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How to Manage the Risk to Your Public Entity When Different Standards are Being Applied

STUDENT BULLYING AND PEER HARASSMENT:

How to Manage the Risk to Your Public Entity When Different Standards are Being Applied

By Julie E. Lewis, Esq.

Litigation filed against educational institutions and officials over the issue of student-on-student/peer bullying is on the rise, despite the fact that the U.S. Supreme Court set a high standard for proving liability against school districts in lawsuits for monetary damages as a result of peer sexual harassment under Title IX in 1999¹. Moreover, the U.S. Department of Education Office for Civil Rights (OCR) has ramped up its investigation and enforcement efforts by focusing a great deal of attention on the issue and by applying an expansive reading of the applicable laws to its investigations. In addition to other laws, OCR enforces Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, both of which prohibit disability discrimination.





OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials *knew or should have known* about the bullying; and (4) the school does not respond appropriately.² OCR acknowledges that the standard they apply for administrative enforcement is “different from the standard in private lawsuits for money damages, which, many courts have held, requires proof of a school’s actual knowledge and deliberate indifference.”³ When OCR issued new guidance to public schools regarding the bullying of disabled students in the form of a Dear Colleague Letter on October 21, 2014, it was the third time OCR issued guidance on this topic in the past 4 years.

While there is no federal statute that prohibits bullying, litigants and complainants seek protection under federal statutes that protect students from discrimination based on disability⁴, race, color, national origin⁵ and sex⁶. They assert that peer harassment or bullying is a form of discrimination prohibited by these federal statutes. In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court held that a school district, as a recipient of federal funds, can only be liable for peer harassment based on sex when an “appropriate” school official with authority to remedy the harassment (1) had actual knowledge of severe, pervasive, and objectively offensive harassment based on sex that deprived the victim of access to an educational opportunity or benefit, and (2) was deliberately indifferent to the harassment. In *Davis*, the mother of a fifth-grade student sued the Monroe County Board of Education alleging that school officials failed to prevent her daughter’s suffering sexual harassment at the hands of another student. Ms. Davis asserted that the school’s deliberate indifference to the student’s persistent sexual advances toward her daughter created an intimidating, hostile, offensive, and abusive environment that violated Title IX of the Education Amendments of 1972. While the *Davis* decision involved a harassment claim based on sex, lower federal courts have applied the same standard to harassment claims that were filed by litigants based upon disability and race as well.

Conversely, OCR stated in its October 2010 Dear Colleague Letter that it would find a school district in violation of the various



federal civil rights statutes mentioned above where (1) the harassment was severe, pervasive, or persistent, (2) the harassment interfered with or limited the student’s educational benefits and opportunities, and most significantly, (3) a school official *knew or reasonably should have known* about the harassment.⁸ OCR says that a “school has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment.” A responsible employee would include “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”⁹ This is drastically different than the actual knowledge standard applied by courts.

IN ATTEMPTING TO MANAGE THE RISK OF ANY TYPE OF PEER HARASSMENT/ BULLYING, WHAT SHOULD A RISK MANAGER DO?

- ❶ Once a complaint of peer harassment/bullying is made, conduct a prompt, thorough, and impartial inquiry.
 - a. The inquiry should be conducted regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.
 - b. Ensure that the individuals conducting the inquiry/ investigation are well-trained investigators and thoroughly understand your processes and policies.
- ❷ Take immediate and appropriate action to investigate the issue (what occurred).
- ❸ If bullying or discriminatory harassment occurred, take steps to stop the bullying/harassment, eliminate any hostile environment and its effects, and prevent it from recurring.
 - a. The school should take steps such as separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser.
 - b. The school must be careful not to penalize the student who was harassed.
 - c. The school may need to provide training or other

ADDITIONAL INFORMATION TO REVIEW:

- OCR & the Office of Special Education and Rehabilitative Services (“OSERS”) joint guidance informing schools that disability-based harassment may deny a student equal educational opportunities under Section 504 and Title II (See OCR Dear Colleague Letter on Prohibited Disability Harassment, July 25, 2000, available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>).
- OSERS Dear Colleague Letter on Bullying of Students with Disabilities, which provides additional guidance to schools that the bullying of a student with a disability on any basis can result in a denial of FAPE under IDEA that must be remedied (See OSERS Dear Colleague Letter on Bullying of Students with Disabilities, August 20, 2013, available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>).





By taking proactive and preventive steps to manage the risk based upon OCR's standards and guidance, schools ensure that they will not run afoul of the various federal laws under which claimants and litigants bring complaints and lawsuits.

interventions not only for the alleged perpetrator(s), but also for the larger school community.

- 4 If bullying/harassment occurred based on disability, remedy the effects of the bullying/harassment on the services that the student with a disability receives to ensure the student continues to receive a free appropriate public education (FAPE). (Any remedy should not burden the student who has been bullied.)
- 5 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.
- 6 Issue/revise policies on harassment and ensure wide dissemination of existing policies/procedures. Ensure that the policies include the names and contact information of specific female and male employees to whom students, parents, and employees can report harassment/bullying.
- 7 Train employees and the students on the updated policies/procedures.¹⁰

By taking proactive and preventive steps to manage the risk based upon OCR's standards and guidance, schools ensure that they will not run afoul of the various federal laws under which claimants and litigants bring complaints and lawsuits. While developing policies, procedures, and training based on the OCR standards and guidance may take additional time up front, it will pay off in the long run with fewer claims, fewer lawsuits, and successful motions to dismiss/motions for summary judgment in federal court without having to pay monetary damages if the school and its officials are implementing the policies, procedures and training appropriately. ■

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ENDNOTES

- 1 *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).
- 2 See Office for Civil Rights ("OCR") Dear Colleague Letter on Responding to Bullying of Students with Disabilities (October 21, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>, page 4.
- 3 See OCR 2014 Dear Colleague Letter, note 18 (*Long v. Murray Cnty. Sch. Dist.*, 522 Fed. Appx. 576, 577 & n. 1 (11th Cir. 2013) (applying the test enunciated in *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643 (1999)).
- 4 Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2014); Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. (2014).
- 5 Title VI, 42 U.S.C. § 2000d (2014).
- 6 Title IX, 20 U.S.C. § 1681 et seq. (2014).
- 7 Title IX of the Education Amendments of 1972 prohibits a student from being "excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a).
- 8 See OCR Dear Colleague on Harassment and Bullying (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>, page 2.
- 9 U.S. Department of Education, Office for Civil Rights. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Title IX*. Retrieved October 31, 2014, from <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.
- 10 See 2010 OCR Dear Colleague Letter, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>, page 3.

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