

# Bullying and Special Education Students

How to Avoid Liability and Prevent Harassment

Presented by Melinda Jacobs, Esq.

## What is "bullying?"

- + Bullying is **unwanted, aggressive behavior** among school aged children that involves a real or perceived **power imbalance**. The behavior is **repeated**, or has the potential to be repeated, **over time**.
- + In order to be considered bullying, the behavior must be aggressive and include:
- + **An Imbalance of Power**: Kids who bully use their power—such as physical strength, access to embarrassing information, or popularity—to control or harm others. Power imbalances can change over time and in different situations, even if they involve the same people.
- + **Repetition**: Bullying behaviors happen more than once or have the potential to happen more than once.

+ Source: [www.StopBullying.gov](http://www.StopBullying.gov)

## ***Bullying in U.S. Public Schools***

- + Bullying is the most common form of violence in American schools. ([www.stopbullying.gov](http://www.stopbullying.gov))
- + Nationwide, **28%** of students in middle and high school are bullied. (National Center for Education Statistics and Bureau of Justice Statistics)
- + 49 states have enacted anti-bullying legislation.

([www.bullypolice.org](http://www.bullypolice.org))

3

## ***Types of Bullying***

- + Verbal acts (name calling, teasing, shaming).
- + Graphic/written statements (includes cyber-bullying).
- + Physical acts.
- + Emotional bullying.
- + Destruction of property.
- + Unauthorized release of confidential information.

4

## ***Bullying and "Hostile Environments" in Schools***

Dear Colleague Letter, 55 IDELR 174 (OCR 2010). Bullying may include: verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Bullying and harassment do not have to involve repeated incidents.

A "**hostile environment**" is created when conduct is "sufficiently severe, pervasive, or persistent to 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."

5

## ***What is a "Hostile Environment?"***

- + Kearney R-I (MO) Sch. Dist., 111 LRP 24625 (OCR 2010). School districts must take prompt and effective steps to end disability harassment, eliminate any hostile environments, and prevent harassment from recurring. In this case, OCR found that although incidents where classmates teased a girl about her peanut allergy were not "pervasive or persistent," the incidents created a "hostile environment" because the girl was so frightened that she did not want to attend school.

6

## ***Landmark Case: Davis v. Monroe Co. Bd. Of Education (U.S. 1999)***

- + (1) The student has been identified as a member of a protected class (i.e., disability);
- + (2) The student was harassed based on his/her disability;
- + (3) The harassment was sufficiently severe or pervasive that it interfered with the student's education and created a hostile environment;
- + (4) The school knew of the harassment; and
- + (5) The school was deliberately indifferent to the harassment.

7

## ***Schools are not automatically responsible for all peer-to-peer bullying and harassment***

- + ***D.R. v. Middle Bucks Vo-Tech Sch.***, 18 IDELR 650 (3<sup>rd</sup> Cir. 1991). Administrators were not liable for the injuries sustained by a female special education student who was repeatedly sexually harassed by male students in a vocational-technical high school graphic arts classroom. The state compulsory attendance law did not create a custodial relationship. Therefore, the school was not responsible for preventing all peer-to-peer harassment.

8

## ***"Dear Colleague" Letter (OCR 2010)***

A school district has a duty to respond when it "knows or reasonably should have known" about disability-based harassment. An appropriate response may include:

- + Separating the accused harasser and the victim.
- + Providing counseling for the victim and/or harasser.
- + Taking disciplinary action against the harasser.
- + Providing training or other interventions for the perpetrators and the school community.
- + Issuing new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment.

9

## ***Cyber-bullying***

- + Using the Internet or cell phones to post or send malicious, harmful, or damaging information and/or photos to inflict harm or pain on a person(s).
  - + MySpace
  - + Facebook
  - + Blogs
  - + Sexting

10

## T.C.A. 49-6-1015 – Cyber-bullying

(1) "Cyber-bullying" means bullying undertaken through the use of electronic devices;

(2) "Electronic devices" include, but are not limited to, telephones, cellular phones or other wireless telecommunication devices, personal digital assistants (PDAs), computers, electronic mail, instant messaging, text messaging, and web sites;

(3) "Harassment, intimidation or bullying" means any act that substantially interferes with a student's educational benefits, opportunities or performance; and:

- + (A) If the act takes place on school grounds, at any school-sponsored activity, on school-provided equipment or transportation or at any official school bus stop, the act has the effect of:

+

11

## Cyber-Bullying

(i) Physically harming a student or damaging a student's property;

(ii) Knowingly placing a student or students in reasonable fear of physical harm to the student or damage to the student's property;

(iii) Causing emotional distress to a student or students; or

(iv) Creating a hostile educational environment; or

(B) If the act takes place off school property or outside of a school-sponsored activity, it is directed specifically at a student or students and has the effect of creating a hostile educational environment or otherwise creating a substantial disruption to the education environment or learning process.

