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STUDENT-TO-STUDENT HARASSMENT: A SCHOOL DISTRICT'S RESPONSIBILITY REGARDING BULLYING BASED ON DISABILITY STATUS

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I. INTRODUCTION

While bullying is a widespread problem, it raises additional challenges and considerations in the special education context. Not only are students with disabilities disproportionately affected by bullying, but more and more, school districts are faced with special education complaints and due process hearing requests arising out of bullying incidents. Schools must also comply with state and federal anti-discrimination laws, as well as a new State law that requires an IEP team or 504 team to respond to bullying incidents.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2016 Ratwik, Roszak & Maloney, P.A.

A. Common Law Duty to Supervise. In general, schools have a duty to safeguard students from reasonably foreseeable dangerous conditions. If a school fails to fulfill that duty, and a student suffers injury as a result, the school may be found negligent.

1. *Sheehan v. St. Peter's Catholic School*, 188 N.W.2d 868 (Minn. 1971)

a. A teacher escorted 20 8th grade female students to a playground during recess, instructed them to sit along the third-base line of a baseball field, and then left and went back into the building. Several of the baseball players began throwing rocks at the girls. Despite various protests, the rock-throwing continued for three to four minutes. One of the girls was struck in the eye and lost her sight in that eye. The Minnesota Supreme Court held that a jury could reasonably find that had the teacher been present she would have put a stop to the dangerous activity before the plaintiff was struck. As a result, a jury could find that the injury was foreseeable.

2. *Phillips ex. rel. Gentry v. Robertson County Bd. of Educ.*, 2012 WL 2984637 (Tenn. App. 2012).

a. A student lost his sight in one eye after another student struck him in the classroom. The teacher had left the room unsupervised when the incident occurred.

b. The court found that it was reasonably foreseeable that the student, who was evaluated for special education, might injure another student if left unsupervised. The student who injured the other student had been a target of bullying. He also had meltdowns and exhibited inappropriate behavior with his peers. The school was well aware of the student's special needs and the fact that his peers antagonized him.

c. The Tennessee Court of Appeals affirmed the lower court's award of \$300,000.00 in damages to the injured student and his family.

B. Section 504 of the Rehabilitation Act. "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"

1. Section 504 applies to all District programs, including employment, educational services, and extra-curricular and non-academic school-sponsored events.
 2. The Office of Civil Rights (“OCR”) enforces Section 504 with respect to its application to students.
- C. The Americans with Disabilities Act (“ADA”).** Title II of the ADA states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.”
1. Title II of the ADA generally applies to a school district’s educational programs, extra-curricular and non-academic school sponsored events.
 2. Another provision of the ADA (Title I) applies to employment.
 3. The OCR enforces Title II of the ADA and its application to students.
- D. The Minnesota Human Rights Act (“MHRA”).** The Minnesota Human Rights Act is a comprehensive anti-discrimination statute.
1. With respect to educational opportunities, the MHRA prohibits discrimination on the basis of “race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability.” It also makes it illegal for the District to “fail to ensure physical and program access for disabled persons.”
 2. The Minnesota Department of Human Rights (“MHRA”) enforces the MHRA.
- E. Disability Discrimination and Harassment Policies.** “Section 504 and Title II require that institutions have published internal policies and grievance procedures to address issues of discrimination on the basis of disability, which includes disability harassment. While there need not be separate grievance procedures designed specifically for disability harassment, the grievance procedures that are available must be effective in resolving problems of this nature.” *See* 34 CFR § 104.7, 28 CFR § 35.107(a). *See also* “Dear Colleague” Letter, U.S. DEPT. OF EDUC. (July 25, 2000).

Among other things, this policy should make clear that disability harassment:

1. is prohibited
2. violates federal law
3. will result in disciplinary action

Practice Point. A policy is only as good as its enforcement. In order for a policy to be successful, it must be neutral with respect to protected classes. Additionally, a school must take care to enforce it consistently. Without neutrality and consistent enforcement, a school district becomes vulnerable to discrimination complaints.

