

The seal of the Ohio State Bar Association is centered in the background. It is a circular emblem with a pink outer ring containing the text "OHIO PUBLIC DEFENDERS" at the top and "SINCE 1955" at the bottom. Inside the ring is a blue circle with a yellow "OSBA" logo in the center.

LIMITING BULLYING LAW SUIT LIABILITY

***2013 OSBA Capital Conference
November 13, 2013***

Miriam Pearlmutter

BRITTON SMITH PETERS & KALAIL Co., L.P.A.

3 Summit Park Drive, Suite 400

Cleveland, OH 44131

Telephone: (216) 503-5055

Facsimile: (216) 503-5065

Email: mpearlmutter@ohioedlaw.com

<http://www.ohioedlaw.com>

Bullying Lawsuits– Minimizing District Liability

MIRIAM PEARLMUTTER
BRITTON SMITH PETERS & KALAIL CO., LPA
3 Summit Park Drive, Suite 400
Cleveland, OH 44131
(216) 503-5055
mpearlmutter@ohioedlaw.com

Presentation Topics

- I. Introduction & Definitions
- II. Relevant Laws
- III. Prevention, Policies, & Forms
- IV. Addressing Bullying Complaints
- V. Special Education
- VI. Questions?

What Is Bullying?



- ▶ There is no one definition.
- ▶ Many definitions include a power imbalance.
- ▶ Most definitions include conduct sufficiently severe to affect the school environment and/or limit the student's participation.
- ▶ Definition differences can have real-world impact. *E.g.*, The Revised Code and ODE's model policy require conduct to take place **more than once**, but OCR's definition specifies that **harassment does not have to involve repeated incidents**.

Types of Bullying

- ▶ **“Generic” bullying:** general mean things that kids say or do to each other.
- ▶ **Bullying based on protected status:** race, ethnicity, national origin, religion, citizenship status, gender, sexual orientation, disability.



Part I: Amendments and Statutes 14th Amendment

- ▶ **Due Process Clause:** The state cannot take away your rights without some sort of process.
- ▶ **Equal Protection Clause:** The state will not intentionally discriminate against you based on your race, ethnicity, national origin, religion, citizenship status, gender, etc.

Due Process

- ▶ **Generally:** These suits fail because the government is not obligated to protect you from third parties.
- ▶ **Two Exceptions:**
 - **Special Relationship:** State controls the person's daily life.
 - **State-created Danger:** State creates or increases the danger more than it would have been had the state done nothing. *E.g. Teacher requires student to work with bullies on a special project.*

Equal Protection

- ▶ **Traditionally:** Courts explain that unless the plaintiff alleges that the district took her bullying less seriously than that of non-minority children, she doesn't have a discrimination claim.
- ▶ **Recent Developments:** Courts have started to view deliberate indifference to bullying as evidence of intent to discriminate.

Deliberate Indifference

- ▶ A clearly-unreasonable response to harassment in light of known circumstances
- ▶ Traditionally, courts avoided evaluating districts' disciplinary decisions.
- ▶ Now, courts have started to assess districts' responses to bullying. **Deliberate indifference has been found where districts took action but harassment continued or worsened.**

Deliberate Indifference Found:

- ▶ ***Patterson v. Hudson Area Schools:*** Verbally reprimanding bullies is not enough, even though this approach was successful with each particular child. School district changed victim's IEP and he could not attend the resource room anymore, one of the few places he was not bullied.
- ▶ ***Mathis v. Wayne Cnty Bd. of Educ.:*** Even though 7th grade rape perpetrators were suspended from school for 11 days and from the basketball team, the district was deliberately indifferent because they ignored other incidents and eventually allowed the bullies back on the team.

No Deliberate Indifference

▶ **Williams v. Port Huron Sch. Dist.**: Racial bullying included: slurs, graffiti, physical violence, and death threats. The 6th Circuit found that the superintendent and principal were not deliberately indifferent because they:

- set up video surveillance;
- reported incidents to police;
- ordered students to remove Confederate flags;
- expelled students;
- hired management consultants;
- held training seminars; and
- held parent conferences.

1st Amendment: Free Speech On Campus

▶ Schools may categorically prohibit:

- lewd, vulgar, profane language on school grounds;
- school-sponsored speech because of any legitimate pedagogical concerns;
- speech that **substantially disrupts** school operations or **interferes with others' rights**; or
- speech that is "a true threat," defamatory, drug-promoting or "fighting words."



1st Amendment- Free Speech Off Campus /Cyberbullying

▶ Make sure your policies are not **vague** or **overbroad**.

- ▶ Courts will usually uphold discipline for off-campus conduct if the conduct:
- **substantially disrupted** learning or **interfered with** school work or discipline;
 - **was reasonably expected to substantially disrupt** or materially **interfere** with educational environment; or
 - was a true threat.

Off-Campus Speech Cont.

- ▶ In determining discipline, always consider:
 - What kind of speech is involved?;
 - Why do we want/need to discipline?;
 - Location: Is there a connection to the district system or network?;
 - Disruptive effect;
 - Nature of speech; and
 - Manner in which speech was distributed.



- ▶ **If you cannot mete out discipline, you can still take action!**

Federal Statutes

- ▶ **Title IX:** Prohibits gender-based exclusion, denial of benefits, or discrimination in education programs. Includes bullying based on sexual orientation.
- ▶ **Title VI:** Prohibits discrimination based on race, ethnicity, or national origin in federally funded programs.
- ▶ **Section 504/ ADA:** Prohibit discrimination based on disability.
- ▶ **IDEA:** Requires schools to provide special education students with a free appropriate public education.

Title IX, VI, and 504/ADA:

- ▶ To succeed on any of these claims, plaintiff must show that:
 - the student falls within a protected category;
 - the student was harassed because of his or her protected status;
 - the harassment was **severe, pervasive, and objectively offensive** so that it deprived the student of access to educational opportunities and benefits;
 - the district **knew** about the harassment; and
 - the district was **deliberately indifferent**.

More Examples of Deliberate Indifference:

- ▶ **Logan v. Sycamore Cmty. Sch. Bd. of Educ.:** In this famous sexting suicide case, school district was deliberately indifferent because the counselors and principals knew about the harassment but failed to address it.
- ▶ **Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ.:** Principal and teachers failed to address severe disability-based harassment and even participated in it.

No Deliberate Indifference Found:

- ▶ **Pahseen v. Merrill Cmty Sch. Dist.:** School district was not deliberately indifferent in rape case because, after the perpetrator engaged in more minor sexual misconduct, the IEP team convened and assigned an adult to continuously monitor the student for 30 days.
- ▶ **S.S. v. E.Ky. Univ.:** School district was not deliberately indifferent to disability-based harassment because it: held mediation sessions; arranged for outside speakers; monitored the victim; had police speak with offenders; communicated with parents; and disciplined the bullies.

Individuals with Disabilities Education Improvement Act

- ▶ Although this is rare, some courts have found that severe and pervasive harassment denies a child a free appropriate public education.
 - **Shore Reg'l High Sch. Bd. of Educ. v. P.S.:** Court upheld tuition reimbursement after parent unilaterally placed her son in a private school to avoid bullying.



Regulatory Agencies – OCR

- ▶ The Office for Civil Rights is charged with protecting civil rights in federally-funded programs.
- ▶ Once a complaint is filed, OCR investigates anything remotely relevant, not only the complaint itself.
- ▶ This is not a lawsuit, so districts typically do not risk financial liability. Instead, they may be required to implement various corrective measures. The ultimate (and rare) consequence is a loss of federal funds.

OCR's Standards v. Federal Courts'

- | | |
|--------------------------------------------------------|-------------------------------------------------------|
| ▶ Actual knowledge; | ▶ Known or should have known; |
| ▶ Severe, pervasive, AND objectively offensive; | ▶ Severe, pervasive, OR objectively offensive; |
| ▶ Effectively bars access; | ▶ Interferes with or limits participation; |
| ▶ Respond in a manner not clearly unreasonable. | ▶ Take prompt steps to end harassment, etc. |

Federal Courts

Office for Civil Rights

OCR Requires Districts to:

- ▶ have well-publicized policies prohibiting harassment in protected areas;
- ▶ have well-publicized procedures for reporting and resolving complaints; and
- ▶ adopt and publish grievance procedures providing for the prompt resolution of protected-status discrimination.

