-F:4, II(h).

b. After the investigation is complete

The policies must also contain "[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. This communication shall occur within 10 school days of completion of the investigation." RSA 193-F:4, II(m).

2. Prohibition Against Retaliation

Each policy must include "[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." RSA 193-F:4, II(b).

3. An Investigation Procedure

The statute also requires that each policy include "[a] written procedure for investigation of reports, to be initiated within 5 school days of the reported incident, identifying either the principal or the principal's designee as the person responsible for

the investigation and the manner and time period in which the results of the investigation shall be documented. The superintendent or designee may grant in writing an extension of the time period for the investigation and documentation of reports for up to an additional 7 school days, if necessary. The superintendent or superintendent's designee shall notify in writing all parties involved of the granting of an extension." RSA 193-F:4, II(j).

4. Disciplinary Consequences and/or Interventions

The policy must also contain "[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." RSA 193-F:4, II(d).

5. Response to Remediate Substantiated Incidents of Bullying

The policy must also contain "[a] requirement that the principal or designee develop a response to remediate any substantiated incident of bullying or cyberbullying, including imposing discipline if appropriate, to reduce the risk of future incidents and, where deemed appropriate, to offer assistance to the victim or perpetrator. When indicated, the principal or designee shall recommend a strategy for protecting all pupils from retaliation of any kind." RSA 193-F:4, II(k).

III. 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).

1. 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).

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.

1. <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.

2. Available Remedies: Disability-Based Harassment

Parents who believe that their child has been discriminated against in violation of Section 504 have several options available to them. They may file a complaint with the Office for Civil Rights ("OCR"), they may file a local grievance with their school district, or they request an impartial due process hearing. If the parent believes that the harassment has resulted in a denial of FAPE to his/her child, then he may also file a complaint or request due process through the State Department of Education.

a. The Office for Civil Rights

The Office for Civil Rights ("OCR") is responsible for investigating complaints alleging violations of Section 504 and Title II of the ADA ("Title II"). Under Section 504 and Title II, once a school district has notice of possible disability harassment between students, it is responsible for determining what occurred and for responding appropriately. The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. What constitutes a reasonable response to harassment will depend upon the circumstances.

According to OCR, a school district may violate Section 504 or Title II of the ADA and their implementing regulations if:

(1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program;

(2) the district knew or reasonably should have known about the harassment; and,

(3) the district fails to take appropriate responsive action.

A district has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. 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). A "responsible employee" includes employees with the authority to take action to redress the harassment; with a duty to report the harassment to appropriate school officials; or an employee who a student could reasonably believe has this authority or responsibility. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (OCR Jan. 2001), available at http://www.ed.gov/about/offices/list/ocr/docs/shguide.html (accessed March 4, 2011).

When a district knows or reasonably should have known about harassment, it must take action to respond to the same. Such action may include, but would not be limited to: separating the accused and the target, counseling, disciplinary action. 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).

When a student or parent files a complaint with OCR, OCR evaluates the appropriateness of the district's response to the alleged harassment by assessing whether it was **prompt, thorough, and effective.** The district's response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. This may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district should also take steps to prevent any retaliation against the student who made the complaint or those who provided information. Finally, the district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

b. The Judicial Test

A parent may also file a Section 504 damage action with the court. When courts are asked to resolve cases involving disability-based discrimination resulting from a failure to respond to peer-on-peer harassment, they generally utilize the following five-part test:

1) Is the plaintiff an individual with a disability?

2) Was the plaintiff harassed on the basis of his/her disability?

3) Was the harassment sufficiently severe or pervasive that it altered the condition of the plaintiff's educational environment?

4) Did the district know about the harassment?

5) Was the district deliberately indifferent to the harassment?

See P.R. v. Metropolitan Sch. Dist. of Washington Township, 110 LRP 64615 (S.D. Ind. Nov. 1, 2010).

A district is "deliberately indifferent" when it "deliberately ignore[s] a complain[t] and knowingly refuse[s] to take action." Id. As discussed below, courts generally focus on the fifth element, whether the district was "deliberately indifferent" to the harassment.

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.

1. Investigations into Bullying and Disability-Based Harassment

a. Bullying investigations

As indicated above, each district's bullying policy must contain an investigation procedure. The policies must:

- Indicate that the investigation will be initiated within 5 school days of the reported incident;
- Identify either the principal or the principal's designee as the person responsible for the investigation;
- Describe the manner and time period in which the results of the investigation shall be documented. The superintendent or designee may grant a written extension of the time period for the investigation and documentation of reports for up to an additional 7 school days, if necessary;
- Contain a written procedure for communication with the parent/guardian of the victim and perpetrator regarding the school's remedies and assistance; and,

- Contain a statement prohibiting retaliation and false accusations against a victim, witness, or anyone else who in good faith provides information about an act of bullying or cyberbullying.