II. THE MINNESOTA SAFE AND SUPPORTIVE SCHOOLS ACT

- A. The Safe and Supportive Schools Act, also known as the anti-bullying law, prohibits “bullying.” Minn. Stat. § 121A.031, subd. 2. In order to qualify as “bullying” under the Act, the conduct must:
 1. Be student-to-student;
 2. Occur in a location/forum identified by the statute;
 3. Consist of “intimidating, threatening, abusive, or harming” conduct;
 4. Be objectively offensive;
 5. Meet either the “imbalance of power and pattern” standard or the “material disruption” standard.
- B. The Act applies to student conduct occurring:
 1. on school premises, at school functions or activities, like prom, football, games, and fieldtrips, or on school transportation;
 2. by use of electronic technology and communications on school premises, during school functions or activities, on school transportation, or on the school computers, networks, forums, and mailing lists; and
 3. by use of electronic technology and communications off of school premises, **if** such use substantially and materially disrupts student learning or the school environment.

Practice Point: If conduct does not occur in one of these locations, it is possible that the school would lack the required nexus to discipline the student for that conduct pursuant to the Act and/or bullying prohibition policy. Misconduct still may be disciplined, however, pursuant to other school policies.

- C. The Act Prohibits “intimidating, threatening, abusive, or harming” conduct. This includes, but is not limited to, conduct that:
1. causes physical harm to a student or a student’s property or causes a student to be in reasonable fear of harm to person or property;
 2. under Minnesota common law, violates a student’s reasonable expectation of privacy, defames a student, or constitutes intentional infliction of emotional distress against a student; or
 3. is directed at any student or students, including those based on a person’s actual or perceived race, ethnicity, color, creed, religion, national origin, immigration status, sex, marital status, familial status, socioeconomic status, physical appearance, sexual orientation, including gender identity and expression, academic status related to student performance, disability, or status with regard to public assistance, age, or any additional characteristic defined in chapter 363A.

Practice Point: The Minnesota Human Rights Act (“MHRA”) already obligates schools to prevent harassment based on protected class status. The Safe and Supportive Schools Act is drafted broader than the MHRA. It specifically prohibits intimidation, abuse, threats, or harm that is **not** “based on any particular characteristic defined in this paragraph or chapter 363A.” The Act also protects classifications not addressed in the MHRA or federal anti-discrimination laws such as a person’s physical appearance, gender identity and expression and academic status.

- D. The Act only prohibits conduct that is “objectively offensive.”
1. The Act does not define the term “objectively offensive.”
 2. One common law definition of an “objectively and subjectively offensive” act is “one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998). This indicates that objectively offensive conduct is conduct that a “reasonable person would find hostile or abusive.”

Practice Point: Until there is more guidance in regards to what meets the objectively offensive standard, schools should:

- a. Look at the totality of the circumstances. This includes looking at the conduct's: (1) frequency; (2) severity; (3) nature of the conduct (physically threatening, humiliating, offensive utterance, etc.); and (4) unreasonable interference with the victim's performance.
- b. Respond to all reports of bullying, even if the behavior does not appear to be objectively offensive.

E. The Act only prohibits conduct when:

1. there is “an actual or perceived imbalance of power between the student engaging in prohibited conduct and the target of the behavior and the conduct is repeated or forms a pattern;” *or*
2. the conduct “materially and substantially interferes with a student’s educational opportunities or performance or ability to participate in school functions or activities or receive school benefits, services, or privileges.”

Practice Point: The Act does not define the term “imbalance of power.” When evaluating this criterion, school staff could consider factors such as age, social status, physical characteristics, economic status, or any other form of physical, social, or emotional influence that the perpetrator might bring to bear on the victim. It is likely that bullying involving a special education student will also involve an actual or perceived imbalance of power.

Practice Point: In order to qualify as prohibited “bullying” under the “imbalance of power” prong of the test, there also must be a pattern or repetition of the behavior.

F. Other Prohibited Conduct

1. Retaliation for asserting, alleging, reporting, or providing information about prohibited conduct is prohibited.
2. Knowingly making a false report about bullying is prohibited.

