DISABILITY HARASSMENT: LEGAL UPDATE & PRACTICAL THOUGHTS

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A note about these materials: These materials are not intended to serve as a comprehensive review of all case law, rules, and regulations on bullying and disability harassment under Section 504/ADA. Instead, the author sought to provide an overview of the rules, analysis of the school dynamics surrounding compliance, and practical tips on how to respond. These materials are not intended as legal advice, and should not be so construed. Note that the Office for Civil Rights (OCR) frequently applies strategies and procedures used in Title IX sexual harassment situations to disability harassment. The author has done so as well. These materials will focus on federal law. Your state law likely includes rules addressing these issues as well. Since unique facts, state law, and local policy make a dramatic difference in analyzing any situation or question, please consult a licensed attorney for legal advice regarding a particular situation.

I. Two differing approaches to enforcing the federal rules on disability harassment.

A. U.S. Department of Education (ED) enforcement of Section 504 & ADA Title II.

1. July 2000 "Dear Colleague" letter from OCR & OSERS on Disability Harassment. On July 25, 2000 the U.S. Department of Education (ED), through the joint efforts of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) issued a letter warning schools about the need to address harassment based on disability. *Dear Colleague Letter,* 111 LRP 45106 (OCR/OSERS 2000)[hereinafter, *"DCL 2000"]*. The letter is the result of concerns communicated to the department by parents and advocates, substantiated by focus groups conducted by OCR & OSERS on the **"often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students."** (Emphasis added). ED reminds districts that disability-based harassment is a form of discrimination under both Section 504 and Title II of the Americans with Disabilities Act (ADA). With reference specifically to §504, ED is concerned that disability harassment may result in denial of FAPE to a student or may deny him/her an equal opportunity to participate or benefit in a school's educational programs. Disability harassment of a student eligible under the IDEA could also deny FAPE. A quick reminder: **students eligible under the IDEA are also entitled to the nondiscrimination protections of Section 504 and the ADA.** "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993).

"Disability Harassment" defined. "Disability harassment under Section 504 and Title II is [1] intimidation or abusive behavior [2] toward a student based on disability [3] that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating." *DCL 2000, p.2 (bracketed material added by author).*

Under federal law, bullying & harassment are related, but different. Throughout the disability harassment cases, misconduct is often referred to by the courts as "bullying," to the point that the

terms are used somewhat interchangeably. Likewise, society at large and the schools in particular often make no distinction between "bullying" and "harassment." OCR (the Office for Civil Rights) sees the terms as different.

> "The complaint alleged that the actions taken against the Student constituted 'bullying.' The laws enforced by OCR, however, do not utilize the term 'bullying' and instead prohibit unlawful harassment. Although the possible bases for actions constituting 'bullying' are much broader than the bases constituting harassment under the federal laws enforced by OCR, because the complaint stated actions alleged to have been taken against the Student because of disability, the distinction between 'bullying' and harassment in this matter is immaterial and the complaint was investigated as one alleging harassment." *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010).

While bullying can arise from any number of motivations (including one's attire, diminutive stature, or inability to throw a baseball), harassment focuses on actions arising from legally protected status—race, color, national origin, sex or disability. Consequently, a student "bullied" due to disability is a student protected not only by the school's policies and procedures on bullying, but also by the requirements of federal law enforced by OCR and outlined below.

Hostile Environment: When harassment can violate rights under Section 504, ADA Title II. "When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program." *Id.* It is also possible for the harassment to violate an eligible-student's right to FAPE under either Section 504 or IDEA. "Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a violation of FAPE." *Id.*

OCR: The school's duty to end disability harassment and prevent recurrence.

> "Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.
>
> A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. **The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring** and, where appropriate, remedying the effects on the student who was harassed." *DCL 2000, p. 3 [emphasis added]*.

See also, Willamina (Or) Sch. Dist., 30-J 27, IDELR 221 (OCR 1997)("Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act the district has the obligation to take all necessary steps to address and eliminate such harassment."). The legal duty "to end the harassment" is not recognized by the federal courts. Instead, the courts find liability for harassment when the school is aware of the harassment and is deliberately indifferent.

2. A Second Dear Colleague Letter in 2010. On October 26, 2010, OCR issued a second Dear Colleague letter to SEAs (state education agencies) and LEAs (school districts) on the subject. *Dear Colleague Letter,* 55 IDELR 174 (OCR 2010)*[Hereinafter, "DCL 2010"]*. The 2010 letter recognized the growing efforts of schools to address bullying, and emphasized that while these efforts were important, the civil rights implications of harassment could not be neglected.

> "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." *DCL 2010, p. 1 [emphasis added]*.

Treatment of disability harassment as mere "bullying" is a major concern for OCR, as it strips eligible students of legal protection provided by federal law. *See, for example*, *Williamston (MI) Community Schools,* 56 IDELR 22 (OCR 2010)("OCR also found that District staff did not address incidents of disability-based name-calling and related physical conduct as disability-based harassment. Instead, name-calling such as 'go to your rubber room' 'go back to your sped class,' 'retard' or 'stupid' were treated as minor infractions of 'rude inconsiderate or disrespectful behavior' under the School's Code rather than the more serious 'harassment'….").

B. Federal court enforcement of Section 504 & ADA Title II.

The federal court approach to harassment liability under civil rights laws was crafted by the U.S. Supreme Court in response to litigation under Title IX. The anti-discrimination provision of Title IX is remarkably similar to that of §504. Title IX states "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a).

In *Davis v. Monroe County Board of Education,* the Supreme Court applied what we know as the "*Doe v. Taylor* rule" on sexual assaults by school employees on students to suits brought under Title IX for student-on-student sexual harassment. The plaintiff was the mother of a fifth grade girl who over five months was subjected to numerous acts of "objectively offensive touching" as well as offensive comments by a classmate. The boy eventually pled guilty to criminal sexual misconduct. The parent sued alleging that the District did nothing despite the student's repeated complaints to teachers and other employees, and the complaints of other girls as well. The Supreme Court concluded that **districts may be held liable where the school is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.** *Davis v. Monroe County Board of Education,* 119 S.Ct. 1661 (1999).

What conduct constitutes sexual harassment actionable under Title IX? The Court provided an example of the obvious, and some analysis to assist in identifying less-obvious harassment.

> "The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource–an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles[.]" *Id., at* 1675.

