

SECTION 504 NONDISCRIMINATION UPDATE: EXTRACURRICULAR ATHLETICS, ACCELERATED CLASSES & DISABILITY HARASSMENT

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A note about these materials: These materials are not intended as a comprehensive review of all new case law, rules and OCR guidance on Section 504' nondiscrimination duties, but as an overview of some of the more current issues and trends confronted by schools as they seek to comply with Section 504. These materials are not intended as legal advice, and should not be so construed. 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. References to the U.S. Department of Education will read "ED."

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from three important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html and is referenced herein as "Revised Q&A."

In January 2012, OCR released a long-awaited guidance document on the ADAAA and its impact on Section 504. The "Dear Colleague Letter" consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012)(hereinafter "2012 DCL").

Finally, on January 25, 2013, OCR released a Dear Colleague Letter explaining schools' obligations to students with disabilities in the area of extracurricular athletics. The letter can be found at *Dear Colleague Letter*, 60 IDELR 167 (OCR 2013)(hereinafter "Athletics DCL").

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).

I. ED's 2013 Guidance on Students with Disabilities & Extracurricular Athletics

A. Overview & Background

The 2010 GAO Report. In June of 2010, in response to a Congressional inquiry on the subject, the General Accounting Office (GAO) released a report entitled *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics*, GAO, (June 23, 2010)(hereinafter, "GAO"). Specifically, GAO was asked to examine PE and extracurricular athletic opportunities for students with disabilities and how the Department of Education assists the states and schools in these areas. **Utilizing a variety of data sources including on site interviews in school districts, the GAO report found, not surprisingly, that lack of training and budget concerns remain serious barriers to participation by students with disabilities in both PE and extracurricular athletic activities.** Further, GAO found that the U.S. Department of Education needs to provide additional help to schools not only to understand schools' duties with respect to PE and

athletics for students with disabilities, but also to identify promising practices in the field. *GAO*, p. 31-32. A few highlights from the report:

•**Benefits flow to students with disabilities from participation in PE and athletics.** “The health and social benefits of physical activity and athletic participation for children are well established. **These benefits may be even more important for children with disabilities**, including those with cognitive and physical disabilities who have a greater risk of being sedentary and having associated health conditions such as obesity and reduced cardiovascular fitness. Studies have shown that for students with disabilities, regular physical activity may help control or slow the progress of chronic disease, improve muscular health, control body weight, and enhance students’ psychological well-being through additional social ties and improved self-confidence and self-esteem.” *GAO*, p. 1 (*emphasis added*).

•**Easier access in elementary than middle or high school.** “Various factors may affect students’ experience in PE, such as their school level (e.g., elementary or middle) or their type of disability. For instance, some parents and school officials said that PE teachers in elementary school may be able to more easily integrate students with disabilities in their classes than those in secondary schools because peers in elementary school are more accepting, the equipment is more varied, and there is less focus on competitive games than in secondary school, which may be harder for students with disabilities to participate. Some district and school officials also said that middle school can be particularly difficult for some students with disabilities who may have more difficulty changing into PE uniforms or opening combination locks on their PE lockers.” *GAO*, p. 12.

A little commentary: The problem of student acceptance of disability can be even more severe when a culture of harassment is allowed to exist, especially in unsupervised and unstructured settings like a locker room. It is not uncommon for parents of students with disability to seek exemptions from PE due to harassment or bullying experienced as students are dressing out for PE. Efforts by school staff to provide structure or supervision to the locker room would seem a sensible place to start a school’s efforts to make PE and athletic activities more accessible.

•**Extracurricular Athletics.** A number of other barriers appear to complicate access to athletics, including the competitiveness of athletic teams (a Texas school official noted that “extracurricular athletics in his district were very competitive and that it was unlikely that many students with disabilities would make these teams”). *GAO*, p. 21-22. **The type of disability may also impact participation. GAO reports that “students with hearing impairments, speech impairments, learning disabilities, or other health impairments reported participating on sports teams as a higher rate compared to students with orthopedic impairments, mental retardation, visual impairments, autism or multiple disabilities.”** *GAO*, p. 22. The latter group of students would require far more modifications and assistance in order to participate. “Officials from several schools and disability groups also noted that Special Olympics has had a strong influence nationally in providing opportunities for students with intellectual disabilities but that there is not a similar organization for students with physical disabilities.” *GAO*, p. 22-23. Special Olympics limits participation to athletes with an intellectual disability, a cognitive delay, or a developmental disability (athletes may also have a physical disability). No qualifying scores are required to participate. In contrast, Paralympic athletes “are generally those with amputations, cerebral palsy, intellectual disabilities, visual impairments, and spinal injuries. Unlike Special Olympics, the Paralympics is focused on elite performance sport and athletes must go through stringent qualification processes to compete.” *GAO*, p. 23, *fn. 31*. Schools reported greater success in access by students with disabilities when these students were specifically invited or recruited to play, or where special education teachers also worked as coaches and “this dual role enabled them to encourage students with disabilities to participate.” *GAO*, p. 21.

•**What are schools required to do under Section 504?** With respect to participation by students with disabilities in extracurricular athletics, schools reported confusion as to their legal obligations

under Section 504. “Officials in two districts and several disability associations told us that Education’s Section 504 regulations regarding schools’ responsibilities to provide extracurricular opportunities are ambiguous. For example, a few disability associations noted that there is lack of clarity regarding how “equal opportunity” should be defined. Officials from another district questioned whether their responsibilities included providing specifically designed programs for students with disabilities, such as separate adapted athletics, particularly within a school environment focused on greater inclusion for students with disabilities.” *GAO*, p. 26. Following a review of OCR guidance, GAO “found several documents that state that students with disabilities may not be excluded on the basis of a disability from an extracurricular activity, which may include athletics, and that students must be provided opportunities to participate in these activities equal to those of other students. However, with regard to PE and extracurricular athletics, these documents do not provide information beyond what is stated in the Section 504 regulations. In contrast, OCR has provided more detailed guidance in other civil rights areas, such as letters, pamphlets, and question and answer sheets.” *GAO*, p. 28.

The Department of Education’s Two-Prong Response. In response to the GAO’s findings, ED indicated by letter that it would provide additional assistance to schools in addressing the needs of students with disabilities in this area. Specifically, “The Department agrees that it is important for schools to be aware of their responsibilities and that students with disabilities have opportunities to participate in extracurricular athletics equal to those of other students. In fiscal year 2011, the Department’s Office for Civil Rights intends to issue additional guidance on Section 504 of the Rehabilitation Act and recipients obligations to provide students with disabilities equal access in extracurricular activities.” *GAO*, p. 50. Further, “To help states and schools access existing knowledge and resources, we recommend that the Secretary of Education facilitate information sharing among states and schools on ways to provide opportunities in Physical Education (PE) and extracurricular athletics to students with disabilities.” *GAO*, p. 49. In 2011, ED released *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, U.S. Department of Education (August 2011), providing suggestions to help school increase opportunities for students with disabilities to participate, but the promised legal guidance was not released until January 2013.

B. January 2013 Dear Colleague Letter

The letter is broken up into four main areas: an overview of schools’ obligations under Section 504 and ADA Title II; cautions against making decisions on the basis of presumption and stereotype; the Section 504 requirements to ensure equal opportunity for participation; and discussion of the provision of separate or different athletic opportunities for students with disabilities. **The intent of the letter was to explain existing rules, not create new requirements.** “This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.” *Athletics DCL*, p. 2, footnote 4. As this is the first major guidance letter on the topic from OCR, extensive quotations from the letter are reproduced here.

Some limitations on the discussion of special education-eligible students... Since the letter was written by OCR, and OCR does not enforce the IDEA, the letter does not address IDEA’s requirements with respect to extracurricular athletics.

“Because the IDEA is not enforced by OCR, this document is not intended as an explanation of IDEA requirements or implementing regulations, which include the requirement that a student’s IEP address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to, among other things, participate in extracurricular and other nonacademic activities. In general, OCR would view a school district’s failure to address participation or requests for participation in extracurricular athletics for a qualified

student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation.” *Athletics DCL*, p. 4, fn 8.

IDEA rules in this area, while unaddressed in the guidance, are important to consider. In the 2004 reauthorization of IDEA, a provision was added to the section setting forth the required contents of an IEP. The language specifically addressed extracurricular activities. The language states that the IEP must include

“a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child... to participate in extracurricular and other nonacademic activities.” 20 U.S.C. §1414(d)(1)(A)(i)(IV)(bb).

The relevant 2006 federal regulation likewise includes the same requirement. *See* 34 C.F.R. §300.320(a)(4)(ii). Thus, IEP teams are required, as part of the IEP development process to consider whether a student needs supplementary aids and services, program modifications, or personnel supports, in order for them to participate in extracurricular and/or nonacademic activities. Another regulation adds that states must ensure that the IEP team addresses participation in nonacademic services:

“Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.” 34 C.F.R. §300.107(a).