G. What Does the Safe and Supportive Schools Act Require regarding Special Education Students?

1. *Have a Policy.* Schools must adopt an anti-bullying policy that contains certain elements, or else complies with the Department of Education’s model policy. Minn. Stat. § 121A.031, subd. 3.
 - a. *If a District Adopts its Own Policy.* The Act requires school policies to allow a child’s IEP team or 504 team to address the skills and proficiencies the child needs to respond to or not engage in bullying. This applies regardless of whether the child in question was the perpetrator or target of a bullying incident. Minn. Stat. § 121A.031, subd. 4(a)(8).
 - i. *Notice to IEP Team.* The IEP team should receive notice of bullying incidents involving special education students. An IEP team or 504 plan cannot determine whether it is appropriate to change a student’s IEP or 504 plan in response to a bullying incident if the team does not know that the incident occurred.
 - ii. *IEP Team Involvement.* The amount of involvement that a team will have in such a situation depends largely on the facts of each individual situation. At minimum, the team must decide whether it is appropriate to change the student’s IEP or 504 plan to address the behavior. If the team decides that such a change is appropriate, it will have an additional role as it amends the student’s IEP or 504 plan.
 - b. *If a District Adopts the MDE model policy.* The Act requires the MDE model policy to contain a provision requiring “for a child with a disability, whenever an evaluation by an individualized education program team or a section 504 team indicates that the child’s disability affects the child’s social skills development or the child is vulnerable to prohibited conduct because of the child’s disability, the child’s individualized education plan or section 504 plan may address the skills and proficiencies the child needs to not engage in and respond to such conduct.”
2. *Special Education Victims or Perpetrators.* In regards to situations where the victim or alleged bully is a special education student, administrators and special educators also need to:
 - a. Consider the possibility that some special education students have difficulty understanding social cues or communications modes

common to their peers. Thus, a special education student may misinterpret or perceive some comments as more negative and upsetting than would other students.

- b. Remember that, while the incidents a special education student reports may not amount to bullying, it is imperative for the Student's IEP Team to meet to discuss the incident; consider the student's individualized education program or section 504 plan; and determine whether there are skills and proficiencies the student needs in order to more appropriately respond to or not engage in bullying.
- c. If the Team believes that the Student needs additional skills and proficiencies to succeed in the mainstream educational environment and/or to develop sound peer relationships, the Student's IEP or Section 504 plan must be revised accordingly.
- d. When a student has not already been identified as a student eligible to receive IEP services or 504 accommodations, but appears to school administrators or educators to be overly sensitive and/or over-reactive to negative peer interactions, the school district may have an obligation to consider whether the student needs to be evaluated for eligibility under IDEA or Section 504. Such consideration should be properly documented.

III. A NOTE ON CYBERBULLYING

“Cyberbullying” means bullying using technology or other electronic communication, including, but not limited to, a transfer of a sign, signal, writing, image, sound, or data, including a post on a social network Internet website or forum, transmitted through a computer, cell phone, or other electronic device. The term applies to prohibited conduct which occurs on school premises, on school district property, at school functions or activities, on school transportation, or on school computers, networks, forums, and mailing lists, or off school premises to the extent that it substantially and materially disrupts student learning or the school environment.

Practice Note. Because cyberbullying is a form of “bullying,” the conduct still must meet the definition of “bullying,” as discussed above.

IV. RECENT IDEA AND SECTION 504 CASES RELATED TO BULLYING

Bullying can have implications for school districts' decisions related to identifying children for evaluations, making eligibility determinations, providing FAPE, and determining placements.

A. Bullying and Child Find

1. *Child Find Legal Standard.* The IDEA requires school districts to identify, locate, and evaluate children with disabilities who reside in their district. This so-called "child find" obligation is triggered where a district has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability." *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010).
2. *Rose Tree Media Sch. Dist.*, 111 LRP 6194 (SEA Pa. 2010).
 - a. The student was impulsive and had difficulty socializing. He was hyperactive, did not take social cues, and spoke loudly without realizing.
 - b. The student's behaviors made him a target for bullying. The school investigated incidents in which other student pushed the child, spat on him, and splashed water on him.
 - c. The school tried non-special education interventions but they were ineffective.
 - d. The hearing officer found that the district should have evaluated the student for special education much earlier than it did.
3. *Anaheim City Sch. Dist.*, 113 LRP 28570 (SEA Cal. 2013).
 - a. The student continually exhibited extreme bullying behaviors. She hit other students, used profanity, was argumentative, and had difficulty controlling her temper. She treated other students and used racial slurs.
 - b. The hearing officer found that the district was justified in overriding parent's refusal to consent to an initial evaluation under the IDEA.

