BULLYING: AVOID THE LEGAL PITFALLS WHEN RESPONDING TO BULLYING ALLEGATIONS.

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BULLYING DEFINED

1. Why is the issue of bullying so important now?

In the past few years, there has been a sharp focus on the issue of bullying, its effects on students, and the manner in which schools respond. In October 2010, the Department of Education issued a “Dear Colleague” letter addressing bullying in schools. The Texas legislature passed a “bullying bill” that became effective as of the 2012-2013 school year. This legislation, which is reflected in school Board Policies FFI (legal) and FFI (local), imposes additional obligations on school personnel to investigate and respond to allegations of bullying. Federal and state governments, especially the U.S. Department of Education, have made bullying prevention a major focus. Bullying can rise to discriminatory harassment when the basis of the bullying is a protected characteristic such as gender, race, or disability.

More recently, on August 20, 2013, the Office of Special Education and Rehabilitative Services (“OSERS”) published a guidance letter regarding a public school district's responsibilities under the Individuals with Disabilities Education Act (“IDEA”) to address bullying of students with disabilities. See attachment.

2. How is bullying defined under Texas state law?

T.E.C § 37.0832 defines bullying, as follows:

(a) In this section, “bullying” means, subject to Subsection (b), engaging in written or verbal expression, expression through electronic means, or physical conduct that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district and that:

1) Has the effect or will have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student’s person or of damage to the student’s property; or

2) Is sufficiently severe, persistent, and pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student.

(b) Conduct described by Subsection (a) is considered bullying if that conduct:

1) Exploits an imbalance of power between the student perpetrator and the student victim through written or verbal expression or physical conduct; and

2) Interferes with a student’s education or substantially disrupts the operation of a school.

3. Why is it so important to know what does and does not constitute “bullying?”
Under a public school districts’ Board Policies FFI (Legal) and FFI (Local), school personnel have an increased obligation to report, investigate, and respond to claims of bullying. Staff must investigate the claims in order to determine whether the conduct meets the definition of “bullying,” and if so, take appropriate action in response. If bullying has occurred, the parents of the victim may have additional rights, including the right to request a transfer of their student or the student found to have engaged in bullying. Additionally, conduct described as “bullying” may also meet the definition of discriminatory harassment if the student is being bullied or harassed on the basis of a protected characteristic such as sex, gender, race, religion, or disability.

Public school districts also have the obligation to ensure that students with disabilities who are the targets of peer bullying, and/or the perpetrators of peer bullying, continue to receive a Free and Appropriate Public Education (“FAPE”).

CONSIDERATIONS FOR STUDENTS WITH DISABILITIES

1. Are there any special considerations regarding bullying and students with disabilities?

Yes. Claims of bullying may trigger additional obligations under the IDEA, the federal law that requires school districts to provide a FAPE to eligible students with a disability. For example, a student with a disability who has reported bullying may need additional services, such as special education counseling and instruction on self-advocacy. Decisions regarding a special education student’s identification, evaluation, placement, or the provision of FAPE to the student, must be made by the student’s ARD committee. The ARD committee should convene to appropriately address bullying of, and/or by, students receiving special education services.

The August 20, 2013 guidance letter from OSERS addresses these very points.

Also, bullying based on a student’s disability may constitute peer-on-peer harassment prohibited by Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (ADA).

2. What did the August 20, 2013 guidance letter from OSERS say about bullying?

School district personnel should familiarize themselves with and be mindful of the following:

a. Regardless of the reason, the "bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education ("FAPE") under the IDEA that must be remedied."

b. When the student with a disability is the target of bullying, the Admission, Review, and Dismissal ("ARD") committee should convene to:
i. Determine if the student's individualized educational needs have changed due to the effects of the bullying.

ii. If necessary to receive a meaningful educational benefit, modify the student's individualized education program ("IEP") to address additional special education and/or related services necessary to receive a FAPE.

iii. Address the continued provision of services in the Least Restrictive Environment ("LRE").

If a student with a disability has been the victim of bullying or harassment, it is best to convene an ARD meeting to review and revise the IEP to address any needs. For example, the student may need additional counseling or psychological services to deal with the effects. It may be appropriate to implement social skills training, self-advocacy training, in-home training to help the parents, or communication goals and objectives to ensure that the student knows how to identify and report any additional behavior. Depending on the nature of the claims, and the student’s physical or intellectual limitations, the student may require closer supervision, additional support staff, or a change of placement to ensure the student’s safety. It may also be necessary to conduct additional evaluations if there are any other areas of suspected disability.