And a final regulation references the LRE requirement:

“In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that *each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child*. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child’s IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.” 34 C.F.R. §300.117 (emphasis added).

FAPE need not be implicated for these provisions to apply. The plain language of the rules does not require FAPE to be implicated. Instead, the need to address supplementary aids and services necessary for a student with a disability to participate in extracurricular or nonacademic services arises whether or not the participation is tied to, or required in order to meet, the student’s educational goals. For example, in *Independent Sch. Dist. No. 12, Centennial v. Minnesota Dept. of Educ.*, 110 LRP 58331 (Minn. 2010), the Minnesota Supreme Court ruled that the IEP of a child with autism and Tourette Syndrome had to address her need for supplementary aids and services to afford her participation in volleyball and school clubs regardless of whether participation in such activities was necessary in order to receive a FAPE. The court noted that none of the above-cited regulations required such a linkage to educational needs or FAPE in order for the student to receive supports required merely to participate in the extracurricular or nonacademic service. To the court, if participation in the student’s selected activity requires the provision of supports, the IEP team must address that need.

A little commentary: A significant question is whether the IDEA requirement exceeds that imposed under §504, or whether it merely is intended to reiterate the requirement and ensure its compliance by means of the IEP team process. Certainly, if the IEP team has to address the provision of supplementary aids and services for participation in nonacademic/extracurricular activities, even if they bear no

relation to the student’s educational goals or receipt of FAPE, it would appear that the requirement applies as it is intended under §504—as a matter of non-discrimination and equal opportunity to access.

UIL or similar sports leagues or associations. While the letter addresses the relationship between schools and sports leagues or associations (like UIL), these sections are not addressed in the materials. *See, for example, Athletics DCL, p. 5, ¶2.*

What follows is a summary of the letter’s other contents, together with references to OCR letters of finding to illustrate the concepts.

1. Overview of Section 504 Requirements. OCR begins the guidance letter with a reminder of the schools’ Section 504 obligations.

“To better understand the obligations of school districts with respect to extracurricular athletics for students with disabilities, it is helpful to review Section 504’s requirements.

Under the Department’s Section 504 regulations, a school district is required to provide a qualified student with a disability an opportunity to benefit from the school district’s program equal to that of students without disabilities. For purposes of Section 504, a person with a disability is one who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. With respect to public elementary and secondary educational services, ‘qualified’ means a person (i) of an age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

Of course, simply because a student is a ‘qualified’ student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.” *Athletics DCL, p. 3 (emphasis added).*

Discrimination can occur in a variety of way, each prohibited by the regulations.

- denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service;
- affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;
- providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs;
- providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and
- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 C.F.R. §104.4(b)(1)(i)-(iv), (vii), (2),(3).

Finally, Section 504 also requires that a free appropriate public education be provided to qualifying students with disabilities. 34 C.F.R. §104.33(a).

2. Section 504 Prohibits Acting on Generalizations & Stereotypes. Like IDEA, Section 504 requires an individualized approach to serving students with disabilities.

“A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular. A school district also may not rely on generalizations about what students with a type of disability are capable of—one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play that sport.” *Athletics DCL*, p. 5.

Avoiding generalization and stereotypes requires schools to make decisions based on data with respect to an individual student. OCR provides the following example.

The Lacrosse Example. “A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school’s lacrosse club. As she enters the ninth grade in high school, she tries out and is selected as a member of the high school’s lacrosse team. **The coach is aware of this student’s learning disability and believes that all students with the student’s particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. Based on this assumption, the coach decides never to play this student during games.** In his opinion, participating fully in all the team practice sessions is good enough.

Analysis. OCR would find that the coach’s decision violates Section 504. The coach denied this student an equal opportunity to participate on the team by relying solely on characteristics he believed to be associated with her disability. A school district, including its athletic staff, must not operate on generalizations or assumptions about disability or how a particular disability limits any particular student. Rather, the coach should have permitted this student an equal opportunity to participate in this athletic activity, which includes the opportunity to participate in the games as well as the practices. **The student, of course, does not have a right to participate in the games; but the coach’s decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions).**” *Athletics DCL*, p. 5-6 (*emphasis added*).

A little commentary: The coach’s thinking may actually have been correct with respect to the student—that time pressure negatively impacts the student’s athletic performance. What makes the decision discriminatory is that the coach did not look for evidence that with respect to *this* student time pressure was problematic. Had the coach utilized timed scrimmages or otherwise simulated game-time pressure, and then observed the student’s performance, evidence of *actual* poor performance under time pressure would support the student not participating in games, and the decision would not be discriminatory.

3. Ensure Equal Opportunity for Participation. “A school district that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program.” *Athletics DCL*, p. 6.

a. To have a right to participate, the student must first make the team.

“Schools may require a level of skill or ability for participation in a competitive program or activity; **equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out.** A school district must, however, afford qualified students with disabilities an equal opportunity for

participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student. This means that a **school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity**, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity.” *Athletics DCL*, p. 7 (*emphasis added*).

Students with disabilities may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. **OCR generally approves of uniform application of eligibility requirements of school extracurricular activities.** See Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504, A Report of the United States Commission on Civil Rights (September 1997), p. 343. Although some accommodations may be required of schools in this area, it appears that students must submit to the general behavioral, academic, and performance standards applied to nondisabled students. A few OCR letters of finding illustrate the requirement.

Must the student be enrolled in the public schools? In Virginia, the answer is yes. *Paul v. Henrico County Public Schools*, 32 IDELR 173 (E.D.VA. 2000). The student, a fourteen-year-old with dyslexia and ADHD was a member of the school baseball team prior to his parents’ enrolling him in a private school. The parents sought a preliminary injunction allowing him to play despite his attendance at a private school, arguing that the student was excluded from the baseball team due to disability. The court rejected the request for waiver of the enrollment requirement.

“Requiring HCSB to waive the enrollment requirement for Phillip is not a reasonable accommodation, but fundamentally alters the baseball program. Were HCSB to change the enrollment policy, what was once a school activity where Short Pump students could gather and improve upon a skill while fostering school spirit, would become a program where students from perhaps far reaching areas, having no relationship with the school other than one existing on paper, would be allowed to play in the program, taking places from students at Short Pump. This accommodation could so drastically alter the baseball program as to render it unreasonable.”

Note that state law may not require enrollment to participate in extracurricular athletics. Consult your school attorney for state law requirements.

Can a student with disability be excluded from the team due to lack of the required baseball skills? Yes. Students with disabilities may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. For example, a student with Tourette Syndrome was not subjected to discrimination when he was allowed to try out, albeit unsuccessfully, for a school baseball team. The parent was concerned that having supervised the in-school-suspension room, the baseball coach had knowledge of the student’s behaviors, and had excluded him from the team because of that knowledge. OCR found otherwise. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students vying for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation since the “student was given an equal opportunity to compete for a position.” *Maryville City (TN) School District*, 25 IDELR 154 (OCR 1996).

Note that the same rule applies to cheerleading (and every other activity requiring a try-out). *McDowell County (W.V.) Schools*, 55 IDELR 82 (OCR 2010). Twenty-four girls tried out for the 12 available cheerleader positions. Complainant argued that Student was not selected due to her small stature, the result of a growth hormone deficiency. The cheerleading coach explained the selection criteria to OCR. “There were five judges, including the coach, for the cheerleading tryouts and each judge was given a rubric to fill out... [T]he students were rated on the following: set, smile, loudness, clap, coordination and attitude. Students were also rated on two types of jumps, as well as

a jump of their choice.... In addition to the judge's rubrics, the cheerleading coach said that she has each girl's classroom teacher fill out a rubric rating the girls on classroom performance in the following areas: behavior, attendance, attitude, responsibility and grades." OCR notes that while the parent and student "were of the opinion that the Student was better at cheerleading and gymnastics than at least three of the other students who made the team" the judges disagreed. The scores were tallied and the girls with the highest scores received the positions. OCR concluded that while the tally sheets had been destroyed and could not be reviewed as part of the investigation, OCR's investigation did not reveal any evidence (other than the parent and student's opinions) to suggest that the Student did or should have scored in the top 12. Additionally, none of the judges were aware that the student was disabled nor did the judges suspect any disability.

Might a school be required to provide accommodations during try-outs? Yes. *See, for example, Marion County (FL) Sch. Dist.*, 37 IDELR 13 (OCR 2001)(School was required to provide accommodations to a girl with unspecified disabilities who wanted to try out for cheerleading. The school was required to allow her to videotape the sponsor's instructions and demonstrations.)

