BULLYING AND SPECIAL EDUCATION STUDENTS: HOW TO AVOID LIABILITY AND PREVENT HARASSMENT

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The Law Office of Melinda Jacobs
1229 Westbury Road
Knoxville, TN 37922
Phone: 865-604-6340
Facsimile: 865-539-6159
Email: melindajacobslaw@aol.com
Web Site: www.melindajacobslaw.com

I. INTRODUCTION

Bullying is the most common form of violence in American schools. The 2009 Youth Risk Behavior Surveillance System (Centers for Disease Control and Prevention) indicates that, nationwide, 20% of students in grades 9-12 were victims of bullying. The 2008-20009 school Crime Supplement (National Center for Education Statistics and Bureau of Justice Statistics) indicates that, nationwide, 28% of students in grades 6–12 experienced bullying. Source: StopBullying.gov. According to the web site, Bully Police USA (www.bullypolice.org), since 1999 a total of forty-nine (49) states have enacted anti-bullying laws. As of the date of writing this outline, only Montana had passed no anti-bullying legislation. Clearly, this issue has become a "front-burner" legal concern for public school administrators and teachers, and for parents and students. Making matters even more crucial for the field of special education, students with disabilities are often involved with school bullying, either as victims or the initiators of bullying. This presentation is developed primarily for school administrators, special education officials, and teachers, and focuses on the legal issues surrounding this difficult issue.

II. WHAT IS BULLYING?

a. Types of Bullying

1. **Verbal Acts (name calling, teasing, shaming)**
2. **Graphic and written statements (which may include cyber-bullying).**
3. **Physical bullying.**
4. **Emotional bullying**
5. **Destruction of Property**
6. **Unauthorized release of confidential information.**

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

A "**hostile environment**" is created when conduct is "sufficiently severe, pervasive, or persistent to as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."

c. **Dear Colleague Letter, 111 LRP 45106 (OCR 2000).** Intimidation or abusive behavior toward a student based on disability may constitute "bullying" or disability harassment under Section 504 and/or Title II of the ADA.

d. **Toltec (AZ) Elementary School Dist., 52 IDELR 22 (OCR 2008).** Teasing a student about her clothes did not constitute "disability harassment" under Section 504/Title II because the bullying was unrelated to her impairment.

e. **Gaston County (NC) Schs., 44 IDELR 98 (OCR 2005).** Illegal "disability harassment" under Section 504 and Title II is defined as intimidating or abusive behavior or comments toward a person that are solely based on the person's disability, and that create a "hostile environment" by interfering with or denying that person's participation in or receipt of benefits, services, or opportunities. Disability harassment may include verbal abuse/name-calling, posting of abusive statements/images on-line, and/or physical actions that are threatening, harmful, or humiliating.

III. Bullying as a Violation of Civil Rights

1. *School officials were "deliberately indifferent" to "severe, pervasive, and objectively offensive" sexual harassment of a fifth-grade girl that effectively barred the girl's access to an educational opportunity.*

Davis v. Monroe County Bd. Of Education, 526 U.S. 629, 103 LRP 20059 (1999). The Davis case is the leading case on bullying in schools, and was based on the alleged sexual harassment of a fifth-grade public school student. The girl's mother filed a lawsuit seeking monetary and injunctive relief under Title IX of the Education Amendments of 1972. The Supreme Court held that a private right of action exists against a school board for student-on-student harassment only where (1) the school agency is "deliberately indifferent" to known acts of harassment, and (2) the harassment is "so severe, pervasive, and objectively offensive" that it effectively bars the victim's access to an educational opportunity or benefit.

To determine liability, the Court devised a five-part test:

(1) The student has been identified as a member of a protected class (i.e., disability);

(2) The student was harassed based on his/her disability;

(3) The harassment was sufficiently severe or pervasive that it interfered with the student's education and created a hostile environment;

(4) The school knew of the harassment; and

(5) The school was deliberately indifferent to the harassment.

