

BULLYING AND HARASSMENT OF STUDENTS WITH DISABILITIES: PRACTICAL GUIDANCE ON PREVENTION AND RESPONSE

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

Bullying & Harassment are related, but different. Throughout the disability harassment cases, misconduct is often referred to by the courts as “bullying,” to the point that the terms are used somewhat interchangeably. Likewise, society at large and the schools in particular often make no distinction between “bullying” and “harassment.” OCR sees the terms as different.

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

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

I. The Continuing Evolution of Disability Harassment Rules

A. July 2000 “Dear Colleague” letter from OCR & OSERS on Disability Harassment

On July 25, 2000 the U.S. Department of Education (ED), through the joint efforts of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) issued a letter warning schools about the need to address harassment based on disability. *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 2000)[hereinafter, “*DCL 2000*”]. The letter is the result of concerns communicated to the department by parents and advocates, substantiated by focus groups conducted by OCR & OSERS on the “often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.” ED reminds districts that disability-based harassment is a form of discrimination under both Section 504 and Title II of the Americans with Disabilities Act (ADA). With reference specifically

to §504, ED is concerned that disability harassment may result in denial of FAPE to a student or may deny him/her an equal opportunity to participate or benefit in a school's educational programs. Disability harassment of a student eligible under the IDEA could also deny FAPE. A quick reminder: **students eligible under the IDEA are also entitled to the nondiscrimination protections of Section 504 and the ADA.** "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).

"Disability Harassment" defined. "Disability harassment under Section 504 and Title II is 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." *DCL 2000*, p.2.

Hostile Environment: When harassment can violate rights under Section 504, ADA Title II.

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

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

"Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.

A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. **The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring** and, where appropriate, remedying the effects on the student who was harassed." *DCL 2000*, p. 3 [emphasis added].

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

B. U.S. Supreme Court took a different posture on school liability under Title IX.

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

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

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

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

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

Applying the Court’s Title IX analysis to disability harassment, simple name-calling and teasing based on disability is not enough to invoke district liability for money damages. Interestingly, according to the Supreme Court, a plaintiff must show something more than a “mere decline in grades” in order to prevail on a harassment claim. *Id.*, at 1676. In addition, the student would also have to demonstrate difficulty accomplishing school assignments or tasks, a reluctance to attend school or a school activity, or some other sort of barrier (physical or otherwise) to the student receiving equal access to education programs and activities. In the Title IX context, ED painted district liability for student-to-student sexual harassment very broadly when it warned districts of the potential problems. For example, in an early pamphlet on sexual harassment issued by OCR, districts were told “If a school finds out that there has been sexual harassment, it has the obligation to stop it and make sure that it does not happen again.” *Sexual Harassment: It’s Not Academic* (OCR Pamphlet, 1997). Later, the courts reined in the standards as demonstrated in the Supreme Court’s decision in *Davis*. The difference in approach and liability

standards still remains between the courts and OCR. OCR explains that the difference rests on monetary damages. “As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving federal administrative enforcement by a federal agency.” *In re: Dear Colleague Letter of October 26, 2010*, 111 LRP 32298 (OCR 2011).

C. A Second Dear Colleague Letter in 2010

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

“In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools’ appreciation of their important responsibility to maintain a safe learning environment for all students. **I am writing to remind you, however, that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR).** As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.” *DCL 2010*, p. 1 [*emphasis added*].

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

Are there academic implications from bullying and harassment? Even when IDEA and Section 504/ADA are not implicated, these behaviors harm students. It’s important not to forget the academic/educational implications of harassment. A successful campus must maintain a certain level of order so that students can remain focused on the academic tasks at hand. “Bullying, mean-spirited teasing, sexual harassment, and victimization are relatively common-place occurrences on school campuses, and these behaviors clearly compete with our schools’ mission of closing the achievement gap.” *RTI and Behavior: A Guide to Integrating Behavioral and Academic Supports*, Jeffrey Sprague, Clayton R. Cook, Diana Browning Wright, and Carol Sadler, LRP Publications (2008) [hereinafter “*RTI & Behavior*”], p. 2. Consequently, attending to these “behavioral concerns” should have a positive impact on the school’s academic performance and AYP.

D. So what should my school do?

ED and the federal courts apply different standards to disability harassment. ED’s standards require more of schools (schools must stop the harassment, and the knowledge standard is higher). For compliance purposes, the conservative position is to comply with the ED standard that will also satisfy your obligations should the school have to defend its practices in federal court. Talk with your school attorney as you seek to comply with these rules.

To make a determination regarding the student's disability harassment allegation, OCR considers the following:

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

Kearney R-I (MO) School District, 111 LRP 24625 (OCR 2010). These materials will focus on satisfying OCR (which should also satisfy the courts), and will address each of the factors in turn.