What about communication skills? There has to be chemistry in volleyball? *Festus (MO) R-VI School District*, 47 IDELR 17 (OCR 2006). Explaining to OCR that the Student at issue in a discrimination complaint did not have the required skills, the varsity volleyball coach discussed the importance of on-court chemistry.

"Ms. Eggemeyer explained 'chemistry' between the players on the court is extremely important in volleyball. Ms. Eggemeyer explained how she used the term chemistry to describe how well the team members interacted or worked together, including their communication and confidence in each other on the court. According to Ms. Eggemeyer, Student A's chemistry on the court with the other players was just decent because she was really quiet, not out-going, lacked confidence and was not vocal enough or consistent enough. Ms. Eggemeyer explained being vocal is crucial because players have to talk to each other on the court to prevent dropped balls and collision with other players."

The coach explained to OCR the efforts she had undertaken to help the student identify the skills that needed improvement. The Student needed "to be more consistent, more vocal, quicker, and not walk through drills." OCR found no discrimination in the amount of playing time the student received. While the evidence suggests that "Student A is a very capable athlete, she was not considered one of the top six volleyball players by at least three coaches who were familiar with her play."

A little commentary: One of the allegations made in this complaint is quite common in the reported cases. "The complainant stated Student A was one of the top six players on the varsity volleyball team." Interestingly, when OCR opened the investigation, it "accepted as true the complainant's allegation that Student A was at least among one of the top six players on the team." After investigation, and hearing the opinions of several coaches, it concluded otherwise. One of the reasons proffered by the complainant for the high opinion of the student's skills was the amount of playing time she received on the junior varsity team. OCR learned from the junior varsity coach that "Student A received more playing time at the junior varsity level because the goal was to give the girls the experience they needed to move up to the varsity level. At the varsity level, the goal is different." It is all about winning, and she ranked somewhere between 9th and 11th in skills rather than in the top six.

Can the school apply attendance requirements to team eligibility (miss a practice, miss a game)? *Houghton Lake (MI) Community Schools*, 45 IDELR 199 (OCR 2005). Pursuant to district policy, the student must attend school at least for a half-day (three hours, excluding lunch) to participate in any extracurricular activity, including athletics, that day. The policy applies to all

students, disabled and nondisabled alike, and there are no exceptions. Parents of a student with diabetes requested an exception when a previously scheduled doctor's appointment caused a student to miss the entire school day of a basketball game. The appointment had been scheduled months in advance, and the parents had been unaware of the game at the time the appointment was made. The district refused to grant an exception. The student was not allowed to participate in that particular basketball game (although he could attend).

The parent complained to OCR, arguing that the district's policy and its refusal to grant an exception was disability discrimination. OCR determined that the policy was contained in the student handbook that was provided to all students. A parent and the student acknowledged by their signatures that they had received and read the handbook. Further, coaches remind students of the policy at the first practice of each year. OCR also determined that a nondisabled student sought an exception to the policy and was also denied. The District planned to provide schedules to parents for the 2005-2006 school year by June 2005 to allow for scheduling of potentially conflicting appointments. OCR found the policy facially neutral and applied equally to all students. No violation found.

See also, Shelby County (AL) Sch. Dist., 37 IDELR 41 (OCR 2002)(A student was suspended for three days, which caused her to miss three days of volleyball practice, which resulted in her dismissal from the team under the school's rules. OCR found that the school applied the rule uniformly, and that thus, there was no disability discrimination.); *Maine Sch. Administrative Dist. #1*, 37 IDELR 160 (OCR 2002)(Student was removed from the hockey team for missing three practices, and not allowed to travel with the team for an overnight trip due to his absence from school on that day. The student's actions violated the rules for the hockey team. OCR found that the absences were not due to disability-related reasons, and thus, there was no discrimination.); *Salem (NH) Sch. Dist.*, 35 IDELR 260 (OCR 2001)(Student was excluded from hockey team partly due to not meeting state attendance requirements, and partly due to behavior and grades at school. OCR found no discrimination.).

Can a student with disability be removed from a team for violating a coach's instructions, team rules, or laws that apply to all students? Yes. *See, for example, Carmel (NY) Central School District*, 23 IDELR 1195 (OCR 1995)(District did not violate §504 when it removed a disabled student from the wrestling team for failing to follow instructions during practice, since non-disabled students were also removed for the same offense.); *Cabarrus County (NC) School District*, 22 IDELR 506 (OCR 1995)(District was not in violation of §504 when it suspended a student from participation in sports for four months due to his criminal conviction. The suspension was required by district policy and there was no evidence of discriminatory application.); *Kaneland (IL) Community Unit Sch. Dist. #302*, 37 IDELR 287 (OCR 2002)(Student was cut from baseball team although parent alleged he was one of the best players. The coach, however, indicated that the student did not meet the attitude and teamwork criteria set forth in the Baseball Team Guidelines. For example, the student had twice quit the team the year before. OCR found no discrimination.); *Alief ISD*, 26 IDELR 202 (SEA TX. 1997)(Student was removed from the football team after drinking alcohol from a soft drink bottle at school, in violation of the school's rules on extracurricular participation.).

Bona fide safety standards. “[A] school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity. A school district, however, must consider whether safe participation by any particular student with a disability can be assured through reasonable modifications or the provision of aids and services.” *Athletics DCL*, p.6. In essence, if the student's participation creates safety concerns, the district cannot deny participation if, with the provision of reasonable aids and services, the student can safely participate. No athletic example of safety standard analysis is provided by OCR in the guidance, but a footnote references a U.S. Supreme Court case an example that illustrates the point by analogy. *See, Southeastern Community College v. Davis*, 442 U.S. 397 (1979)(Student with a serious hearing impairment who relied on lip

reading was determined not qualified to enter a college nursing program because of her inability to safely perform in the operating room or other sterile room environments where masks are used that cover the mouth.)

b. Modifications that result in fundamental alterations of the program are not required.

“In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the school district must allow it unless doing so would result in a fundamental alteration of the nature of the extracurricular athletic activity. **A modification might constitute a fundamental alteration if it alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (such as adding an extra base in baseball).** Alternatively, a change that has only a peripheral impact on the activity or game itself might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition. **Even if a specific modification would constitute a fundamental alteration, the school district would still be required to determine if other modifications might be available that would permit the student’s participation.**” *Athletics DCL, p. 7 (emphasis added).*

OCR provides three examples in the guidance letter to illustrate this point. Only one is reproduced here.

The Swimmer with One Hand. “A high school student was born with only one hand and is a student with a disability as defined by Section 504. This student would like to participate on the school’s swim team. The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets. The student has the required swimming ability and wishes to compete. She asks the school district to waive the ‘two-hand touch’ finish it requires of all swimmers in swim meets, and to permit her to finish with a ‘one-hand touch.’ The school district refuses the request because it determines that permitting the student to finish with a ‘one-hand touch’ would give the student an unfair advantage over the other swimmers.

Analysis. A school district must conduct an individualized assessment to determine whether the requested modification is necessary for the student's participation, and must determine whether permitting it would fundamentally alter the nature of the activity. Here, modification of the two-hand touch is necessary for the student to participate. In determining whether making the necessary modification—eliminating the two-hand touch rule—would fundamentally alter the nature of the swim competition, the school district must evaluate whether the requested modification alters an essential aspect of the activity or would give this student an unfair advantage over other swimmers.

OCR would find a one-hand touch does not alter an essential aspect of the activity. **If, however, the evidence demonstrated that the school district’s judgment was correct that she would gain an unfair advantage over others who are judged on the touching of both hands, then a complete waiver of the rule would constitute a fundamental alteration and not be required.**

In such circumstances, the school district would still be required to determine if other modifications were available that would permit her participation. In this situation, for example, the school district might determine that it would not constitute an unfair advantage over other swimmers to judge the student to have finished when she touched the wall with one hand and her other arm was simultaneously stretched forward. If so, the school district should have permitted this modification of this rule and allowed the student to compete.” *Athletics DCL, p. 9-10 (emphasis added).*

A little commentary: The fact that a proffered modification will not work (here, one-hand touch

results in unfair competition) does not end the school's obligation. OCR insists that it remains the school's obligation to look for alternatives that would not fundamentally alter the activity and would not provide unfair advantage. There is no clear indication at what point the inquiry can be stopped without the district being subjected to a discrimination claim. An additional concern raised by school attorneys (including the National School Boards Association in a letter to OCR) is the mechanism for making determinations of need and reasonable modifications. For example, NSBA, assuming that a Section 504 Committee or other similar group would be tasked with evaluating need and making these decisions, expressed concern over the additional Section 504 meetings and evaluations required to perform these tasks in addition to existing 504 meeting requirements. NSBA has sought clarification on this issue. The NSBA letter to OCR addresses a large number of concerns with the guidance, and is available on the NSBA website at <http://www.nsba.org/SchoolLaw/Issues/Equity/NSBA-Response-to-OCRs-January-25-2013-Dear-Colleague-Letter.pdf>.