A plaintiff cannot simply allege that he/she has been teased *and recover money damages.* "Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling** among school children, however, even where these comments target differences in gender." *Id., at* 1675. Instead, for district liability to arise, **the plaintiff must show "sexual harassment so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.*** Single events or incidents of harassment are not likely to create liability for money damages. "Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." *Id., at* 1676. **Finally, districts are not required to "remedy" peer harassment. "On the contrary, the recipient [school district receiving federal funds] must merely respond to known peer harassment in a manner that is not clearly unreasonable."** *Id., at* 1674.

Applying the Court's Title IX analysis to disability harassment, simple name-calling and teasing based on disability is not enough to invoke district liability for money damages. Interestingly, according to the Supreme Court, a plaintiff must show something more than a "mere decline in grades" in order to prevail on a harassment claim. *Id., at* 1676. In addition, the student would also have to demonstrate difficulty accomplishing school assignments or tasks, a reluctance to attend school or a school activity, or some other sort of barrier (physical or otherwise) to the student receiving equal access to school programs and activities. In the Title IX context, ED painted district liability for student-to-student sexual harassment very broadly when it warned districts of the potential problems. For example, in an early pamphlet on sexual harassment issued by OCR, districts were told "If a school finds out that there has been sexual harassment, it has the obligation to stop it and make sure that it does not happen again." *Sexual Harassment: It's Not Academic* (OCR Pamphlet, 1997). Later, the courts reined in the standards as demonstrated in the Supreme Court's decision in *Davis.* The difference in approach and liability standards still remains between the courts and OCR. OCR explains that the difference rests on monetary damages. "As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving federal administrative enforcement by a federal agency." *In re: Dear Colleague Letter of October 26, 2010,* 111 LRP 32298 (OCR 2011).

For purposes of clarity in these materials, since Section 504 and ADA Title II use "harassment" to identify the actionable behavior under federal civil rights law, the author will do so as well. These materials will now focus on satisfying OCR (which should also satisfy the federal courts), and will address each of the factors in turn. To make a determination regarding the student's disability harassment allegation, OCR considers the following:

(1) whether the student was harassed based on disability;
(2) whether the harassing conduct was sufficiently severe, persistent, or pervasive to create a hostile environment, or limit the student's ability to participate in or benefit from the District's educational program;
(3) whether the District has actual or constructive notice of the harassment; and
(4) whether the District failed to take prompt and/or effective action to end the harassment, prevent it from recurring, and, as appropriate, remedy the effects of the harassment on the student. *Kearney R-I (MO) School District,* 111 LRP 24625 (OCR 2010).

II. The intimidating or abusive behavior was based on the target student's disability.

A. What was the behavior and why did it happen?

> "Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating." *DCL 2000, p.2.*

Generalized disruptive behavior is not harassment. What happens when the school environment is simply chaotic, but the chaos is not disability-based and no particular behavior is directed at the student with the disability? Where the parent complained of disruptive behavior by other students in general, it did not trigger a campus duty to investigate harassment. "Because the other students' actions were not directed at the Student individually or, even assuming they were directed at the Student, they were not directed at him because of his disability, the other students' actions were not harassment and the District had no obligation to view them as harassment." *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010). *See also, Johannesburg-Lewiston Area (OH) Sch. District,* 110 LRP 67492 (OCR 2010)(Students told both school administration and police that they poured shampoo on and snapped towels at all of their classmates, and that Student wasn't singled out).

B. Was the target student's disability the reason for the intimidating or abusive behavior?

No disability = No actionable harassment. OCR determined that no disability harassment occurred since the student was not in fact disabled. School personnel were not aware of any physical or mental impairment, had no records or accommodation plans on file documenting a disability, nor had the complainant ever reported the student as having disability. The complainant also confirmed to OCR that complainant had no records indicating the student was disabled, and had never provided the district with evidence of disability. *Citrus County (FL) School District,* 35 IDELR 130 (OCR 2001).

> *A little commentary:* Since the student had not been determined eligible for either Section 504 or special education at the time of the complaint, the focus of the inquiry was on existing evidence that might demonstrate disability that would create eligibility. Since there was none, the harassment claim was dismissed. *See also, Washington West Supervisory Union #42 (VT),* 37 IDELR 194 (OCR 2002)(Despite allegations that the student was subjected to choking, interference with his computer use, pushing and tripping, there was no evidence of disability as the motivation. In the author's opinion, the actions were likely triggered by the student's weight.); *Smith v. Guilford Board of Educ.,* 2007 WL 1725512 (2nd Cir. 2007)(Complaint alleged that while the student had ADHD, the bullying was the result of his small stature, not disability); *Weidow v. Scranton School District,* 58 IDELR 93 (3rd Cir. 2012)(In this unpublished decision, the court found that a student with bipolar disorder could not maintain a claim for disability harassment as she was not substantially limited by her impairment. Note that the decision relies on the more demanding standard of "substantial limitation" that existed prior to passage of the ADAAA. Further, OCR has taken the position that students with bipolar disorder are "virtually always" eligible following the ADAAA, see *Dear Colleague Letter,* 112 LRP 3621 (OCR 2012)).

Possible basis in disability survives summary judgment. The parents of Paul C, a student with an emotional disturbance, sued arguing in part that he was harassed by other students. The parents alleged that he was teased because his mother came to school to tutor him, that students called him names ("retard" "reject" and "stupid"), and placed a crude drawing on his book bag. Finally, the parents alleged that another special education student repeatedly said that Paul engaged in sexual relations with his mother. His parents placed him privately during the pendency of the hearing and district court action. The district court found that this harassment could have been based solely on Paul's disability. Summary judgment was denied. *Rick C. v. Lodi School District,* 32 IDELR 232 (W.D. Wis. 2000).

Sometimes the words used and acts committed make the link to disability fairly obvious. In sixth grade, the student's teacher asked him, "in front of the entire class, if he really had seizures and questioned what the seizures looked like because 'I have never seen you have a seizure.'" When the student had a seizure, he would often become incontinent. Some students in his class "mimicked him by throwing water on their pants and shaking themselves violently, and calling Joseph 'seizure boy,' all with the knowledge and approval" of the classroom teacher. On the basis of the evidence, the court found sufficient facts to support the allegation that the bullying was disability-based. *Galloway v. Chesapeake Union Exempted Sch. Bd. of Educ.,* 112 LRP 52949 (S.D. OH. 2012).