- c. The hearing officer noted that incidents of bullying, whether the child is a victim or a perpetrator can be a sign that the child has a disability for which she needs special education.

Practice Point: Incidents of bullying can be a red flag that a student may have a disability and is in need of special education for both the bully and the bullied.

B. Initial Eligibility Determinations and Bullying

1. *Eligibility Legal Standard.* To be eligible for IDEA services, a child must have an identified condition under the law, and who by reason thereof, needs special education in the form of specially-designed instruction to meet his or her unique needs. Bullying behavior could potentially indicate that the child is eligible as a student with an emotional disturbance or other disability.
2. *Birdville Indep. Sch. Dist., 57 IDELR 60 (SEA TX 2001)*
 - a. The student had longstanding behavioral problems, including bullying classmates, and demonstrating “explosive” rage. He had previously been kicked out of two day care centers because of his aggressive and explosive behavior.
 - b. After the parents requested an evaluation, the district found the student ineligible for special education.
 - c. The evaluation did not include in-class observations or the observations of his psychiatrist, who diagnosed the student with a mood disorder.
 - d. The school’s psychologist interviewed the student and concluded that his teachers had encouraged negative behavior by sending the student to the office where he sat with a “grandmother” figure and allowed him to be a special helper to redirect his outburst.
 - e. The ALJ found that the evaluation was inappropriate, and that, even though the student made academic progress, his mood disorder precluded him from making progress with social skills.

C. How Bullying Potentially Affects the Provision of FAPE

1. *OSEP’s Opinion.* In a 2013 Dear Colleague Letter, the Department of Education stated that bullying of a student with a disability which results

in the student not receiving meaningful educational benefit constitutes a denial of FAPE. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). It does not matter whether or not the bullying is related to the student's disability. If the bullying deprives a student of meaningful educational benefits, IDEA obligates the school to remedy the situation.

2. *Jackson County Sch. Bd.*, 113 LRP 22741 (SEA FL 2012).
 - a. Among a litany of other allegations, parents of a student with a traumatic brain injury claimed that the student was bullied by his peers and was denied a FAPE because of bullying.
 - b. The parents' presentation of the incident was grossly inaccurate. It was an isolated incident among friends who were all interested in WWF. They were play wrestling. A teacher supervising the playground intervened in the rough play, and after they were redirected, all three peers continued to play with one another appropriately.
 - c. The SEA found that the incident did not constitute bullying and had no effect on the school's provision of FAPE. The hearing officer stated that in order for bullying to violate the IDEA, it must be sufficiently severe, persistent, or pervasive to create a hostile environment. Here, the evidence failed to establish that the conduct reached that level or even constituted bullying at all. Further, the SEA noted that the school intervened quickly and investigated the incident by informally speaking with each student involved. The response was reasonable given the circumstances.
3. *Shore Regional High Sch. Bd. of Educ.*, 381 F.3d 194 (3rd Cir. 2004).
 - a. The student was ridiculed because of his perceived effeminate nature and lack of athleticism. When new students came to school, others students told them not to associate with the student. Peers called him derogatory names, threw stones at him when he walked home from the bus, and made fun of him at gym and in the locker room. He ate lunch alone.
 - b. The middle school found the student eligible for special education due to depression and anxiety he developed from the bullying. The resultant IEP focused on removing the student from certain situations during which he was most likely to be bullied. For example, he had a special education gym class so he could avoid

interacting with peers in the locker room and he was permitted to leave class early so that he would not have to be in the halls at the same time as his bullies.