Additionally, OSEP reminds us that parents may request an ARD committee meeting to address whether a student's needs have changed due to bullying behavior. School districts should generally grant such requests to the extent the request is regarding the student's individualized education program.

c. When a student with a disability is the target of bullying, administrators may not unilaterally change the student's special education services or placement to resolve the bullying. These decisions must be made by the ARD committee.

The change of placement for a student receiving special education services under the IDEA is an ARD committee decision. OSERS warn that the ARD committee should "...exercise caution when considering a change in placement or the location of services provided to the student with a disability who was the target of bullying behavior and should keep the student in the original placement unless the student can no longer receive a FAPE in the current LRE placement."

The ARD committee should be careful that any recommended change of placement is based upon the student's individualized education needs, and necessary for the continued provision of FAPE. Changes made simply to avoid bullying behavior may result in a denial of FAPE.

d. When the student with a disability engages in bullying, the ARD committee should convene to:

i. Consider if the student's IEP needs to be modified to address the bullying behavior.

ii. If necessary, modify the student's IEP to include any environmental changes or additional supports and/or services to address the behavior.
For example, if the accused student does not understand the nature of his/her actions, or the ARD committee determines the conduct was a manifestation of the disability, the student should not have a disciplinary change of placement. However, other forms of corrective action may be appropriate. For example, the student may require a more restrictive placement or additional services (such as counseling or social skills training) to ensure that the prohibited conduct does not reoccur. Additional supervision may be required, and the victim may require counseling or support as well.

If the accused student engaged in prohibited conduct and the victim is also disabled, more precautions may need to be put in place to ensure the safety of all students. These precautions could include additional supervision, counseling with the victim to ensure he or she understands what conduct is “inappropriate,” and how to report any additional inappropriate or prohibited conduct.

e. Bullying may trigger a district's child find obligations under the IDEA.

It is not uncommon for a student who has reported bullying to also report that the bullying has resulted in social anxiety, depression, school phobia, or some other condition. If the student is reporting these conditions, the district should consider offering to conduct a psychological evaluation to determine if the student’s emotional issues require specially designed instruction under IDEA.

Additionally, a district's child find obligation is triggered if incidents of bullying cause district staff to suspect that the student being bullied, and/or the student perpetrating the bullying, is a student with a disability requiring special education and related services. 34 CFR 300.11.

f. Additionally, OSERS provided the document entitled "Effective Evidence-Based Practices for Preventing and Addressing Bullying" to outline strategies school districts may employ to facilitate a successful bullying prevention and intervention program. You can access both OSERS' letter and the strategy document at:


3. What should we consider when deciding whether or not to discipline the student with a disability for bullying behavior?

Disciplining students who bully or harass others is typically required under OCR guidance, FFI (Local), and Chapter 37 of the Education Code. However, the IDEA and Section 504 impose certain limitations on school districts when disciplining students with disabilities.

Under the IDEA, a disciplinary removal for more than 10 school days is considered a “change of placement” that requires a manifestation determination review. Members of the ARD committee must review the conduct that resulted in the removal to determine if the conduct was:

1) A manifestation of the student’s disability, or
2) The direct result of the school’s failure to implement the student’s IEP or Behavior Intervention Plan (BIP).

If so, the ARD committee must return the student to the placement from which he was removed, conduct a Functional Behavioral Assessment (FBA) unless one has already been conducted, and develop or revise the BIP. If the conduct is determined not to be a manifestation of the student’s disability, the student can be disciplined in the same manner as a non-disabled student. However, the ARD committee must ensure that the student’s IEP can be implemented in the disciplinary setting and that the student can continue to receive FAPE.

4. What about the language in Chapter 37 of the Education Code regarding special education students?

The provision in the Education Code that prohibits bullying, harassment, and making hit lists, states that “a student in a special education program may not be disciplined for [bullying, harassment, and making hit lists] until an Admission, Review, and Dismissal committee meeting has been held to review the conduct.” This provision goes beyond what is required under IDEA because it would require an ARD meeting before any discipline is imposed, whereas the IDEA requires a review prior to disciplinary removals of more than 10 days.

5. What are the other things to consider when the student with a disability is the accused bully?

Depending on the circumstances, there are a number of considerations. Remember that each special education student is required to have an Individual Education Program (IEP) that addresses the student’s needs and is designed to ensure progress toward the student’s goals and objectives. If the student is engaging in behaviors that impede his or other students’ learning, the IDEA requires the ARD committee to consider the use of positive interventions and supports, and may consider conducting a FBA and implementing a BIP.