What if there is disability, but it wasn't known at the time? Parents of a student eventually diagnosed as having ODD argued that the principal's decision to have classmates write letters to the student describing the things the student did that bothered them was disability-based harassment. The parent took exception to the letters that, although not referring to disability, focused on the student's behaviors. The parent alleged that the student suffered from extreme distress upon seeing the content of the letters. OCR could not determine that the letters were written because the student was disabled, rather than some other reason, and dismissed the complaint. *Washoe County (NV) School District,* 36 IDELR 216 (OCR 2002).

Could the targeting of the student for bullying evidence an impairment and need for services, triggering child find? Yes. Take a deep breath and consider this rather dense language from a Pennsylvania Hearing Officer's decision. "The intersection between the issues this hearing officer must address and the bullying/teasing lies solely in the determination of whether the behaviors Student presented that may have made Student a 'target' and/or the emotional and social difficulties Student had that may have led to misinterpretation of or an overreaction to normal childhood/preadolescent interactions constituted a disability or not, and then whether by virtue of that disability Student required a 504 Service Plan or specially designed instruction." *Rose Tree Media School District,* 111 LRP 6194 (SEA PA. 2010).

Are some disabilities more likely to give rise to harassment than others? The research seems to support the thought that different impairments may give rise to different triggers for harassment. "Many students with disabilities have significant social skills challenges, either as a core trait of their disability or as a result of social isolation due to segregated environments and/or peer rejection. Such students may be at particular risk for bullying and victimization." *T.K and S.K. v. New York City Dept. of Educ.,* 56 IDELR 228 (E.D.N.Y. 2011). For example, students with autism are "at greater risk of being bullied because they had trouble managing their emotions and stress, expressing their thoughts and feelings, and understanding their friends' thoughts and feelings[.]" Special Education Today, *Students with autism at risk of bullying because of emotions,* May 16, 2011. Similarly, students with learning disabilities and emotional disorders may lack social awareness, making them more vulnerable. *T.K., supra.* Students with serious cognitive impairments would appear vulnerable should they be unable to identify harassers or communicate what has happened to them.

A terrifying cross-over problem: Sexual harassment made more likely because of disability. While not a disability harassment case, *Murrell* provides a sobering lesson with respect to the vulnerability of some disabled students to sexual assault– especially at the hands of other students with disability-enhanced sexual aggression. A female high school student with spastic cerebral palsy was unable to use/control the right side of her body, deaf in one ear, and functioning at the first grade level intellectually and developmentally when she was sexually assaulted numerous times by a male disabled student with a history of sexually inappropriate conduct. The assaults were made possible by inappropriate supervision despite school knowledge of the need to at least watch the male student, and demands by the mother of the female student that she be supervised *because of sexual assaults on her at a previous campus.* Things were made worse by staff instructing the female student to not report the assaults to her parents or to the police, and a pattern of deceptive communications from the school to the parent. The district's response looks pretty indifferent. Other than trying to hide the

assaults, little was done to prevent further attacks. The male student was never punished by the school nor reported to law enforcement. *The female student, however, was suspended* for "behavior which is detrimental to the welfare of other pupils or school personnel." The Tenth Circuit found that a Title IX claim due to the school's "response" to the assaults should survive summary judgment. *Murrell v. School District #1, Denver Colorado,* 186 F.3d 1238 (10th Cir. 1999).

Section 504 demand for money damages on similar claim. In an Arkansas case, the parent of a Student with ADHD and reactive attachment disorder objected to placement in a learning center based on Student's history of being sexually abused, his social/emotional issues, and the possibility that the Student would be bullied by the older students at the learning center. The parents' concerns were tragically accurate, as the Student was sexually assaulted by another student in the learning center. The parents allege discrimination under Section 504. The court determined that if facts alleged in the police report were true, there was sufficient evidence that some if not all of the defendants had actual or constructive knowledge that Student's classroom environment was potentially dangerous to Student, as well as to other students, and the "Student's educational placement subjected him to the danger of being sexually abused or undergoing other emotional trauma." Summary judgment for defendants was denied and the claims may continue to trial. *Braden v. Mountain Home School District,* 60 IDELR 16 (W.D. AR. 2012).

Equal opportunity rudeness? A parent alleged that the bus driver harassed the student because of the student's disability. Specifically, the parent alleged that he driver allowed other students to tease her, and was rude and inattentive. OCR investigated and found that prior to the complaint, the driver was not aware of the teasing. Once the teasing on the bus was brought to the district's attention by the complainant, it was stopped. On the issue of the driver's rudeness, OCR found that the bus driver was rude and inattentive to all students, and not selectively rude and inattentive to the complainant's student. No harassment was found. *Union (OK) Public Schools,* 36 IDELR 74 (OCR 2001).

Equal opportunity apathy to bullying? In an unpublished case from Texas, the parents of a deceased special education student argued that his suicide by hanging in the nurse's office restroom in the school created a claim under Section 504. The parents alleged that the student was bullied, the school was aware of the bullying, but the school did not appropriately respond. Instead, the parents allege that the school labeled their son a "bad child" and a "troublemaker" for reporting the bullying, and that the school ignored the student's threats to kill himself while placed in the alternative school. A federal district court dismissed the Section 504 claims because there was no evidence of intentional discrimination solely on the basis of disability. Wrote the court: **"If Plaintiffs'—often uncontested—facts are to be believed, the Defendants' approach to what seems to be fairly wide-spread bullying based on Plaintiffs' summary judgment evidence is to bury their collective heads in the sand."** While the death is tragic, and perhaps could have been preventable, the court nevertheless finds no claim for disability discrimination. **"Nowhere in Plaintiff's voluminous record is there any evidence that Montana was bullied or treated differently by school administration because of his disability, or his membership in any other federally protected class. To the contrary, what Plaintiffs' record reveals is that the Defendants had a consistent policy of ignoring bullying against all students. That is not an issue within the limited jurisdiction of this court."** *Estate of Lance v. Kyer,* 59 IDELR 226 (E.D. TX. 2012). The court notes, in a footnote, that the state legislature could provide a mechanism for the parents to recover in tort, but has not done so.