II. The harassment was based on disability

A. Was it harassment?

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

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

B. Was disability the basis for the harassment?

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

A little commentary: Since the student had not been determined eligible for either 504 or special education at the time of the complaint, the focus of the inquiry was on existing evidence that might demonstrate disability that would create eligibility. Since there was none, the harassment claim was dismissed. *See also, Washington West Supervisory Union #42 (VT)*, 37 IDELR 194 (OCR 2002)(Despite allegations that the student was subjected to choking, interference with his computer use, pushing and tripping, there was no evidence of disability as the motivation. In the author's opinion, the actions were likely triggered by the student's weight.); *Smith v. Guilford Board of Educ.*, 2007 WL 1725512 (2nd Cir. 2007)(Complaint alleged that while the student had ADHD, the bullying was the result of his small stature, not disability).

Possible basis in disability survives summary judgment. The parents of Paul C, a student with an emotional disturbance, sued arguing in part that he was harassed by other students. The parents alleged

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

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

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

A terrifying cross-over problem: Sexual harassment made more likely because of disability.

While not a disability harassment case, *Murrell* provides a sobering lesson with respect to the vulnerability of some disabled students to sexual assault— especially at the hands of other students with disability-enhanced sexual aggression. A female high school student with spastic cerebral palsy was unable to use/control the right side of her body, deaf in one ear, and functioning at the first grade level intellectually and developmentally when she was sexually assaulted numerous times by a male disabled student with a history of sexually inappropriate conduct. The assaults were made possible by inappropriate supervision despite school knowledge of the need to at least watch the male student, and demands by the mother of the female student that she be supervised *because of sexual assaults on her at a previous campus*. Things were made worse by staff instructing the female student to not report the assaults to her parents or to the police, and a pattern of deceptive communications from the school to the parent. The district’s response looks pretty indifferent. Other than trying to hide the assaults, little was done to prevent further attacks. The male student was never punished by the school nor reported to law enforcement. *The female student, however, was suspended* for “behavior which is detrimental to the welfare of other pupils or school personnel.” The Tenth Circuit found that a Title IX claim due to the school’s “response” to the assaults should survive summary judgment. *Murrell v. School District #1, Denver Colorado*, 186 F.3d 1238 (10th Cir. 1999).

Equal opportunity rudeness? A parent alleged that the bus driver harassed the student because of the student’s disability. Specifically, the parent alleged that he driver allowed other students to tease her, and was rude and inattentive. OCR investigated and found that prior to the complaint, the driver was not aware of the teasing. Once the teasing on the bus was brought to the district’s attention by the complainant, it was stopped. On the issue of the driver’s rudeness, OCR found that the bus driver was

rude and inattentive to all students, and not selectively rude and inattentive to the complainant's student. No harassment was found. *Union (OK) Public Schools*, 36 IDELR 74 (OCR 2001).

Should the school assume, at the start of its investigation, that the harassment is because of disability? That was the parent's argument with respect to a series of incidents in the locker room, on the bus and in the hallways, restroom and cafeteria. "The Complainant could not recall if she specifically complained to the District that these incidents were due to the Student's disabilities, but she contends that because of the nature of the Student's disabilities the District should have known that the Student was subjected to the complained of treatment because of his disabilities." The Student was cognitively impaired, and the facts were a mixed-bag. For example, students on the bus called Student names ("retard" and "idiot") which seem to evidence a basis in disability for the actions, while the horseplay in the locker room appears to have involved all of the students, and was not directed at Student in particular. Ultimately, OCR concluded that it was unclear whether all of the allegations were disability related, but the District nevertheless took prompt and appropriate action to address the incidents. *Johannesburg-Lewiston, supra*.

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

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

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

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

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

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

- Several students *continually* remark out loud to other students during class that a student with dyslexia is “retarded” or “deaf and dumb” and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.
- A student *repeatedly* places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates’ ability to enter the classroom.
- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability, with the result that the student tries to avoid school through increased absences.
- A school administrator *repeatedly* denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for taking time off from school for required services related to the students’ disability.
- A professor *repeatedly* belittles and criticizes a student with a disability for using accommodations in class, with the result that the student is so discouraged that she has great difficulty performing in class and learning.
- Students *continually* taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

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

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

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

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

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

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

“A school is responsible for addressing harassment incidents about which it knows or reasonably should have known. **In some situations, harassment may be in plain sight, widespread, or well-known to students and staff**, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. **In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment.** In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.” *DCL 2011*, p. 2.

When does the school have knowledge? In guidance provided to schools on sexual harassment, OCR states that the school has knowledge of harassment when “a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment. A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.” *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*, (OCR January 2001), p. 13.