A variety of letters of finding illustrate the fundamental alteration exception. For example, consider these two letters on swim team modifications, one is required, one is a fundamental alteration.

Are independent walking and dressing essential to swim team eligibility? No. A student with an intellectual disability and a neuro-degenerative disorder wished to participate in the swimming team. OCR found that the district was required under §504 to provide accommodations to the student, in the form of an aide to assist with walking and dressing. Since those functions were not essential eligibility standards for participation in swimming, requiring the accommodations would not constitute a fundamental alteration of the swimming program. *Quaker Valley (PA) School District*, 352 EHLR 235 (OCR 1986).

What about staying in the pool during competition? That's different. *S.S. v. Whitesboro Central School District*, 112 LRP 5880 (N.D.N.Y. 2012) (“There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions.... [O]ne of the essential requirements of swim team members is the ability to enter, and remain in, the pool when required by the coach during practices and competitions. To require otherwise would fundamentally change the nature of the swim team and thus be unreasonable.”)

Fundamental alteration & essential standards. *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996). In this OCR letter of finding, a 17-year-old student with Down Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was demoted from manager to co-manager of the varsity basketball team, was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, was not alert enough to get out of the way of an incoming play on the bench, and could not perform most of the duties of a manager, resulting in the need to replace him with someone who could perform the required duties. Despite accommodations, the student was unable to perform the essential functions of the position. OCR found no violation of §504. In short, he could not perform the essential duties for which the position existed, and the district had no obligation to dramatically change the position to fit the student's abilities. Instead, the district created a position more suited to the student's ability level. OCR agreed that the varsity basketball manager had to be able to do manager activities.

Some final thoughts on fundamental alteration. It's important to understand that fundamental alteration with respect to Section 504 and students is very different from the same concept in the adult Section 504/ADA world. For example, “neither the fundamental alteration nor undue burden defense is available in the context of a school district's obligation to provide a FAPE under the IDEA or Section 504.” *Athletics DCL*, p. 8, fn 17. Further, the undue burden defense (the argument that the modification is too expensive or inconvenient) is generally disfavored by OCR as well, even for

nondiscrimination purposes (when FAPE is not an issue). “Although a school district may also raise the defense that a needed modification or aid or service would constitute an undue burden to its program, based on OCR experience, such a defense would rarely, if ever, prevail in the context of extracurricular athletics...” *Id.* This position is supported by OCR’s application of IDEA requirements to Section 504 students. “Moreover, whenever the IDEA would impose a duty to provide aids and services needed for participation in extracurricular athletics...OCR would likewise rarely, if ever, find that providing the same related aids and services for extracurricular athletics constitutes a fundamental alteration under Section 504 for students not eligible under the IDEA.”

4. Offering Separate or Different Athletic Opportunities. This section of the guidance begins with reference to traditional notions of LRE. “[I]n providing or arranging for the provision of extracurricular athletics, a school district must ensure that a student with a disability participates with students without disabilities to the maximum extent appropriate to the needs of that student with a disability. The provision of *unnecessarily separate or different services is discriminatory.*” *Athletics DCL*, p. 11. Of course, some students with disabilities will be unable to participate in regular extracurricular athletics with nondisabled peers—even with reasonable modifications or aids and services. It’s here that the guidance has raised the most controversy.

“Students with disabilities who cannot participate in the school district’s existing extracurricular athletics program—even with reasonable modifications or aids and services—should still have an equal opportunity to receive the benefits of extracurricular athletics. **When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district’s existing extracurricular athletic program, the school district *should* create additional opportunities for those students with disabilities.**”

In those circumstances, a school district *should* offer students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities. **These athletic opportunities provided by school districts *should* be supported equally, as with a school district’s other athletic activities.** School districts must be flexible as they develop programs that consider the unmet interests of students with disabilities. For example, an ever-increasing number of school districts across the country are creating disability-specific teams for sports such as wheelchair tennis or wheelchair basketball. When the number of students with disabilities at an individual school is insufficient to field a team, school districts *can* also: (1) develop district-wide or regional teams for students with disabilities as opposed to a school-based team in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer ‘allied’ or ‘unified’ sports teams on which students with disabilities participate with students without disabilities. OCR *urges* school districts, in coordination with students, families, community and advocacy organizations, athletic associations, and other interested parties, to support these and other creative ways to expand such opportunities for students with disabilities.” *Athletics DCL*, p. 11 (*emphasis added*).

A little commentary: The language raises some interesting questions, including whether the law requires the creation of wheel-chair basketball teams, whether these teams get equal funding and access to facilities (even though they may serve far fewer students), etc. To some degree, the angst generated by this section may be unnecessary. The paragraph is dominated by the use of “should” and “can” (see italics in quote) rather than the mandatory or compulsive “shall” and “must.” The language is hopeful rather than regulatory. Further, public explanations by an ED spokesperson, cited in the NSBA response letter, indicates that OCR is urging, but not requiring separate sports programs. Michele McNeil, “*Did the ED. Dept. Really Create a Right to Wheelchair Basketball?*” *Education Week blog*, Jan. 25, 2013, as quoted in NSBA letter, p. 7, fn. 22. Talk with your school attorney to determine an appropriate response to this and other portions of the OCR guidance letter.

II. Section 504 Plans & IEPs in “Accelerated Classes”

Any discussion of accommodations in accelerated classes (here, OCR shorthand for Advanced Placement, Honors, Magnet, Gifted, etc.) must begin with recognition of two competing, but polar opposite, assumptions. The first, held by some school folks, is that accommodations are not possible in accelerated classes. That position is rejected outright by a letter from OCR (with OSEP input) dated Dec. 26, 2007, which clarified the basic Section 504 duty with respect to accelerated classes. Interestingly, the letter does not directly address the *other* assumption, commonly articulated by some parents, that students with disabilities are entitled to any accommodation they might need to be successful in accelerated classes, regardless of the effect of the accommodation on the “accelerated” nature of the class. The letter does seem to recognize limits to accommodations, but does not provide the clear guidance that schools desire when faced with unreasonable demands that may dilute above-grade level curriculum. *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs*, 108 LRP 69569 (12/26/07) (*Hereinafter, “Dear Colleague” or “2007 Letter”*).

A. IDEA & Section 504 students do not give up their services and accommodations as a condition of attendance in accelerated programs.

In its December 2007 letter, OCR focused on two major concerns with respect to disability discrimination in accelerated programs. **“Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs. Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs. These practices are inconsistent with Federal law, and the Office for Civil Rights (OCR) in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur.”** *Dear Colleague, p. 1.* Further, “conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the IDEA and Section 504.” *Id.* OCR has enforced this position in *Wilson County (TN) School District*, 50 IDELR 230 (OCR 2008) (“the evidence shows that the District’s decision was based on an erroneous interpretation and application of Section 504 requirements that resulted in an automatic denial of academic accommodations for the student in his honors class.”). This letter of finding is discussed in greater detail below.

B. Accommodations in Accelerated Classes.

While OCR’s declaration that accommodations are required in accelerated classes is not surprising (the notion that no accommodation would ever be required in an accelerated class seems indefensible in the context of a law that seeks equal participation and benefit in a recipient’s programs and activities), OCR takes the position that accelerated classes are “generally” part of FAPE. That position is interesting, as it means that accommodation in accelerated classes is not then subject to the limitations of “reasonable accommodation,” but is governed by the higher FAPE standard.

“Participation by a student with a disability in an accelerated class or program **generally** would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations. **Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program.** For example, if a student’s IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes.” *Dear Colleague, p. 3. (emphasis added).*

So, what does this mean?

1. Accommodations or services the student receives through Section 504 or IDEA in a regular education class or program are available to the student in an accelerated program.
2. As a corollary, a student with an IEP or Section 504 plan cannot be denied access to an accelerated class or program because he has an IEP or Section 504 plan, nor can the student's admission to the accelerated class be conditioned on the student giving up accommodations or services he receives from a 504 plan or IEP.

As OCR concluded "The requirement for individualized determinations is violated when schools ignore the student's individual needs and automatically deny a qualified student with a disability needed related aids and services in an accelerated class or program." *Dear Colleague, p. 3.; Wilson County (TN) School District, 50 IDELR 230 (OCR 2008)* (OCR finds a Section 504 violation when the school refused to apply a student's existing Section 504 academic accommodations to his honors classes, including extra time on class work, homework, and routine classroom tests, although he continued to receive the plan's accommodations in his regular classes).