Should the school assume, at the start of its investigation, that the harassment is because of disability? That was the parent's argument with respect to a series of incidents in the locker room, on the bus and in the hallways, restroom and cafeteria. "The Complainant could not recall if she specifically complained to the District that these incidents were due to the Student's disabilities, but she contends that because of the nature of the Student's disabilities the District should have known that the Student was subjected to the complained of treatment because of his disabilities." The Student was

cognitively impaired, and the facts were a mixed-bag. For example, students on the bus called Student names ("retard" and "idiot") which seem to evidence a basis in disability for the actions, while the horseplay in the locker room appears to have involved all of the students, and was not directed at Student in particular. Ultimately, OCR concluded that it was unclear whether all of the allegations were disability related, but the District nevertheless took prompt and appropriate action to address the incidents. *Johannesburg-Lewiston, supra.*

A little commentary: Note that OCR's response was probably influenced by the District's appropriate actions. Had the school not responded appropriately to the numerous incidents, OCR might have been inclined to pursue the parent's theory to ensure that the school improved its response in the future. Bad facts can sometimes make bad law. While the parent theory is not a rule, one could argue that its application could help a school avoid the problem of failure to appropriately respond. Put simply, is a presumption of disability-based harassment a bad place to begin when investigating an incident when the student targeted is either Section 504 or IDEA-eligible? If upon receipt of notice of an incident the school identifies the target as a student with a disability, and treats the incident as disability harassment *until the facts prove otherwise,* the school will likely take the appropriate steps in every investigation where disability harassment is possible.

III. When disability harassment is sufficiently severe, persistent or pervasive to deny or limit the student's ability to participate or benefit, a hostile environment is created.

In the context of determining hostile environment on a sexual harassment claim, OCR provided the following guidance. While some of the factors apply rather uniquely or more appropriately to sexual harassment than disability harassment (i.e., sex of the harasser and victim, relationship between them), the factors provide some guidance as applied to disability harassment as well. "Relevant considerations include, but are not limited to:

- How much of an adverse effect the conduct had on the student's education;
- The type, frequency, or duration of the conduct;
- The identity, age, and sex of the harasser(s) and the victim(s), and the relationship between them;
- The number of individuals who engaged in the harassing conduct and at whom the harassment was directed;
- The size of the school, location of the incidents, and context in which they occurred; and
- Whether other incidents occurred at the school involving different students." *Sexual Harassment: It's Not Academic* (OCR 1997), p. 6.

The factors can change with the facts being analyzed. For example, where a limited number of incidents might militate against a finding of hostile environment, the fact that "complainant's daughter was so frightened by the incidents" and the possibility of a severe allergic reaction from other students waving peanut butter sandwiches in front of student's face, OCR assumed for purposes of its analysis, that the limited number of incidents was sufficient to create a hostile environment. *Kearney R-I (MO) School District,* 111 LRP 24625 (OCR 2010)(Ultimately, no school liability for harassment was found as the school took prompt, effective steps calculated to end the hostile environment).

How about some examples of a hostile environment? As part of the July 2000 Dear Colleague Letter, OCR provided "examples of harassment that could create a hostile environment[.]" Note that the italics added to the examples are by the author, not ED.

- Several students *continually* remark out loud to other students during class that a student with dyslexia is "retarded" or "deaf and dumb" and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.

- A student *repeatedly* places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates' ability to enter the classroom.

- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability, with the result that the student tries to avoid school though increased absences.

- A school administrator *repeatedly* denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for taking time off from school for required services related to the students' disability.

- A professor *repeatedly* belittles and criticizes a student with a disability for using accommodations in class, with the result that the student is so discouraged that she has great difficulty performing in class and learning.

- Students *continually* taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

A little commentary: It should be clear from an analysis of the examples that a single event or a few incidents of name-calling or teasing are typically not enough to create a hostile environment. The example on inappropriate discipline/restraint is interesting, because it seems to indicate that for ED, a single incident of *physical assault* due to disability may be enough to constitute a hostile environment. An example of single incident resulting in hostile environment without physical assault is provided below in *Philadelphia.* It should also be clear that OCR does not require much adverse impact on access or benefit to education for the harassment to create a hostile environment.

Can a single incident create a hostile environment? Yes. A student receiving speech/language support through special education was subjected to disability harassment when the nickname "Radio" was printed below his picture in the school yearbook. The nickname "Radio" was disparaging and demeaning to the Student. The nickname refers to a recent movie in which the main character, "Radio," had a severe speech impediment. The Student indicated that the name was printed in the yearbook without his approval. While the initial printing of the nickname with the picture was not deemed to create a hostile environment (as the nickname seems innocuous to the yearbook advisor who had no knowledge of the film), the District's failure to act after printing did create a hostile environment.

> "In light of the age of the Student, the fact that the nickname was related directly to his disability, and the fact that the nickname appeared in a document that was distributed in the School and creates a permanent record, we find that the Student was subjected to a hostile environment as this one incident was sufficiently severe so as to interfere with the Student's ability to benefit from a service, activity and privilege provided by the District. Thus, once the District had notice of the matter, it was obligated to take steps to address it. Although the Assistant Principal looked into the matter, she did not report back to the Complainant about the results of her investigation, nor did the District take any other steps to address any adverse effects that may have resulted from the yearbook incident." *Philadelphia (PA) School District,* 46 IDELR 169 (OCR 2006).

Was there an example of denial of FAPE? While ED indicated that harassment could violate FAPE, no explicit example of that level of deprivation is provided in the Dear Colleague Letters. As a practical matter, denial of FAPE is likely a matter of severity—a more severe harm to the student than mere hostile environment (adverse impact on the student's ability to participate in or benefit from the educational program.). Denial of FAPE likely requires a higher degree of deprivation and length of deprivation than hostile environment. The student has to be able to access the program put in place by the IEP or Section 504 Plan to receive FAPE. The longer a student is denied required IEP or Section 504 services due to disability harassment or the more severe the deprivation of those services due to the harassment, the more likely a FAPE deprivation claim will arise.

IV. The district knew or should have known about the harassment.

A. OCR and the school's duty to be vigilant.

> "A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. **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." *DCL 2011,* p. 2.

When does the school have knowledge? In guidance provided to schools on sexual harassment, OCR states that the school has knowledge of harassment when "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." *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties,* (OCR January 2001), p. 13.

If the principal knows, the school knows. Parents of a student originally diagnosed with autism (later re-classified as learning disabled) sought to discuss bullying incidents with the school's principal. Those efforts were rebuffed during an IEP meeting when the principal stated that it was not the appropriate time to discuss bullying, but bullying could be discussed later. No future meeting was scheduled or took place. A year earlier, the parents brought the student to the principal's office to discuss bullying. When the parents tried to discuss the matter, "the principal asked them to leave. As the parents continued to try to discuss their daughter's problem the principal opened the door to her office and said she would call security if they did not leave." The principal does not recall what she did to investigate the parent's claims. Parents placed the student privately and sought reimbursement arguing that the public school placement was inappropriate, in part because of disability harassment. The school's motion for summary judgment on the issue was denied. *T.K and S.K. v. New York City Dept. of Educ.,* 56 IDELR 228 (E.D.N.Y. 2011).