RSA 193-F:4, II(b), (j), (m). Aside from the above, the investigatory process is left up to each individual district.

b. Investigating disability-based harassment

Section 504 and Title II of the ADA, also require that districts have internal policies and grievance procedures to address discrimination on the basis of disability, including disability-based harassment. 34 C.F.R. 104.7 (Section 504); 28 C.F.R. 35.107(a) (ADA). These procedures must "incorporate appropriate due process standards" and must "provide for the prompt and equitable resolution of complaints." 34 C.F.R. 104.7.

OCR has indicated that it will consider the following factors when determining whether a district's grievance procedure complies with Section 504. Akron (OH) Public Schools, 55 IDELR 146 (2010).

- Whether the policy provides notice of the grievance procedures, including where complaints may be filed;

- Whether the procedures apply to complaints alleging discrimination carried out by employees, other students, or third parties;

- Whether the policy provides for an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

- Whether the policy designates reasonably prompt timeframes for the major stages of the complaint process;

- Whether the policy contains a provision providing the parties with notice of the outcome of the complaint; and

- Whether the policy contains an assurance that the school will take steps to prevent recurrence of any harassment and to correct discriminatory effects of the harassment on the complainant and others, if appropriate.

c. Differing duties

There are two major differences between bullying investigations and investigations into disability-based harassment. They are as follows:

i. Perpetrators

Under RSA 193-F, only a student may be a perpetrator of bullying. See e.g. RSA 193-F:3, IV. This limitation does not exist in Section 504, and OCR will investigate whether a student was subjected to unlawful harassment by an employee of the district. See e.g. Irvine (CA) Unified School District 110 LRP 49179 (OCR Dec. 8, 2009).

ii. Appeals

Bullying policies are not required to include an appeals procedure. Thus, once the investigation into the alleged report is complete, there is no right of appeal.[5]

In contrast, once an investigation into disability-based harassment is complete, a parent may file a complaint with OCR, or may file a grievance in accord with local grievance procedures. A parent may also seek to file a Section 504 damage action.

In addition, although the RSA 193-F contains an immunity provision, that provision is limited to immunity "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 this chapter." RSA 193-F:7. This provision does not provide immunity for violations of Section 504, and in fact, the statute makes clear that parents and students retain rights existing under other statutes. RSA 193-F:9. This includes the right to file a Section 504 damage action.

d. Investigating Disability-Based Harassment, A Case Study

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

[5] Students may have a right to appeal the result of the investigation (i.e., long-term suspensions or expulsions or, as discussed below, a manifestation determination or change in placement).

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 will likely contain greater rights and/or different procedures than those that are required by RSA 193-F. Finally, RSA 193-F does not

require that the bullying policy contain an appeals procedure. 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.

D. Disability-Based Harassment and Bullying: Case Studies

1. Investigating and Responding to Disability-Based Harassment

Hemet (CA) Unified Sch. Dist., 54 IDELR 328 (OCR Nov. 27, 2009)

Facts: During the 2008-2009 school year, the student was in 5th grade at a district elementary school. The student had been identified as an individual with a disability due to a specific learning disability and ADHD. The student was taking medication for his ADHD; the medication caused side effects that included involuntary facial and eye movements and noises. The student's IEP for the 2008-09 school year indicated that the student had been involved in playground incidents; thus, it contained a social/behavioral goal for the student, stating that he would self-monitor his behavior on the playground with the support of adult reminders. The student was placed in a general education classroom with support from a resource specialist.

During the 2008-2009 school year, the student was involved in several incidents on the playground. The parent indicated that he wrote five letters to the school during the period of December 2008 through May 2009, identifying students whom the parents believed were name-calling, teasing, taunting, bullying, and provoking the student on a constant basis. With the exception of the fourth letter, the parent did not refer to the student's disability or state that the student was being harassed or bullied on the basis of his disability.

The District had copies of three of the parent's five letters – the second, fourth and fifth letters. It was unclear whether the district had not received the other two letters, or if it had misplaced them after having received them.

The second letter, dated March 20, 2009, identified a student who was bothering the complainant's child in the classroom, as well as two other students who were teasing and taunting him on the playground. The letter requested that the district consider transferring the student to a special education classroom to avoid these incidents. The district responded to the classroom situation by speaking with the student's teacher; it is unclear how it responded to the allegations pertaining to the playground situation or the request to change the student's classroom.

The fourth letter, dated May 26, 2009, stated that students (who were identified in the letter) were calling the complainant's son derogatory names on a daily basis because of his involuntary facial movements and noises "resulting from his disability." The letter provided examples of the derogatory name-calling. There was no indication as to how the district responded to the letter.

The fifth letter, dated May 20, 2009, referenced a physical altercation between the student and another student on the playground. The district discussed the incident with the parent in response to his letter.

