Bullying and Harassment of Students with Disabilities

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Introduction

In the wake of tragic school shootings at Columbine and other parts of the country, educators, counselors, law enforcement officers, and others have paid increasing attention to both how adults treat children and how children treat each other in school. The issues of bullying and harassment of students by staff and fellow students have begun to receive a great deal of attention. Numerous articles and manuals have been written that address school safety issues, hate crimes, and the need for tolerance and diversity. Many schools have instituted zero tolerance discipline policies as well as diversity workshops and other programs in an effort to combat rising levels of school violence. For students with disabilities, bullying and harassment can be particularly acute. This quarterly fact sheet will address bullying and harassment as they pertain to students with disabilities and will discuss the laws and resources that are relevant to these issues.

Bullying and Harassment

On July 25, 2000, then-Assistant Secretary of the Office for Civil Rights Norma Cantu and Judith Heumann, Assistant Secretary of the Office of Special Education and Rehabilitative Services, issued a joint “Dear Colleague” letter regarding disability-based harassment. Noting that “harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement,” Cantu and Heumann went on to explain that disability harassment may violate Section 504 or Title II of the Americans with Disabilities Act, and may also deny a free appropriate public education under the Individuals with Disabilities Education Act.

The joint letter defines disability harassment under Section 504 and Title II as “intimidation or abusive behavior toward a student based on disability 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.” A hostile environment is created when harassing conduct is “sufficiently severe, persistent or pervasive.” The letter provides several examples of what might constitute disability harassment that creates a hostile environment. One example given is that of a student with dyslexia who has trouble doing her work and whose grades decline because her classmates continually remark out loud to each other during class that she is “retarded” or “deaf and dumb” and does not belong in the class. Another example provided is that of a student who repeatedly places furniture or other objects in
the path of a classmate who uses a wheelchair, thus impeding the student from entering the room. Repeated teasing and intimidation of a student with mental retardation by classmates so that the student does not participate in class is another example given.

The letter also provides several examples of staff harassment of students. For instance, Cantu and Heumann note that a teacher who subjects a student to inappropriate physical restraint because of disability-related conduct, resulting in the student trying to avoid school would be engaging in disability-related harassment. Likewise, a school administrator who repeatedly denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for missing school for appointments related to the student’s disability would be engaging in disability-related harassment. The letter also provides a higher education example, noting that a professor would be engaging in disability-related harassment for criticizing a student with a disability for using accommodations in class if it results in the student being so discouraged that it has an impact on her ability to learn and perform in class.

It is clear from the examples set out in the letter that in order to create a hostile environment that would give rise to a finding of disability harassment, there must be repeated incidents. One or two instances of teasing, one restraint episode, or one punishment by a teacher would not be sufficient to constitute harassment. It is the severity and the continual or repeated nature of the behavior that makes it harassment and that makes the environment hostile.

Cantu and Heumann make clear in the joint letter that schools, school districts, colleges, and universities have a legal obligation both to prevent and to respond to disability harassment. These educational institutions must develop and distribute an official policy statement prohibiting discrimination based on disability, and must establish grievance procedures that can be used to address disability harassment. When disability harassment does occur, the educational institutions have a responsibility to take prompt and effective steps to end the harassment, stop it from recurring, and when appropriate, remedy the effects on the student who suffered the harassment.

The letter goes on to give suggestions of ways that disability harassment can be prevented and eliminated, including creating an environment that is aware of disability concerns and sensitive to disability harassment, and weaving these issues into the curriculum or other school programs, encourage discussions about and reporting of disability harassment, widely publicizing anti-harassment statements and procedures for handling discrimination complaints, providing training for staff, counseling victims and those who have engaged in harassment, implementing monitoring programs to follow up on resolved harassment issues, and regularly assessing and modifying, as necessary, disability harassment policies and procedures.