If we are getting reports that the student is bothering others or engaging in unwanted behaviors, whether we label it as “bullying” or “harassment” or “horseplay” does not matter. We need to address it and possibly revise the student’s IEP or placement. Some suggestions for addressing behaviors include:

- Goals and objectives related to social skills, communication, and behavior;
- Determining whether a more restrictive placement is appropriate; and
- Implementing counseling or other services.

6. Okay, you have our attention, but can a student or their parents actually bring a bullying claim under the IDEA?

The IDEA is the federal law that requires school districts to provide a FAPE to students with a disability who require specially designed instruction. The IDEA is not an anti-discrimination law like Section 504 or the ADA, and the IDEA does not mention “bullying”
or “harassment.” However, many requests for special education due process hearings include claims related to the district’s response, or lack thereof, to claims of bullying and/or harassment. Some hearing officers and judges have ruled that failure to adequately respond to these claims or protect a child from bullying may result in a denial of FAPE. In response to one parent’s allegation that failure to respond to bullying claims violated the IDEA, a former Texas hearing officer held:

The parent does not cite any statutory authority or case law recognizing a cause of action against a school district for allowing an unsafe or hostile educational environment under the IDEA, but it is presumed that such a claim could be cognizable if a student was subjected to such an oppressive educational environment that it hindered the student's access to an appropriate instruction to such a degree that it denied him a free appropriate public education. However, to the extent that such a claim is a general allegation that a student was bullied or otherwise subjected to hostility from others on a school campus, such a claim would not fall within the IDEA. Student v. Katy Independent School District, 108 LRP 2915, (James Holtz, December 15, 2007).

That being said, student advocates and attorneys are increasingly including bullying allegations in their requests for due process hearing, and/or, TEA complaints. Any link between bullying behavior and the denial of a FAPE, may result in liability to the school district, regardless of whether the student was the victim or perpetrator of bullying.

7. What additional obligations might be triggered when a student with a disability reports bullying?

If the investigation reveals that misconduct occurred, and that the misconduct amounted to discrimination based on a protected characteristic, the district must respond in accordance with OCR Guidance and Board Policy FFH. Failure to do so may result in the district’s violation of Section 504, the ADA, or other anti-discrimination laws. For example, OCR found that a school district violated Section 504 when it failed to adequately address teasing for a student with an emotional disturbance:

The Student is a fourteen-year-old with visible physical disabilities who has been enrolled in District schools since kindergarten. She suffered severe burns as a toddler, which continues to affect her appearance significantly. Portions of her face and hair are missing, as is her right hand. She has had numerous reconstructive surgeries and is scheduled for additional surgery in August or September 2008…The Student and her mother informed OCR that the Student was subjected to frequent teasing in elementary school about her appearance and the visible effects of her burns….During an assessment conducted while she was in third grade, the Student reported that other students frequently made fun of her and that her teachers did nothing to stop them.

Fairfield-Suisun (CA) Unified School District, 51 IDELR 139 (OCR 2008).
8. What happens if the investigation reveals that the conduct was not bullying or harassment, but the parent and/or student disagree?

Depending on the circumstances, a student’s IEP may need to be reviewed and revised even if the conduct was not bullying or harassment. For example, a student may perceive uncomfortable peer interactions as “bullying” based on the student’s lack of social skills or communication skills. The student could require additional services to address these deficits.

However, the determination of whether certain conduct is bullying/harassment is an administrative, not an ARD committee decision. ARD committee members and special education staff in general should be careful to avoid labeling any behavior as bullying until an investigation has determined it to be so.

If a parent disagrees with the outcome of a bullying investigation, then Board Policy FFI (Local) typically allows for an appeal of the investigation through FNG. Parents and students also have the following options if they believe their child was discriminated against, or denied a FAPE:

- Grievance or complaint lodged directly with the school under Board Policy;
- Grievance or complaint filed with TEA;
- Grievance or complaint filed with the Office of Civil Rights;
- Request for Due Process Hearing under the IDEA;
- Request for impartial hearing under Section 504; or
- Lawsuit filed in state or federal court.

9. What lessons can we learn from cases involving bulling?


The court held that the proposed placement at the large public high school was appropriate, despite the fears of the parents about bullying. The court found that the school was capable of dealing with bullying if it should occur. Key Quote:

J.E. may face bullying, but a fair appropriate public education does not require that the District be able to prove that a student will not face bullying at a placement, as this is impossible.