- c. The bullying continued despite the IEP. His parents decided that instead of sending the student to the high school where most of his peers would attend, they would enroll him in an arts magnet school. They sought tuition reimbursement.
 - d. The Third Circuit affirmed the hearing officer's decision in favor of the parents. The hearing officer found that the high school would not be able to provide the student a FAPE because it would not be able to protect the student from the peers that had bullied him for so long. Even if the bullying subsided, having to be around his tormentors would create anxiety for the student and deny him a FAPE.
4. *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005).
- a. The test in the Ninth Circuit for bullying-related denial of FAPE is whether the school was deliberately indifferent to bullying and whether the abuse so severe that a child can derive no educational benefit.
 - b. In this case, the student was a new student in the district and had severe autism and was developmentally delayed. His mother accompanied him to the new school for the first five days and reported to his teacher that she witnessed peers teasing the student at lunch each day. In response to every report, the teacher said that she had not seen teasing in her class but assured the mother that she would keep an eye on the student and intervene if necessary.
 - c. After only five days at the school, the mother took the student out of the school. The Ninth Circuit found that by removing the child from the school so early, the mother failed to give the school reasonable opportunity to find a way to prevent the teasing. The mother could therefore not prove that the school had been deliberately indifferent.

5. *T.K. and S.K. v. New York City Dept. of Educ.*, 779 F.Supp.2d 289 (E.D.N.Y. 2011).
 - a. The court held that a school violates its duty to provide FAPE if “school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities.” Further, bullying may deprive a disabled student of substantial educational opportunities only if the conduct is “sufficiently severe, persistent, or pervasive that it creates a hostile environment.”
 - b. In this case, the parents stated that peers ostracized the student, pushed her, refused to touch items she touched, and ridiculed her daily. The parents also claim that attempts to bring this conduct to the attention of school officials were rebuffed. The principal recalled receiving letters from the parents that described the conduct, but she did not recall investigating the allegations or taking other actions.
 - c. The student was making educational progress but the district court was not convinced that this meant that the student was not deprived of educational benefit. Complete deprivation of educational benefit is not required. The court denied the district’s motion for summary judgment.

6. *Pikeland Cmty. Unit Sch. Dist. 10*, 113 LRP 29936 (SEA IL 2013).
 - a. The disabled student was bullied at school over the course of several years. Much of the bullying was overtly racist.
 - b. One issue before the court was whether the district denied the student a FAPE by failing to provide counseling and social worker services specifically addressing the student’s anxiety and depression and by failing to protect the student from bullying.
 - c. The court found for the district on this issue. It found that the district took prompt and appropriate action to investigate, discipline, and change policies when appropriate.
 - d. The court noted that while the district could have taken more effective action, it did not display deliberate indifference. Further, it was unclear how the bullying was impacting the student’s education.

7. *Marion Cty. (FL) Sch. Dist.*, 67 IDELR 128 (OCR S.D. FL 2015).

- a. One student hit another child, who had a disability, and insulted his hair style regularly. This behavior was deemed unrelated to the bullied student's disability but resulted in the bullied student not wanting to do homework or attend school.
- b. School districts must respond to bullying, even if it is not disability-based, because the bullying may nonetheless result in denial of FAPE. The best way for a school to ensure FAPE in this scenario is to convene the IEP/504 Team to determine if the bullied student's behavior or academic performance has suffered.

Practice Point: The standard of review of bullying-related denial of FAPE claims varies by jurisdiction. In general, however, the bullying conduct must be sufficiently severe and the school's response must be sufficiently tepid for a disabled student to successfully claim bullying resulted in denial of FAPE.

D. Least Restrictive Environment and Bullying

IDEA guarantees each eligible student a free appropriate public education in the least restrictive environment (LRE) appropriate for their needs. A student that has been exposed to significant bullying in a particular school placement may argue that he or she must be placed in a more restrictive placement. On the other hand, providing a placement that seeks to prevent bullying by isolating a special education child may be grounds for a disability discrimination claim.

1. *Federal Guidance: 2013 Dear Colleague Letter.* IEP teams should exercise caution when considering a change in placement or the location of services provided to a student with a disability who is the target of bullying, and should keep the student in the original LRE placement unless the student can no longer receive a FAPE there.

Schools may not attempt to resolve a bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. These decisions must be made by the IEP team and must be consistent with the IDEA provisions that address parental participation. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013).