OCR Example

▶ *Monroeville Local School District*: After a parent filed a disability-based harassment complaint, the district resolved the situation by:

- developing and providing parents with grievance procedures;
- training officials in civil rights violations;
- creating a Peer Mediation Council to address bullying;
- implementing elementary-school activities to reduce conflict;
- forming a parent support group;
- implementing a positive reinforcement system; and
- offering mentoring for bullied students.

State Statutes

▶ **Anti-bullying statutes:**
R.C. 3313.666 & R.C. 3313.667

▶ **Anti-hazing statutes:**
R.C. 2307.44 & R.C. 2903.31

▶ **Negligence claims & immunity:**
R.C. 2744.02 & R.C. 2744.03

Anti-Bullying Statutes

▶ R.C. 3313.666 requires the district to develop an anti-bullying policy and lists all the required components. Ex., identify terms, establish procedures for documenting, responding to incidents, investigating, etc. Model policy available on ODE website.

▶ R.C. 3313.667 requires districts to use federal funds to provide training, workshops, etc. to the extent funds are allocated for this purpose.

▶ Neither statute allows for a private course of action, but plaintiffs still try.



Anti-Hazing Statutes

- ▶ Hazing is defined as “doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person.”
- ▶ Courts require plaintiffs to allege a dangerous act of initiation and desired membership in a particular group.

Negligence claims

- ▶ R.C. 2744.02 grants boards of education immunity from typical negligence claims.
- ▶ Employees are also immune, unless the plaintiff alleges the employee acted outside the scope of her duties or with:
 - Malice
 - Bad faith
 - Recklessness
 - Wantonness

Part II: Prevention

- ▶ Policies
- ▶ Cyberbullying
- ▶ Forms
- ▶ Anti-Bullying Curricula
- ▶ Communication



Policies– General

- › **Policy requirements** – R.C. 3313.666
- › **Policy Development** – consider involving principals and teachers.
- › **Training and Review:** **All staff working with children should be thoroughly familiar with your anti-bullying policies and guidelines.** Review these policies annually and consider having your employees sign that they read and understood.
- › Courts and, especially, agencies examine the staff's understanding of, and compliance with, district policies and guidelines.

Policies and Cyberbullying

Cyberbullying is often seen as more severe than other bullying because it:

- reaches a wider audience;
- potentially lasts forever;
- involves difficult-to-identify bullies;
- reaches children in their homes; and
- may be outside of districts' legal reach.



Policy & Cyberbullying Suggestions:

- › Include cyberbullying in your **anti-bullying policy**. Illegal or inappropriate internet conduct that is not constitutionally protected should be grounds for disciplinary action.
- › **Acceptable Use Policy** should also prohibit cyberbullying.
- › Require students to sign a statement agreeing to comply with district rules on internet use and have parents sign consent and release form.

Forms – Document, document, document!

Use separate forms for reporting and investigating bullying.



▶ **Bullying Reporting Form:**

- All bullying complaints (e-mail, phone call) should be **reduced to writing**. This creates a clean record documenting your district's responses to bullying.
- These forms should be easily available and parents, children, and staff should be encouraged to use them.

Forms Continued

▶ **Investigation Form.** This form should document each step:

- Witnesses and their statements
- Interviews with victim, bully, etc.
- Results of the investigation
- Consequences
- Follow up
- Parent contact

Document Retention

- ▶ Store reports by victim and perpetrator so staff can easily retrieve them.
- ▶ Do not shred or discard e-mails, discipline records, or bullying forms on a yearly basis, unless required by your district's policies.
- ▶ Save all related documents, e-mails, forms, etc., especially when litigation or charges are pending or threatened.

Anti-Bullying Programs

- ▶ Your anti-bullying program should:
 - be evidence-based;
 - be age-appropriate, tailored to different grade levels;
 - include regular activities or presentations; and
 - include parent or staff training component.

Communication:



- ▶ Staff across buildings should communicate with each other about students who either have a history of bullying or being bullied.
- ▶ Relevant teachers should also be informed early on in the school year and asked to keep an eye on the situation.

Part III: Addressing Bullying Complaints

- ▶ **Immediate Steps:** reduce the complaint to writing and investigate.
- ▶ **Responsive Interventions:** school-wide, class-wide, group, or individual interventions may be appropriate.
- ▶ **Consultants:** districts with severe bullying problems can consider hiring a consultant.

Immediate Steps

- ▶ 1. **Reduce the complaint to writing** by filling out a Bullying Report form.
- ▶ 2. Contact the parent. **Document.**
- ▶ 3. Conduct a thorough investigation. Investigate everyone involved and bystanders, take statements. **Document.**
- ▶ 4. Determine whether the complaint is substantiated and the appropriate consequences. **Document.**
- ▶ Contact the victim's parent– general explanation only.
- ▶ Follow up with victim as necessary.

Responsive Interventions

- ▶ **Class-wide or school-wide training:** **Diversity training** may be especially useful for protected-category bullying.
- ▶ **Group or individual intervention:** Mediation or social skills group.
- ▶ **Individual intervention:** Offer counseling when appropriate.

Consultants and Surveys

- ▶ Consultants can be useful when your district's bullying problem is extensive or intractable. Ex. *Williams v. Port Huron*.
- ▶ **Surveys:** Some districts like to develop formal surveys to assess the extent of the bullying and determine whether their interventions are successful.



Special Education and Bullying



Evaluations and Re-evaluations

- ▶ Bullying situations may indicate socio-emotional difficulties and may suggest that the bully, the victim, or both should be evaluated for special education.
- ▶ If either the bully or victim already has an IEP, a re-evaluation may be warranted to determine whether additional services are needed.

Evaluations Cont.

- ▶ **60-day timeline:** The district has 60 days from the date of parent's written consent to complete the ETR and hold the ETR meeting.
- ▶ **FBA & BIP:** A Functional Behavior Analysis and Behavior Intervention Plan should be completed for any child with ongoing behavioral concerns.

Special Education and Discipline

Manifestation Determinations

If the bully has an IEP, a disciplinary consequence that results in a "change of placement" (ex. over 10-day suspension) requires the IEP team to meet and determine whether the behavior was a manifestation of the disability or resulted from the district's failure to implement the IEP.





Discipline Cont.

If the manifestation determination team finds that the infraction resulted from the disability or the district's failure to implement the IEP, then:

- ▶ **Placement cannot be changed** without parental consent. Exceptions: weapons, drugs, serious bodily harm.
- ▶ IEP team must conduct **FBA** or implement, review, or modify **BIP**.

Discipline Cont.

If the bully's placement cannot be changed, **how do districts respond to bullying** so they are not found to be deliberately indifferent?

- ▶ Convene IEP team. FBA? BIP?
- ▶ Separating victim and bully (caution advised).
- ▶ Services for victim and bully – individual or group counseling.
- ▶ Monitoring / supervision.

Document, Document, Document!

- ▶ Document any IEP team decisions through a **Prior Written Notice** (PWN, PR-01).
- ▶ Document attempts to reach parents, parent refusals to sign consent, and any relevant parent conversations.

Questions?

MIRIAM PEARLMUTTER
BRITTON SMITH PETERS & KALAIL CO. LPA
3 Summit Park Drive, Suite 400
Cleveland, OH 44131
(216) 503-5055
mpearlmutter@ohioedlaw.com

The seal of the Ohio State Bar Association is centered in the background. It is a circular emblem with a pink outer ring containing the text "SEVEN OHIO PUBLIC SCHOOLS" at the top and "SINCE 1955" at the bottom. The inner circle is blue and features a yellow shield with a blue "S" and a red "B".

LIMITING BULLYING LAW SUIT LIABILITY

***2013 OSBA Capital Conference
November 13, 2013***

Miriam Pearlmutter

BRITTON SMITH PETERS & KALAIL Co., L.P.A.

3 Summit Park Drive, Suite 400

Cleveland, OH 44131

Telephone: (216) 503-5055

Facsimile: (216) 503-5065

Email: mpearlmutter@ohioedlaw.com

<http://www.ohioedlaw.com>

BULLYING LAWSUITS: MINIMIZING LIABILITY

I. INTRODUCTION.

A. Bullying definitions are not all the same.

- a. Ohio's Model Anti-Bullying Policy Definition:
 - i. "Harassment, intimidation or bullying" means either of the following: Any intentional written, verbal, graphic, or physical act that a student or group of students exhibited toward other particular student *more than once* and the behavior both causes mental or physical harm to the other student; and is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for the other student.
 - ii. Bullying includes dating violence.
 - iii. Bullying includes harassment through electronic means (cyber-bullying). An electronic act" is defined as an act committed through the use of a cellular telephone, computer, pager, personal communication device, or other electronic communication device.
- b. Office for Civil Rights:
 - i. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. *Harassment does not have to* include intent to harm, be directed at a specific target, or *involve repeated incidents*. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.
 - ii. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.