In addition to the above, throughout the school year, the student was regularly involved in playground incidents with other students, sometimes as often as several times a day. In response, the district increased its playground supervision and also prevented 5th graders from playing dodge ball to reduce the potential for playground conflict.

The complainant's child also reported to district staff that he was "getting picked on"; when that occurred, the district would speak with the students involved in the incidents. With one exception, the other students either denied the allegations or the district determined that the incident was initiated by the complainant's child. In such cases, the district would apply the same discipline to all students involved, for example, time-out, counseling on the use of appropriate language, and suspensions or detentions, depending on the severity of the incident or name-calling. In April 2008, a student was found to have made a derogatory comment and to have mimicked the complainant's student's manner of speech. The other student was suspended and did not engage in such behavior again.

The parent filed a complaint with OCR, alleging that the district had discriminated against the student based on his disability, in violation of Section 504 and Title II of the ADA.

Issue: Whether the district responded appropriately and effectively to notice that student was subjected to harassment based on disability by other students during the 2008-2009 school year.

Holding: For the parent. The evidence established that the student was regularly involved in incidents with other children on the playground. Many of these incidents involved derogatory name-calling, much of which was disability-related. This should have been sufficient to put the district on notice of possible harassment. In addition to the student reports, the district received at least three letters from the parent. Although two of those letters did not directly refer to the student's disability, OCR found that "in light of the nature of the student's disabilities and discussion in the IEP context of issues about his interactions with other students . . . it could reasonably be inferred that the complainant was referring at least, in part, to the disability-related problems."

In addition, OCR noted that "[w]hile the district took certain actions when the student reported problems, such as interviewing the other students involved, suspending a student who was found to have made a derogatory comment, and increasing the amount of playground supervision . . . the steps were not effective in stopping the harassing conduct of the other students. Also, the district treated the reported problems as an ordinary dispute between students, rather than as incidents

possibly related to the student's disability." Thus, the district did not respond adequately to a potential incidence of illegal harassment.

OCR also found that the fourth letter written by the parent made a specific allegation of disability harassment and the district was not able to provide documentary evidence or information to show that the allegation was investigated and appropriate actions were taken, such as conducting interviews, making a determination of whether disability harassment had occurred, taking action in response to the investigation, or informing the complainant of the district's investigation and actions. Moreover, in light of the continued reports of bullying and teasing, the district had reasonable basis for taking additional actions to address the situation, for example, through counseling, escalating consequences for the other students responsible, and conducting other –anti-harassment initiatives at the school.

To the extent that "the student's own conduct played a role in provoking harassment from other students or was otherwise inappropriate, it need not have been excused simply because he has disabilities. . . . However, under Section 504/Title II, disability-related behavior or peer problems should have been addressed through the IEP process to determine whether the conduct was related to his disability. If so, the IEP should have discussed behavioral interventions or strategies, in addition to those identified during the October 2008 IEP meeting, that were designed to meet the student's individual needs and the consequences that were appropriate."

As a result, the district entered into a resolution agreement with OCR. Pursuant to the agreement, the district agreed to provide training to its administrators concerning harassment of students with disabilities. The district was also required to provide students with age appropriate information indicating that harassment based on disability is inappropriate and would not be tolerated.

Practice Pointer: The quality of your response to an allegation that a student was subjected to disability-based harassment is subject to scrutiny by OCR. If a parent files a complaint, OCR will review the district's response to the alleged harassment to determine whether the District investigated and responded to the alleged harassment.

2. 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?

a. 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.[6] The student

[6] 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

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, dyslexic, 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.

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.

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education under the IDEA. The plaintiff then refilled suit in Federal Court; however, he did not appeal the administrative order.

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)[7]

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, 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.

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[7] 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).

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.

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.

Oftentimes, 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[8] 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.

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.

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[8] 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).

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,"[9] 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

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

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 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. FERPA

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.[10] RSA 193-F:4, II.

It is important to remember that RSA 193-F 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:

[10] In accord with the Pupil Safety and Violence Prevention Act, the policies must contain a provision permitting the Superintendent to waive the notification requirements; when the Superintendent exercises his/her discretion to waive the notification requirement, these letters will not be sent to either parent.

- 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 statement indicating whether the report was substantiated or unsubstantiated
- A description of the remedial measures/non-disciplinary interventions that were provided to <u>that student</u>
- A description of any disciplinary action that was taken against <u>that student</u>

However, the reports cannot contain information about any disciplinary action or non-disciplinary interventions that were 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).

If your district's bullying policy contains an appeals procedure, the second notification should contain information about the parent/student's appeal rights

VI. <u>Conclusion</u>

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?

- Did the district take reasonable steps to investigate allegations of harassment and/or bullying?

    - Were the steps that you took reasonably likely to prevent future harassment and/or bullying?

- 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.