- + **HISTORY:** Acts 2005, ch. 202, § 1; 2011, ch. 251, §§ 1, 3.

12

## *Cyber-bullying vs. Free Speech*

- + **Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503 (1969).** The U.S. Supreme Court held that school officials violated the First Amendment rights of students who wore black armbands to protest against the Vietnam War by suspending them from school. Public school students enjoy freedom of speech and may display or wear symbols indicating their views, unless these expressions of free speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

13

## *Creating a web site to raise money to hire a "hit man" to kill a teacher*

- + **J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).** An eighth grade student created a threatening web site requesting money to pay for a hit man to kill his algebra teacher. The site frightened the algebra teacher so badly that she was forced to take an extended medical leave for the remainder of the school year. The State Supreme Court held that the creation of the threatening web site resulted in a **severe disruption of the instruction at the school** and allowed the school to punish the student even though he had created the web site at his home.

14

## ***Posting an image of your teacher with a gun firing a bullet into his head***

- + Wisniewski v. Bd. Of Educ. Of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2<sup>nd</sup> Cir. 2007). A student used his home computer to create an image of his English teacher with a pistol firing a bullet at the teacher's head with dots representing blood spatter. The words, "Kill Mr. VanderMolen" were printed under the image. The court held that the creation of the image at home was not protected by the First Amendment because "it crossed the boundary of protected speech and pose[d] a reasonably foreseeable risk [of] materially and substantially disrupting the work and discipline of the school."

15

## ***Posting a message on a blog complaining about "douchebags in the central office"***

- + Doninger v. Niehoff, 527 F.3d 41 (2<sup>nd</sup> Cir. 2008). A class officer posted a message on her blog complaining about "douchebags in [the] central office" who had cancelled an activity at school. The student encouraged other students to "piss [the district superintendent] off more." As a result, there was significant disruption to the student body, and a sit-in was planned. The girl was prohibited from running for senior class secretary "because her conduct had failed to display the civility and good citizenship expected of class officers." The court held that disqualification from running for class office was not a violation of the girl's First Amendment rights.

16

### *Creating a fake web page suggesting that your principal is a sex addict and pedophile.*

- + J.S. v. Blue Mountain Sch. Dist., 111 LRP 40374 (3<sup>rd</sup> Cir. 2010, *cert. denied*, 112 LRP 3125 (U.S. 2012)). The court held that a principal violated a middle school girl's First Amendments rights by creating an embarrassing and defamatory online parody profile of the administrator. The Court concluded that the online posting "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously...." Also, the "integral events, occurred outside the school, during non-school hours."
- + Suspended for 10 days.

17

### *What Did The Fake Profile Say?*

- + The profile lists the principal's general interests as: "detention, being a tight ass, spending time with my child (who looks like a gorilla), baseball, my golden pen, f\_ \_ \_ing in my office, hitting on students and their parents."
- + In addition, the profile stated in the "About me" section:
- + "I love children, sex (any kind), dogs, long walks on the beach, tv, being a d\_ \_k head, and last but not least my darling wife who looks like a man"

18

## ***Creating an on-line "parody profile" of your principal with the theme "big"***

- + ***Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3<sup>rd</sup> Cir. 2011).*** The principal of a high school could not suspend a 17 yr. old boy who used his grandmother's computer at home to create a fake MySpace page of the administrator. The fake profile provided bogus answers to questions about the principal's favorite shoes, fears, activities, etc. All of the answers were based on a theme of "big," owing to the fact that the principal is a large man.
- + Placed at the Alternative Learning Center for the remainder of the school year.
- + Banned from extracurricular activities and graduation ceremonies.