B. General v. protected category bullying.

- a. Generic bullying involves general mean things that kids say and do to each other: clothes, boyfriends, weight, etc.
- b. Bullying based on protected status is harassment based on: race, gender, religion, sexual orientation, national origin, ethnicity, color, citizenship status, genetic information.

II. RELEVANT LAW.

A. The Fourteenth Amendment.

1. Due Process: This clause guarantees that the government will not take away an individual's rights without due process, such as a hearing or trial.
 - a) Bullying lawsuits relying on this clause are not typically successful because the government does not have any general obligation to protect individuals from third party harm.
 - b) Exceptions include:
 - (1) Special relationship: When the state has a special relationship with an individual such that the state controls his or her daily life (ex. prison or foster care)
 - (2) State-created danger: When a government actor takes affirmative action creating or increasing the risk of danger to an individual above and beyond the risk that this person would have encountered had the government actor done nothing
 - (a) School Example: After a child complains she is being bullied, her teacher requires her to work with the bullies on a long-term project in the hopes that the students resolve their differences. Then the bullies harass the victim above and beyond their previous interactions.
 - (b) School district did not violate Due Process clause when they dismissed a special education student to her uncle who later raped her. *Doe v. San Antonio Indep. Sch. Dist.*, 197 Fed. Appx. 296 (5th Cir. Tex. 2006).
2. Equal Protection: This clause guarantees that the government will not discriminate against any individual based on race, national origin, citizenship status, and religion. These characteristics are called "protected categories."
 - a) Protected and Quasi-Protected Categories: race, national origin, citizenship, religion, sexual orientation, and gender.
 - b) Non-Protected Categories: all other characteristics, including disability and poverty. Other federal and state laws protect people with disabilities.

- c) Decisions under this clause:
- (1) In the past: In the past, courts found violations only when the victim claimed not only that she was bullied, but also that the school took bullying less seriously when the victims were minorities (not members of a protected group).
 - (2) Current trend: Some courts, including those in the Sixth Circuit, allow bullying claims to go forward, assuming that a district's deliberate indifference to bullying shows an intent to discriminate.
 - (a) Deliberate indifference is defined as a clearly unreasonable response to harassment in light of the known circumstances.

Example of deliberate indifference. *Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009): In a Title IX claim, the court held that a school district was deliberately indifferent when it did nothing but verbally reprimand bullies and removed student from his resource room where he was not bullied.

Example of no deliberate indifference found. *Williams v. Port Huron School District*: the Sixth Circuit found that a superintendent and principal were not deliberately indifferent to race-based bullying. The principal: set up video surveillance where bullying was prominent, reported serious incidents to the police, ordered student to remove Confederate flags from clothing and vehicles, presented regarding inappropriate behavior, expelled children, hired management consultants to study the school, held grade level assemblies, etc. The superintendent approved diversity-training seminars, held parent conferences, and arranged for others to assist the principal.

- (b) Some courts find deliberate indifference even when a district does address the bullying problem, but its efforts are pro forma or are obviously unsuccessful. For example, if bullying continues (even if the bullies are new students), the district's previous responses may be seen as ineffectual and simply repeating them can be seen as deliberately indifferent. Ex. *Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009).

- (3) Court's decisions based on not only the law, but on severity of allegations.

3. First Amendment: The Free Speech clause prohibits the government from abridging citizens' freedom of speech.

a) On-Campus Speech:

- (1) Schools may categorically prohibit:

- (a) lewd, vulgar, or profane language, on school property; *Bethel Sch. Dist. No 403 v. Frazer*, 478 U.S. 675 (1986);
 - (b) school-sponsored speech (*i.e.* speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988);
 - (c) speech that substantially disrupts school operations or interferes with the rights of others (or if there is a reasonable and particularized fear of a disruption or interference); and
 - (d) speech that is a true threat, defamatory, drug-promoting, and fighting words.
- (2) Speech created on school grounds (*e.g.*, internet used at school) is often, but not always, seen as on-campus speech. Minimal use/access by a student will not remove First Amendment protections.
- (3) Example: *Morse v. Frederick*, 551 U.S. 393 (2007). The Supreme Court held that a "BONG HiTS 4 JESUS" sign was not protected by the First Amendment. A student unfurled this banner at a school-sanctioned event, refused to take it down, and was suspended for 10 days. The Court determined that the First Amendment does not require school districts to tolerate student expression that encourages drug use.
- b) Off-Campus Speech: The First Amendment creates unique problems for districts seeking to regulate off-campus bullying, including cyberbullying.
- (1) Courts usually uphold discipline for off-campus behavior if schools show the conduct substantially disrupted learning, interfered with school discipline, or was a true threat (serious expression of intent to cause present or future harm).
 - (2) Discipline is appropriate also when a board holds a reasonable belief that a substantial disruption or material interference with the educational environment will result from the child's off-campus speech.
 - (3) To discipline a student, the district must show that the student's conduct violated a law or school rule. Make sure your rules are not "vague" and "overbroad."
 - (a) A rule is "overbroad" when it punishes protected activities as well as non-protected ones.
 - (b) A rule is "vague" if it fails to give adequate warning that particular conduct is prohibited or fails to set out adequate standards to prevent arbitrary and discriminatory enforcement.

- (4) Example: *J.S. v. Blue Mountain Sch. Dist.*, 211 U.S. App. LEXIS 11947 (3rd Cir. 2011) and *Layshock v. Hermitage Sch. Dist.*, 2011 U.S. App. LEXIS 11994 (3rd Cir. 2011). The Third Circuit determined that a school district could not discipline a student for creating a derogatory website. The two websites, created off-campus, were made to look like they belonged to the schools' principals. J.S.'s website suggested the principal was a pedophile and sex addict, while the Layshock site attributed sex and drug-related content to the principal. The court eventually determined that the First Amendment protected the students' websites because they did not cause a substantial disruption in the school environment and the school districts' fear of disruption was unreasonable.
- (5) In determining how to handle off-campus cyber speech, districts should consider:
 - (a) Location of the speech: is there a viable nexus or connection to the district network or system?;
 - (b) The disruptive effect, if any, on the educational environment. Do you have reliable proof of an actual substantial and material disruption to the educational environment? Is there a provable, concrete, and particular reason to anticipate that a disruption will result from the student's speech?;
 - (c) The nature or type of speech (personal, violent, lewd, vulgar, pro-drug, threatening); and
 - (d) The manner in which the speech was distributed – how did the speech make its way onto the campus?
- (6) When a district cannot discipline, always consider other alternatives:
 - (a) ask student to remove web posting and speak to his or her parents;
 - (b) mediation with bully and victim;
 - (c) contact the website and request removal;
 - (d) contact police if a crime may have been committed;
 - (e) offer counseling to the victim; and
 - (f) see other examples in Section V – Special Education.

B. Federal Statutes.

1. Title IX forbids gender-based exclusion, denial of benefits, or discrimination in educational programs.

- a) Schools can be held liable if they are deliberately indifferent to sexual harassment.
 - (1) They must have actual knowledge of harassment, but exact details are unnecessary, as long as they could have responded with remedial measures.
 - (2) Harassment must be so severe, pervasive, and objectively offensive that it deprives the victim of access to educational opportunities or benefits. *Davis v. Monroe County Bd. of Educ.* 526 US 629 (1999).
 - (3) They must be deliberately indifferent, meaning that their response was clearly unreasonable in light of the known circumstances.
 - (4) Gender-based discrimination will usually include bullying based on sexual orientation.
 - (5) Ex. *Logan v. Sycamore Cmty. Sch. Bd. of Educ.*, 2012 U.S. Dist. LEXIS 77474 (S.D. Ohio June 5, 2012). In this famous sexting suicide case, a school district was deliberately indifferent because although counselors and principals knew the student was being harassed, they failed to address it.
 - (6) Ex. *Pahseen v. Merrill Cmty Sch. Dist.* 668 F.3d 356 (6th Cir. Feb 3, 2012). A school district was not liable in a rape case because it monitored the perpetrator and required an adult to supervise him for 30 days when he was initially enrolled.