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

When aides know. An interesting subplot in the *T.K.* case was the testimony of the student’s aides (the two alternated working with her every other day) with respect to the “constant negative interaction” with peers, peers physically pushing her away, tripping her, and avoiding pencils and other objects that the student had touched. One aide described the situation as a “hostile environment” and indicated she was simply focused on “just trying to get [the student] by each day.” When an aide tried to bring incidents of bullying to the attention of teachers, she was ignored. When she tried to

discuss a particular incident with the principal, she was turned away and told there was no time for a meeting. The school had no written incident reports of bullying involving the student. “This lack of records is significant because it raises questions about whether the school was actually on notice, or if it was, whether it was deliberately indifferent.” Despite the school’s utter lack of documentation of the numerous incidents of alleged harassment experienced by the student, the school did have “several reports where the school alleges [the student] was the aggressor[.]”

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

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

In short, the district has to know about the harassment and the harassment has to occur because of disability. The parents of a student with a physical disability alleged that he was subjected to repeated verbal harassment from classmates over a period of three weeks. The alleged statements were not made in the presence of faculty or staff, nor were complaints made regarding disability harassment. When complaints were eventually made to the principal and counselor, an investigation ensued, but no proof was found to support the allegations. OCR found no violation as the evidence was unclear as to what was complained about to the district. OCR concluded that the student was subjected to verbal abuse, but it could not determine whether the abuse was motivated by disability (or some other reason). Consequently, OCR could not then determine whether the district took adequate steps in response to the harassment. *Willamina (OR) Sch. Dist., 30-J 27, IDELR 221 (OCR 1997).*

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

B. The Duty to Investigate

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

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

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

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

The school must investigate complaints, allegations, rumors.... “When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school’s investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. **In all cases, however, the inquiry should be prompt, thorough, and impartial.**” *DCL 2011*, p. 2.

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

Look to the conduct to determine whether this is harassment, not the language or label used in the complaint. “The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.” *DCL 2011*, p. 3.

What if the student didn’t use the school’s form to complain? Throughout his seventh grade year, a student with cognitive impairments impacting his verbal and nonverbal communication skills and

interfering with his ability to read, respond, and navigate through appropriate social interactions complained of harassment by peers. He repeatedly told his guidance counselor that a group of students teased him about his SPED class (the “rubber room”), and called him names like “retarded,” “moron,” and “stupid.” He identified the harassers as a group of school athletes. While the guidance counselor tried to help the Student work through the problem, she did not report it. The school used “Person-to-Person” forms on which students, staff and teachers were to report inappropriate behavior including harassment. “OCR learned from multiple sources that the Student himself was reluctant to report incidents. The Guidance Counselor told OCR that the Student was reluctant to fill out incident report forms; she noted that he did not want to tattle on other students and he felt that ‘nothing was ever done’ when he did report.” OCR found that a filed Person-to-Person form resulted in a prompt investigation by the Intervention Specialist. Unfortunately, the form was not often filed for this Student. Instead, the counselor worked with the Student on snappy comebacks or responses to the harassers, which the Student did not appear to understand or have the skills to use effectively. OCR found that staff relied on the Student to file a report even though he struggled to do so because of disability and even though staff knew of the incidents. Consequently, the school “did not investigate many of the incidents of which other staff were aware or consider whether the events, as a whole, created a hostile environment based on disability.” OCR found the school’s response to harassment inadequate. *Williamston (MI) Community Schools*, 56 IDELR 22 (OCR 2010).

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

“If an investigation reveals that discriminatory harassment has occurred, **a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.** These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.” *DCL 2010*, p. 2 (emphasis added).

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

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

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

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

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

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

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

B. School action with respect to the harasser.

1. Discipline the harasser.

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

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

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

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

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

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

Don't stop responding after disciplining the harasser. "When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying." *DCL 2010, p. 3.*

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

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

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

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

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

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

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

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

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

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

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

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

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

C. School action with respect to the target.

1. Separate the targeted student and harasser. Where the targeted student is concerned about continued contact with the harasser, it is not uncommon for the school to consider a change of classes or perhaps even a transfer to another school. In making these decisions, OCR warns "not to penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (e.g., not requiring the target to change his or her class schedule)." *DCL 2010*, p. 3. Of course, where the targeted student and his/her parents prefer a fresh start on a new campus, the move would not be considered a penalty.

2. Provide additional services to the targeted student. "A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment." *DCL 2010*, p. 3. A few examples of additional services provided in response to harassment:

- School provided student with additional supervision to watch for future incidents. *M.P. v. Independent School District #721*, 2002 U.S. Dist. LEXIS 9053 (D.C. Minn. 2002).
- School provided Student with a resource class one period per day to teach coping skills and other strategies. *Patterson, supra*. (Oddly, there was no LRE analysis with respect to this provision of services).
- School provided student with a "safety plan" including an aide to assist her throughout the day, including transition times and before school, additional monitoring of the student by both campus security and behavioral staff, a security escort into and out of the building, and changes to student's class schedule so that harassers did not attend class with her. *District of Columbia Public Schools*, 111 LRP 26020 (SEA D.C. 2011).
- School investigated strategies used at other schools to prevent exposure to peanuts, and adopted new policies to prevent exposure, including allowing student to eat in a conference room with friends while a plan was put into place. In addition, the principal talked with student's teacher about steps to keep student from sitting next to a cold lunch student (who

might have peanut products in a lunch brought from home) *Kearney R-I (MO) School District*, 111 LRP 24625 (OCR 2010).