2. *School districts may have a greater duty to prevent bullying and harassment of students with disabilities.*

K.M. ex rel. D.G. v. Hyde Park Central Sch. Dist., 44 IDELR 37 (S.D.N.Y. 2005). The mother of a thirteen-year-old boy with Pervasive Developmental Disorder (PDD-NOS and normal intelligence) and dyslexia sued the school district alleging that district officials were deliberately indifferent to repeated peer harassment of her son. The mother alleged that her son was repeatedly called "idiot," "retard," and other disability-related epithets, and was repeatedly physically abused by other students at school and on the bus. She claimed that she was attempted on multiple occasions to meet with school officials and discuss her concerns, but that no action was taken to stop the harassment of her son. Finally, the student became depressed and was diagnosed with suicidal ideations, and was withdrawn from public school and home-schooled for the remainder of the school year. The court refused to dismiss the claims, finding that the school district could be liable for its alleged failure to react to harassment severe enough to deny the student equal access to an educational opportunity. The court also noted that the district may have a greater duty to protect a disabled student from harassment that it owed to general education students. "Such a student…probably is not on equal footing to defend himself against harassment from his more able peers, leaving him vulnerable to abuse that the District should have anticipated and worked harder to prevent."

Estate of Lance v. Lewisville Indep. Sch. Dist., 57 IDELR 168 (E.D. Texas 2011). A nine-year-old boy with an emotional disturbance, speech/language impairment, and Asperger Syndrome was involved in several altercations with peers at school. The boy was caught with a "small pen knife" during one of these altercations, and was subsequently placed at the alternative school as punishment. Despite having made several suicidal threats and locking himself in a school bathroom, the student was allowed to use the same bathroom unsupervised. He hung himself in the school bathroom, and his parents filed a lawsuit seeking money damages. The court refused to dismiss the parents' claims, holding that the evidence supported a finding of "deliberate indifference." Although normally school districts do not have a duty to protect students from other students, in this case a "special relationship" may have existed due to the child's young age and vulnerability due to his disabilities. The court was especially concerned that the child was punished after being bullied, that the LEA had failed to inform the parents about the child's previous suicide threats at school, and that he had been allowed to use a restroom with a lock that had no key.

3. ***School officials who fail to respond to reports of bullying may be found to have acted with "bad faith" or "gross misjudgment."***

a. **M.P. v. Independent Sch. Dist., 38 IDELR 262 (8th Cir. 2003).** The mother of a sixteen-year-old boy diagnosed with schizophrenia (ED) alleged that the school district failed to respond to her weekly calls to report disability-based harassment of her son. The court held that a reasonable jury could find that the school district acted in "bad faith" or "with gross misjudgment" in failing to respond to and prevent the bullying.

b. **Silano v. Board of Educ. of the City of Bridgeport, 54 IDELR 199 (Conn. Sup. Ct. 2010).** The parents of a high school student with intellectual disabilities were unable to prove that school officials maliciously intended to harm their son by failing to protect him from school bullies. The student was allegedly subjected to repeated harassment, threats, and physical abuse at school, and had been served with homebound educational services for two years as a result.

c. **J.B. v. Mead Sch. Dist. No. 354, 55 IDELR 250 (E.D. Wash. 2010).** A high school sophomore student with Asperger's Syndrome was repeatedly subjected to physical and sexual abuse by two female classmates in unsupervised areas of the campus. However, the school district was not liable for money damages for a Title IX violation. The evidence failed to prove that administrators were aware of the ongoing abuse. Once the abuse was discovered, school administrators responded reasonably by conducting an investigation, disciplining the perpetrators, enrolling the perpetrators in separate classes, offering counseling to the victim, and assigning a 1:1 aide to the student.