2. Title VI prohibits discrimination based on race, ethnicity, or national origin in federally funded programs.
 - a) Same standards as for Title IX claims- actual knowledge, deliberate indifference, severe, pervasive and objectively offensive harassment.
 - b) *Vidovic v. Mentor City Sch. Dist.*, 2013 U.S. Dist. LEXIS 13301 (N.D. Ohio Jan. 30, 2013): School district was not deliberately indifferent when the school knew of general problems but did not know these issues were based on national-origin bullying.
 - c) *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2d Cir. Dec 3, 2012): The district was deliberately indifferent because, despite suspensions, the race-based bullying continued. Importantly, the district refused offers from the NAACP to provide racial sensitivity training and a shadow for the student.

3. Section 504/ADA - These laws prohibit discrimination based on disability. As with the other statutes, the plaintiff must show she:
 - a) has a disability and was harassed based on that disability;

- b) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment; and
- c) the school knew about the harassment but was deliberately indifferent towards it.

Examples:

- (1) *Galloway v. Chesapeake Union*: Teachers and principals were deliberately indifferent to disability based bullying when they ignored (and even participated in) the harassment.
 - (2) *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 456 (6th Cir. Ky. 2008): School district was not deliberately indifferent to disability-based bullying because it held mediation sessions with students, arranged for outside speakers, monitored the victim, had police speak with the offending students, communicated with parents, and disciplined bullies.
4. IDEA - The IDEA requires districts to provide special education students with a free appropriate public education (“FAPE”). Some courts have entertained bullying claims, finding that harassment can be so severe and pervasive that it denies a child a free appropriate public education.
- a) *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004): Court upheld a tuition reimbursement award when parents unilaterally removed their son from the district, alleging that the school district could not provide him with a FAPE because it failed to prevent or stop harassment.
 - b) *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803 (8th Cir. 2006): Parents failed to state an IDEA claim for harassment because their allegations did not show how the bullying deprived the child of access to the basic educational benefits.
5. Regulatory agencies and decisions: Regulatory agencies, such as OCR and ODE, develop regulations and enforce the aforementioned federal laws.
- a) OCR: The Office for Civil Rights uses its own standard in investigating bullying complaints. These standards are stricter than those used by the courts. Dear Colleague Letter (October 26, 2010):
 - (1) Actual knowledge v. OCR’s “known or should have known.” OCR will find that the district knew or should have known if it would have learned of the harassment had it exercised reasonable care or made a reasonably diligent inquiry.
 - (2) Severe, pervasive, AND/OR objectively offensive. Courts require all three, OCR requires only one.
 - (3) Affectively bars access v. OCR’s “interferes or limits participation.”

- (4) Respond in a manner not clearly unreasonable v. OCR’s requirement to “take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence.”
 - (5) OCR will review a district’s global approach: staff training, systematic approach, review of school climate, prevention programs, investigation policies, etc. Most districts will agree to implement various corrective measures through a resolution agreement rather than risk a finding that it violated the student’s rights.
 - (6) Example: Monroeville (OH) Local School District (April 14, 2006). OCR required the district to implement extensive corrective measures after a parent filed a complaint alleging that the district failed to address disability-based harassment. Among other changes, OCR required the district to: (1) develop and send home grievance procedures; (2) train officials in civil and criminal laws relevant to civil rights violations; (3) create a Peer Mediation Council to address continuing bullying concerns; (4) implement age-appropriate activities for elementary school students to prevent or reduce conflict; (5) form a parent support group; (6) implement a positive reinforcement system; and (7) offer mentoring for bullied students.
- b) ODE: ODE can review bullying allegations, either through a Due Process hearing or an investigation.

C. State Statutes.

- 1. Anti-bullying statutes: Ohio statutes do not prohibit bullying. Instead, they require districts to develop specific anti-bullying policies.
 - a) R.C. § 3313.666: Districts must develop a policy prohibiting bullying, harassment, and intimidation. Policy requirements are detailed below in Section III. A. Prevention and Policies: The Law.
 - b) Model Policy from ODE available at: <http://education.ohio.gov/Topics/Other-Resources/School-Safety/Safe-and-Supportive-Learning/Anti-Harassment-Intimidation-and-Bullying-Model-Po>
 - c) R.C. § 3313.667: Districts should use federal funds to provide training, workshops, or courses related to the above policy.
 - d) Neither statute allows for private lawsuits.
- 2. Anti-hazing statutes: R.C. §.2307.44 and R.C. § 2903.31 prohibit hazing and allow a civil action for damages.

- a) Hazing is defined as “doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person.”
 - b) To sustain a hazing claim, the plaintiff must allege a dangerous act of initiation and desired membership in a particular group.
3. Negligence/malice, bad faith etc. Bullying suits can also be filed as state-law negligence claims. In other words, plaintiffs can allege the district had a duty to protect the student and was negligent in failing to do so.
- a) Districts are typically immune from these lawsuits under R.C. Chapter 2744, Ohio’s Political Subdivision Tort Liability Act.
 - b) District employees are typically immune unless the plaintiff alleges facts showing that the employees acted with malice, in bad faith, recklessly, or wantonly. R.C. § 2744.03 (A)(6)(b).

III. PREVENTIVE STRATEGIES.

These policies and practices should be in place before bullying is reported. Courts and agencies tend to look favorably on districts that are proactive in their efforts to address bullying.

A. Prevention and Policies: The Law.

1. Revised Code 3313.666 requires boards of education to establish anti-bullying policies:
- Boards of Education of all city, local, exempted village, and joint vocational school districts must establish individual policies prohibiting harassment, intimidation, and bullying on school property, on a school bus, or at school-sponsored events and expressly providing for the possibility of suspension of a student found responsible for harassment, intimidation, or bullying by an electronic act. The policy must be developed in consultation with (1) parents; (2) school employees; (3) school volunteers; (4) students; and (5) community members. The policy must include the following:
- a) a statement prohibiting harassment, intimidation, or bullying of any student on school property or at school-sponsored events;
 - b) a definition of harassment, intimidation, or bullying in accordance with the language in the statute (as laid out above);
 - c) a procedure for reporting prohibited incidents;
 - d) a requirement that school personnel report prohibited incidents of which they are aware to the school principal or other administrator designated by the principal;

- e) a requirement that custodial parents or guardians of any student involved in a prohibited incident be notified and, to the extent permitted by R.C. § 3319.321¹ and the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g², have access to any written reports pertaining to the prohibited incident;
- f) a procedure for documenting any prohibited incident that is reported;
- g) a procedure for responding to and investigating any reported incident;
- h) A strategy for protecting a victim or other person from new or additional harassment, intimidation, or bullying, and from retaliation following a report, including a means by which a person may report an incident anonymously;
- i) A disciplinary procedure for any student guilty of harassment, intimidation, or bullying, which does not infringe on any student’s rights under the First Amendment to the Constitution of the United States;
- j) A statement prohibiting students from deliberately making false reports of harassment, intimidation, or bullying and a disciplinary procedure for any student responsible for deliberately making a false report of that nature; and
- k) A requirement that the administration semiannually provide the board president a written summary of all reported incidents and post the summary on its website, if the district has a website, to the extent permitted by R.C. § 3319.321 and FERPA.

2. Anti-bullying policies must be included in student handbooks and must include cyberbullying information:

The policy must be included in student handbooks and any other publications that set forth the comprehensive rules, procedures, and standards of conduct for schools and students in the district. The policy and explanation of the seriousness of bullying by electronic means shall be made available to students in the district and to their custodial parents or guardians. Information regarding the policy should also be included in employee training manuals.

3. Boards must explain the anti-bullying policy and consequences for violations:

To the extent that state or federal funds are appropriated for this purpose, each board shall require that all students enrolled in the district annually be provided with age-appropriate

¹ R.C. § 3319.321 is the Ohio law that prohibits the public release of personally identifiable student information other than directory information, subject to certain limited exceptions. Directory information includes information such as a student’s name, address, telephone listing, date and place of birth, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation and awards received.

² FERPA is the federal law that protects the privacy of student educational records. Under FERPA, all but directory information regarding a student is prohibited from public release, subject to certain limited exceptions.

instruction, as determined by the board, on the board's policy, including a written or verbal discussion on the consequences for violations of the policy.