When aides know. An interesting subplot in the *T.K.* case was the testimony of the student's aides (the two alternated working with her every other day) with respect to the "constant negative interaction" with peers, peers physically pushing her away, tripping her, and avoiding pencils and other objects that the student had touched. One aide described the situation as a "hostile environment" and indicated she was simply focused on "just trying to get [the student] by each day." When an aide tried to bring incidents of bullying to the attention of teachers, she was ignored. When she tried to discuss a particular incident with the principal, she was turned away and told there was no time for a meeting. The school had no written incident reports of bullying involving the student. "This lack of records is significant because it raises questions about whether the school was actually on notice, or if it was, whether it was deliberately indifferent." Despite the school's utter lack of documentation of the numerous incidents of alleged harassment experienced by the student, the school did have "several reports where the school alleges [the student] was the aggressor[.]"

A little commentary: The argument that the school had no knowledge because someone in authority was never informed of the incidents appear less than convincing in the context of administration (and to some degree, teachers) who are at a minimum, uninterested in reports of harassment.

Disinterest, or worse, hostility to reports of harassment, arguably reflects a campus environment where harassment is condoned.

The school should have treated this as more than bullying. Despite the fact that the initial parent complaints to the school did not indicate that the intimidating or abusive behavior was disability-driven, the school should have treated incidents as disability harassment. The student has ADHD and is on medication. The parent alleges that the medication causes involuntary facial movements and noises. The student's IEP notes that he has been involved in some playground incidents and a social/behavioral goal was added to his IEP to address these issues. School staff readily acknowledged that the student was regularly involved in playground incidents throughout the year, as often as several times a day. During an interview with OCR, the student "was able to provide information, including examples of derogatory name-calling, much of which was disability-related, that should have put the District on notice of possible harassment." Nevertheless, the school treated the incidents as ordinary disputes among students rather than as incidents of harassment arising from disability. When the steps taken (talking to harassers and time-outs) proved ineffective, additional response was required. "While the District engaged in a good faith effort to respond to a perceived student dispute, the District did not respond adequately to a potential instance of illegal harassment." *Hemet (CA) Unified School District,* 54 IDELR 328 (OCR 2009).

Knowledge & Training. Note the wide range of employees potentially included within the reach of "responsible employees." Not only does the phrase include the likely candidates (teacher, principal or other administrator, counselor) but any employee the student might reasonably believe has authority to redress or report (bus driver, cafeteria worker, librarian?). To the extent that knowledge of a harassment incident held by any of these employees is considered "known" by the school, campus efforts to train all staff on identifying harassment and reporting same are critical to a school's compliance. Says OCR, "training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported." *Id.* The school's well-publicized polices on harassment together with training of students and staff, are important elements of the school's compliance efforts. When staff and students know how to spot harassment, and know how and to whom reports should be made, the school will have knowledge of incidents more quickly and have a better chance to respond before a situation escalates. The importance of reports and a "clearinghouse" for such reports is discussed below.

B. The Duty to Investigate

In the context of a sexual harassment allegation, OCR provides the following recommendations for an appropriate school investigation.

"If a student, his or her parent, or a responsible employee reports the harassment, or a school employee observes the harassment, the school should inform the harassed student (and the student's parent depending on the student's age) of the options for formal and informal action and of the school's responsibilities, which are discussed below. **Regardless of whether the victim files a formal complaint or requests action, the school must conduct a prompt, impartial, and thorough investigation to determine what happened and must take appropriate steps to resolve the situation.**

If other sources, such as a witness to the incident, an anonymous letter or phone call, or the media, report the harassment, the school should respond in the same manner described above if it is reasonable for the school to conduct an investigation and the school can confirm the allegations. Considerations relevant to this determination may include, but are not limited to, the:

- source and nature of the information;
- seriousness of the alleged incident;

- specificity of the information;
- objectivity and credibility of the source that made the report;
- ability to identify the alleged victims; and
- cooperation from the alleged victims in pursuing the matter." *Sexual Harassment, It's Not Academic,* OCR September 2008, p. 9 (emphasis added).

The school must investigate complaints, allegations, rumors…. "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."** *DCL 2011,* p. 2.

Let's roll the videotape… Faced with allegations that the bus driver and an aide hit and verbally abused students with disabilities on a bus, the school reviewed videotapes of the bus' interior on the days in question and found no such behavior. Further, the district interviewed both the driver and aide and could not substantiate the parent's claims. OCR found the school's investigation compliant. *Palm Beach County (FL) Schools,* 59 IDELR 201 (OCR 2012).

Take the data you have and use it to get more. Despite a variety of complaints "the district did not take any action to inquire further from the Student's mother, the complainant, the crossing guard, the security guard, or the instructional aide about the details of past incidents…. It also did not attempt to determine the identity of the student alleged to be harassing the Student and take corrective action or disciplinary action against him if warranted or perform any investigation of the incidents reported." *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010). Once "a district gains knowledge of student harassment or receives a complaint of such, it has an obligation to respond appropriately and initiate an investigation when warranted." Put simply, where there are avenues to investigate, the school needs to investigate those avenues and follow the available leads. *See also, Fairfield-Suisun (CA) Unified School District,* 51 IDELR 139 (OCR 2008)(School's investigation was inappropriate as it failed to interview students identified as witnesses by the target of the harassment).

Look to the conduct to determine whether this is harassment, not the language or label used in the complaint. "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." *DCL 2011,* p. 3.