19

## ***What Did the Fake Profile Say?***

- + *Birthday: too drunk to remember*
- + *Are you a health freak: big steroid freak*
- + *In the past month have you smoked: big blunt3*
- + *In the past month have you Stolen Anything: big keg*
- + *Ever been called a Tease: big whore*
- + *Ever been Beaten up: big fag*
- + *Number of Drugs I have taken: big*
- + *Under "Interests," Justin listed: "Transgender, Appreciators of Alcoholic Beverages."*

20

## ***Creating a fake web site that bullies another student***

- + ***Kowalski v. Berkeley County Schools***, 652 F.3d 565, 111 LRP 51060 (4<sup>th</sup> Cir. 2011), *cert denied*, 112 LRP 3081 (U.S. 2012). Kara, a high school student, was suspended for five days for creating a fake MySpace page called "S.A.S.H.," which stood for "Students Against Sluts Herpes." This site was largely dedicated to ridiculing a fellow student and encouraging other classmates to post offensive and harassing commentary about the girl. After creating the fake page, Kara invited 100 people to join the group and post and respond to text, comments, and photos. Approximately two-dozen classmates joined the group, and several uploaded photos of the targeted girl accompanied by offensive and demeaning comments about her.

21

## ***What Was the Punishment?***

- + 10 day suspension (out of school)
- + 90 day "social suspension"
- + Prohibited from crowning the next "Queen of Charm"
- + No cheerleading

22

## ***A Look at Special Education Bullying Cases***

- + What arguments are advanced by the parents of students with disabilities?
- + How do the courts view allegations of bullying/harassment against students with disabilities?
- + What factors are important to consider when deciding whether to defend or settle?
- + What actions can school administrators take to avoid/reduce liability?

23

## ***Administrators Must Respond to Bullying of Special Education Students***

- + **K.M. ex rel. D.G. v. Hyde Park Central Sch. Dist., 44 IDELR 37 (S.D.N.Y. 2005).** A 13 yr. old boy with PDD-NOS and dyslexia was repeatedly called "idiot," "retard," and other disability-related epithets, and was physically abused by other students at school and on the bus. The mother attempted to meet with school officials, but they were unresponsive and took no action to stop the harassment of the student. The boy became depressed and suicidal, and was withdrawn from public school and home-schooled. The court held that school districts have a greater duty to protect disabled students, who are "not on equal footing" to defend themselves against harassment from peers.

24

## ***Bullying May Cause a Denial of Educational Benefits***

- + **T.K. v. New York City Dept. of Education, 56 IDELR 228 (E.D.N.Y. 2011).** The parents of a twelve-year-old girl with a learning disability alleged that her principal had repeatedly ignored complaint that the girl was ridiculed and ostracized at school, and that this abuse resulted in a denial of educational benefits and emotional withdrawal. The court held that bullying may caused a denial of FAPE, even when the school was offering all IEP services and programs to a student. The bullying did not have to be directly related to the student's disability, as long as the evidence supports a finding that the harassment "adversely affects" the student's education.

25

## ***"Hazing" activities may constitute bullying***

- + **M.Y. v. Grand River Academy, 54 IDELR 255 (N.D. Ohio 2010).** A private high school allegedly supported the bullying and harassment of a teen with Asperger's Syndrome and may be liable for money damages. The student was repeatedly subjected to physical and verbal harassment by a group of upperclassmen. When the student developed depression and suicidal ideations, the parents complained to the administrator. The headmaster of the school reported told the parents of the student that it was the school's policy to "look the other way" at hazing activities directed at underclassmen. The court refused to dismiss the lawsuit against the school, finding that the parents had sufficiently stated a claim for damages.

26

## *Asperger Syndrome and bullying*

- + **Brown v. Ogletree, 58 IDELR 128 (S.D. Texas 2012)**. A middle school boy with Asperger Syndrome was repeatedly bullied at school. Despite his parents' complaints, the principal allegedly ignored the bullying and failed to return the parents' calls or respond to their emails. The student and his friends also made repeated reports to the principal about the harassment. The boy committed suicide after suffering two years of bullying at school. His parents sought money damages under Section 504 for "deliberate indifference," and also alleged violations of Title IX and Section 1983.

The parents' lawsuit was allowed to continue to a jury trial on the Constitutional claims.

27

## *Release of Confidential Information*

**P.R. v. Metro Sch. Dist. of Washington Twp., 55 IDELR 199 (S. D. Ind. 2010)**. A middle school girl confided to her best friend that she was HIV+. The BFF passed this information to other students, resulting in the girl being harassed and teased over the next two years at school. The school district responded to each incident of harassment by meeting with the alleged harassers, informing the parents, and punishing the perpetrators.