d. **Patterson v. Hudson Area Schools, 109 LRP 351 (6th Cir. 2009).** A seventh grade student was subjected to daily harassment by his peers due to his perceived sexual orientation. The student testified that he was called "faggot," "gay," "queer," "pig," and "man boobs" more than 200 times during his seventh-grade year. In addition, he was physically assaulted and his possessions vandalized. District officials were aware of the bullying and responded by verbally reprimanding the perpetrators, but the verbal reprimands did not succeed in stopping the harassment. The court found the district liable for damages under Title IX because it continued to use disciplinary methods that it knew were not working and failed to take reasonable actions to stop the bullying.

e. **Nordo v. Sch. Dist. of Philadelphia, 34 IDELR 173 (E.D. Pa. 2001).** A money damages lawsuit was dismissed after the court found that the district and its officials did not act with "willful disregard" or "deliberate indifference" to the ongoing bullying of a young girl with intellectual disabilities. The evidence showed that

the girl had been harassed on the playground by other students after school, but that district officials were unaware of the abuse.

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

IV. When is a School a "Hostile Environment?"

1. ***OCR defines a "hostile environment" as behavior that is so "severe, pervasive, or persistent" that it interferes with or limits a student's educational benefit or access.***

   Dear Colleague Letter, 55 IDELR 174 (OCR 2010). School districts have a duty to respond when disability-based peer harassment creates a "hostile environment." A "hostile environment" is created when conduct is "sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."

2. ***A single incident of bullying may create a "hostile environment."***

   Philadelphia (PA) Sch. Dist., 46 IDELR 169 (OCR 2006). A single incident of bullying can create a "hostile environment" that triggers a district's duty to respond.

   But see, District of Columbia Public Schs., 111 LRP 24663 (SEA DC 2011). A single incident of fighting over a girl did not constitute "bullying" or result in a denial of FAPE.

3. **Broaders v. Polk County Sch. Bd., 111 LRP 46063 (M.D. Fla. 2011).** The parent of a thirteen-year-old student with a learning disability failed to prove that the school district had a "policy or custom" of failing to respond to bullying that led to the assault of her son at school.

4. **Morgan v. Bend-La Pine Sch. Dist., 109 LRP 16574 (D. Or. 2009).** The parent of a student with emotional, social, and communication impairments failed to prove that the placement of

her son in an alternative school where he was allegedly bullied was "deliberately indifferent" to his rights.

V. How Must Schools Respond to Bullying?

1. **Dear Colleague Letter, 55 IDELR 174 (OCR 2010).** A school district has a duty to respond when it "knows or reasonably should have known" about disability-based harassment. An appropriate response may include:

    a. Separating the accused harasser and the victim.

    b. Providing counseling for the victim and/or harasser.

    c. Taking disciplinary action against the harasser.

    d. Providing training or other interventions for the perpetrators and the school community.

    e. Issuing new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment.

2. **Williamston (MI) County Schs., 56 IDELR 22 (OCR 2010).** The fact that a student with cognitive impairments never filed a written complaint against students who regularly called him "retard" and "moron" did not excuse the school district's failure to investigate those incidents when the district officials "knew or should have known" of the harassment.

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

VI. Cyber-Bullying

a. **What is "cyber-bullying?" - Using the Internet or cell phones to post or send malicious, harmful, or damaging information and/or photos to inflict harm or pain on a person(s).**

Kinds of Cyber-bullying:

1. **Flaming** – Online fighting using electronic messages/posts to convey insults, usually with vulgar/offensive language.

2. **Outing** – purposefully exposing a person's secrets against their will and without their permission.

3. **Masquerading** – Pretending to be someone's friend/confidant to gain their trust and get them to share personal information that is passed on to others for the purpose of embarrassing/harassing the victim.

4. **Cyberstalking** – Repeated, malicious online harassment including threats or statements intended to create fear in the recipient.