Quoting the Council on Scientific Affairs of the American Medical Association, the National Center on Secondary Education and Transition defines bullying as “…a negative behavior involving (a) a pattern of repeated aggression, (b) deliberate intent to harm or disturb a victim despite apparent victim distress, and (c) a real or perceived imbalance of power (e.g., due to age, strength, size), with the more powerful child or group attacking a physically or psychologically vulnerable victim.” Hoover and Stenhjem, “Issue Brief: Examining Current Challenges in Secondary Education and Transition,” National Center on Secondary Education and Transition,
December, 2003, Vo. 2, Issue 3 (available at www.ncset.org). Bullying may include harassment because of perceived differences or physical assault or abuse; it is a series of “repeated, intentionally cruel incidents between the same children who are in the same bully and victim roles.” Id.

Protecting Students from Harassment and Hate Crime: A Guide For Schools

On January 6, 1999, the United States Department of Education’s Office for Civil Rights and the National Association of Attorneys General jointly issued Protecting Students from Harassment and Hate Crime: A Guide for Schools. This 159 page guidance manual, which is available on the Office of Civil Rights’ website at http://www.ed.gov/offices/OCR/archives/Harassment/index.html, contains a step-by-step guide for school districts regarding the development of written policies to prevent unlawful harassment, the provision of formal complaint policies, creating a school climate that supports diversity, and responding to incidents of harassment and violence. Sample policies, protocols, and checklists are included in the appendices, as are references and sources of technical assistance.

Notable, but not surprising, is the Guide’s statement that “[s]uccessful prevention strategies depend on the coordinated efforts of all school employees, including individuals responsible for administration, curriculum, instruction, discipline, counseling, public relations, and personnel. Parents, students, law enforcement agencies, and other community organizations also play an important role.” Guide, p. 5.

The Guide recommends that formal complaint procedures include notice to students, parents, and employees of the complaint process, including how and where complaints can be filed, an opportunity for a prompt, thorough, and impartial investigation, confidentiality to the extent possible, notification to the complainant of the outcome of the process, and effective remedies when discrimination is found. Guide, p. 8.

In discussing disability harassment, the Guide specifically gives an example that it recognizes as atypical of other types of harassment: a situation in which a person seeks to involve a student with disabilities in dangerous, criminal, or antisocial activity but the student, because of his or her disability, is unable to understand fully or consent to the activity. Guide, p. 18. The Guide makes clear that age, along with other factors should be considered when determining whether particular conduct caused a hostile environment. The Guide also makes clear that a tangible harm, such as a drop in grades, is not necessary to establish a hostile environment. Additionally, the Guide indicates that while an isolated incident of name calling is unlikely to amount to harassment, one incident of severe harassment that provokes fear of violence on the part of the victim, could be enough to cause a hostile environment; in making the determination, it is necessary to look at the totality of the circumstances. Guide, p. 19.

The Guide also addresses harassment by students with disabilities, noting that although schools may discipline students with disabilities who harass others, they must do so consistent with the laws governing discipline of students with disabilities, and may need to use their
evaluation and placement procedures to consider a placement changes when a student’s harassing behavior is related to his or her behavior. Guide, pp. 27-28.

The appendices to the Guide offer a rich source of information to school district personnel and to families and advocates. Appendix A includes sample or model documents from Arizona, Minnesota, Vermont, West Virginia, New Jersey, and Edmonds, Washington. Minnesota’s policy and West Virginia’s rules do not specifically mention disability harassment. Vermont’s policy, on the other hand, explains that disability harassment “includes any unwelcome verbal, written or physical conduct, directed at the characteristics of a person’s disabling condition, such as imitating manner of speech or movement, or interference with necessary equipment.” Guide, p. 68. All of the model policies contain complaint forms and clear procedures for how to address incidents of harassment or hate crimes.

Appendix B of the Guide contains protocols and checklists for complaints investigation, grievance procedures, addressing racial harassment, prevention, conflict intervention teams, and other issues. While these documents are not legally mandated under Section 504 or the ADA and essentially embody best practice, advocates can use these checklists and protocols to assess how effectively a school district has complied with the requirements of these statutes. The technical assistance and resource appendices may also be useful to advocates who handle bullying or harassment cases involving students with disabilities.