- IEP Team amended the IEP to include a goal for self-advocacy. *Santa Monica-Malibu (CA) Unified School District*, 55 IDELR 208 (OCR 2010).
- Should the harassment result in absences or other loss of instructional services, compensatory services should also be considered by the IEP Team or Section 504 Committee as appropriate.

3. Check back with targeted student and family. “At a minimum, the school’s responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.” *DCL 2010*, p. 3.

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

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

“In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond.” *DCL 2010*, p. 3.

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

Teach students, staff and parents about how to identify and report harassment. Folks are far more likely to report harassment if they know it when they see it. When students and staff are informed about what to look for, and understand how and why they should report what they see, the school creates a strong network of eyes and ears that can help the school discover incidents quickly and respond with greater precision. *See, for example, Blanchard (OK) Public Schools*, 35 IDELR 12 (OCR 2000)(In this mixed Title IX/disability harassment case, the district agreed to take corrective action with OCR. The district agreed to continue to publish and disseminate the grievance procedure to all students and staff, to identify the person responsible for taking and investigating complaints, time lines for each step of the process, and provisions for prompt, thorough and impartial investigations and hearings); *See also, Hamilton (MO) R-II School District*, 37 IDELR 76 (OCR 2002)(District agrees to develop and disseminate a harassment policy to students, faculty and staff, review the policy with those groups, explain the range of consequences to students for harassment and take other appropriate steps to prevent recurrence of harassment.); *Greenport (NY) Union Free School District*, 50 IDELR 290 (OCR 2008)(School agrees to adopt and publish a grievance procedure to ensure the prompt and equitable resolution of disability discrimination complaints).

Update and publicize policies. “An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report

allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.” *DCL 2010, p. 3.*

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

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

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

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

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

E. School action when parents are the harassers.

In the past, school efforts to accommodate and serve students with disabilities seemed complicated primarily by logistics and the need to convince the occasional reluctant school employee to comply. Unfortunately, an increasingly difficult problem arises when a student’s Section 504 plan or IEP requires the cooperation and support of his nondisabled peers and their parents. While the required cooperation is often (thankfully) given freely, a growing body of case law reflects a backlash: anger and advocacy by the parents of nondisabled students objecting to accommodations or services for others. At times, the backlash is in response to things that seem overly intrusive in the lives of the nondisabled population (limits on what foods can be brought to school, requests that certain scents or perfumes not be used) or seem excessive (hosing down a road in front of a school after a horse passes by) or because

the accommodation or service is perceived as creating an unfair advantage. A few cases provide a feel for this problem.

When other parents are angry that a student with a disability will be the valedictorian. *Hornstine v. Township of Moorestown*, 39 IDELR 64 (D.C. N.J. 2003). The student, a senior at the time of the dispute, suffered “substantial fatigue” from an unspecified physical impairment. She was unable to attend school for a full day, and was provided, by IEP, “a hybrid program that allows her to attend morning classes and receive the remainder of her instruction at home.” Under this hybrid approach, she took many honors classes with weighted grades, and was poised to be the class valedictorian until community unrest about her “unfair advantage” together with a new superintendent resulted in a proposed policy change (which would apply retroactively) under which the school board would have discretion to name multiple valedictorians or could award the honor to someone other than the student with disability.

The main push for the policy change seems to have been made by the new superintendent, apparently in response to “‘parents, students and other community members’ expressing concern that ‘students were not provided equal opportunities to earn awards because Plaintiff was granted ‘accommodations in a disparate manner.’” In response to the pressure, the superintendent appears to have embarked on an investigation into the student’s disability, accommodations and academic record in order to document the unfairness. Complaints included allegations that she had access to more AP courses due to home instruction, was able to get higher grades in classes than students attending the high school, and that home instructors did not grade as harshly as the faculty at school. Each example raised by the school was addressed head-on by the district court, giving the impression that the allegations were an after-thought invented once the outrage was already burning. For example,

“Plaintiff’s IEP specifically states that ‘standard grading practices will apply’ and ‘grading in Home Instruction classes will be determined by the Home Instructor in conjunction with the regular class teachers.’ In fact, in one of plaintiff’s home instruction courses, AP Calculus, she was required to take chapter tests graded by her home instructor as well as the same mid-term exam as her non-disabled classmates, graded by the in-school instructor. Plaintiff received an A+ on the in-school exam, and an A average on her home instructor’s tests. Her home instructor stated in a certification that ‘[i]n retrospect, perhaps my grading is actually more rigorous than the school’s own’ grading.” (*internal citations omitted*).