5. **Sexting** – Sharing pornographic, semi-nude, or otherwise sexually explicit photos via cell phone or Internet for a malicious or embarrassing purpose.

b. Cyber-Bullying and First Amendment Concerns

1. ***Public school students may express their personal and political views in ways that do not "materially and substantially interfere with" the operation of their school.***

Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503 (1969). The U.S. Supreme Court held that school officials violated the First Amendment rights of students who wore black armbands to protest U.S. involvement in the Vietnam War by suspending the students from school. Public school students retain their First Amendment right to freedom of speech and may display or wear symbols indicating their views. School officials may not prohibit these expressions of free speech unless the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

Exceptions to *Tinker*:

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). Court upheld the suspension of a high school student for delivering a nominating speech at a school assembly laced with sexual innuendos that the court described as "elaborate, graphic, and explicit."

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988). A principal's deletion of articles about teen pregnancy from the school newspaper did not violate the First Amendment. The

newspaper was not a "public forum" and therefore its content could be regulated by the school administration.

2. ***Creating a web site to solicit money to hire a hit man to kill your teacher may be punishable.***

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

3. ***Posting an image of your teacher with a gun firing a bullet into his head may be punishable.***

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

4. ***Complaining online about the "douchebags" in the central office may result in your being barred from running for class office.***

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

5. ***Creating a fake web page suggesting that your principal is a sex addict and pedophile may not be punishable.***

J.S. v. Blue Mountain School Dist., 111 LRP 40374 (3rd Cir. 2010), *cert denied,* 112 LRP 3125 (2012). The 3rd Circuit held that a Pennsylvania principal violated a middle-schooler's First Amendment free speech rights when he suspended the student for creating an embarrassing and defamatory online profile of the administrator. Using her home computer, the eighth-grade girl created an "imposter" Internet profile for her principal, including his picture and statements that portrayed the principal as a pedophile and a sex addict. It didn't take long for other students and their parents to become aware of the profile. The profile was traced to the girl and she admitted creating the web page. As a result, she was suspended for two weeks. The student's parents filed a lawsuit challenging her suspension, alleging that the suspension violated the student's First Amendment right to free speech. The student argued that the district had no right to punish her for creating the internet profile because it was "not profane" and it did not cause a substantial disruption at school, as contemplated by the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 US. 503, 107 LRP 7137 (U.S. 1969). Reasoning that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," the District Court dismissed the First Amendment claim. The court, relying on the rationale used in *Bethel School District v. Fraser*, 478 U.S. 675, 103 LRP 22719 (U.S. 1986), held that there was no First Amendment protection for "lewd, vulgar, indecent and plainly offensive speech" in school. On appeal, the 3rd Circuit applied the *Tinker* standard and concluded, "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did." The court noted "the integral events ... case occurred outside the school, during non-school hours." The court was also persuaded by the fact that the profile was made "private" and access was limited to the girl's friends. The appellate court held that the girl could not be punished for the use of profane language outside of school, during non-school hours.

6. ***Creating an on-line "parody profile" of your principal may be considered protected free speech.***

Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 111 LRP 40385 (3rd Cir. 2011). A seventeen-year-old high school student used his grandmother's computer to create a fake MySpace "parody profile" of his principal. The profile provided bogus answers to questions about the principal's favorite shoes, fears, etc.

All of the answers were based on a theme of "big," owing to the fact that the principal is a large man. For example,

"Birthday: too drunk to remember"
"Are you a health freak: big steroid freak"
"In the past month have you smoked: big blunt"
"In the past month have you been on pills: big pills"
"In the past month have you gone Skinny Dipping: big lake, not big dick"
"In the past month have you Stolen Anything: big keg"
"Ever been drunk: big number of times"
"Ever been called a Tease: big whore"
"Ever been Beaten up: big fag"
"Ever Shoplifted: big bag of kmart"
"Number of Drugs I have taken: big"

Under "Interests": Transgender, Appreciators of Alcoholic Beverages"

The principal was able to limit other students' access to the web site at school. His parents "grounded" him, and the student apologized to the principal for creating the offensive page. He was then suspended for ten days, placed at the Alternative Education Program for the remainder of the school year, banned from all extracurricular activities (including Academic Games and Foreign-Language Tutoring), and barred from participating in graduation ceremonies. The student sued alleging violation of his First Amendment rights, and the Court agreed. The school district admitted that the fake MySpace page did not cause a severe disruption in the school, but argued that the student's use of the school district web site to procure the photo of the principal entitled it to impose discipline. The Court held that the student's use of the District's web site to procure a digital photo of the principal did not constitute "entering the school." Therefore, the school could not punish the student for engaging in free speech outside of the schoolhouse.