T.K. v. NYC DOE, 56 IDELR 228 (E.D. N.Y. 2011).

The L.K.’s parents stated that her peers ostracized her, pushed her, refused to touch items she touched, and ridiculed her daily. L.K complained to her parents almost daily about being bullied at school. Specific incidents of bullying included: a drawing in the record made by a student in L.K.’s class depicting L.K. in a disparaging light; a student chasing L.K. with what he claimed was blood, but was in fact ketchup; other students refusing to touch things once L.K had; and a
prank phone call made to L.K.’s home, which the school was informed about. No incident reports were generated by the school relating to these occurrences. L.K.’s aide reported that there was a great deal of teasing of L.K., with other children physically backing away to avoid her. Children would intentionally stay away from L.K. and at times physically push her away for fun. She would be tripped, where she was walking by and then if L.K. fell, the teachers would get upset with L.K. for making a scene. When L.K. tried to participate in class and raised her hand, others laughed at her. When L.K.’s aide brought the incidents of bullying to the attention of classroom teachers, it was ignored. When trying to discuss the incidents with the principal, the aide was turned away and told there was no time for a meeting.

During a CSE (IEP) meeting, L.K.’s parents sought to discuss bullying of their daughter, but the principal stated that it was not the appropriate time to discuss bullying, however, the matter could be discussed later. No future meeting was scheduled or took place. L.K.’s parents brought her to the school principal's office to discuss bullying in the school. After showing them into her office, the principal asked L.K.’s parents to have the conversation outside of L.K.’s presence. After removing L.K., when L.K.’s parents continued to try to discuss the matter, the principal asked them to leave. As the parent’s continued to try to discuss their daughter's problem the principal opened the door to her office and said she would call security if they did not leave. No subsequent meeting about bullying with school personnel took place. No investigation regarding bullying ever took place.

L.K.’s parents contend that this failure to address their concerns is just one example of many where bullying was brought the school's attention and nothing was done. L.K.’s parents contended that every attempt to address the bullying issue with the school principal both in person and in writing were summarily dismissed without response or investigation and as such they were denied a meaningful opportunity for participation in the CSE meetings. Additionally, L.K.’s father insisted that this constant bullying made L.K. "emotionally unavailable to learn." L.K.’s parents maintained that bullying caused their daughter to suffer academically and emotionally because she became resistant to attending school, began to have poorer academic performance, and it damaged her emotional well-being. The school pointed to progress reports showing L.K.’s academic progress and portraying her as an enthusiastic classroom participant.

The court stated that the parents did not have to show that the student was deprived of all educational benefit, or that she regressed. Rather, they only had to show that her educational benefit was "adversely affected." "Where bullying reaches a level where a student is substantially restricted in learning opportunities she has been deprived a FAPE.” Citing OCR's “Dear Colleague” letter reported at 55 IDELR 174, the District Court stated that when responding to bullying of a student with a disability, a district must take prompt and appropriate action, including investigating, and taking appropriate steps to prevent it from recurring. In this case, there was substantial evidence that the student was bullied, and that the district knew about it, yet did nothing.


The parent asserted that M.L., a child with autism, was denied a FAPE because the FWSD failed to take action to prevent other students from teasing M.L. The parent argued that FWSD was
deliberately indifferent to the parent’s reports that her child was being teased. The parent maintained that the teasing resulted in a denial of a FAPE. While the court noted that neither the statute nor any court at that point had directly addressed the question whether un-remedied teasing can constitute a denial of a FAPE, the court held that it can. In this case, however, the parent had failed to prove that bullying had occurred or that it resulted in loss of a FAPE.

Notable quote: Under the IDEA, a disabled child is guaranteed a FAPE, [internal citation omitted] which provide[s] educational benefit to the handicapped child.(quoting Rowley, 458 U.S. at 201, 102 S.Ct. 3034) (emphasis added). If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.


In this case, P.S was the victim of relentless physical and verbal harassment as well as social isolation by his classmates. Most of the harassment of P.S. focused on his lack of athleticism, his physique, and his perceived effeminacy. Bullies constantly called P.S. names such as “faggot,” “gay,” “homo,” “transvestite,” “transsexual,” “slut,” “queer,” “loser,” “big tits,” and “fat ass.” The bullies told new students not to socialize with P.S. Children threw rocks at P.S., and one student hit him with a padlock in gym class. When P.S. sat down at a cafeteria table, the other students moved. Despite repeated complaints, the school administration failed to remedy the situation.