Selected Rulings by the Office for Civil Rights (OCR)

In Willamina (OR) Sch. Dist. 30-J, (May 1, 1997), 27 IDELR 221, OCR did not find sufficient evidence of discrimination in a case in which a student with a disability affecting his arm and hand claimed verbal and physical harassment by his classmates. Specifically, OCR found conflicting evidence as to whether district staff had actually received a specific complaint or witnessed verbal harassment of the student, whether an assault of the student was motivated by his disability, and whether the district had conducted an appropriate investigation of the student’s complaints. However, OCR did advise the district to develop appropriate harassment reporting and documentation procedures.

A school district was in violation of Section 504 for failing to investigate disability harassment claims by a student with attention deficit disorder and obsessive compulsive disorder. Manteca (CA) Unified Sch. Dist. (June 12, 1998), 30 IDELR 544. The district voluntarily agreed to provide training to all district staff and to modify its Section 504 plan regarding investigation of claims of discrimination.

OCR found no evidence of discrimination in Crocket County (TN) Sch. Dist. (October 30, 2000), 34 IDELR 186, in which a student’s parent alleged that the student’s science teacher discriminated against the student by making derogatory comments about her disability in class and in her daily planner. The teacher denied making any derogatory statements to the student. The teacher’s observations in the student’s planner pertained to her academic performance, not her disability. Additionally, the student had completed a favorable evaluation of her teacher in which she had stated that her teacher was very smart and funny and that she hoped her next year’s teacher would be just like this year’s teacher. She also stated that she loved her teacher.
and the fun and laughter the teacher had given her. OCR concluded that even if the alleged incident were true, it did not amount to harassment because it was not sufficiently severe, persistent, or pervasive, and once district officials became aware of the parent’s concerns, they met with him. See also, El Dorado (CA) Union High School District (March 29, 2002), 37 IDELR 78 (OCR closed investigation because unable to corroborate student’s allegations that teacher made disparaging disability-related remarks to him).

In 2001, a California school district voluntarily agreed to formulate an anti-harassment policy, provide training to administrators, teachers, and staff at one of its high schools, and include information to increase awareness of social and behavioral issues associated with Asperger’s Syndrome, autism, and communication disorders. The district’s willingness to take these steps came in response to a complaint that a student with a communication disorder and Asperger’s Syndrome was subjected to harassment when a teacher allowed other students in his special education classroom to ridicule and humiliate the student. San Juan (CA) Unified School District (May 29, 2001), 36 IDELR 135.

OCR was not able to substantiate disability-based discrimination in Washoe County (NV) School District (February 5, 2002), 36 IDELR 78, a complaint involving a child who was receiving special education for attention deficit disorder and learning disabilities at the time the incident giving rise to the complaint occurred. After raising concerns about the student’s behavior, her classmates were encouraged by the school principal to write letters to the student explaining what they wanted her to stop doing, what she could do differently, and how other students could help her. Some of the letters stated what students did not like about her and what she should do differently to be that student’s friend. The letters did not refer to the student’s disability. The student was distressed by the letters and was subsequently diagnosed with depression and oppositional defiance disorder. She transferred to another school. OCR ruled that because it could not conclude that the principal’s directive to the students to write the letters was based on the student’s disability, it could not conclude that the student was subjected to disability-based harassment under Section 504.

OCR found that a district took appropriate steps to address harassment of a student with Tourette’s Syndrome and Obsessive Compulsive Disorder and therefore dismissed a complaint that the district had discriminated against the student in violation of Section 504. The district disciplined students who harassed the student with the disability, made accommodations for him regarding alternative restroom use, provided supervision in the locker room, and provided counseling and training to students, as well as training to staff. Richmond (IN) Community Schools (April 11, 2002), 37 IDELR 45. See also: Puyallup (WA) School District No. 3 (June 20, 2003), 40 IDELR 76 (District effectively responded to incidents of general student-on-student harassment; in this case, no evidence that harassment that occurred was based on disability or race).