4. Boards must forward the anti-bullying policy to parents annually:

Each board shall require that once each school year a written statement describing the policy and the consequences for violations of the policy be sent to each student's custodial parent or guardian. The statement may be sent with regular student report cards or may be delivered electronically.

B. Prevention and Policies: Practical suggestions.

1. General policy training and review: All staff members who work with children should be familiar with your district's anti-bullying policies and guidelines. Courts and administrative agencies examine not only the district's policies and guidelines, but also the staff's understanding of, and compliance with, these policies.
 - a) Example: If your district's policy requires all informal reports to be reduced to writing and submitted to the superintendent, each staff member must understand what an informal report is and how to forward this to the superintendent.
 - b) Example: If your district's guidelines direct teachers to forward bullying complaints to a Civil Rights Coordinator, your staff must know the contact information for that individual and understand what types of complaints, and in what format, should be forwarded.
 - c) Review policies annually and with new staff.
 - d) Consider having your employees sign that they read and understood the materials.
2. Cyberbullying Policies: cyberbullying has become an area of unique concern because:
 - a) Cyberbullies can spread hurtful messages to a very wide audience with remarkable speed. Unlike traditional rumors that eventually die out, rumors in cyberspace can be cut, pasted, printed, and forwarded ad infinitum;
 - b) Cyberbullies do not have to own their own actions or fear punishment, because it is difficult to identify them if they use screen names;
 - c) Home may no longer be a haven from bullying; and
 - d) Cyberbullying can sometimes be outside the legal reach of schools and school boards because the behavior often happens outside of school on home computers or cellular phones.
3. Policy Suggestions:
 - a) As noted above, the recently amended R.C. § 3313.666 requires District policies to explicitly include cyberbullying in its anti-bullying policy.

- b) Illegal or inappropriate internet-related conduct should be considered grounds for disciplinary action.
- c) Acceptable Use Policy:
 - (1) Acceptable Use Policies ("AUPs") can help educate students, parents, and staff about internet use and issues of online privacy and safety, and to seek parental consent for their children's internet use.
 - (2) Make cyberbullying a punishable offense.
 - (3) Require students to sign a statement agreeing to comply with district rules on network or internet use and have parents sign a consent form and a release authorizing their child's use of the school network.
 - (4) In the release, the authorized student user and his/her parent (if the student is under age 18) should agree to indemnify and hold the school system harmless from all claims that result from the student's activities while using the school's network and that cause direct or indirect damage to the user, the school system, or third parties.
 - (5) The release should also prohibit e-mails that include malicious gossip and slander, "hit lists" via e-mail or other methods of electronic communication naming specific students and/or teachers, and changing other students' e-mail or personal settings.

C. **Prevention and Forms.**

Your policies require reporting and documenting bullying incidents. Make sure your forms are up-to-date and are easily available to parents, staff, and students.

- 1. For clarity, use separate forms to describe the bullying incident and to document the investigation, and results.
- 2. *Bullying Incident Form*: These should be available online, and in each principal's office, at a minimum. To aid in retrieval, consider printing these on colored paper.
 - a) Reduce all bullying complaints, even verbal ones or those sent by e-mail, to writing. Your staff should fill out this form whenever any parent, child, or other staff member reports a bullying incident. Not only is documenting bullying complaints required by your policies, but reducing even informal complaints to writing creates a clean record that shows your district is not deliberately indifferent to bullying.
 - b) Do not assume a computer program, such as Public School Works, suffices to document investigations or bullying claims because such programs may categorize infractions by the offender and not by the victim.
 - c) Notify parents, children, and staff about these forms and encourage their use.

3. *Bullying Investigation and Results Form:* The administrator or teacher responsible for investigating bullying should complete this form to document the investigation details: who witnessed the event, who was interviewed and when, what the results of the investigation were and whether the offender received any consequences. Attach any witness statements to this document.
4. *Document Retention:* Emails and phone conversations are not enough to document the incident or follow-up with parents.
 - a) Store your bullying report and investigation forms by victim and perpetrator in a way that your staff can retrieve them easily.
 - b) Do not shred forms or discard e-mails on a yearly basis, unless required by your district's records retention policy. Be especially careful to retain documents when litigation or an administrative charge is pending or threatened.

D. Anti-Bullying Curricula.

There is a plethora of anti-bullying programs.

1. A general "leadership" or "citizenship" program with a "good friend" module may not be enough. The ideal anti-bullying program is:
 - a) evidence-based;
 - b) tailored to grade levels;
 - c) includes regular hands-on activities or presentations; and
 - d) has a parent and/or staff training component

E. Communication.

Districts should examine whether staff communicate about bullying issues across buildings and identify students who have a history of bullying or being bullied.

IV. ADDRESSING BULLYING COMPLAINTS.

- A. Steps administrators or teachers should take immediately** when a parent, child, or staff member reports bullying:
 1. Reduce the complaint to writing. A bullying report form should be completed for every complaint, even one sent by e-mail or discussed over the phone.
 - a) Do not assume minor infractions are not bullying. The Office for Civil Rights, for example may consider one child calling a student with an IEP "stupid" to be a form of disability-based harassment.

- b) Remember, computer programs that store disciplinary reports are not enough to document bullying complaints and your district's response to them.
2. Document and Investigate: Every step of your investigation should be documented.
- a) After reducing the complaint to writing, call the alleged victim's parent and let them know of the incident and your district's follow-up procedures. Document this call.
 - b) Conduct a thorough investigation. Interview the victim, the bully, and any witnesses. Witnesses should give statements when possible. Document these steps on your district's Investigation and Results form.
 - c) Determine whether the complaint is substantiated and if so, what consequences the bully will receive. Use your district's disciplinary policies as a guide. Document any discipline the bully receives: verbal reprimand, recess suspension, detention, in-school suspension, out-of-school suspension, etc.
 - d) Contact the victim's parent and let them know, in general terms only, the results of your investigation. FERPA does not permit you to inform the victim's parents about any specific discipline given to another child, with the exception of information needed to protect the health and safety of other students or individuals. Take care, therefore, to be general in your conversation. Ex. *Our investigation substantiated your daughter's complaint and appropriate disciplinary consequences have been administered. Please let us know immediately if the bullying continues.* If possible, provide this information in writing.
 - e) Follow up with the victim, as necessary. Encourage the child to report any additional harassment and assign a staff member to check-in with the student regularly.

B. Responsive Interventions.

- 1. Consider a class-wide or school-wide intervention, especially if the bullying is based on a protected category such as race or religion. For example, when a child complains of race-based bullying, consider whether diversity training may be useful for the class or school as a whole.
- 2. Consider group or individual interventions.
 - a) Mediation: a formal mediation session for the bully and victim may indicate that your district took the complaint seriously. An adult facilitator typically meets with the children and develops an agreement, sometimes memorialized in a written contract. Note, however, that mediation is not always appropriate. For example, the Office for Civil Rights does not permit mediation between sexual assault victims and their assailants.

- b) **Social Skills Groups:** Many school psychologists, social workers, and guidance counselors run social skills groups with children who have identified social difficulties. Both bullies and victims benefit from additional social skills training.
- c) **Counseling:** Offer individual counseling to bullying victims, as needed.

C. Consultants and Surveys.

- 1. Districts with extensive bullying problems can consider engaging a consultant for specific and relevant suggestions. Courts mention this approach as an example of a reasonable response to bullying.
- 2. **Surveys:** Developing and administering a formal survey to students and/or parents is generally a good way to assess a school's "climate" and begin addressing harassment or bullying.
 - a) Follow up on any survey results that indicate a child is being bullied. Treat survey results just as you would any other bullying complaint.
 - b) General survey results should be reviewed and used to develop or enhance anti-bullying programs. Do not leave your survey results in a box in the closet.

V. SPECIAL EDUCATION AND BULLYING.

A. Red Flags: Bullying incidents can indicate the need for special education services:

- 1. An evaluation if the bully is not on an IEP.
- 2. A reevaluation if the bully is suspected to be misidentified.
- 3. An evaluation or reevaluation for the victim to address emotional difficulties or social skill deficits.

B. Deadlines: Intervention Assistance Teams ("IAT") and IEP teams should pay particular attention to victims already receiving special education services, because complainants may allege IDEA and Section 504 violations by claiming the victim has been deprived of educational benefits as a result of the bullying.