4. ***Creating a fake web site that bullies another student may be punishable.***

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

Approximately two-dozen classmates joined the group, and several uploaded photos of the targeted girl accompanied by offensive and demeaning comments about her. Kara sued the school district alleging a violation of her First Amendment right to free speech. The Court upheld a grant of summary judgment to the School District, holding that the school officials acted properly by punishing Kara's behavior. The court noted, "Public school officials have a "compelling interest" in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."

The 4th Circuit had to decide if the senior's activity fell within the boundaries of the district's legitimate interest in maintaining order and protecting the wellbeing and educational rights of students. The Supreme Court in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 107 LRP 7137 (1969), held that a district may regulate a student's free speech rights if exercising those rights "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." Here, the court held, the senior's speech caused the interference and disruption described in *Tinker* as being immune from protection. The webpage was a direct verbal attack on a classmate. Administrators must be able to prevent and punish such harassment and bullying to provide a safe environment conducive to learning. The court explained that while the senior "pushed her computer's keys in her home," she had to realize that the response would be "published beyond her home and could reasonably be expected to reach the school or impact the school environment." She also knew the group would include other students, and the repercussions of her speech would be felt at school. Next, the court held the district complied with due process. The senior had sufficient notice from the school handbook and code of conduct that the district prohibited harassment and bullying. She also had an opportunity to be heard when she met with the principal.

VII. BULLYING AND SPECIAL EDUCATION STUDENTS

a. Peer-on-Peer Bullying

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

D.R. v. Middle Bucks Vocational Technical School, 18 IDELR 650 (3rd Cir. 1991). A three-member panel of the court of appeals ruled that the state's compulsory attendance

laws could not be viewed as establishing a custodial relationship between a school and a student to the extent that the school would owe a constitutional duty to protect the student from deprivations of liberty by private actors. Thus, the district court neither erred by dismissing the female students' Section 1983 action for failure to state a cognizable constitutional claim, nor by finding that the school officials were entitled to qualified immunity. Furthermore, the appeals panel concurred with the district court that the female students failed to allege any facts regarding a conspiracy between the school officials and the male students; therefore, the dismissal of the Section 1985 claim had also been proper.

b. Denials of FAPE Caused by Bullying

1. ***Bullying at school can result in denial of a "free appropriate public education."***

   Dear Colleague Letter, 111 LRP 45106 (OCR 2000). Bullying can create a denial of a "free appropriate public education (FAPE)."

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

3. **T.B. v. Waynesboro Area Sch. Dist., 56 IDELR 104 (M.D. Pa. 2011).** The parents of a middle school student diagnosed Asperger's Syndrome sought reimbursement for their son's private placement. The parents alleged that the boy was subjected to routine bullying at school due to his disability and was denied FAPE. However, the evidence showed that the student made above-average grades, had social interactions with peers, and was excited about entering high school. Also, the district made "good-faith" offers of services designed to lessen the potential for bullying, including social skills training and an adult escort to classes.

4. **M.Y. v. Grand River Academy, 54 IDELR 255 (N.D. Ohio 2010).** A private high school allegedly supported the bullying and

harassment of a teen with Asperger's Syndrome and may be liable for money damages. The headmaster of the school reported told the parents of the student that his was the school's policy to "look the other way" at hazing activities directed at underclassmen.

5. **Harrisburg (PA) City School Dist., 55 IDELR 149 (SEA PA 2010).** The parent of an eleven-year-old student with learning disabilities failed to prove that bullying was the cause of her son's lack of educational progress. The student had been involved in several altercations at school, both as victim and participant.