The hybrid program resulted in Plaintiff not being able to take AP Biology at home (as she could not complete the lab component) nor Honors National Government (no suitable home instructor was available) resulting in her taking unweighted courses instead. Student wins, and the new valedictorian policy is rejected by the court.

A little commentary: Interestingly, the school never disputed the student’s impairment and its impact on school attendance and resulting need for a hybrid program (in fact, its own doctor agreed that full-time attendance was inappropriate based on her condition). Instead, administration and the board seems to have been swept up in the controversy rather than standing up to it. Says the court,

“In summary, it appears that Superintendent Kadri and the Board initially attempted to appease the interests of some parents and students in the school community by reviewing plaintiff’s academic history to confirm that she had fairly earned the valedictorian award. In so doing, however, defendants adopted the assumption that somehow plaintiff’s disability and accommodations have given her an academic advantage over other students. **They have lost sight of the fact that plaintiff, unlike her peers, suffers from a debilitating medical condition, which has never been disputed by the Board, and that her accommodations were aimed at putting her on a level playing field with her healthy classmates.** Defendants should revel in the success of their IDEA program and the academic star it has produced; instead they seek to diminish the honor that she has

rightly earned. Regrettably, this issue has polarized the graduating class and the community--most of whom are uninformed about the facts and the law. In light of that, I want to make clear that the evidence in this case has shown that Ms. Hornstine earned her distinction as the top student in her class in spite of, not because of, her disability.”

When other parents protest accommodations and refuse to cooperate. *Smith v. Tangipahoa Parish School Board*, 46 IDELR 282 (E.D. LA 2006). The principal of a Louisiana school found enforcement of a ban on horses (due to a student’s allergy to horse hair) difficult to enforce. In an effort to enforce the campus-wide ban on horses, the principal ‘called a deputy in to help and personally stood in the roadway to attempt to stop the horses from proceeding,’ but that ‘[t]he parents refused to stop and proceeded down the road, and the deputy had to pull [the principal] out of the way.’” Further, in response to the campus administration’s decision to cancel their reward to the students for good attendance during test week (both the principal and assistant principal promised to ride their horses to school), a campus parent passed out flyers urging them to reconsider. “In the flyer, she urged all parents to contact Browning and members of the school board and voice their support for Browning and the vice principal's decision to ride horses to school on March 24. Although the flyer did not identify Plaintiffs or any of their children by name, the flyer stated that there was a child allergic to horse hair who threatened cancellation of the event and noted that ‘[t]his same parent caused our students to miss out on a beautifully decorated Library during Book Fair about 2 years ago, when the theme was western, and saddles, etc. had to be removed for ONE child.’” That flyer, together with vandalism of the student’s home, and group of citizens in a car yelling “horse hater’ to the child’s parent were characterized as retaliation by the school, despite the fact that there was no evidence that the school in anyway encouraged or promoted these activities.

“Even assuming, for present purposes, that both Defendants and Fairburn are responsible for the flyer, the information contained in the flyer is not an adverse act or an attempt to incite adverse action.... The flyer did not adversely affect the status of C.R.S. as a student and did not incite people to do anything directly or indirectly to C.R.S. or Plaintiffs. Contrary to the Plaintiffs' characterization, the flyer asked only that people contact Browning and Members of the Board to voice their support for permitting Browning and the vice-principal to ride horses to campus on March 24. The flyer also did not entirely oppose Plaintiffs’ advocacy efforts and even acknowledged that a child should receive reasonable accommodations because of his or her allergies. Even if the flyer criticized Plaintiffs for making unreasonable demands, that criticism is not the same as encouraging people to verbally or otherwise attack Plaintiffs and, in and of itself, such criticism is not an adverse act.... Based on the undisputed evidence presented, the Court finds that Plaintiffs have failed to establish a case of retaliation as a matter of law. ‘[M]inor annoyances do not make a federal case.’ *Doe v. SEPTA*, 72 F.3d 1133, 1137 (3rd Cir. 1995). Plaintiffs present no proof that Defendants and Fairburn actively sought or attempted to incite the more serious acts committed by members of the community. In fact, the evidence indicates otherwise. Defendants are not liable for actions not caused by them.”

When other parents ask a lot of questions, is it disability harassment? *Pacific Grove (CA) Unified School District*, 47 IDELR 138 (OCR 2006). Parents of students in a third grade class complained and questioned the efforts of the school to accommodate a classmate with a life-threatening allergy to nuts. The student qualified for special education as Other Health Impaired. On a daily basis, the school vacuumed classroom carpet, washed all classroom desks, required hand-washing by anyone entering the room and maintained the classroom food-free. Parents and students asked a lot of questions about the accommodations and why things were occurring. Generally, the tone was not hostile, although the parent of the student with allergies reported hostile looks, and “3rd grade parents unnecessarily calling her and being rude.”