The school district's actions saved it from liability for the girl's injuries.

28

## ***Bullying and Disability-Based Discrimination***

- + **Horry County (SC) Schs., 111 LRP 49540 (OCR SC 2011).** Peer teasing that does not mention a student's disability and is not directed at any of the traits of the disability does not constitute disability-based harassment under Section 504. The school district was not in violation of Section 504 for failing to investigate reports that a student with Asperger Syndrome was being teased because there was no evidence that the boy, who was shot to death by a school resource officer, was harassed because of his disability.

29

## ***Sexual Orientation Bullying and Discrimination***

- + **Shore Regional High Sch. Board of Education v. P.S., 41 IDELR 234 (3<sup>rd</sup> Cir. 2004).** A student with ED was subjected to "relentless" physical and verbal abuse and social isolation because classmates perceived him as "effeminate" and called him "gay," "faggot," and other gay slurs. The court found that his continued placement at the high school would likely result in further bullying and a denial of FAPE, and ordered the school district to place him in a neighboring school district.

30

## *Racial Issues and Disability-based Discrimination*

- + **Kendall v. West Haven Dep't. of Education, 33 IDELR 270 (Conn. Sup. Ct. 2000).** The parents of an African-American elementary student with intellectual disabilities won \$67,000 in damages as a result of their son's injuries sustained during a bullying incident. The student had been repeatedly bullied by a Caucasian special education student, and the parents had reported this to the assistant principal. The assistant principal informed the student's mother that she would take care of the matter, but the evidence "unambiguously establishe[d] that she did nothing." The student was seriously injured when the offending student attacked him in the school cafeteria. The court found the assistant principal personally liable and awarded money damages to the parents of the injured student.

31

## *Teachers who bully students*

- + **Mathers v. Wright, 56 IDELR 188 (8<sup>th</sup> Cir. 2011).** A fifth-grade teacher who allegedly refused to instruct a student with disabilities, excluded her from recess and mandatory fire drills, and forced the student to crawl on the floor could be found to have engaged in disability-based harassment and may be liable for damages.
- + **Toledo (OH) Pub. Schs., 55 IDELR 298 (OCR 2010).** A teacher's comments to an overweight eleventh grade girl with Dysthymic Disorder about her tight shirts did not constitute disability-based discrimination. The teacher's comments were designed to ensure compliance with the school's dress code, and the teacher was unaware of the girl's emotional disability or its effect on her body image.

32

## *Responding Effectively to Bullying*

- + **District of Columbia Public Schs., 111 LRP 25120 (SEA DC 2010).**  
A student with an emotional disturbance (ED) was not deprived of FAPE as a result of a single incident when he was called "stupid" and "retarded" by his classmates. The district officials responded appropriately by calling a meeting, punishing the students who were involved, and offering the student the option to change his class schedule.

33

## Long v. Murray Co. Sch. Dist., 112 LRP 32447 (N.D. Ga. 2012)

- + A 17 yr. old boy with Asperger Syndrome committed suicide after being bullied for years at school.

34

## *The correct way to respond to bullying in schools*

- + *S.S. v. Eastern Kentucky University*, 50 IDELR 91 (6<sup>th</sup> Cir. 2008), *rehearing denied*, No. 06-6165, 110 LRP 62749 (6<sup>th</sup> Cir. 2008). A district can defend against a deliberate indifference charge brought under the ADA and Section 504 by showing that it appropriately responded to all incidents of bullying. The fact that this school investigated all altercations between the students, conducted interviews with students, separated the offenders from the student, imposed discipline, provided training, and communicated with parents indicated that it took affirmative steps to halt harassment.

35

## *Remember ...*

- + School districts are NOT liable for ALL acts of bullying or harassment.
- + School districts are liable ONLY for acts of bullying/harassment when they are aware of this activity and fail to act reasonably.
- + The law does not hold schools to a 100% standard of perfection – you cannot ensure that NO bullying or harassment will occur!

36

### *What Must You Do To Avoid Liability?*

- + Maintain anti-bullying policies and programs in your school district.
- + Train staff to spot/stop bullying.
- + Take ALL reports of bullying/harassment seriously.
- + Meet with parents and students to hear complaints of bullying/harassment.
- + Investigate, interview, and document!
- + Punish the perpetrators (not the victim)!