In Lancaster (CA) School District (September 24, 2003), OCR found that a teacher’s single comment to a preschooler, if actually made, that she was a baby because she wore pull-up underwear due to her disability, did not constitute disability harassment because it was not sufficiently severe persistent or pervasive to constitute a hostile environment or to deny the child access to the preschool program.
OCR could not substantiate a middle school student’s claim of disability harassment by his science teacher in Gaston County (NC) Schools (January 14, 2005), 44 IDELR 98. The student alleged that he was repeatedly locked out of his classroom due to lateness because he had trouble with the lock on his locker. The district noted that although all classroom doors were locked at the beginning of class because of security concerns, the student could knock at the door or use the entrance through an adjoining office. The student’s claim that his teacher ridiculed him in class was unsubstantiated. The science teacher admitted that he used the phrase “Can you hear me now?” to see if the student was wearing his hearing device, but said that he was trying to determine if the device was working. OCR did not find the teacher’s statement inappropriate, since the student often did not wear the device or turn it on. Further, although the student alleged that the district ignored the fact that he was harassed while using the bathroom, the district had offered him a separate bathroom, but he had refused to use it, and had not notified the principal of the incidents of harassment.

OCR determined that a school district violated Section 504 and the ADA by failing promptly to investigate allegations of disability harassment by the student’s physical education teacher, who had made derogatory comments to the student about whether she really had a disability (migraine headaches). The school district agreed to conduct training of school site administrators and staff and to institute a uniform complaint investigation process. Morgan Hill (CA) Unified School District (March 15, 2006), 106 LRP 35208.

Several conclusions can be drawn from the OCR rulings. First, because of the ephemeral nature of verbal reports, it is important to make complaints about disability harassment to school and district staff in writing. Formal notice of disability harassment should not be left to a telephone call or a quick hallway conversation with the principal. It should be provided in writing, and the parent and attorney or advocate should retain a copy. Second, it is clear that a one-time only comment or incident or isolated incidents will not amount to disability harassment under Section 504 and Title II of the ADA. OCR looks at whether the incidents are repeated and pervasive in nature; if not, they will not constitute harassment. Finally, if the school or the district has taken appropriate steps such as disciplining those who have engaged in the harassment, conducting training, promptly investigating the complaint, offering accommodations to the student, or other such actions, OCR will likely not find any violation of the law because the school or district will not have been “deliberately indifferent” to the harassment.

Selected Caselaw

In 1998, the United States Supreme Court issued its decision in Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998). Although Gebser was a Title IX damages case, its holding has become important in the arena of disability harassment. In Gebser, Alida Gebser, an eighth grade student, joined a high school book club led by Frank Waldrop, one of the high school teachers. Waldrop often made sexually suggestive comments to the students during the book club discussions. When Gebser entered high school, she was assigned to Waldrop’s classes during both semesters of the year. Waldrop continued to make suggestive comments and began to direct comments to Gebser. In the spring of that year, he began a sexual relationship with her, which continued until the following winter when a policeman discovered the two of
them having sex and arrested Waldrop, who was fired. His teaching license was later revoked. Gebser did not report the relationship to school officials because, as she later testified, she did not know what to do, and she wanted to continue to have Waldrop for classes. The parents of two other students had complained to the principal about the Waldrop’s comments in class. The principal had arranged a meeting at which Waldrop said he did not believe he had said anything offensive but apologized to the parents and said it would not happen again. The principal advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting but did not report the complaint to the superintendent, who was the Title IX coordinator for the district. The school district did not have a formal anti-harassment policy, and had not developed or distributed an official grievance policy.