“In order for the classroom program to work effectively and result in a reasonably safe environment for the Student, the voluntary cooperation of other students and their parents was essential. Part of this process was an on-going dialogue and informational process. The other participants were being asked to alter their customary behavior in ways that were novel and restrictive of their personal preferences. It is reasonable that, without animus or a discriminatory purpose, they might question the necessity of the procedures they were being asked to follow.

Much of the behavior identified by the complainants represents reasonable inquiries on the part of parents and their children who were participants in the classroom to which Student was assigned. In many cases, the questioning by parents and students were made to Student's mother and her aide. It appears that this was done to avoid questioning the Student directly, in most cases.

The evidence shows that the District took reasonable steps to inform the affected students and their families as to the nature of the modifications to their educational environment and to explain the necessity for the changes. When it appeared that additional information was required, the District provided forums to supply information, in a manner consistent with the voluntary nature of public education and the District's legal obligations under Title II and Section 504.”

These inquiries and communications from parents were not harassment.

Bottom line: How does the school respond if the harasser or bully is a parent? For some §504 accommodations or elements of IEPs to work, a base level of cooperation by other nondisabled students and their parents is required. Schools must seek to achieve this cooperation through FERPA-appropriate communications with the school community. Where opposition is vocal, schools should be especially wary so as not to support efforts to frustrate required accommodations or services. For the school to avoid responsibility for the acts hostile to accommodation or service, school employees and policy cannot be seen as supporting or encouraging the hostility. Further, disability harassment rules require the school to take action reasonably calculated to stop actions by students or parents that jeopardize the delivery of FAPE under §504 or IDEA.

VI. Some interesting disability harassment cases

A. Harassment as evidence of need for a private placement?

Private placement denied as public school could provide FAPE if it consistently implemented a safety plan. “Petitioner does have a right to insist on DCPS’ compliance with the individual safety plan, which (inter alia) dictates certain actions by a dedicated aide required under the IEP. A consistent failure to follow this plan may well give rise to a denial of FAPE (in the form of an inappropriate educational environment and/or a failure to implement the dedicated-aide provisions of the IEP), which could be presented in a future due process complaint. Thus, DCPS would be well advised to investigate any and all circumstances suggesting any departure from the safety plan, and to enforce strictly the terms of such plan, for the remainder of this school year.” *District of Columbia Public Schools*, 111 LRP 26020 (SEA D.C. 2011).

A little commentary: The parents had sought a publically funded private placement due to negative impact of harassment on the student’s educational progress. The hearing officer opined “While Petitioner’s desire to place the Student in a ‘more supportive and less chaotic learning environment’ is understandable—and she may well perform better in that environment—DCPS is not required to place the Student in the best possible program.”

FAPE does not demand the total elimination of bullying or harassment. “J.E. may face bullying, but a fair appropriate public education does not require that the District be able to prove that a student

will not face future bullying at a placement, as that is impossible.” *J.E. v. Boyertown Area School District*, 56 IDELR 38 (E.D. Pa. 2011).

A little commentary: The conclusion is helpful, but the court’s inaccuracy as to FAPE (*fair appropriate...*) is a little disconcerting. Here, the student had not been subjected to harassment, and the parents’ concerns were determined to be entirely prospective. “That the Mother heard students discussing bullying is an insufficient basis for her to determine that J.E. would be bullied at BAHS—rather, both Parents would always be dissatisfied with the District’s offers so long as the offer included placing J.E. at BAHS.”

Disability Harassment can violate FAPE. As recognized in *T.K v. New York City Department of Education*, *supra*, a few Circuit Courts of Appeals have at least recognized the possibility of FAPE violations arising from harassment. *See, for example, M.L. v. Federal Way School District*, 105 LRP 13966, 394 F.3d 634 (9th Cir. 2005); *Shore Regional High School Bd. of Ed v. P.S.*, 41 IDELR 234, 381 F.3d 194 (3rd Cir. 2004); *Charlie F. v. Bd. of Educ.*, 24 IDELR 1039, 98 F.3d 989 (7th Cir. 1996).

B. Parents may characterize legitimate school actions with which they disagree as harassment.

School’s refusal to remove the BIP from an IEP is disability harassment? No. “Disability harassment only occurs when there is harassing conduct that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of the individual to participate in or benefit from the services, activities or privileges provided.” The complainant reported that the student was currently attending sixth grade, was not experiencing any medical symptoms due to his disability, and that the sixth grade teachers had not reported any behavior issues different from other sixth graders. Nevertheless, the student remained on a behavior intervention plan. OCR concluded that keeping the child on a BIP as required by the student’s IEP was not harassment, and the complaint was dismissed. *Washington County (TN) School District*, 36 IDELR 164 (OCR 2001).

A little commentary: It doesn’t take much conjecture to lay out the opposing argument, likely presented by the school: the fact that behaviors are no longer a problem is pretty good evidence that something, perhaps the BIP, is working. Since that BIP keeps the behaviors under control and the student in his IEP-created placement, the absence of the BIP would be a problem, not its continued use.