- 1. **Child Find:** Districts are required to identify, locate, and evaluate students who are suspected of having a disability that may require specialized instruction. If your district does not consider evaluating bullies or victims when a disability is suspected, it may be violating Child Find.
- 2. **Evaluations:** Once a district determines that a bully or victim should be evaluated, the district has 60 days from the date of the parent's written consent to complete an ETR and hold the ETR meeting.

- Any assistance the IAT implements related to social skills (*e.g.*, RTI) should be undertaken contemporaneously with the evaluation process, and should not be used to delay an evaluation.
3. **FBA and BIP:** If a student exhibits ongoing or extensive behavioral concerns, his or her evaluation may need to include a Functional Behavior Assessment ("FBA") leading to a Behavior Intervention Plan ("BIP"). If a student has a behavior goal on his or her IEP, the IEP team may examine whether that goal is appropriate given the ongoing bullying behavior.
 4. **Victims with an IEP:** OCR recently issued a Dear Colleague Letter (8/20/13) noting that some districts attempt to solve bullying problems by removing the bullied child to a different setting. If the student has an IEP, OCR cautions districts to consider whether a more restrictive placement may violate FAPE.
 - a) "Placement in a more restrictive 'protected' setting to avoid bullying behavior may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE."
 - b) Districts cannot attempt to resolve bullying by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education services.
 - c) If the district believes such a change is necessary, it must convene a IEP team meeting - including the parent - and discuss a possible change in services or placement.
 5. **Bullies with an IEP / Manifestation Determinations:** When a child with a disability violates the student code of conduct, the team may consider changing the student's programming or his or her placement, including a suspension of 10 days or more. To do so, the IEP team must conduct a manifestation determination hearing within 10-days of the decision to change placement.
 - a) If the team determines the behavior was, in fact, a manifestation of the student's disability, the district may not change the student's placement without parental consent, unless a 45-day emergency removal exception applies (weapons, drugs, serious bodily harm).
 - b) If placement cannot be changed, consider these options:
 - (1) convene the IEP team to revise the student's IEP and or BIP;
 - (2) separate the bully and victim (proceed with caution);
 - (3) provide counseling or mediation services for both victim and bully;
 - (4) increase monitoring or supervision; and

- (5) if all else fails, consider filing a Due Process complaint to change the bully's or victim's placement. Consult with counsel before taking this step.
6. **Documentation:** As always, documenting IEP team suggestions and decisions under these circumstances is critical. IEP teams should send Prior Written Notices (PR-01) to parents whenever any decision is made, regardless of whether the parents are in agreement with the outcome. Teams should also document attempts to reach parents, parent refusals to sign consent to evaluations or services, and any relevant parent conversations.

VI. Conclusion.

Bullying lawsuits and agency complaints are on the rise, especially as related to protected-status bullying and harassment. To protect students and limit liability, districts should: develop comprehensive policies; implement preventive programs; document all reports, investigations, and outcomes; and address all special education issues.

SELECT CASE LAW- DELIBERATE INDIFFERENCE

Deliberate Indifference: Courts find that school districts are deliberately indifferent when they respond to harassment in a clearly-unreasonable manner in light of the known circumstances. Although courts traditionally avoid evaluating districts' disciplinary decisions, some have begun to consider the effectiveness of a district's response to the harassment as a factor in determining liability.

Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ.
2012 U.S. Dist. LEXIS 152080 (S.D. Ohio Oct. 23, 2012)

Facts:

- * A high school student with Asperger's Disorder, ADHD, and seizure disorder sued a school district, and several teachers and administrators, alleging they failed to prevent disability-based bullying and harassment.
- * The plaintiff alleged that other students called him names, threw water on themselves to mimic his incontinence during seizures, stole and destroyed his belongings and projects, punched him, encouraged him to commit suicide, and sexually assaulted him.

District's Response:

- * The student alleged one teacher repeatedly quizzed him in front of the class about whether he really had seizures, and told his parents that he was lazy and that it was a nuisance to teach him.
- * Another teacher reportedly signed a petition to remove the plaintiff from the classroom.
- * A principal allegedly told the plaintiff to "work it out" when he complained that other students told him they wanted him to "hang himself, let us watch, we will tighten the noose, dig your grave, cut the rope after you're dead and cover you up with dirt."

Outcome:

The Court held that the district, as well as the individual administrators and teachers, could be liable for the plaintiff's Section 504, and ADA claims. Additionally, the court allowed the student's Title IX claim to proceed against the district, and his Equal Protection and state-law claims to continue against the individual defendants. The student alleged enough facts to suggest the district knew its staff was deliberately

indifferent to the bullying, because the administrators and teachers purportedly ignored disability-based bullying and treated the student differently based on his disability.

Patterson v. Hudson Area Schools
551 F.3d 438 (6th Cir. 2009)

Facts:

- * A high-school student was shoved into lockers and called “queer,” “faggot,” and “pig,” and “Mr. Clean,” based on his purported lack of pubic hair. The bullies defaced the student’s planner with sexual phrases such as “I HEART penis” and concomitant drawings.
- * In eighth grade, the student received an IEP and was educated in a resource room setting, where he was safe from bullying. Despite his parents’ pleadings, the principal refused to continue the resource room placement for ninth grade.
- * Bullies broke into the student’s locker, urinated on his clothes, and covered the locker with sexually oriented words spelled out in shaving cream. On another occasion, the students used permanent markers to draw a penis being inserted into a rectum and defaced the locker with more derogatory phrases of a sexual nature.
- * In the final incident, a bully sexually assaulted the student by forcing him into a corner and rubbing his penis over the victim’s face and neck. A second student blocked the exit.

District’s Response:

- * Each time an incident was reported to administration (and the identity of the perpetrator was known), the administrator disciplined the perpetrator, generally with a verbal reprimand. The reprimand usually ended the bullying by that particular student, but another harasser would typically take his place and begin bullying the victim once again.
- * Although the sexual assailant was formally expelled, he was allowed to attend a sports awards ceremony at which the victim was present.
- * After the sexual assault, the baseball coach addressed the team, including the victim, and advised the players that they should "not joke around with guys who can't take a man joke."

Outcome:

The appellate court held that Title IX claim could proceed against the district. The school district's response, although effective in ending harassment with individual bullies, was never effective in preventing subsequent harassment by new perpetrators. The court implied that the district should have employed more severe discipline to discourage other bullies, and was deliberately indifferent because it knew that the resource room was an effective solution for this victim but refused to employ it.

Williams v. Port Huron Sch. Dist.
455 Fed. Appx. 612 (6th Cir. 2012)

Facts:

- * Racial bullying was widely prevalent at the district. Examples included: racial slurs, racist posters, death threats, graffiti, swastika images, hit lists, and physical violence.
- * Fifteen African-American students left the school during the 2006-2007 school year.

District's Response:

- * The previous principal failed to discipline or investigate any incidents. He was promoted to assistant superintendent, and a new principal took his place. The district also hired a new superintendent.
- * The new administration promptly took action. The principal:
 - ✦ set up video surveillance where bullying was prominent;
 - ✦ reported serious incidents to the police;
 - ✦ ordered student to remove Confederate flags from clothing and vehicles;
 - ✦ video-presented regarding inappropriate behavior;
 - ✦ expelled children;
 - ✦ hired management consultants to study the school culture;
 - ✦ offered anonymity to reporters; and
 - ✦ held grade level assemblies promoting tolerance and diversity.

- * The superintendent:
 - ✦ approved diversity training seminars for the teachers and students;
 - ✦ held parent conferences; and
 - ✦ arranged for experts to assist the principal.

Outcome:

The appellate court found that the principal and superintendent were not deliberately indifferent to bullying. Although the parents sued because they thought the administration should have done more, the court explained that the parents do not have a right to particular remedial demands.

Mathis v. Wayne County Board of Education
496 Fed. Appx. 513 (6th Cir. 2012)

Facts:

- * A group of eighth-grade boys subjected seventh graders to locker room pranks. For example, in the “lights-out” game, the older boys turned off the lights and proceeded to hump and gyrate on the younger children. In the “blind-folded sit-up” game, older students placed their naked buttocks in front of a seventh grader who was convinced to do sit-ups blindfolded, thereby smacking his face on their behinds.
- * Another seventh grader was forced to the ground and anally penetrated with a marker. Upon learning of the rape, the coach failed to report it to the principal or to the victim’s parents.
- * After the rape victim’s parent informed the principal, the district suspended the assailants from school for 11 days and from the team for one month. The district also reprimanded the coach for failing to report the incident.
- * Following the rape, the victim was further harassed at school and multiple students commented on his sexuality.