E. Section 504 Damages and Bullying

1. *Doe v. Torrington Bd. of Educ.*, 2016 WL 1257819 (D. Conn. Mar. 30, 2016)
 - a. Doe, a high schooler, had an IEP that addressed his specific learning disability. His disability lowered his ability to advocate on his own behalf and made him more vulnerable to harassment and bullying. Doe was subjected to physical harassment and bullying by his football teammates, including being pushed down such that his glasses broke and having another student take his hat in the locker room and rub it on his genitals, among other things. He further felt the need to shield himself from being seen in study hall when he was receiving services related to his disability for fear of ridicule.
 - b. The court dismissed the claim, finding that even if other students knew about Doe's disability, he did not sufficiently prove that the bullying was related to his disability and not some other reason, such as "personal animus." Thus, the student was not entitled to relief under Section 504. In addition, the court noted that the student did not plead deliberate indifference by the District, which is required for damages under Section 504 and Title II of the ADA.

V. WHAT CONSTITUTES "HARASSMENT?"

- A. According to applicable state and federal law, harassment with respect to educational services consists of physical or verbal conduct, including but not limited to electronic communications, relating to an individual's or group of individuals' race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation or *disability*, whether actual or perceived, when the conduct:
 1. Has the purpose or effect of creating an intimidating, hostile or offensive academic environment. 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 district.
 2. Has the purpose or effect of substantially or unreasonably interfering with a student's ability to participate in or benefit from the services, activities or opportunities offered by a school district; or

3. Otherwise adversely affects a student's ability to participate in or benefit from the services, activities or opportunities offered by a school district.
- B. Disability harassment is a form of disability discrimination prohibited by Section 504, the ADA, and the MHRA.
- C. **Examples of Harassing Conduct.**
1. 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.
 2. 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.
 3. Other students repeatedly belittle and criticize 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.
 4. Students continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.
 5. Utilization of technology to engaging in harassing behavior ("cyber-harassment"). For example, students use social media or text messages to make offensive comments based on an individual's disability.

VI. SCHOOL LIABILITY FOR HARASSMENT

- A. **Federal and State Civil Rights Law.** In *Davis v. Monroe County Board of Education*, the U.S. Supreme Court held that a school district could be liable under federal anti-discrimination statutes for peer-to-peer harassment if the harassment if two requirements are met:
1. The harassment is so "severe, pervasive, and objectively offensive" that it deprives the victim access to educational opportunities and benefits, and;
 2. The school had actual knowledge of harassment but was deliberately indifferent to it. 526 U.S. 629 (1999).

B. Davis Standard Expanded. The *Davis* case involved sexual harassment but the Court's test has been applied in cases involving harassment based on race, color, national origin, and disability.

1. *Long v. Murray Cnty. Sch. Dist.*, 2012 WL 2277836 (N.D. Ga. 2012).
 - a. Before he committed suicide, Tyler Long was a student at Murray County High School. Tyler was diagnosed with Asperger's four years before his death.
 - b. The evidence showed that the Tyler was a disabled student and was bullied and harassed by his peers because of his disability on a daily basis.
 - c. In determining whether the district was liable under Section 504, the court considered five issues: 1) whether Tyler was harassed on the basis of his disability; 2) whether the harassment was severe and pervasive; 3) whether the harassment deprived him of educational opportunities; 4) whether the school had actual knowledge of the harassment; and 5) whether the school was deliberately indifferent to the harassment.
 - d. The court held that the harassment Tyler experienced was sufficiently severe and pervasive that it altered the conditions of his education and created an abusive educational environment. It found a fact question on whether the harassment was a causal factor in his death and it found that the school had actual knowledge of the harassment.
 - e. The court ultimately found for the school because there was insufficient evidence it had been deliberately indifferent.
 - f. The Court noted: "a school . . . is not deliberately indifferent simply because the measures it takes are ultimately in effective in stopping harassment. . . . School administrators will be deemed deliberately indifferent if their 'response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'"
 - i. Although the school policies and training on bullying were nearly non-existent, the school was not deliberately indifferent. The district disciplined the bullies and responded to each reported incident.