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

7. **Shea v. Union Free Sch. Dist. of Massapequa, 110 LRP 31681 (N.Y. Sup.Ct. 2009).** Parents of a teenage girl alleged that the district's failure to stop ongoing bullying during middle and high school resulted in their daughter's emotional disabilities (PTSD, agoraphobia) and "substantially limited" her ability to function in a classroom setting. The court denied the district's motion for dismissal.

8. **M.L. v. Federal Way Sch. Dist., 105 LRP 13966, 394 F.3d 634 (9th Cir. 2005).** A teacher who is deliberately indifferent to severe teasing of a child with a disability may cause the child to be deprived of FAPE if the bullying results in a loss of educational benefit.

9. **Shore Regional High Sch. Board of Education v. P.S., 41 IDELR 234 (3rd Cir. 2004).** A student with ED was subjected to "relentless" physical and verbal abuse and social isolation because classmates perceived him as "effeminate." The court found that his continued placement at the high school would likely result in further bullying and a denial of FAPE.

10. **Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68, 24 IDELR 1039 (7th Cir. 1996).** A student may be able to recover damages where a teacher allegedly invited students to list their complaints about a classmate, leading to a lack of his self-confidence and deprivation of educational benefits.

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

incident of harassment by meeting with the alleged harassers, informing the parents, and punishing the perpetrators. The school district's actions saved it from liability for the girl's injuries.

12. **Doe v. Big Walnut Local Sch. Dist. Bd. Of Education, 57 IDELR 74 (S.D. Ohio 2011).** A middle school boy with cognitive impairments got into several altercations with his classmates, resulting in his nose being broken. The boy was sometimes the instigator, sometimes the victim. His parents sued seeking money damages and alleging a violation of their son's Constitutional rights and disability-based harassment. In this case, the school district officials had developed a Safety Plan that adjusted his class schedules and those of his offenders to avoid the boys from having any contact at school, allowed the student to leave class early to prevent issues in the hallways, and assigned an aide to monitor the student during the day. The court held that the school district had acted reasonably to prevent bullying and/or harassment and dismissed the case.

c. **Placement Decisions and Bullying**

1. **J.E. v. Boyertown Area Sch. Dist., 56 IDELR 38 (E.D. Pa. 2011).** The parent of a high school student with Asperger's Syndrome failed to prove that the district's proposed placement of her son would present a significant risk of bullying for the student.

2. **T.K. v. New York City Dep't. of Educ., 56 IDELR 228 (E.D.N.Y. 2011), remanded by 112 LRP 8001 (E.D.N.Y. 2011).** Parents of a twelve-year-old girl with learning disabilities alleged that their daughter was denied FAPE due to being bullied at school. The girl was routinely ostracized by her peers at school and subjected to physical bullying. Her grades had declined, but she was still passing all of her courses. The court held that bullying becomes actionable when a student's educational benefit is "adversely affected." The parents did not have to prove that the girl was denied all educational benefit, or that she was regressing. The case was remanded back to the administrative level for a determination of whether the child suffered a deprivation of educational benefits.

3. **T.B. v. Waynesboro Area Sch. Dist., 56 IDELR 67 (M.D. Pa. 2011).** The parents of a student with ADHD, a speech-language impairment, and Asperger's Syndrome were not entitled to private tuition reimbursement where the evidence showed the student progressed in school, despite the fact that he had difficulty interacting with peers and was both the victim and perpetrator of bullying in his school.

4. **Morgan v. Bend-La Pine Sch. Dist., 109 LRP 16574 (D. Or. 2009).** The district placed a student with emotional, social, and communication impairments in an alternative school. Although the parent alleged the student was bullied and sexually abused at the school by predatory male students, she failed to show the placement was deliberately indifferent to the student's Constitutional rights.

d. Staff Who Bully Students

1. **Mathers v. Wright, 56 IDELR 188 (8th Cir. 2011).** A fifth-grade teacher who allegedly refused to instruct a student with disabilities, excluded her from recess and mandatory fire drills, and forced the student to crawl on the floor could be found to have engaged in disability-based harassment and may be liable for damages.