A recommendation for expulsion is disability harassment? Conceivably, but not this time. The student was arrested for Facebook communications indicating that he was threatening to bring a gun to school, kill himself and take others with him. The principal initiated an action to expel the student. The parent alleges that the school’s action is disability harassment. OCR indicates that a decision to discipline a student could constitute disability harassment. “However there must be evidence that the decision was in fact based on disability, e.g., evidence that the student was treated differently than similarly situated students without disabilities.” While threats made by other students did not generate the same recommendation, OCR identified key differences justifying the discipline of this student: the mention of a gun and the threat to the student population. Threats by the other students did not include those aggravating elements. In fact, in the other three cases, there was no threat of harm to multiple students and no mention of a weapon. Further, at the time of the incident, the student was not identified as a student with a disability.” No harassment was found. *Greenville (SC) County School District*, 111 LRP 6792 (OCR 2010).

A little commentary: A problematic piece of this letter of finding is that within weeks of the student’s expulsion hearing, he was determined special education eligible (although the impairment and eligibility category is not disclosed in the letter). One wonders how a student can go from not eligible to eligible in such a short time—put simply, did the school fail to child find and timely evaluate prior to the recommendation for expulsion? There is no such finding here, but the timing is interesting. *See discussion of Citrus County, supra, for the timing analysis that appears to be missing here.*

Harassment as causation for truancy and tardies? Conceivably, but not this time. While harassment can certainly result in a student's unwillingness to attend school, such was not the case here. Timing was a key ingredient missing in determining the link between the attendance troubles and harassment. "The attendance problems were occurring at a high rate from the beginning of the year, well before February, when the altercations emerged as a serious educational issue. Thus, the record does not support the idea that the altercations and bullying led to the attendance problems." *Harrisburg City School District*, 55 IDELR 149 (SEA PA. 2010). *See also, Williamson County (TN) School District*, 35 IDELR 97 (OCR 2000)(District policy required that the student provide a note from his physician to be excused from school for an eight-day absence. The student did not provide the required note. The student was on an "excessive absence list" from the previous school year. Pursuant to policy, the student was referred to the juvenile court and a truancy officer was sent to the student's home. OCR found no harassment, but instead, compliance with the school's state law duties to enforce compulsory attendance.).

C. Educators say and do the stupidest things, but is that disability harassment?

Off-hand comments and thoughtless actions by school staff anger parents, and can result in allegations of disability harassment. Even if the educator and school ultimately prevail, a lot of time and money and sleep is lost in the process. A few examples:

Nothing positive to say? The complainant alleged that the teacher, during a parent-teacher conference, said to the student as the parent looked on, "you haven't learned anything." During the same meeting, when the complainant commented on the lack of positive teacher comments about the student, the teacher allegedly said "I don't see anything positive." The teacher denied the comments. OCR determined that there was no violation due to the conflicting testimony and the lack of evidence to support the allegations. *New York City (NY) Board of Education*, 36 IDELR 190 (OCR 2001).

You're not bright enough to write this kind of story. In response to a classroom assignment, a student with a disability alleged that he quickly completed the required work. After reading the story, the teacher allegedly declared in front of the class that the student had copied it from a book, and that he did not have the intelligence to write such a story. The student further alleged that he was denied credit for the paper. The teacher's recollection was vastly different. Not only did the student not turn the work in quickly, he delayed for over a month. After submission of the story, the teacher read it, told the student it was well-written, and privately asked the student if the work was his own. The teacher denied any disparaging remarks. Since the student had not supplied a rough draft of the assignment, he was initially denied credit until a draft was eventually submitted. Since OCR could not corroborate the student's story, and credit was in fact given, no harassment was found. *El Dorado (CA) Union High School District*, 37 IDELR 78 (OCR 2002).

A few dumb comments not enough. A teacher's alleged comments regarding the student's eating needs and habits ("What kind of weird kid is she?") and behavior management (She gets two tries, and then we put her in the Rifkin chair!") were not actionable. With respect to the first statement, OCR concluded that if it were made, it was inappropriate, a poor choice of words, and maybe even offensive to the complainant, but not harassment. The second statement was likewise not hostile, intimidating, abusive, degrading or threatening. The statement about the potential use of the Rifkin chair does not rise to the level of harassment. *Yuma (AZ) School District One*, 35 IDELR 258 (OCR 2001).