What if the student didn't use the school's form to complain? Throughout his seventh grade year, a student with cognitive impairments impacting his verbal and nonverbal communication skills and interfering with his ability to read, respond, and navigate through appropriate social interactions complained of harassment by peers. He repeatedly told his guidance counselor that a group of students teased him about his SPED class (the "rubber room"), and called him names like "retarded," "moron," and "stupid." He identified the harassers as a group of school athletes. While the guidance counselor tried to help the Student work through the problem, she did not report it. The school used "Person-to-Person" forms on which students, staff and teachers were to report inappropriate behavior including harassment. "OCR learned from multiple sources that the Student himself was reluctant to report incidents. The Guidance Counselor told OCR that the Student was reluctant to fill out incident report forms; she noted that he did not want to tattle on other students and he felt that 'nothing was ever done' when he did report." OCR found that a filed Person-to-Person form resulted in a prompt investigation by the Intervention Specialist. Unfortunately, the form was not often filed for this

Student. Instead, the counselor worked with the Student on snappy comebacks or responses to the harassers, which the Student did not appear to understand or have the skills to use effectively. OCR found that staff relied on the Student to file a report even though he struggled to do so because of disability and even though staff knew of the incidents. Consequently, the school "did not investigate many of the incidents of which other staff were aware or consider whether the events, as a whole, created a hostile environment based on disability." OCR found the school's response to harassment inadequate. *Williamston (MI) Community Schools,* 56 IDELR 22 (OCR 2010).

What if the parent and student don't help much? OCR found no disability-based harassment in response to two parent allegations that her student had been hit with a belt by other students. Interestingly, **the parent told OCR that "she did not provide the District the names of the students harassing the Student, even though she knew them, because she felt it was the District's responsibility to determine who was harassing the student."** (Emphasis added). The District informed the parent that it would be difficult for the District to investigate without this information, but the parent still refused. The District was able to determine that there was evidence of students "fooling around" and chasing one another, but no evidence of her student being hit by a belt, and no evidence that the chasing around was related to disability. OCR determined the investigation was sufficient. *Ann Arbor (MI) Public Schools,* 56 IDELR 84 (OCR 2010).

V. Faced with knowledge of disability harassment, did the school take appropriate responsive action?

"If an investigation reveals that discriminatory harassment has occurred, **a school must [1] take prompt and effective steps reasonably calculated to end the harassment, [2] eliminate any hostile environment and its effects, and [3] 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." *DCL 2010,* p. 2 (emphasis and bracketed numbering added).

An effective response to harassment is multifaceted, addressing the harasser, the targeted student, and where necessary campus policy and procedure. *See, for example, Richmond (IN) Community Schools,* 37 IDELR 45 (OCR 2002). Complainant alleged that although her son was locked in his gym locker during PE, and harassed in a school bathroom, the school did nothing to stop the harassment. OCR found to the contrary. Immediately upon gaining knowledge of the incidents, the students who harassed the boy were counseled and disciplined appropriately. Additionally, OCR found that the school gave the harassed student permission to use a separate restroom, assigned an adult to serve as a hallway escort during certain periods of the day, and held a session on harassment for the entire sixth grade class.

The following paragraphs look a bit more closely at the types of responses required to assist the targeted student, educate and punish the harasser, and remedy the environment.

A. Can the school be liable if it never had a chance to take action? No.

"The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately." *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010); *Fairfield-Suisun (CA) Unified School District,* 51 IDELR 139 (OCR 2008).

Where the parents removed their student prior to making allegations of disability harassment, and prior to the district having any knowledge of the alleged harassment, the district did not have an opportunity to respond to the complaint and OCR was unable to determine whether its actions were appropriate. The district did, however, express "a desire to work with the Complainant to address her concerns

should the Student wish to return to the School." No violation was found. *Washington West Supervisory Union #42 (VT),* 37 IDELR 194 (OCR 2002).

A little commentary: School liability occurs when the hostile environment occurs and the district does not respond appropriately. The fact that harassment happens does not, by itself, mean that the school has violated Section 504 or ADA Title II. *See also, M.L. v. Federal Way School District,* 105 LRP 13966, 394 F.3d 634 (9th Cir. 2005)(student stayed in school only five days, which was insufficient time for the school to remedy the bullying. Further, the court found no interference with education as the student was described in testimony as "happy as a lark.").

B. School action with respect to the harasser.

1. Discipline the harasser.

The school cannot just help the targeted student. It must address the harasser as well. A single-edged solution will not satisfy OCR. *See, for example, Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010)("[The school] did not attempt to determine the identity of the student alleged to be harassing the Student and take corrective action or disciplinary action against him if warranted or perform any investigation of the incidents reported.").

Punishments will vary with the conduct. In this case from New York, each alleged act of disability harassment was addressed appropriately by the school. The case addressed harassment targeting two siblings with severe peanut allergies. The first occurrence (a student called one of the siblings "peanut butter boy" and offered him peanut butter) was addressed by a verbal reprimand from the school counselor and a call to the harasser's parents. A second incident (a student said she would go to the store, get peanut butter and smear it all over one of the siblings, and assaulted one of the siblings) was addressed by parent conference, detention and removal from chorus. Other students involved in the incident received detention and parent conferences. Campus administration also met with the 5th and 6th grade classes about threats and teasing related to the peanut butter allergies. A third incident was alleged but could not be substantiated following the principal's investigation. No violation was found for harassment by the district (although the school was required to adopt and publish a grievance procedure to ensure the prompt and equitable resolution of disability discrimination complaints). *Greenport (NY) Union Free School District,* 50 IDELR 290 (OCR 2008).

A little commentary: Like other disciplinary sanctions, punishment for harassment should be based on the school's student code of conduct and, as a general rule, similar infractions should generate similar punishments. Individual facts and situations may require some individualized treatment. Further, to the extent that the harasser is also a student with a disability, manifestation determination rules must be followed and IEP Team or Section 504 Committee involvement may be needed as well to add or make changes to a behavior intervention plan.

In addition to the obvious problem of the school's inability to share with the parent the discipline applied to the harasser (absent FERPA exception or consent), the targeted student's parents may not believe that the punishment was sufficiently severe (again, based on what punishment they are able to see). In *P.R. v. Metropolitan School District of Washington Township,* 55 IDELR 199 (S.D. IN. 2010), the parents of harassed student argued that the school's response was inadequate as the harassers were not sufficiently disciplined or punished. Although the parents believe that the two student harassers should have been suspended (they were instead educated and warned), the court determined that "school administrators enjoy a great deal of flexibility when making disciplinary decisions and responding to allegations of harassment." The school's response was not clearly unreasonable in light of the known circumstances.

FERPA consent can provide a solution to this problem. When school administration receives a complaint with respect to the perceived absence of appropriate punishment of the harasser, the

administrator could seek FERPA consent from the harasser's parents to disclose the punishment to the targeted student's parents. While the disclosure could only reinforce the suspicion of inadequate discipline, the fact that much of the punishment received by the harasser could not be seen by the targeted student's parents, and with consent now can be seen, could well settle the issue. Of course, this is a judgment call best left to the folks on the ground with knowledge of the dynamics and personalities involved in a given situation.