P.S. became depressed, and his schoolwork suffered. When P.S. was in fifth grade, his mother, on the recommendation of the school psychologist, obtained private psychiatric counseling for him. The psychiatrist diagnosed P.S. with depression and prescribed medication, but there was no appreciable improvement. After P.S.’s grades slipped badly, the school evaluated him and classified him as eligible for special education and related services based on perceptual impairment. The Child Study Team (“CST”) then developed an Individualized Education Program (“IEP”) that placed P.S. in the “resource room” for math and gave him extra teacher attention to help with his organizational skills. But the CST manager believed that P.S.’s poor academic work was due to the bullying rather than any cognitive deficiencies.

An alternative physical education class was added to help P.S. with his physical skills and to avoid the locker room changing period, during which other children ridiculed his physique. The school also permitted P.S. to change classes at special times so that he would not encounter other students in the hallways and could thus avoid the harassment that customarily occurred there. In eighth grade, the harassment became so intense that P.S. attempted suicide. At the request of his psychiatrist, who told the CST manager that P.S.’s life and health were at stake, P.S. received home schooling for six weeks. In February and March of that year, the school changed P.S.’s classification, finding him eligible for special education on the basis of emotional disturbance.
P.S.’s parents requested a new school for P.S., which Shore Regional School denied. P.S.’s parents ultimately filed suit. The IHO ruled that P.S. could not receive a FAPE at Shore due to the continued threat of harassment from the bullies, and that the parent should be reimbursed for the costs of the separate school. The Circuit Court agreed.

10. How have the Texas Hearing Officers ruled?

Student v. Mabank ISD, 113 LRP 2115 (Tex. SEA 2012)

A student with an emotional disturbance engaged in bullying behavior that resulted in multiple DAEP placements. The student's parents alleged that the school district failed to provide staff with appropriate training regarding the nature of the student's disabilities, appropriate behavioral interventions, and how to address and/or avoid bullying behavior. The hearing officer determined that the school staff was adequately trained within the meaning of the IDEA. District staff training included continuing education focusing on behavioral issues, training on the student's IEP and BIP, and frequent consultation and modeling of appropriate behavioral strategies by the district behavior specialists. It is important to note that the district staff conducted an FBA and revised the student's BIP to address the student's bullying behavior.

Student v. McAllen ISD, 112 LRP 47208 (Tex. SEA 2012)

A student's private evaluators diagnosed the student with severe dyspepsia (indigestion), and mild myopia/astigmatism (nearsightedness). Additionally, the parents alleged that one of the student's teachers had bullied the student to the extent that the student was too stressed to pass the TAKS assessment, caused the student to perform below his ability level, and that the resulting anxiety established eligibility for special education services. The district conducted a Full Individual Evaluation. The ARD committee convened and determined that the student did not have an emotional disturbance, considered the student's other diagnoses, and ultimately determined the student to be ineligible for special education services. The district granted an Independent Educational Evaluation at public expense. The ARD committee reconvened to consider the private evaluation, and still determined the student to be ineligible for special education services. The hearing officer determined that the district's evaluation was appropriate and upheld the decisions of the ARD committee.

DISTRICT OBLIGATIONS UNDER STATE LAW AND BOARD POLICIES

1. What should special educators know about state law and board policy?

District policy addressing state bullying law can be found in Board Policies FFI (Legal) and FFI (Local).

Because every district employee is required to take some action under these policies, it is imperative that all district employees are aware of these policies and what they require.
2. What is required under Board Policy FFI (Legal)?

Policy FFI (Legal) includes the new definition of “bullying” (stated above) and requires each school board to adopt local policies that do the following:

- Prohibit bullying;
- Prohibit retaliation of anyone reporting bullying;
- Establish procedures for notifying the parents of the victim and the bully of the bullying incident;
- Establish actions a student should take to obtain assistance and intervention in response to bullying;
- Sets out the counseling options for students who witness or are victims of bullying, and those who engage in bullying;
- Establish procedures for reporting and investigation of bullying;
- Prohibit discipline for students who, after investigation, are found to be a victim of bullying and were acting in self-defense in response to the bullying; and
- Require that discipline for bullying by a student with a disability complies with federal law, including the Individuals with Disabilities Education Act (IDEA).

3. What is required under Board Policy FFI (Local)?

School district Policy FFI (Local) generally provides a detailed process for addressing allegations of bullying. Administrators should review the local policy for any characteristics unique to their individual districts. What follows is a general description of the primary components reflected in the default policy promulgated by the Texas Association of School Boards.