3. There is no indication in the OCR analysis/guidance that the student must be provided additional accommodations or services due to his participation in accelerated classes.

On the contrary, **the example provided in the OCR letter clearly envisions that the accommodations that the student was already receiving in regular classes will be those she receives when she enrolls in an accelerated or advanced history class.** Consequently, a student who wants additional accommodations (beyond those she currently receives) in order to tackle the more difficult subject matter, speed, or coverage of the accelerated course would appear to have no entitlement to expanded accommodations based on the move to an accelerated class. Unfortunately, this was the only example provided by the 2007 letter, so whether this limitation is intended or is an unfortunate implication of the chosen example is unclear. Note, however, that in the *Wilson County* case, the result seems to follow that in the example. OCR's concern in *Wilson County* was that accommodations in the student's plan at the time he began accelerated classes were not applied to the accelerated classes. A clear statement of this rule from OCR would be helpful, especially as schools are confronted with parents demanding additional supports in the face of more difficult demands in accelerated classes.

4. There appears to be no concern over whether the accommodations or services provided in the regular class, when provided in the accelerated class, will still be appropriate.

Accelerated classes, by definition, are meant to be different from regular classes of the same subject matter. Accelerated classes typically move at a faster pace, involve more reading and writing, and can be otherwise more intense versions of their regular education counterparts. In some cases, these classes may also expose the student to curriculum in excess or above a grade-level class of the same subject matter, and may offer weighted grades to encourage participation and in recognition of the greater difficulty of the material. **Strangely, OCR treats grade-level curriculum and accelerated curriculum as identical (although there may be significant differences).** While in other contexts, OCR recognizes that remedial and special education classes may offer below-grade-level curriculum, and accelerated classes may offer above-grade-level curriculum, OCR acknowledges no difference in curriculum level in this analysis on accommodations. (*See for example, OCR guidance on notations to transcripts to indicate classes with modified or alternative education curriculum, In Re: Report Cards and Transcripts for Students with Disabilities, 51 IDELR 50 (OCR 2008)*) (**"While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is**

consistent with the transcript’s purpose of informing postsecondary institutions and prospective employers of a student’s academic credentials and achievements. Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities would be consistent with similar transcript designations for classes such as advanced placement, honors, and basic and remedial instruction, which are provided for both students with and without disabilities, and thus would not violate Section 504 or Title II.”) (emphasis added).

OCR appears to assume here that accommodations appropriate in a regular class will not (regardless of the type or scale of the accommodation) take away from the accelerated nature of the class, and thus potentially provide the accommodated student with weighted credit for mere grade-level work. The possibility is not directly addressed in the OCR letter (unless that is the implication of the word “generally” in the 2007 letter).

Doesn’t an academic accommodation make an “accelerated” class a “regular” class, constituting a fundamental alteration? Perhaps, but not this time. ... *Wilson County (TN) School District*, 50 IDELR 230 (OCR 2008). While not prevented from enrolling in honors courses, the school mistakenly refused to allow a Section 504 student with ADHD and OCD to receive his Section 504 accommodations in honors classes. During the 2005-06 school year, the student was determined eligible for Section 504 to address the student’s difficulty focusing on and completing work and “expending extreme amounts of time” on homework that negatively impacted his grades. Extended time was among his accommodations. In 2006-07, the student (now a ninth-grader) enrolled in honors English and algebra, but in a Section 504 meeting, his previous accommodation plan was amended to exclude extra time on classwork, homework and classroom tests in his honors classes (although these same accommodations continued to apply to his other classes). Interestingly, the resistance to accommodate did not come from the honors classroom teacher (as is generally the case, due to concerns over diluting the accelerated class’s curriculum) but from the school’s Section 504 Coordinator, who took the position that academic accommodations were not possible in the honors class, and if the work could not be done, the student should be placed in regular education classes. The rationale provided by the Section 504 Coordinator was that:

- (1) The school needed to provide behavioral, medical/physical accommodations in honors classes (distraction-free seating, behavior plans, scribes for students with broken arms, etc., but that “changing the testing requirements would effectively change the criteria for the honors program.”
- (2) Academic accommodations “are appropriate in ‘regular’ classes that assess the basic core curriculum standards that are not advanced or enhanced in regard to academic expectations[.]”
- (3) Finally, “in her opinion, it would be direct contradiction to declare that a student has a limitation in learning, yet place them in an academic honors program.”

OCR disagreed with the coordinator’s thinking, citing its December 2007 letter and data that Section 504 plans providing academic accommodations (including extra time on classwork and homework) were provided to five other students, but not this one.

Lost in translation: You don’t really want to take French, try Spanish instead.... *Washington Township*, 48 IDELR 80 (OCR 2006). In an issue analogous to the accelerated class analysis, a school district offered three foreign languages in middle school (Spanish, French and German) but did not provide in-class support (ICS), resource room, or curriculum modification in French or German. These services are only available for students in the Spanish class. As students with disability choosing French or German would effectively have to forego access to certain special education related aids and services, the impact of the school’s foreign language policy was to offer only one language option: Spanish. An equal opportunity to participate was not available in French or German in violation of Section 504.

A view from a federal court: A gifted program and reasonable accommodation. *G.B.L. v. Bellevue School District #405*, 60 IDELR 186 (W.D. Wash. 2013). A special education eligible

student with ADHD and sensorineural hearing loss was accepted into the school district's PRISM program, an "accelerated program for highly gifted students with more advanced curriculum and a faster pace" despite "an entrance score one point below the requirement." During the summer prior to PRISM, a new IEP was developed that included 48 accommodations and modifications and nine special education services. While the year started well, "both his grades and mood quickly declined over the course of the school year." When things got rough, the parents requested additional accommodation that was refused, and the district suggested that the student leave the program. Before the district took action to move the student, the parents unilaterally placed him in a private school, and filed this action seeking reimbursement. The court explains the reasonable accommodation analysis that it will apply to resolve the dispute.

"Under the ADA and Section 504, 'an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.' *Zukle v. Regents of the Univ. of Cal.*, 14 NDLR 188, 166 F.3d 1041, 1046 (9th Cir. Cal. 02/23/99) (citing *Alexander v. Choate*, 556 IDELR 293, 469 U.S. 287, 300 (1985)). If the Plaintiffs meet 'the burden of producing evidence of the existence of a reasonable accommodation that would enable [the Student] to meet the educational institution's essential eligibility requirements,' the burden shifts to the District 'to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards.' *Id.* at 1047. The District 'may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards.'"

At issue here is the school's refusal to provide two accommodations requested by the parents. Both requests arise from the student's difficulty keeping pace with the required out-of-class work. Homework was a significant problem for the student. **In his regular education classes the previous year, "which has much less homework than the PRISM program, the Student spent four hours each night doing homework."**

"The accelerated PRISM program has a critical component of homework and students are expected to develop understanding and comprehension of the material outside of class. **The homework is also more difficult than in the regular education program.** The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and 'catching up' on homework creates problems." [Emphasis added].

Faced with the more difficult curriculum and sheer volume of material in the PRISM program, the student was unable to keep up. His "therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned." The therapist also argued that the homework burden was the student's "greatest source of stress." The district denied the request **"finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations."** The ALJ believed that the student, even with the proposed limitation, would not be successful since "the Student was already doing partial homework and was not mastering the course material." Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student's ability to continue in the program and learn the course material." Both ALJ and district court found the teacher's testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

The second request by the parents was to allow extended time on assignments. Parents argue that the school failed to provide extended time as required in the IEP ("if extended time is need for assignment [Student] or his parent will indicate a suggested new date on the daily progress report.") since the student was failing. "The ALJ found that the Student's 'teachers uniformly gave full credit for the Student's homework regardless of when it was turned in.'" The court found that the school provided reasonable accommodation, and that the additional request for homework limitation was not reasonable. Parent's action and demand for reimbursement of private school placement is denied.

A little commentary: Was the student “otherwise qualified for the program” if his entrance scores were below the established eligibility criteria? The court notes this fact in a single sentence, without any commentary. Assuming that eligibility criteria for the program are educationally based, and are appropriate and nondiscriminatory, did the school accomplish anything by ignoring the criteria for this student?

The court notes that the district did not discuss the requested two-hour homework limitation with teachers prior to rejecting the request. During the hearing, the teachers testified that *had they been told* to limit homework, they would have complied, despite their belief that homework is a necessary part of the PRISM program. “The teachers also testified that setting a time limit would not be a good option for helping the Student be successful in the program because of the educational value in each assignment and the specific processing difficulties faced by the Student in completing homework.” The author would be concerned if the natural inclination of educators here to meet student needs overrode the school’s obligation to provide educational benefit. A student, who due to services and accommodations, is denied opportunity for equal access and benefit in the school’s programs and activities is not, by definition, receiving FAPE. In other words, excessive or inappropriate accommodation can deny FAPE if it takes away learning opportunities from the child. Here, without the necessary homework component, the student would simply not be able to keep up. Hence, this requested accommodation, if provided, would deprive the student of opportunity to benefit in the PRISM program.