2. *Zeno v. Pine Plains Central Sch. Dist.*, 702 F.3d 655 (2d. Cir. 2012)
 - a. A student claimed that he was subject to intense harassment during his entire high school career and was therefore entitled to damages under Section 504.
 - b. In this case, the court found that the school's response to the bullying incidents could reasonably be concluded as deliberately indifferent. Although the school disciplined individual harassers and implemented school-wide programming aimed at improving the school climate, the court found that these responses "could not have plausibly changed the culture of bias or stopped harassment." To the contrary, the court held that, on the facts of this case, the school should have been aware that a greater response was needed.
 - c. The court's reasoning indicates that in order for a school to prove it was not deliberately indifferent, its response to bullying must have some chance of remedying the situation and preventing further harassment.

3. *Sparman v. Bount Cty. Bd. of Educ.*, 2016 WL 5110484 (N.D. Ala. Sept. 19, 2016)
 - a. Other students physically pushed, hit, pinched, and name-called a high school student due to his dyslexia. The student repeatedly reported he behavior to school officials, teachers, and the principal. Because of the ongoing harassment, he began dreading attending school and resented his grandmother, Plaintiff and legal guardian, for making him go. The District conducted "copious" meetings that addressed the bullying, instituted two safety plans for the student, and provided the student a complaint form to submit reports of bullying to staff.
 - b. In determining whether the District's response was deliberately indifferent, the court cited Davis stating the standard is met when, "the [district's] response to the harassment or lack thereof is *clearly unreasonable* in light of the known circumstances." Because the District documented its response to the bullying in meetings and created safety plans for the student, the Court could not find that the school was deliberately indifferent.

VII. RECOGNIZING AND RESPONDING TO BULLYING OR HARASSMENT

A. Examples of Bullying

1. Name calling
2. Physical threats and abuse
3. Verbal or physical teasing
4. Put downs or jeering
5. Rejection or ostracizing
6. Vandalism
7. Flaming: Sending angry, rude, or vulgar messages to a person.
8. Cyberstalking: Online or electronic harassment that is highly intimidating or includes threats of harm. May result in large volumes of text messaging to the person being stalked.
9. Masquerading: Pretending to be someone else and sending materials to another for the purpose of negatively affecting that other person.
10. Outing: Sending materials that contain sensitive or private information about a person to someone who was not an original recipient to embarrass the original sender.
11. Sexting: (sex + texting) Sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cell phone or over the Internet. *See Miller v. Skumanick*, 605 F.Supp.2d 634, 637 (M.D. Penn. 2009).

Practice Note: Bullying may constitute harassment if based upon a protected classification. Conduct should be reviewed under both standards.

B. In the Moment: Immediate Steps to Take if You Witness Bullying or Harassment

1. Intervene immediately. It is ok to get another adult to help.

2. Separate the kids involved.
3. Make sure everyone is safe.
4. Meet any immediate medical or mental health needs.
5. Stay calm. Reassure the kids involved, including bystanders.
6. Model respectful behavior when you intervene.
7. Avoid these common mistakes:
 - a. Don't ignore it. Don't think kids can work it out without adult help.
 - b. Don't immediately try to sort out the facts.
 - c. Don't force other kids to say publicly what they saw.
 - d. Don't question the children involved in front of other kids.
 - e. Don't talk to the kids involved together, only separately.
 - f. Don't make the kids involved apologize or patch up relations on the spot.
8. Get police help or medical attention immediately if:
 - a. A weapon is involved.
 - b. There are threats of serious physical injury.
 - c. There are threats of hate-motivated violence, such as racism or homophobia.
 - d. There is serious bodily harm.
 - e. There is sexual abuse.
 - f. Anyone is accused of an illegal act, such as robbery or extortion—using force to get money, property, or services.
9. Support the students involved

C. Follow Your School's Policy for Reporting Harassment and Bullying

As discussed earlier, your school should have anti-harassment and anti-bullying policies that outline the specific procedures staff should follow if they observe or receive a report of either behavior. See below for general guidelines:

1. What must be reported?
 - a. harassment or violence on the basis of protected class, whether actual or perceived
 - b. Bullying or other prohibited conduct
 - c. reports do not require verification of the conduct, only knowledge or a belief that conduct that may constitute harassment or violence has occurred
2. Who is required to make a report?
 - a. Any person who believes he or she has been the victim of harassment or violence on the basis of a protected classification.
 - b. Anyone who witnesses or believes he or she has any knowledge of harassment/bullying should report it.
 - c. Reporter does not have to be the target.
3. To whom should a report be made?
 - a. Building principal
 - b. Superintendent
 - c. Human Rights Officer
4. Reports must be made immediately
5. How should a report be made?
 - a. A report may be made orally or in writing. If the report is oral, it must be reduced to writing by the principal or other administrator.