District’s Response:

- * The district verbally reprimanded the remaining bullies, and attempted to prevent recurrences by:
 - ✦ requiring the seventh and eighth graders to use the locker room at different times;

- ✦ requiring an extra coach to monitor the locker room;
 - ✦ requiring the door to the locker room to be kept open;
 - ✦ requiring the coach to monitor the team more closely;
 - ✦ offering instruction on bullying; and
 - ✦ providing counseling.
- * After a trial, the jury awarded \$ 100,000 to each plaintiff.

Outcome:

The court upheld the jury’s award, finding the district was deliberately indifferent to the harassment. Specifically, the jury reasonably decided that the assailants should have been punished more severely, and permitting them to return to the team and interact with the victims in close quarters was unreasonable. Likewise, the district failed to investigate the additional locker-room pranks and did not mete out discipline to those bullies at all. The school district's response, noted the court, was "too little too late."

S.S. v. E. Ky. Univ.
532 F.3d 445, 456 (6th Cir. 2008)

Facts:

- * A middle-school student with cerebral palsy, pervasive developmental disorder, ADHD, and post-traumatic stress syndrome was bullied by his peers.
- * The student claimed that the bullies called him names such as “retard” and “gay,” threw wet paper towels at him, slammed his head into his desk, kicked him, grabbed his genitals, hit him with a drum stick, threw bleach on him, mocked his speech patterns, extorted money from him, and pushed him through a glass sneeze-guard in the cafeteria.

District’s Response:

- * When school officials were told about the incidents, they:
 - ✦ conducted individual and group interviews with students to determine who was at fault;
 - ✦ arranged for outside speakers to talk to students about name-calling;
 - ✦ monitored the victim;

- ✦ separated the victim from other students;
 - ✦ held a mediation session between the victim and the other student;
 - ✦ disciplined students who were found to be at fault;
 - ✦ contacted the police and had officers speak to offending students; and
 - ✦ called the bullies' parents to discuss their children's conduct.
- ★ The student left the district after eighth grade and sued the district and administrators for violating the Constitution, the ADA, and Section 504. The student also alleged that the district discriminated against him when it monitored him and separated him from the others.

Outcome:

The Sixth Circuit held in the district's favor, finding that it was not deliberately indifferent and did not have a permissive attitude amounting to discrimination. The court specifically noted that the district met with the students, disciplined when necessary and communicated with parents. The court also noted that the district did not violate the Constitution because (1) the Fourteenth Amendment does not generally require school districts to protect children from third-party harm, and (2) when the district disciplined the student, it did not do so discriminatorily.

Vidovic v. Mentor City Sch. Dist.
921 F. Supp. 2d 775 (N.D. Ohio 2013)

Facts:

- ★ After a high-school student from Bosnia killed herself, her parents sued the school district, several administrators, and a guidance counselor, alleging that the district and its employees ignored nationality-based bullying.
- ★ The parents alleged the bullies pushed their daughter down the stairs, and called her a lesbian, a slut, and a whore. Many incidents related to general adolescent conflicts about boys and friendships.
- ★ The student also experienced unrelated difficulties at school, and was disciplined for skipping class, fighting, and excessive tardiness. During these years, the student sought private therapy and was also hospitalized for suicidal ideations.
- ★ Eventually, she left the school and began a virtual education program at home. Shortly after the beginning of that school year, the student killed herself. Her

suicide note referred to bullying and social challenges, as well as various family conflicts.

District's Response:

- * Although the district was never told that the harassment was based on the student's nationality, it took prompt action when bullying was reported, including:
 - ✦ providing in-school counseling;
 - ✦ investigating allegations;
 - ✦ arranging for closer monitoring by the security guard; and
 - ✦ allowing the student to leave the classroom and meet with her counselors when she was upset.

Outcome:

With few exceptions, explained the court, school districts are not obligated to protect students from their peers. The court dismissed the case, noting also that the district was not deliberately indifferent to nationality-based bullying because neither the student nor her parents ever informed school employees that the bullying related to the student's nationality. Further, school officials took reasonable action in response to reported harassment.

Zeno v. Pine Plains Cent. Sch. Dist.
702 F.3d 655 (2d Cir. N.Y. 2012)

Facts:

- * After almost four years of bullying, a biracial high school graduate sued the school district for failing to protect him from racial harassment.
- * The student was assaulted and threatened numerous times. He was called racial epithets, threatened with lynching, death, and his sister's rape. His property was defaced, he was beaten, and the school's bathroom graffiti featured death warnings addressed to him.
- * Because of academic difficulties and perceived social challenges, the student was placed on an IEP. When the student had difficulty completing the requisite graduation credits, he chose to accept an IEP diploma, because he did not want to remain in the school district any longer.

District's Response:

- * Although some students were suspended or moved to another school, the bullying continued.
- * In response to the student's request, the local NAACP chapter leaders met with the superintendent and principal, offering to implement racial sensitivity programming and provide a shadow for the student free of charge. The district, however, declined the offer. Instead, the district offered sporadic and optional sensitivity training sessions for students, touching superficially on racism and prejudice.

Outcome:

A jury awarded the student 1.25 million dollars, and the school district appealed, arguing that it did not violate federal law, and that the damages were excessive. The second circuit affirmed the jury's award, finding that the school district did not sufficiently address the harassment, thereby depriving the student of several educational benefits. Specifically, the court noted that as time went on, the bullying grew increasingly severe; the district, therefore, should have realized suspending the offenders was not effective. These disciplinary approaches, the jury found, were not reasonably calculated to end the harassment. The student, therefore, was deprived of a harassment-free educational environment, and had to leave school with a substandard diploma, one less likely accepted by employers and colleges.

Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.
837 F. Supp. 2d 742 (S.D. Ohio 2011)

Facts:

- * A middle-school student with a cognitive disability was bullied by his classmates.
- * The bullies beat the student in the school parking lot, taunted him about the death of his household pet, and threatened to murder him in his home.

District's Response:

- * In response, the school board:
 - ✦ wrote reports;
 - ✦ disciplined the bullies;
 - ✦ involved the police;

- ✦ altered the student's schedule to help him avoid contact with the bullies;
 - ✦ provided him with a hall monitor to keep track of his whereabouts; and
 - ✦ permitted him to use the office bathroom.
- ★ Despite all of these safeguards, the harassment continued.

Outcome:

The court found that the district had not been deliberately indifferent to the student's plight, and whether it could have done more to protect him was irrelevant. Additionally, because he was bullied by other children, the victim could not successfully allege that the district itself violated his Constitutional rights.

Logan v. Sycamore Cmty. Sch. Bd. of Edn.

S.D.Ohio No. 1:09-CV-00885, 2012 U.S. Dist. LEXIS 77474 (June 5, 2012)

Facts:

- ★ A high-school student committed suicide after a sexting incident.
- ★ Her peers began to harass the student after a nude photograph of her was circulated around the school, calling her "porn queen," "slut", and "whore."
- ★ The victim first informed her counselor about the harassment and then appeared in a television interview about sexting.

District's Response:

- ★ The parents alleged that even though the superintendent watched the interview and the principal knew about the photograph, they did not take any specific action in response to the harassment.
- ★ The school officials, in turn, alleged that only the counselor and resource officer knew about the harassment.

Outcome:

The court decided that a reasonable jury could find that the school board knew about the sexual harassment, and that the district disregarded the victim's complaints. The court allowed this case to proceed to trial, but it was ultimately settled for \$154,000.00.

This case ultimately led to the passage of the Jessica Logan Act, legislation requiring school districts to include cyberbullying in their anti-harassment policies.

Schroeder v. Maumee Bd. of Educ.
296 F. Supp. 2d 869 (N.D. Ohio 2003)

Facts:

- * After finding out that his brother was gay, a middle-school student became a vocal proponent of gay rights.
- * In return, his peers assumed he was gay and called him names, beat him, and threatened his life.