Note finally that this is a case where the school’s good faith efforts were critical. Consider this language from the court’s opinion.

“This case presents the unfortunate story of a bright Student who qualified for special education services and was given an IEP allowing the Student to participate in the accelerated PRISM program for highly gifted students; Parents who worked every day to ensure the Student’s academic success by monitoring daily reports, communicating with the Student’s special education teacher, and enlisting professional support and services whenever needed; and a School District that took many extra steps to facilitate the Student’s learning. Despite the interventions of the Parents and the District, the Student was unable to achieve success in the PRISM program and the Parents ultimately removed the Student from the District.”

That’s a “high ground” position from which a defense of this type of litigation is much easier.

III. Disability Harassment

A. Deliberate Indifference.

Although it is not a new liability theory, the number of cases seeking money damages for disability harassment alleging deliberate indifference has grown. Of special concern are claims where the harassing conduct includes sexual assault or precipitates a suicide attempt by the student targeted. A modern movement in public education calls for more aggressive responses to bullying and harassment, as well as training on strategies to prevent the problem. Most states have passed laws to help address the problem. In light of the depth and severity of the problem, half-hearted attempts to address the issue on campuses simply will not be enough, as districts must explore comprehensive approaches to deal with this difficult problem and avoid liability.

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).

Note that in their enforcement of disability harassment rules, the federal courts and U.S. Department of Education (ED) frequently look to Title IX cases and guidance. The author will do so as well.

In *Davis v. Monroe County Board of Education*, 103 LRP 20059, 526 U.S. 629 (U.S. 1999), 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 Bd. of Educ.*, 103 LRP 20059, 526 U.S. 629 (U.S. 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. This standard has been applied by analogy in the federal courts to claims of disability harassment as well.

1. How does the school respond in a manner that is clearly not unreasonable?

A variety of common-sense steps. *G.M. v. Drycreek Joint Elem. Sch. Dist.*, 59 IDELR 223 (E.D. Cal. 2012), a student with learning disabilities was allegedly subjected to harassment over a period of six months. The parents claimed that the District’s failure to stop the behavior from taking place indicated that staff acted with deliberately indifference, thus making a claim for money damages possible. The court noted, however, that school officials took action following each incident of

harassment. **There were five incidents over a 6-month period, and each was followed by increasingly intensive measures.** After the first incident, the teacher committed to monitoring the interactions. After the second, the teacher and a counselor met with the two harassers and prohibited them from working in any group with the target. After the parent claimed that the original harassers were enlisting other students to target their son, the assistant principal met with the latest harassers to warn them to stop or face consequences. In the last incident, where the student was punched, the harasser received a 5-day suspension. **The court pointed out that the fact that the measures were not fully effective did not mean staff was deliberately indifferent.** Deliberate indifference, said the court, means that District staff knew of the harm, yet failed to act upon it, and that was not the case here. Because the District took affirmative steps to address the harassment incidents, it could not be found to have acted with deliberate indifference.

A different outcome when reports don't trigger school action. *Preston v. Hilton Cent. Sch. Dist.*, 59 IDELR 99 (W.D.N.Y. 2012). A high-schooler with Asperger's Syndrome was taunted with profanities that included references to Autism and intellectual disabilities, and his grades dropped by 40% in two classes. The parents alleged that their reports to staff led to neither investigations nor any attempts to stop the harassment. The court held that these allegations were sufficient to raise an issue as to whether the school acted with deliberate indifference, and thus, sufficient to maintain an action for disability harassment in violation of §504.

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 Pub. Sch. Dist.*, 110 LRP 22284, 231 F.3d 253 (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.").

Steps may be necessary beyond the harasser and target. 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 Schs.*, 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*, 105 LRP 51835, 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.”).

A more complete approach. 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 (MO) R-I Sch. Dist.*, 111 LRP 24625 (OCR 08/25/10) (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.”).

A little commentary: Focus on creating an environment where harassment is not tolerated. This requires a variety of interconnected policies, practices, and mindsets. The process begins when the school creates policies and procedures to notify students of inappropriate conduct, together with a mechanism to receive complaints or reports and a process for promptly and appropriately investigating and resolving those complaints. Once the infrastructure is established, the school must create an awareness of what constitutes harassment by teaching students, staff, and parents both why and how they should report harassment when they become aware of it. Students, staff, and parents should be familiarized with the school’s policy and process. As the school promptly responds to reports (by conducting appropriate investigations and taking action reasonably calculated to stop the harassment and remedy its effects), students, staff, and parents will gain confidence that reports are addressed and reporting will become easier. The result is a strong network of eyes and ears that can help the school discover incidents quickly and respond with greater precision. A series of OCR letters of finding demonstrate the comprehensive nature of the change required. See, for example, *Blanchard (OK) Pub. Schs.*, 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 Sch. Dist.*, 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 Sch. Dist.*, 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.). Note that the 2013 Dear Colleague Letter on harassment, discussed below, concludes with a lengthy description of evidence-based practices for preventing and addressing bullying.

2. The confluence of sexual assault and disability. A few cases, divided widely by time, illustrate the types of extreme facts that are likely to generate a damages claim.

For some students, sexual harassment will be more likely because of disability. While not a disability harassment case, *Murrell* provides a sobering lesson with respect to the vulnerability of some students with disabilities 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 10th Circuit found that a Title IX claim due to the school’s “response” to the assaults should survive summary judgment. *Murrell v. Denver Sch. Dist. No. 1*, 110 LRP 22280, 186 F.3d 1238 (10th Cir. 1999).

A more recent disability harassment claim on similar facts. In *Braden v. Mountain Home Sch. Dist.*, 112 LRP 52094 (W.D.Ark. 2012), the court decided that a claim for money damages should proceed against a District in which a 4th-grader with ADHD and reactive attachment disorder was sexually assaulted in an alternative learning class. The school placed the student in the alternative class with significantly older students although the parents objected, believing he would be a target for harassment because of his emotional issues and history of being sexual abused. After another student allegedly sexually assaulted him, the school placed him on homebound services. Since the parent asserted that the student was subjected to multiple incidents of sexual abuse and assault in the classroom and in the presence of teachers with school officials’ knowledge, the parent raised a genuine issue of fact as to whether school staff acted in bad faith or with gross misjudgment. The parents reported all incidents to the teacher and school resource officer but alleged they received no response. A police report completed after the parent reported a particularly disturbing incident described facts that, if proven true, indicate that various staffpersons had knowledge of the dangers to the student in his educational setting. Thus, the matter is proceeding to trial.

Deliberate indifference due to failure to make timely changes to the IEP? *Stewart v. Waco ISD*, 60 IDELR 241 (5th Cir. 2013)(now vacated, see discussion below). When disability harassment is manifested as sexual assault, a claim for money damages is increasingly likely. The student at issue (Stewart) has an intellectual disability, together with speech and hearing impairments. After “an incident involving sexual contact between Stewart and another student” the school made changes to her IEP “to provide that she be separated from male students and remain under close supervision at school.” Despite these efforts, Stewart was involved in three more instances of sexual contact (characterized by the parents as sexual abuse) over the next two years. The three instances alleged are described as follows.

“In February 2006, a male student sexually abused Stewart in a school restroom. The District concluded that Stewart ‘was at least somewhat complicit’ in the incident and suspended her for three days. In August 2006, school personnel allowed Stewart to go to the restroom unattended, and she was again sexually abused by a male classmate. Finally, in October 2007, a male student ‘exposed himself’ to Stewart. The District suspended her again. In none of these instances, according to Stewart, did the District take any steps to further modify her IEP or to prevent future abuse.

The first theory in the litigation is the familiar disability harassment analysis that borrows from Title IX and looks to see whether the school was deliberately indifferent to known acts of peer-to-peer harassment. On this theory, the 5th Circuit affirms the dismissal of the claim by the district court, finding that Stewart has failed to plead sufficient facts to support the claim. Noting that deliberate indifference is an “exceedingly high standard,” the court finds her allegations insufficient to meet the test.

“The complaint’s largely cursory allegations, however, provide little information on the ‘constellation of surrounding circumstances, expectations, and relationships’ necessary to determine whether the District’s responses were ‘clearly unreasonable’ under the circumstances. The complaint fails to address the harassers’ identities and relationship to Stewart, the punishments meted out to the harassers, the nature of the abuse, the names and responsibilities of District personnel with knowledge of the harassment, the time-delay between the abuse and the District’s response, the extent of Stewart’s harm and exclusion from educational opportunities, the specific reasons why the District’s responses were obviously inadequate, or the manner in which such

responses likely made Stewart susceptible to further discrimination. Courts have found these factors, among others, relevant in the context of student-on-student harassment under Title IX.”