The band director. The Eighth Circuit found that a student who had been served in special education was not a student with a record of a disability for purposes of Section 504 (WRONG, *see Letter to Mentink, supra*), and thus was not protected by the anti-discrimination provisions of 504. As a result, her band director (and school) escape liability for some truly unprofessional activity. For

approximately every day for a month, the director told the student, in front of other students, that she was retarded, stupid, and needed to go to a school where retarded people are taught. During one such tirade, again, in front of the class, the band director threw the student's notebook at her, hitting her in the face. Her performance at school declined and she began to experience major depression. To fix the problem, the school transferred her from the band class to another music class... *taught by the same band director*. While the panel ruled that she was not eligible for Section 504 protection (and thus no discriminatory conduct had occurred), the dissent argued that the band director should be on the hook for intentional infliction of emotional distress under state law. *Costello v. Mitchell Public School District #79*, 266 F.3d 916 (8th Cir. 2001).

A little commentary: Doesn't the throwing of the notebook sound strikingly similar to the example provided by ED of one-time behavior that creates a hostile environment? Note that at the time of the decision, "retarded" was used to describe what we now refer to as intellectual disability. The term is used here as in the recorded case.

A related FERPA issue. A parent alleged that in frustration over the student's behavior, the teacher had made inappropriate comments about the student in front of the class. While the comments were made under her breath, and the exact words were uncertain (probably to the teacher's advantage), the comments included "I don't care if he is disabled... it's his problem and not mine, and I don't have to deal with it." The Family Policy Compliance Office (FPCO) found that no exception to the parental consent requirement fit this disclosure. FERPA was violated and the school was required to provide a letter of assurances that the problem would not recur. *School Administrative District #75 (ME)*, 31 IDELR 222 (FPCO 1998).

Bottom line on the employee as harasser. That the harassment is perpetrated by a school employee doesn't change the need to take action to remedy the damage and stop the harassment. With respect to the targeted student, it may mean limiting or preventing outright the employee's further contact with the student (the *Costello* case provides a good example of what *not* to do). With respect to action against the employee, rather than the Code of Student Conduct, state and local employment rules and ethical standards will provide possible avenues of punishment and remediation. As with student harassers, reprimands and additional training may be appropriate at first, but should harassment continue, more serious interventions and employment sanctions will be required.

What about a school volunteer as a harasser? The analysis only changes with respect to the control the school has over the volunteer. The school will lack the authority to discipline the volunteer as it would a student committing the harassment, or take employment action as it would for an employee committing the harassment. For minor infractions, the volunteer could be reminded of the proper conduct required to serve at the school. For persistent conduct, in the absence of a contractual or other right to volunteer recognized in state law or local policy, the school could simply deny the harasser access to the campus for volunteer activities or restrict the volunteer to activities where there is no exposure to students. These actions are in addition to those necessary to remedy the situation with the student and the school environment as discussed previously. Note that the possibility of harassing conduct by school volunteers should result in training prior to working with students. Schools should consider providing volunteers with instruction on conduct with students, in addition to any other training (like FERPA training) provided to volunteers who will work with students.

D. What if a service animal is harassed? Is that considered disability harassment?

Unfortunately, harassment is not limited to individuals with disabilities. It can also be directed at service animals assisting students with disabilities. In such a situation, the school should be wary of taking action to exclude the service animal for conduct triggered by harassment. The Department of Justice (DOJ) provides the following counsel in its commentary to the ADA service animal regulations:

“The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that **there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched.** While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. **In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public entity must give the handler a reasonable opportunity to gain control of the animal.** Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public entity otherwise has reason to suspect that provocation or injury has occurred, the public entity should seek to determine the facts and, **if provocation or injury occurred, the public entity should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the public entity.** This language is unchanged in the final rule.” Federal Register, Vol. 75, No. 178 (September 15, 2010), p. 56197 [*emphasis added*].

A little commentary: Perhaps an easy way to remember this rule is to treat the service animal as an extension of the individual with disability, and apply the rules of disability harassment. If the animal (necessary either for FAPE or for equal access by the individual with disability) is impeded from performing its necessary functions or is “baited” to lose control, the school has a duty to take action reasonably calculated to stop the harassment. Such action may include discipline or other appropriate response with respect to the harassers, and careful thought and review of the animal’s response to the provocation. This view is consistent with some analysis provided in an early service animal case from California. The court was critical of the school’s attempt “to distinguish between plaintiff and her service dog for purposes of admission to the school premises.” Such a distinction, said the court, “cannot be reconciled with either the letter or the spirit of the Rehabilitation Act.”

“In the matter at bar, plaintiff has chosen to use a service dog to increase her physical independence and to decrease her need to rely on others to perform tasks that are beyond her own physical capacity. The choice to employ a service dog for these purposes is akin to choosing to use a wheelchair to increase her mobility rather than a pair of crutches. By excluding her service dog, defendants have asked plaintiff to assume a different persona while she attends school, i.e., the persona of a disabled person without a service dog. In this basic sense, the effect of defendants’ decision to deny entrance to the service dog is to exclude the person who exists everywhere but in school, i.e., a disabled person with a service dog, from participation in the educational program as well.” *Sullivan v. West Vallejo City Unified School District*, 731 F. Supp. 947 (E.D. Cal. 1990).