The Court found that Gebser’s case against the school district was not well-founded, as the district had not had actual notice of discrimination and had not acted with deliberate indifference. The Court stated that the express remedial scheme under Title IX is based upon notice to an “appropriate person” and an opportunity to correct any violation, and that an implied damages remedy should be created along the same lines. The court held that a damages remedy under Title IX will not be available “unless an official who has the authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of the discrimination in the recipient’s programs and fails adequately to respond…The response must amount to deliberate indifference to discrimination.” 524 U.S. at 290.

_Gebser_ is important in the context of disability harassment. Attorneys and advocates who have a client who has been the victim of disability-based harassment should provide written notice to school and district officials of the harassment or bullying; this gives the officials an opportunity to fix the situation, and establishes a record of notice. Without a record of such notice, a future claim of harassment is likely to fail.

The Supreme Court issued another Title IX decision the following year addressing student-on-student sexual harassment in _Davis v. Monroe County Board of Education_, 526 U.S. 629 (1999). The Court held that a private damages action may be filed against a school board under Title IX in cases of student-on-student harassment when the board acts with deliberate indifference to known acts of harassment in its programs or activities, and when the district’s response is “clearly unreasonable in light of the known circumstances.” 524 U.S. at 648-9. To rise to the level of being actionable for damages, the harassment must be so severe, pervasive, and objectively offensive that it undermines the victim’s educational experience and effectively denies the victim equal access to the educational institution’s resources and opportunities. The _Davis_ case is also useful in the context of disability harassment because it underscores the importance of establishing the severity and pervasiveness of the harassment, the need for deliberate indifference on the part of the school district, and the need for an adverse effect on the part of the victim, such that access to education services is effectively denied. This lack of access might be in the form of a drop in grades, as happened in the _Davis_ case.

The district court for Maryland issued a decision in 2002 holding that a local school board was immune from suit under the ADA and Section 504, and finding that even if the school board was not immune, the parents had failed to establish a case of disability harassment of their
daughter with epilepsy by her peers because the school board had not demonstrated deliberate indifference to her plight. In fact, every time the parents complained to the school, the administration took action by setting up meetings with the boys who were harassing the student, sending letters to the boys’ parents threatening suspension if the parents did not respond to a request for a conference, and sending notices to each of the student’s teachers to send anyone who teased the student to the office. Biggs v. Board of Educ. Of Cecil County, L-00-1003 (D. Md. 2002), 36 IDELR 124.

In a case addressing the question of whether harassment can lead to a denial of a free appropriate public education, the Third Circuit Court of Appeals answered in the affirmative, finding that the history of harassment of the student by his peers from elementary school through middle school justified his placement in a public high school in a neighboring district. Shore Regional High School Board of Education v. P.S., 381 F. 3d 194 (3d Cir. 2004), 41 IDELR 234. The court found persuasive the fact that the student’s district high school would likely not have been able to protect him from the students who had bullied him mercilessly for years, and that he would have been in contact with them on the bus, where the school would have had no ability to protect him.

In K.M. v. Hyde Park Central School District, 381 F. Supp. 2d 343 (S.D.N.Y. 2005), 44 IDELR 37, the court held that the school district could be liable for its alleged deliberate indifference to the student’s rights and denied summary judgment to the school system. The student’s parent filed suit alleging that the district violated the ADA and Section 504 by intentionally discriminating against her son when it mishandled the student-on-student disability harassment her son experienced in middle school. The student had been subjected to repeated instances of physical and verbal intimidation and eventually required home teaching because he was unable to continue attending school.

In Scruggs v. Meriden Board of Education, Case No. 3:03CV2224(PCD) (D.Conn. 2005), the parent of a student with a learning disability filed suit under 42 U.S.C. §1983 based on violations of the IDEA and Section 504 of the Rehabilitation Act, 42 U.S.C. 1986, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, as well as under state law, after her son committed suicide. She claimed that the school district had violated his rights by dismissing him improperly from special education in April, 2000, failing to take a number of steps related to his special education needs, and failing to supervise and protect him adequately from known harassment, bullying, and assaults. She claimed that the defendants knew or should have known of the bullying and harassment that caused the student to miss thirty three days of school in sixth grade and that intensified in seventh grade.