The second theory in *Waco* was more interesting. While the Plaintiff failed to allege sufficient facts to survive on a claim of deliberate indifference, a second theory survives. Recall that the student alleged a series of sexual contact incidents with male students at school, but no changes to the student’s IEP to address the issue. The court notes that a successful Section 504 claim is not limited to claims that a school literally refuses to make a reasonable accommodation. **Although “such cases are clear violations of Section 504, situations may arise where a district’s course of action goes strongly against the grain of accepted standards of educational practice in ways that have nothing to do with affirmatively refusing a reasonable accommodation.”** Such would be the case were the school to stop providing an effective accommodation and replace it with a practice that is not effective and “persists in the latter approach without adequate justification.”

“Notably, a plaintiff also may plead gross misjudgment by alleging that a school district knew of his disabilities but failed to investigate disability-based discrimination and harassment complaints or to ‘take appropriate and effective remedial measures once notice of [the] harassment was provided to school authorities.’ **In sum, a school district refuses reasonable accommodations under § 504 when it fails to exercise professional judgment in response to changing circumstances or new information, even if the district has already provided an accommodation based on an initial exercise of such judgment.**” [Emphasis added.]

The court emphasizes that while similar, the theories of difference indifference and gross misjudgment are distinct. “Deliberate indifference applies here only with respect to the District’s alleged liability for student-on-student harassment under a Title IX-like theory of disability discrimination. On the other hand, ‘gross misjudgment’—a species of heightened negligence—applies to the District’s refusal to make reasonable accommodations by further modifying Stewart’s IEP, a claim traditionally cognizable in some fashion via the IDEA, the ADA, and the Rehabilitation Act.” [Internal citations omitted].

In short, the school cannot simply implement an IEP and rest on its labors. The plan must adapt to changing circumstances and address new problems (or create new solutions to old problems not solved by the previous IEP). The court finds that she states a valid claim for relief on the gross misjudgment theory. **“At this early stage, we conclude that even if the District provided Stewart with reasonable accommodations when it initially modified her IEP, the three subsequent instances of alleged sexual abuse could plausibly support a finding that the modifications were actionably ineffective.”** Finally, the court steps back to look at the big picture, and reassure schools as to future liability.

“We caution that this opinion should not be read to make school districts insurers of the safety of special-needs students. We emphasize that courts generally should give deference to the judgments of educational professionals in the operation of their schools. This opinion neither alters that default rule nor lowers the high standards plaintiffs must satisfy to impose liability against school districts. **Isolated mistakes made by harried teachers and random bad acts committed by students and other third-parties generally will not support gross-misjudgment claims. At this stage in the case, we cannot say definitively that this case involves only the latter.**” [Internal citations omitted, emphasis added.]

A little commentary: The court addresses the school’s allegation that to some degree, Stewart was complicit in the sexual contact, but finds such complicity a problem to be solved through behavior management. “Regardless of what role Stewart allegedly played in facilitating this misconduct, her IEP was designed to prevent such encounters, and Stewart can plausibly argue at this stage that its effective implementation would have obviated any need for discipline.” The dissent to this opinion is heated, arguing that the court has created a tort-like duty not to mismanage the student’s IEP.

The 5th Circuit's *Stewart* decision has been vacated. A Motion for Rehearing and Motion for Rehearing En Banc, were both filed in this matter. On June 3, 2013 the 5th Circuit vacated this decision and remanded the case to the District Court to determine whether the student's failure to exhaust her IDEA remedies precluded her from suing under Section 504. *Stewart v. Waco Indep. Sch. Dist.*, 113 LRP 23555 (5th Cir. 06/03/13, *unpublished*). While this decision now has no precedential value, it remains an excellent example of the types of theories that may be pursued as demands for money damages continue. It is especially instructive as the Fifth Circuit has been historically deferential to the judgment of educators, and resistant to efforts to expand liability for schools.

3. The confluence of suicide and disability harassment. A review of recent case law reveals the growing relationship between bullying in public schools and cases involving suicidal students. When bullying is severe enough that victimized students begin making suicidal statements, parents can become concerned enough to pull students out of school, place them in private school, or otherwise take legal action against the public school.

Equal opportunity apathy to bullying? In an unpublished case from Texas, the parents of a deceased special education student argued that his suicide by hanging in the nurse's office restroom in the school created a claim under Section 504. The parents alleged that the student was bullied, the school was aware of the bullying, but the school did not appropriately respond. Instead, the parents allege that the school labeled their son a "bad child" and a "troublemaker" for reporting the bullying, and that the school ignored the student's threats to kill himself while placed in the alternative school. A federal District Court dismissed the Section 504 claims because there was no evidence of intentional discrimination solely on the basis of disability. Wrote the court: **"If Plaintiffs'—often uncontested—facts are to be believed, the Defendants' approach to what seems to be fairly wide-spread bullying based on Plaintiffs' summary judgment evidence is to bury their collective heads in the sand."** While the death is tragic, and perhaps could have been preventable, the court nevertheless finds no claim for disability discrimination. **"Nowhere in Plaintiffs' voluminous record is there any evidence that [Student] was bullied or treated differently by school administration because of his disability, or his membership in any other federally protected class. To the contrary, what Plaintiffs' record reveals is that the Defendants had a consistent policy of ignoring bullying against all students. That is not an issue within the limited jurisdiction of this court."** *Estate of Lance v. Kyer*, 59 IDELR 226 (E.D. Tex. 2012)(Unpublished). The court notes, in a footnote, that the state legislature could provide a mechanism for the parents to recover in tort, but has not done so.

See also, El Paso County Sch. Dist. 3, Widefield, 60 IDELR 117 (SEA Col. 2012). The parents of a student with traumatic brain impairment (TBI) reported that he was being harassed in one particular class, and that the school failed to adequately address those allegations to the point that he was not receiving the services set forth in his IEP. After initial attempts to resolve the problem with campus administrators, the parents again met with the assistant principal about their continuing concerns, which led him to investigate the matter more closely. **After his investigation, the assistant principal concluded that both the student and the alleged harassers were acting out in class and trying to get each other in trouble, and that the matter was more a case of mutual antagonism than unilateral bullying.** After a subsequent spitball incident, the parents again met with the principal, who proposed three options: (1) the student could remain in the class and administration would monitor the classroom more closely, (2) the student could stay in the 78-minute class for half the time and spend the other half in a supervised study hall to receive instruction personally from the principal (a former math teacher), or (3) the student could spend the entire class period in an improvised study hall in the room normally designated for in-school suspension receiving instruction from the principal. The parent, however, wanted the alleged harassers removed from the class and for the principal to monitor the class the entire period. The principal indicated this option was not feasible, but that he would agree to excuse the student's absence from this class when the parents stated they

preferred to take him out of school during that period. After the student told his parents that he was contemplating suicide due to the harassment, which he alleged was continuing in other settings, his parents hospitalized him and withdrew him from school, and did not respond to offers to have him finish out the year in a new school. The State Agency determined that the reason the IEP services were not implemented was the student's withdrawal from school before the school could address their escalating concerns. Moreover, the school was not deliberately indifferent to the student's allegations, but the parents refused to consider the options proposed by the school administrators.

A little commentary: The state agency correctly states the legal proposition that harassment can amount to a denial of FAPE by negatively impacting the ability of a student to receive special education services, citing *M.L. v. Federal Way Sch. Dist.*, 105 LRP 13966 (9th Cir. 2005). That case also cites the majority caselaw analysis of "deliberate indifference," whereby a school can be liable for student-to-student bullying if it fails to act in response to conduct of which it is aware. **But, the case also holds that the school cannot be held liable until the parent gives the school a reasonable opportunity to respond to the allegations and take action.** Here, the parents could not legitimately claim that the school administrators were deliberately indifferent to the student's problems when they met with the parents on several occasions and offered a number of proposals and options to address the bullying allegations. See, e.g. *G. M. v. Drycreek Joint Elem. Sch. Dist.*, 112 LRP 45306 (E.D. Cal. 2012) and *Dunfee v. Oberlin City Sch. Dist.*, 47 IDELR 217 (N.D. Ohio 2007)(deliberate indifference requires more than proof of school negligence).