District's Response:

- * The student reported the incidents to his mother and the school principals, but the perpetrators were not disciplined.
- * On one occasion, a principal allegedly asked the student if he was a fag like his brother, and instructed him to try out for the football team and to learn to like girls. That principal also allegedly explained that if the student would “shut his mouth about gay rights, he would stop getting into so many fights.”
- * The district had no written record of the plaintiff's bullying complaints.
- * The student eventually left the school, and was diagnosed with post-traumatic stress disorder, bipolar disorder, and obsessive-compulsive disorder.

Outcome:

The court held in the student's favor, finding that the principal's remarks could be seen as a sign of animus towards homosexuals. A jury, therefore, could conclude that the administrators were deliberately indifferent to the student's plight because he was perceived to be gay. The board of education and its superintendent, however, could not be held liable because a board of education can be held liable if, and only, if the board's policy or practice causes the harm. Here, the principal's failure to address the harassment did not reflect the board's policy or practice.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

October 26, 2010

Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964¹ (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972² (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973³ (Section 504); and Title II of the Americans with Disabilities Act of 1990⁴ (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.⁵ School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.⁶ School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil

¹ 42 U.S.C. § 2000d *et seq.*

² 20 U.S.C. § 1681 *et seq.*

³ 29 U.S.C. § 794.

⁴ 42 U.S.C. § 12131 *et seq.*

⁵ OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905. This letter does not specifically address those statutes.

⁶ The Department's regulations implementing these statutes are in 34 C.F.R. parts 100, 104, and 106. Under these federal civil rights laws and regulations, students are protected from harassment by school employees, other students, and third parties. This guidance focuses on peer harassment, and articulates the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.

rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools.⁷ And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.⁸

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.⁹ In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.¹⁰

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile

⁷ For instance, the U.S. Department of Justice (DOJ) has jurisdiction over Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c (Title IV), which prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. State laws also provide additional civil rights protections, so districts should review these statutes to determine what protections they afford (e.g., some state laws specifically prohibit discrimination on the basis of sexual orientation).

⁸ Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression. For more information on the First Amendment's application to harassment, see the discussions in OCR's Dear Colleague Letter: First Amendment (July 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>, and OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (*Sexual Harassment Guidance*), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁹ A school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. For a discussion of what a "responsible employee" is, see OCR's *Sexual Harassment Guidance*.

¹⁰ Districts must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex and disability discrimination complaints, and must notify students, parents, employees, applicants, and other interested parties that the district does not discriminate on the basis of sex or disability. See 28 C.F.R. § 35.106; 28 C.F.R. § 35.107(b); 34 C.F.R. § 104.7(b); 34 C.F.R. § 104.8; 34 C.F.R. § 106.8(b); 34 C.F.R. § 106.9.

environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.¹¹

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (*e.g.*, bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.
- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the

¹¹ Districts must designate persons responsible for coordinating compliance with Title IX, Section 504, and Title II, including the investigation of any complaints of sexual, gender-based, or disability harassment. See 28 C.F.R. § 35.107(a); 34 C.F.R. § 104.7(a); 34 C.F.R. § 106.8(a).

hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights.¹² In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

Title VI: Race, Color, or National Origin Harassment

- *Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.*

In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (*e.g.*, racial slurs) and also targeted students on the basis of their race (*e.g.*, notes directed at African-American students). The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately

¹² Each of these hypothetical examples contains elements taken from actual cases.

and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.¹³

- *Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, “You Jews have all of the money, give us some.” When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student “Drew the dirty Jew.” The responsible eighth-graders were reprimanded for teasing the Jewish student.*

The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,¹⁴ groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school’s Title VI responsibilities when the harassment is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members’ religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.¹⁵

In this example, school administrators should have recognized that the harassment was based on the students’ actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students’ religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school’s

¹³ More information about the applicable legal standards and OCR’s approach to investigating allegations of harassment on the basis of race, color, or national origin is included in *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), available at <http://www.ed.gov/about/offices/list/ocr/docs/race394.html>.

¹⁴ As noted in footnote seven, DOJ has the authority to remedy discrimination based solely on religion under Title IV.

¹⁵ More information about the applicable legal standards and OCR’s approach to investigating complaints of discrimination against members of religious groups is included in OCR’s Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), available at <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- *Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.*

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

In this example, the school employees failed to recognize that the “hazing” constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (e.g., sexual rumors and name calling), and sufficiently serious that it limited the student’s ability to participate in and benefit from the school’s education program (e.g., anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school’s policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district’s Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.¹⁶

Title IX: Gender-Based Harassment

- *Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student’s self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.*

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—i.e., even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their

¹⁶ More information about the applicable legal standards and OCR’s approach to investigating allegations of sexual harassment is included in OCR’s *Sexual Harassment Guidance*, available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program (e.g., access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an *ad hoc* basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.¹⁷

Section 504 and Title II: Disability Harassment

- *Several classmates repeatedly called a student with a learning disability "stupid," "idiot," and "retard" while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a*

¹⁷ Guidance on gender-based harassment is also included in OCR's *Sexual Harassment Guidance*, available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (e.g., absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.¹⁸

I encourage you to reevaluate the policies and practices your school uses to address bullying¹⁹ and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- *Sexual Harassment: It's Not Academic* (Revised 2008):
<http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>
- *Dear Colleague Letter: Sexual Harassment Issues* (2006):
<http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>
- *Dear Colleague Letter: Religious Discrimination* (2004):
<http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>
- *Dear Colleague Letter: First Amendment* (2003):
<http://www.ed.gov/about/offices/list/ocr/firstamend.html>

¹⁸ More information about the applicable legal standards and OCR's approach to investigating allegations of disability harassment is included in OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

¹⁹ For resources on preventing and addressing bullying, please visit <http://www.bullyinginfo.org>, a Web site established by a federal Interagency Working Group on Youth Programs. For information on the Department's bullying prevention resources, please visit the Office of Safe and Drug-Free Schools' Web site at <http://www.ed.gov/offices/OESE/SDFS>. For information on regional Equity Assistance Centers that assist schools in developing and implementing policies and practices to address issues regarding race, sex, or national origin discrimination, please visit <http://www.ed.gov/programs/equitycenters>.

- *Sexual Harassment Guidance* (Revised 2001):
<http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>
- *Dear Colleague Letter: Prohibited Disability Harassment* (2000):
<http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>
- *Racial Incidents and Harassment Against Students* (1994):
<http://www.ed.gov/about/offices/list/ocr/docs/race394.html>

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit <http://www2.ed.gov/about/offices/list/ocr/whatsnew.html>.

OCR is committed to working with schools, students, students' families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assistance in your efforts to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>, or call OCR's Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America's students.

Sincerely,

/s/

Russlynn Ali
Assistant Secretary for Civil Rights

Dear Colleague Letter
Office of Special Education and Rehabilitation Services and Office of Special Education Programs, U.S. Department of Education

August 20, 2013

The Department of Education (“DOE”) issued a “Dear Colleague” letter this summer warning school districts to think twice before changing a bullied child’s least restrictive educational environment.

At the outset, the DOE reviewed its position on bullying and its many harms. It noted that students with disabilities are disproportionately affected by bullying, but may not have the skills to alert adults and seek help. If the child has been identified as having a disability, the IEP team must review the student’s placement to ensure he or she continues to receive a free appropriate public education (“FAPE”) in the least restrictive environment. If, because of the bullying, the student’s needs have changed to the extent the IEP is no longer designed to provide meaningful educational benefits, the team must determine what additional or different services the child needs. Changing a bullied child’s placement to protect him or her, however, may deny FAPE to that student, especially if the change is done unilaterally, without the parents’ input or the team’s consideration. The same applies, noted the DOE, to unilateral changes to the frequency, duration, intensity, or location of services.

The DOE also reminded districts to review a student’s IEP when the disabled child is the one bullying others. Just as with a victim, the bully may need changes to his or her environment, or additional supports and services to address inappropriate behaviors. As an aside, the DOE notes that districts’ child find obligations under the IDEA may be triggered when non-identified students are bullied.

To assist districts with bullying in general, the DOE enclosed a list of “effective evidence-based practices for preventing and addressing bullying.” These include:

- using a comprehensive multi-tiered behavioral framework;
- teaching appropriate behaviors and how to respond to bullying;
- providing active adult supervision;
- training and providing ongoing support for staff and students;
- developing and implementing clear policies to address bullying;
- monitoring and tracking bullying behaviors;
- notifying parents when bullying occurs;
- addressing ongoing concerns; and
- sustaining bullying prevention efforts over time.