- b. A written report from the reporter is encouraged but not required.
- c. Anonymous reports will be investigated.

D. Factors Schools Should Consider When Addressing Student-to-Student Harassment and Bullying

1. Whether conduct by a student toward another student constitutes harassment is evaluated in the same manner as it is with respect to the conduct of employees. The behavior must be sufficiently severe, persistent or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment.
2. A one-time incident may amount to harassment if it is sufficiently severe.
3. Even if the individual incidents are not severe, a pattern of conduct may rise to the level of harassment.
4. Consider:
 - a. age and maturity of students
 - b. whether the conduct is based on a protected classification (i.e., student's contact with another student to demonstrate a sports maneuver is not harassment)
 - c. whether the behavior is welcome (whether student requested or invited conduct or regarded it as undesirable or offensive)?

Practice Note: Even if the student to whom the conduct is directed welcomes or is not offended by the behavior, the conduct still may constitute harassment. Intent also is not the standard. Comments may be intended to be friendly but may be seen by the receiver or bystander as harassing. Reciprocation does not necessarily mean the conduct is welcome.

- d. whether the harasser was in a position of authority/relationship between the parties
- e. whether the conduct was severe, persistent or pervasive
- f. whether the conduct deprived a student of an educational opportunity

- g. Allow students' IEP teams, when appropriate, to address skills and proficiencies the child needs to respond to or not engage in the prohibited conduct.

E. Investigative Procedures

1. Human Rights Officer will generally undertake, initiate or direct the investigation when the complaint relates to a protected classification. An investigation is to begin within three (3) days.
2. Investigations may consist of personal interviews and collection of documentation.
3. Interim steps may be taken during the investigation to prevent allegations of retaliation (i.e., removal of student from contact with the complainant).
4. Prohibitions against reprisal should be given

F. Documentation

1. Investigation report
2. Notification to the parties

G. Conduct May Require Mandatory Reporting (i.e., Maltreatment of Minors, Referral to Police, etc.)

H. Action to Remediate Conduct Should be Tailored to the Particular Incident and Nature of the Conduct

1. Disciplinary action toward the actor (based on school policy)
2. Transfers, etc. to limit contact between actor and target (such action should not negatively impact the target to the extent possible)
3. Additional/Individualized training/education/counseling for students, target, actor
4. Additional supervision/monitoring/surveillance
5. Conducting outreach efforts to involve students and the community as to school climate

6. Mediation, but only if the target consents
7. Tutoring or additional educational assistance
8. Immediate intervention, as appropriate.

I. Subsequent Procedures

1. Ensure that the target is encouraged to report further concerns and is aware of the procedure to follow in doing so.
2. Conduct follow-up inquiries, regardless of further reports.
3. Immediately respond to further complaints or complaints of retaliation.

J. Address Bullying and Harassment, but Avoid Disruption

1. Attempts to shield a bullied student from bullying by putting him or her in a more protective environment could expose a district to claims of disability discrimination or denial of a FAPE in the least restrictive environment. Federal guidance strongly cautions moving a bullied student from his or her current placement, unless the student is no longer able to receive a FAPE in that placement. Consider instead:
 - a. Changing the bully's schedule
 - b. Evaluating the bully for special education, if the student engages in a persistent pattern of bullying or the situation otherwise indicates a special education need
 - c. Assigning a classroom aide to have another set of eyes on the lookout for bullying behavior.
2. If the parent of a bullied, disabled student pushes for a placement change, look at the progress the child is making in the current placement and discuss that with the parents. If the child is otherwise successful and has friend in the current placement, disruption should be avoided.
3. If the student who engaged in the bullying behavior is a student with a disability, the IEP team should review the student's IEP to determine if additional supports or services are needed to address the behavior.

4. Don't ignore the overall climate of the school. Consider educational programming for all students if systemic bullying appears to be taking hold.

VIII. QUESTIONS?

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