Child Find implications. *In re: Student with a Disability*, 112 LRP 5256 (SEA New Mexico 2012). The 8th-grade student, who was previously identified and later dismissed from special education, again started having problems in the 6th grade, including refusing tasks and problems with peers. In the 7th grade, the student made a suicidal threat and expressed suicidal ideations, which led to the school conducting a suicide intervention. The student stated that everyone hated him, that he was upset over his parents' divorce, and that he wanted to kill himself. He also scratched himself, although not to the point of drawing blood. A month later, he again threatened suicide, for which police and emergency service providers responded. The school's suicide interventionist found that the student had pressure at school from bullies, teachers, and his parent, that he was concerned with his parents' divorce, that he neglected his school work, and that he self-mutilated by scratching. Private evaluators had diagnosed the student with emotional and behavioral disorders, including ADHD and oppositional defiant disorder. The student, moreover, was missing classroom instruction by frequently going to the nurse's office. The school district, however, had not evaluated the student for potential ED. **The hearing officer found that the school had failed in its child-find obligation with regard to the potential for ED in the student, as there were ample behaviors and symptoms raising a suspicion of ED.** Moreover, the hearing officer held that the failure to identify ED served to deny the student a FAPE, as an appropriate IEP that would have addressed his emotional conditions was not put in place. He ordered the student qualified as ED and provided an appropriate IEP. The hearing officer denied compensatory education services, however, as the parent failed to offer evidence to prove what services the student should have received under an appropriate IEP that recognized his ED, finding that "subsequent placement may remedy the prior violation."

A little commentary: While the case makes clear that the district's suicide prevention/intervention protocol was both in place and implemented, its activities took place without apparent coordination with the special education program. The persistent and recurring nature of the suicidal threats, together with the obvious impact the student's stressors were having on his functioning at school should have led the school's suicide intervention team and the special education personnel to put two and two together. Thus, the lesson for schools is to link their suicide prevention protocols to the special education child-find system, so that special education personnel could make cogent child-find decisions in a timely fashion with the information gleaned from the suicide intervention process.

To avoid liability, the school need not take every step available to address the harassment. *Long v. Murray Sch. Dist.*, 59 IDELR 76 (N.D. Ga. 2012). A student with Asperger's Syndrome committed

suicide after he and his parents reported harassment based on his disability. The parent sued, claiming that the school was deliberately indifferent to the harassment. The court found, however, that after the harassment was reported, the school disciplined the perpetrators and developed a safety plan for the student, which allowed the student to avoid crowds in the halls, be walked to the bus, and sit near the bus driver. Numerous cameras and teachers monitored the hallways during the school day. **Although the parent alleged that the school’s decision to convene a meeting with the student and the perpetrators together was inappropriate, the court did not find it unreasonable.** Moreover, although the parents claimed the harassment continued after these efforts, there was no evidence that any single harasser repeated his conduct once the school addressed it through its efforts. The parent’s argument was that there was a “culture of harassment,” as evidenced by offensive bathroom messages (e.g., “we won’t miss you”) and students wearing nooses to school after the student’s suicide. **While the court noted that the school never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate, including requiring staff to review its anti-bullying policies, and conducting a program where teachers met with small groups of students to discuss peer relationships and review the local code of conduct. In addition, the school held a tolerance program and implemented a district-wide behavior improvement program.** The court noted that the deliberate indifference standard is a difficult standard—it requires that the school’s response be clearly unreasonable in light of the known circumstances, and neither negligence nor mere unreasonableness is enough. “This is an emotionally charged case with very difficult facts. There is little question that Tyler was the victim of severe disability harassment, and that Defendants should have done more to stop the harassment and prevent future incidents. To establish a claim under §504 and the ADA, however, Plaintiffs must demonstrate that Defendants’ response to disability harassment constitutes deliberate indifference. **Deliberate indifference is a difficult, exacting standard, and there is simply no evidence of an existence of a clear pattern of inaction or abuse by any school employees.**” [Emphasis added.] Thus, the court granted summary judgment to the district.

A little commentary: Notice that while the conduct of the offending students is outrageous and even shocking, the legal focus is on the actions of the school. Moreover, the issue is not whether the actions of the school in attempting to address bullying or harassment are in fact fully effective, but whether they indicate that the school was not deliberately indifferent to the victim’s plight.

Despite the tragic facts, the road to monetary recovery in these cases is definitely a difficult one. *Brown v. Ogletree*, 58 IDELR 128 (S.D. Tex. 2012). The parents of a middle schooler with Asperger’s who committed suicide claimed the district engaged in disability discrimination by ignoring her complaints of harassment against her son at school. The student was socially awkward, short, talked with a lisp, and was pigeon-toed. Other male students allegedly called him “queer,” simulated sex acts with him, and pushed him down stairs on one occasion. The court noted that the parent’s complaint failed to “connect the dots” between the harassment and her son’s disabilities, and crucially, failed to allege that the district knew about the student’s Asperger’s. Thus, a disability discrimination claim could not proceed. But, the court initially held that the parent had stated a plausible constitutional claim based on deprivation of bodily integrity. On reconsideration, however, the court changed its mind after further briefing and dismissed the constitutional claims as well, based on 5th Circuit precedent regarding constitutional claims for the acts of private individuals, rather than state actors. *Brown v. Cypress Fairbanks Independent Sch. Dist.*, 59 IDELR 293 (S.D. Tex. 2012)

A little commentary: It should come as no surprise that it is rare for a federal court to reverse course and change its opinion on second thought. The fact that it happens on a case like this shows the complexity of the interplay of the various legal theories and remedies at play.

B. OCR's Series of Dear Colleague Letters on Disability Harassment

1. 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.”** (Emphasis added). 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.

“Disability Harassment” defined. “Disability harassment under Section 504 and Title II is [1] intimidation or abusive behavior [2] toward a student based on disability [3] 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 (bracketed material added by author)*.

Under federal law, 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 (the Office for Civil Rights) 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 “bullied” 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.

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.

2. A Second Dear Colleague Letter in 2010. On October 26, 2010, OCR issued a second Dear Colleague letter to SEAs (state education agencies) and LEAs (school districts) on the subject. *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’”).

3. A Third Dear Colleague Letter in 2013.

In the third letter, OCR fine-tunes the message. OCR again recognizes the policies and practices in place to address both bullying and harassment, and then makes a couple of important points not raised in previous letters. *Dear Colleague Letter, 113 LRP 33753 (OCR 2013)*[*Hereinafter, “DCL 2013”*].

Prior letters had focused schools' attention on what motivated a particular student with a disability to be harassed (was it disability or some other reason?). Consequently, OCR distinguished between bullying and harassment (see 1st and 2nd Dear Colleague Letters above). **OCR's current letter focuses on the impact of the bullying, whether motivated by the targeted student's disability or not.**

"Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. States and school districts have a responsibility under the IDEA, 20 U.S.C. § 1400, et seq., to ensure that FAPE in the least restrictive environment (LRE) is made available to eligible students with disabilities. In order for a student to receive FAPE, the student's individualized education program (IEP) must be reasonably calculated to provide meaningful educational benefit." *DCL 2013, p. 2.*

The language is especially interesting as allegations of bullying and disability harassment are legion, but published cases of bullying and harassment giving rise to a violation of FAPE are scarce. Schools need to recognize that *impact* of the bullying behavior on the student with disability is an OCR focus in addition to the motivation for the behavior that transforms bullying into a harassment.

In light of the concern over the impact of bullying on a targeted student's education, OCR cautions schools that in their response to bullying of a student with a disability, there should be **review by the IEP Team (and presumably the Section 504 Committee where applicable) to determine whether FAPE has been negatively impacted.**

"Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying." *Id., p 2-3.*

Where FAPE has been negatively impacted, **OCR warns of two concerns as schools respond: impact on LRE and changing services without required IEP Meetings.**

"The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. While it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive 'protected' setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation." *Id., p. 3.*

OCR also speaks to the now-common problem of the student with disability as harasser. In fact, it is not uncommon for a disability harassment allegation to consist of two students with a disability, each accusing the other of harassment. IEP Teams should respond appropriately.

“If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student’s IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted.” *Id.*, at p. 3.

A little commentary: Put simply, when the student with a disability is both the harasser and the target of harassment, schools must address both sides of the problem by remedying harmful effects, restoring lost FAPE and addressing the behavioral implications of the student’s own harassing behavior as well.

4. A quick note on OCR’s approach to harassment liability vs. that used in the federal courts. OCR requires more from schools to avoid violations of Section 504 than do the federal courts. *See, for example, 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. Why the difference? 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. So what should my school do?

ED and the federal courts apply different standards to school district liability for disability harassment under Section 504 and ADA Title II. ED’s standards require more of schools (schools must stop the harassment, and the knowledge standard is more stringent). For federal compliance purposes, the conservative position is to comply with the ED standard that will also satisfy the school’s obligations should the school have to defend its practices in federal court. With respect to the interplay between state bullying/harassment rules and federal disability harassment rules, talk with your school attorney.