The parent complained to the vice principal but she did not take any action, and the student began to miss more school. Subsequently, after a meeting in mid-October, 2001 between the mother and the vice-principal and guidance counselor, the student was moved to another program, but the bullying and harassment continued. In December, 2001, the planning and placement team met, and the student’s mother again raised concerns about bullying and harassment, citing specific incidents of punching, kicking, desks being slammed into the student, and having his hair pulled so violently that his head snapped back. The student’s mother agreed to have the school test the student to assess his learning and social skills. The school did not
schedule or conduct the tests, and the student committed suicide at the beginning of January, 2002.

The defendant school district moved to dismiss the parent’s complaint for failure to exhaust administrative remedies. Finding that exhaustion would have been futile, the court denied the motion. The court also found that the suit was not time-barred, and that the parent’s allegations that the defendants knowingly placed the student in a class with a student who was a known threat to him and then refused to move him, in combination with their alleged failure to provide him with required special education services were sufficient to state a claim. The court further found that the parent had stated sufficient allegations that defendants had acted in bad faith and with deliberate indifference to withstand defendants’ motion for judgment on the pleadings for the parent’s equal protection claim and her claim that the defendants had failed to train and supervise staff adequately and to establish anti-bullying and harassment policies. Finally, the court found the parent’s claims of intentional discrimination sufficient under the Rehabilitation Act and the Americans with Disabilities Act, granting the defendants’ motion for judgment on the pleadings only to the extent that the parent sought punitive damages under the Rehabilitation Act and the Americans with Disabilities Act. The court also granted the defendants’ motion as to individual liability under those two statutes. The court sustained the parent’s claim of supervisory liability against one of the defendants as well as her claims regarding a conspiracy. All of the defendants’ defenses regarding sovereign immunity were denied.

In Stringer v. St. James R-I School District, 446 F. 3d 799 (8th Cir. 2006) 45 IDELR 179, the court dismissed the parents’ pro se case under the IDEA, finding that they did not allege any facts to support their claims that school staff had engaged in persistent and pervasive harassment of their son that deprived him of access to his education. The student, a child with autism, was suspended for six days. The principal suggested a longer suspension, placement in an alternative school, and a loss of credits, but after intervention by the IEP team, the longer suspension was withdrawn, no change in placement occurred, and the student did not lose credits.

Conclusion

The OCR/National Association of Attorneys General Guide and the joint OCR/OSEP letter regarding harassment are useful documents for attorneys and advocates who represent students who have faced disability harassment. These documents clearly define harassment and discuss the obligations of school districts regarding the need for policies and procedures to address harassment. Taken together, the documents offer a legal and best practices framework within which attorneys and advocates can evaluate how a district has addressed instances of harassment of a particular student.

One way of addressing disability harassment is through the IDEA and the IEP process, if the student’s ability to receive a free appropriate public education is affected by the harassment. Shore Regional High School Board of Education v. P.S., 381 F. 3d 194 (3d Cir. 2004), 41 IDELR 234 was an effective use of the IDEA for this purpose. Another option is to file an OCR complaint. See, e.g. Manteca (CA) Unified Sch. Dist. (June 12, 1998), 30 IDELR 544. A third is a private civil suit. See, e.g., Scruggs v. Meriden Board of Education, Case No. 3:03CV2224 (PCD) (D.Conn. 2005).
It is clear from the OCR rulings and caselaw that in order to establish disability harassment that rises to a violation of the law, a student must establish that there has been a repeated series of incidents that has created a negative atmosphere for him or her, the school staff must have been put on notice, and the school or district staff must have sat idly by while the harassment was occurring and being reported to them. Without all three components in place, a harassment case will not withstand a summary judgment motion. Notice to school or district staff should be in writing, negative effects of harassment such as a decline in grades, need for counseling, etc., should be documented, and any responses from the school system should also be documented, as the adequacy of the response may become an issue.