Don't stop responding after disciplining the harasser. "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 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." *DCL 2010, p. 3.*

2. Teach the harasser. Note that merely removing the harasser from school may not prevent him from harassment in the future. "**Schools that use office referrals, out-of-school suspension, and expulsion—without a comprehensive system that teaches positive and expected behaviors and rewards the same—are shown to actually have higher rates of problem behavior and academic failure.** Specifically, chronic suspension and expulsion have detrimental effects on teacher-student relations, as well as on student morale; these kinds of responses leave the student with reduced motivation to maintain self-control in school, do not teach alternative ways to behave and have been shown in the research to have limited effect on long-term behavioral adjustment." *RTI & Behavior,* p. 1 (emphasis added). To change behavior, a new behavior must replace the harassing behavior giving rise to the problem. Consequently, OCR suggests that schools consider counseling for the harasser that could focus on the development of social skills, self-esteem issues, conflict resolution or other appropriate interventions. *DCL 2010, p. 3.* In addition, the school should consider reviewing with the harasser campus rules with respect to harassment, and reminding the harasser of the escalating response required of the school should the conduct be repeated.

3. Appropriate response when the harasser can't be identified. Where the allegations are vague and identify no specific individuals, and an investigation into the allegations turns up no further detail, a more generic approach to the harasser (grade-wide or school-wide warnings or education) is appropriate. Of course, the lack of an identified harasser does not change the school's duty to the targeted student. Preventing future recurrence could be accomplished (without knowing the identity of the student's harassers) by enhanced monitoring or supervision of the student to watch for future concerns, explaining the reporting process, and encouraging the student to promptly report future incidents. The school might also consider having the student look through the school yearbook to see if he can identify the harassers in that way. Finally, as noted below, the school would also be wise to check in with the victim and family from time to time to ensure that no further incidents occur. Note that this response pattern applies when the school has investigated, followed leads and identified no harasser. OCR will not be satisfied with a school that failed to identify a harasser because it made no effort to investigate the complaint.

4. Can the school simply respond the same way each time the harasser commits an offense? No. The answer lies in the standard of deliberate indifference. To show that the school is not indifferent, it is required to take action reasonably calculated to stop the harassment from recurring. If after Student A has harassed Student B, Student A meets with the principal and is reminded of the rules and consequences, the district has taken action reasonably calculated to stop the problem. If Student A commits another harassing act, is the same response sufficient? No. Once a response has failed to have the desired effect, it would be difficult to argue that doing it again is reasonably calculated to solve the problem. Something else must be tried. *See, for example, Vance v. Spencer County Public Sch. Dist.,* 231 F.3d 253, 261 (6th Cir. 2000)(Where a school district has actual knowledge that its

efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.”).

Be careful that you don’t ignore school-wide harassment (the forest) while punishing individual perpetrators (the trees)…. A case from the Sixth Circuit provides an interesting lesson to schools that fail to look at the overall climate on the campus by treating incidents of harassment as discrete, unconnected events. *Patterson v. Hudson Area Schools,* 109 LRP 351, 551 F.3d 438 (6th Cir. 2009). A student with an emotional disturbance alleged disability and sexual harassment over a series of incidents occurring from sixth grade through ninth grade. The district argued that since it responded to each individual incident and that each harasser never again harassed the student after the district’s action, there could be no district liability for harassment. Said the court:

> “The thrust of Hudson’s argument is that Hudson dealt successfully with each identified perpetrator; therefore, it asserts that it cannot be liable under Title IX as a matter of law. The argument misses the point. As explained above, Hudson’s success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson’s isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law.”

The granting of the school’s motion for summary judgment by the district court was reversed. *See also, Theno v. Tonganoxie Unified Sch. Dist. No. 464,* 377 F.Supp.2d 952 (D. Kan. 2005)(“this is not a case that involved a few discrete incidents of harassment. It involved severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped, and the school rarely took disciplinary measures above and beyond talking to and warning harassers.”).

For an example of a campus addressing both the current problem (two students who waved peanut butter sandwiches in the face of an allergic student) and preventing future repetition, *see Kearney R-I (MO) School District,* 111 LRP 24625 (OCR 2010)(The principal not only punished or counseled with the two harassers, but also “met with complainant’s daughter’s second grade class and talked with all of the students in class about how serious a peanut allergy is and how cold lunch students must sit with other cold lunch students.”).

5. What if the harasser is also Section 504 or IDEA-eligible? The steps noted above do not change, but IEP Team or Section 504 Committee involvement should occur to address the behavior.

> “With respect to the District’s reference to the conflicts being ‘mutual’, if the Student’s own conduct played a role in provoking harassment from other students or was otherwise inappropriate, it need not have been excused simply because he has disabilities. However, under Section 504/Title II, disability-related behavior or peer problems should have been addressed through the IEP process to determine whether the conduct was related to disability. If so, the IEP should have discussed behavioral interventions or strategies… that were designed to meet the Student’s individual needs and the consequences that were appropriate.” *Hemet (CA) Unified School District,* 54 IDELR 328 (OCR 2009).

A little commentary: The process described makes sense, but oddly, OCR draws a distinction here not found in the regulations on behavior intervention. In the language of IDEA, when the student’s behavior “impedes the child’s learning or that of others” the IEP Team is required to “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. §300.324(a)(2)(I). Note the absence of a requirement that the behavior be related to disability in order for the behavior to trigger consideration of a behavioral interventions and supports. Because the behavior, if not remedied, could result in the student’s removal from school (and

separation from educational services), addressing harassing behavior whether related or not makes good sense. The student's IEP Team or Section 504 Committee will have to address that issue.

The need for appropriate behavioral supports. When the IDEA was first enacted by Congress there were two major problems impacting the education of students with severe disabilities. The Fifth Circuit explained: "Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs." *Daniel R.R. v. State Board of Education,* 874 F.2d 1036, 1038 (5th Cir. 1989). Just as services must be provided to help a student with a learning disability access the regular classroom, so too are behavioral interventions and supports required for a student with a disability impacting behavior to give him access to the classroom (and help him retain that access). Merely being "deposited" in the mainstream classroom without adequate supports to address a student's behaviors raises the distinct prospect of long-term removals from the educational setting for violation of student codes of conduct. Consequently, where the student with a disability is also a harasser, the IEP Team or Section 504 Committee should meet to address the behavior through implementation of a new behavior intervention plan (or changes in the current plan to address harassment), and consider other supports to provide replacement behaviors such as counseling, conflict management, and social skills training or social stories as appropriate.