2. **Dennis v. Caddo Parish Sch. Bd., 111 LRP 5112 (D. La. 2011).** A special education aide sued a district over alleged verbal and physical sexual harassment by two students with disabilities. She failed to show that the harassment was so severe or pervasive that it altered the conditions of her employment. Considering the totality of the circumstances, a reasonable aide to special education students in her position would not have been detrimentally affected by the conduct.

3. **Grossmont Union High Sch. Dist., 56 IDELR 245 (SEA CA 2011).** The increasingly out-of-control and confrontational behavior exhibited by a sixteen-year-old with an emotional disturbance (ED), including a physical altercation with a classmate, throwing objects at others, and bullying peers justified placing him in an interim alternative education program.

4. **Toledo (OH) Pub. Schs., 55 IDELR 298 (OCR 2010).** A teacher's comments to an overweight eleventh grade girl with Dysthymic Disorder about her tight shirts did not constitute disability-based discrimination. The teacher's comments were designed to ensure compliance with the school's dress code, and the teacher was unaware of the girl's emotional disability or its effect on her body image.

5. **Los Angeles (CA) Unified Sch. Dist., 46 IDELR 198 (OCR 2006).** A school district violates Section 504 if: (1) an employee who is acting or who reasonably appears to be acting in his/her official capacity; (2) harasses a student on the basis of disability, and (3) the harassment denies or limits a student's ability to participate in or benefit from the program, regardless of whether or not the district has notice of the employee's conduct.

6. **Yucaipa-Calimese (CA) Joint Unified Sch. Dist., 47 IDELR 231 (OCR 2006).** A school district failed to promptly or adequately investigate claims that staff members were harassing a high school student with ADHD and bipolar disorder.

e. **Bullying and Child Find/Eligibility/Evaluation**

1. **Birdville Indep. Sch. Dist., 111 LRP 47266 (SEA TX 2011).** A Texas school district failed to comply with the IDEA when it determined that a boy who was bullying classmates was ineligible for special education and related services.

2. **Rose Tree Media Sch. Dist., 111 LRP 6194 (SEA PA 2010).** An ALJ found that a district violated "child find" when it failed to evaluate a student whose erratic behavior may have made him a target for bullies, and whose emotional and social difficulties may have led him to misinterpret childhood interactions.

f. **Bullying and Exhaustion of Administrative Remedies**

1. **M.M. v. Tredyffrim/Easttown Sch. Dist., 46 IDELR 125 (E.D. Pa. 2006).** Parents of a ten-year-old student with a fine motor impairment who alleged that their son was being bullied by his teacher were required to exhaust their IDEA administrative remedies before pursuing their claims for IDEA, Section 504, or Civil Rights Act violations in federal court.

2. **R.R. v. Board of Education of Kingsport City Schools, 45 IDELR 212 (E.D. Tenn. 2006).** Parents of a high school student with an LD who was allegedly denied a FAPE due to bullying at school were required to exhaust their administrative remedies prior to pursuing a federal action seeking money damages.

VIII. DISABILITY-BASED HARASSMENT AND SECTION 504

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

2. **Greenville (SC) County Sch. Dist., 56 IDELR 145 (OCR 2010).** OCR dismissed a complaint alleging that a student's expulsion was based on his disability. The investigation showed that the student was expelled for posting threatening remarks about a classmate using social media, and there was no association between the punishment and the fact that the student had a disability.

3. **Hemet (CA) Unified Sch. Dist., 54 IDELR 328 (OCR 2009).** A school district is required to respond to reports of disability-based harassment, even if the parents do not mention their child's disability when making the report. School officials have a duty to respond if there is reason for them to believe that the alleged harassment may be linked to a student's disability.

4. **Ann Arbor (MI) Pub. Schs., 56 IDELR 84 (OCR 2010).** OCR will examine the conduct of the victim of alleged harassment to determine whether his peer's actions were based on the student's disability.

5. **Santa Monica-Malibu (CA) Unified Sch. Dist., 55 IDELR 208 (OCR 2010).** A district incorporated items into a eighth grader's IEP to deal with bullying and harassment. However, the district violated Section 504 by failing to ensure that theses measure were implemented until after the student had suffered additional harassment.

6. **Westfield (MA) Public Schs., 53 IDELR 132 (OCR 2009).** School districts are responsible for addressing student-on-student harassment if they have adequate notice that such harassment based on disability s occurring and fail to take prompt and effective action to stop it, and to prevent its recurrence.

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

8. **Fairfield-Suisan (CA) Unified Sch. Dist., 51 IDELR 139 (OCR 2008).** A district violated Section 504 by treating the harassment of a fourteen-year-old burn victim as a dispute between teenage girls rather than disability-based harassment.

9. **Greenport (NY) Union Free Sch. Dist., 50 IDELR 290 (OCR 2008).** A district properly handled the teasing and harassing of two brothers with peanut allergies by disciplining the harassers and

conducting in-service on bullying and the gravity of peanut allergies.

10. **Philadelphia (PA) Sch. Dist., 46 IDELR 169 (OCR 2006).** A student who was referred to in the yearbook by a derogatory nickname ("Radio") was a victim of disability-based discrimination in violation of Section 504. The assistant principal "looked into the matter," but failed to properly investigate the matter, report her findings to the student's parents, or take any other steps to address the incident.

11. **Werth v. Board of Directors of Pub. Sch. of Milwaukee, 47 IDELR 67 (E.D. Wis. 2007).** Isolated incidents where students in a vocational woodshop class threw objects at a student with a congenital bone disease did not constitute a "pattern of severe or pervasive harassment" and were not based on the student's disability.

12. **Caverna (KY) Indep. Schs., 46 IDELR 141 (OCR 2006).** The parent of a middle-school student with a hearing impairment and ADHD failed to prove that her son was assaulted in the school restroom because of his disability.

13. **Jenison (MI) Pub. Schs., 47 IDELR 81 (OCR 2006).** An on-going feud between a student with a disability and her former best friend did not constitute disability-based harassment.

14. **Los Angeles (CA) Unified Sch. Dist., 45 IDELR 107 (OCR 2005).** OCR found that a teacher was doing "a good job protecting" a middle school boy with disabilities from harassment following the parent's complaint about some initial incidents of bullying.

15. **Marysville (KS) U.S.D. #364, 45 IDELR 70 (OCR 2005).** A Kansas school district responded appropriate and effectively to harassment suffered by a teen with Asperger's Syndrome by members of his wrestling team and coach. In fact, the district fired the coach because of his behavior, even though the student's behavior was also inappropriate. The district gave the student another chance to remain on the wrestling team. The district did not discriminate against the student by removing him from the team following additional incidents of misbehavior.

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

"deliberate indifference," and also alleged violations of Title IX and Section 1983. The court dismissed the 504 claims because the parents failed to "connect the dots" between the harassment and their son's disability. However, the claims under Title IX (sexual harassment) and Section 1983 (Constitutional deprivation) were allowed to continue.

IX. TIPS FOR AVOIDING LIABILTIY

A. Listen and Watch

B. Respond Reasonably

a. Interview the Victim

b. Interview Any Witnesses

c. Punish the Perpetrators

d. Document All Interactions and Actions

e. Provide Necessary Services to the Victim

i. Counseling
ii. Adult Escort
iii. Change of Placement

X. SPECIAL CONCERNS

A. Personal Convictions/Bias

1. Sexual Orientation (LGBT)
2. Gender Identity Issues (Transgender)
3. Racial Prejudices
4. Religious Prejudices

B. Past Experiences as a Student

C. Problems with the Parents

D. Disbelief About the Disability

E. Disbelief About Reports of Bullying