C. School action with respect to the targeted student.

1. Separate the targeted student and harasser. Where the targeted student is concerned about continued contact with the harasser, it is not uncommon for the school to consider a change of classes or perhaps even a transfer to another school. In making these decisions, OCR warns "not to 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)." *DCL 2010, p. 3.* Moving the harasser is specifically authorized by Texas law (discussed previously). Of course, where the targeted student and his/her parents prefer a fresh start on a new campus, the move would not be considered a penalty.

The failure to separate students can be the source of escalating trouble. *See, for example, Shihadeh v. Marple Newtown School District,* 59 IDELR 186 (E.D. Pa. 2012). Parents survived a motion to dismiss for failure to state a claim alleging that their daughter was subjected to a hostile environment due to her being placed in class, for three successive school years and over parent objection, with a boy who had been convicted of molesting the girl's sister. Parents allege that the boy stared, leered, and pointed cameras at the girl at school, resulting in her becoming hysterical and eventually requiring homebound instruction.

2. Provide additional services to the targeted student. "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." *DCL 2010, p. 3.* A few examples of additional services provided in response to harassment:

- School provided student with additional supervision to watch for future incidents. *M.P. v. Independent School District #721,* 2002 U.S. Dist. LEXIS 9053 (D.C. Minn. 2002).

- School provided Student with a resource class one period per day to teach coping skills and other strategies. *Patterson, supra.* (Oddly, there was no LRE analysis with respect to this provision of services).

- School provided student with a "safety plan" including an aide to assist her throughout the day, including transition times and before school, additional monitoring of the student by both campus security and behavioral staff, a security escort into and out of the building, and changes to student's class schedule so that harassers did not attend class with her. *District of Columbia Public Schools,* 111 LRP 26020 (SEA D.C. 2011).

- School investigated strategies used at other schools to prevent exposure to peanuts, and adopted new policies to prevent exposure, including allowing student to eat in a conference room with friends while a plan was put into place. In addition, the principal talked with student's teacher about steps to keep student from sitting next to a cold lunch student (who might have peanut products in a lunch brought from home) *Kearney R-I (MO) School District,* 111 LRP 24625 (OCR 2010).

- IEP Team amended the IEP to include a goal for self-advocacy. *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010).

- Should the harassment result in absences or other loss of instructional services, compensatory services should also be considered by the IEP Team or Section 504 Committee as appropriate.

3. Check back with targeted student and family. "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." *DCL 2010, p. 3.*

4. Involve the IEP Team or Section 504 Committee. Where a student has been subjected to harassment, the school has the obligation to remedy the damage. Discussion of the impact of the events by the appropriate Team or Committee will help to ensure that possible damage to FAPE is explored and, if found, is measured or analyzed to determine what additional services or changes to the IEP or Section 504 plan are necessary as a response.

D. School action with respect to the other students, staff and parents

"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." *DCL 2010, p. 3.*

Send the message: harassment is not tolerated here. "Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to student reports or harassment." *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010).

Teach students, staff and parents about how to identify and report harassment. Folks are far more likely to report harassment if they know it when they see it. When students and staff are informed about what to look for, and understand how and why they should report what they see, the school creates a strong network of eyes and ears that can help the school discover incidents quickly and respond with greater precision. *See, for example, Blanchard (OK) Public Schools,* 35 IDELR 12 (OCR 2000)(In this mixed Title IX/disability harassment case, the district agreed to take corrective action with OCR. The district agreed to continue to publish and disseminate the grievance procedure to all students and staff, to identify the person responsible for taking and investigating complaints, time lines for each step of the

process, and provisions for prompt, thorough and impartial investigations and hearings); *See also, Hamilton (MO) R-II School District,* 37 IDELR 76 (OCR 2002)(District agrees to develop and disseminate a harassment policy to students, faculty and staff, review the policy with those groups, explain the range of consequences to students for harassment and take other appropriate steps to prevent recurrence of harassment.); *Greenport (NY) Union Free School District,* 50 IDELR 290 (OCR 2008)(School agrees to adopt and publish a grievance procedure to ensure the prompt and equitable resolution of disability discrimination complaints).

Update and publicize policies. "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." *DCL 2010, p. 3.*

Respond and investigate promptly. The passage of time between an incident and an investigation creates additional complications. Where complaints fail to generate prompt response, the efficacy of the complaint process is brought into question and staff, students and parents may perceive that no good comes from the effort. Further, incidents may continue and escalate or expand to other students over time. Problems are easier to solve while small and contained. A quick response makes containment possible.

Coordinate incident data. Since unreported incidents may not be addressed properly and may result in the school being unaware of a growing problem, efforts should be made to documents incidents and for someone on the campus to review those incidents looking for larger problems and to ensure that responses are appropriate. Note that where incidents are addressed informally, pieces of the school's appropriate response with respect to punishment or education of the harasser or follow-up with the targeted student may not occur, exposing the school to a discrimination complaint. An example from OCR, with a strange conclusion:

> "While it would have been preferable for the instructional aide or the resource specialist to document the incident and for the District to thereafter take whatever steps that would have been appropriate, the facts do not support the conclusion that the incident provided knowledge to the District that the Student was being harassed. Because the instructional aide and resource specialist had no knowledge of any prior incidents of potential harassment of the Student, they could properly view the incident as an isolated one rather than one of many in a continuing course of conduct that would rise to the level of harassment." *Santa Monica-Malibu (CA) Unified School District,* 55 IDELR 208 (OCR 2010).

A little commentary: OCR's analysis here is fascinating, as it seems to allow districts an "out" where incidents are addressed informally and other incidents are not considered together. That seems a strange position for OCR to take given its desire to end harassment. Once could easily see that conclusion reversed, with OCR finding that the staff's failure to report an incident in essence prevented the school from knowing what it should have known, and acting to stop what it should have seen.

Involve the Section 504 Coordinator. OCR recommends that part of the school's response should be consultation with the school's Section 504/Title II Coordinator "to ensure a comprehensive and effective response." As noted earlier, when various employees are acting independently with respect to harassment issues and don't know that they are actually seeing a small piece of a bigger problem, it will be difficult for the school to make headway in reducing harassment incidents. By involving the Section 504 Coordinator, the school gets the benefit of a "clearinghouse" for incidents and oversight of the school or district environment.