Any district employee who suspects or receives notice that a student has or may have experienced bullying must immediately notify the campus principal or designee, orally or in writing.

A report of bullying may be made to any District employee, and any District employee who receives information that a student has or may have experienced bullying must immediately notify the campus principal or designee. Campus administrators should provide training and instruction to staff members to make certain they know that all concerns regarding bullying should be reported to the principal or designee. This means that regardless of whether the complaint appears to have merit, it must be reported.

Note: Some employees, such as school psychologists, school nurses and counselors, may believe that they cannot report claims of bullying made to them by a student due to confidentiality concerns. There are no exceptions, however, and all employees must report bullying claims of which they have notice or suspicion. Standard policy language:
The principal or principal’s designee must 1) put any oral complaint in writing; 2) promptly investigate any report of bullying; and 3) take interim steps to prevent bullying during the investigation.

Allegations regarding bullying may come to your attention by written notice, verbal notice, or simply by observation. While you may request the complaining party to provide you with a written complaint, there is not legal or policy requirement that they do so. The principal or designee also has the responsibility to investigate any report of bullying. This investigation must be initiated as quickly as possible upon receipt of a complaint. It is also important to remember that necessary, interim steps should be taken to prevent bullying during the investigations. For example, action should be taken to immediately separate the alleged victim from the alleged bully while the investigation is pending.

The investigation should be completed within ten District business days, but may take longer depending on the circumstances. Once the investigation is completed, the principal or designee must prepare a written report of the investigation and findings, including a determination of whether or not ‘bullying’ occurred; and forward a copy of the report to the Superintendent.

The final written report should include the following:

- Date complaint was received;
- Names of alleged victim and alleged bully;
- Brief description of complain/allegations
- Steps taken in investigation;
- Summary of investigative findings;
- Reference to applicable policy and code of conduct provisions;
- Whether you were/were not able to substantiate that bullying had occurred; and
- Recommendations and description of action to be taken.

If the investigation reveals that bullying occurred, appropriate disciplinary and/or corrective action must be taken.

If the investigation finds that bullying (or other harassment under Policy FFH) occurred, the District must take appropriate disciplinary or corrective action to address any misconduct consistent with your student code of conduct. Also, even if the investigation determines that no bullying occurred, it may nevertheless be appropriate to take other responsive action. Counseling should be offered to the victim, witnesses, and the student who engaged in the conduct. The parents of the victim have the right to request a transfer of their child or the student who engaged in the conduct.
Note: The right to request a transfer does not necessarily mean that a transfer should be granted. This will depend on the availability of transfer options. The placement of a special education student may not be changed without a determination of an ARD Committee.

A student who is dissatisfied with the outcome of the investigation may appeal through Policy FNG (Local).

**PRACTICE TIP:** Board Policy FFI (Local) requires principals or their designees to investigate bullying claims *in order to* determine whether the conduct constituted bullying, prohibited discrimination, or something else. A common mistake is to make this determination simply based on the initial description of the conduct, without further investigation. Even if the conduct, as described, does not seem to rise to the level of bullying harassment, an investigation MUST be conducted.

### 4. Transfer requirements regarding bullying:

T.E.C. § 25.0342 provides:

(b) On the request of a parent or other person with authority to act on behalf of a student who is a victim of bullying, the board of trustees of a school district or the board’s designees shall transfer the victim to:

1) Another classroom at the campus to which the victim was assigned at the time the bullying occurred; or

2) A campus in the school district other than the campus to which the victim was assigned at the time the bullying occurred.

(b-1) The board of trustees of a school district may transfer the student who engaged in bullying to:

1) Another classroom at the campus to which the victim was assigned at the time the bullying occurred; or

2) A campus in the district other than the campus to which the victim was assigned at the time the bullying occurred, in consultation with a parent or other person with authority to act on behalf of the student who engaged in bullying.

(b-2) Section 37.004 applies to a transfer under Subsection (b-1) of a student with a disability who receives special education services.

(c) The board of trustees or the board’s designee shall verify that a student has been a victim of bullying before transferring the student under this section.

(d) The board of trustees or the board’s designee may consider past student behavior when identifying a bully.
(e) The determination by the board of trustees or the board’s designee is final and may not be appealed.

(f) A school district is not required to provide transportation to a student who transfers to another campus under Subsection (b)(2).

5. **Why is it important to determine if the bullying is based on a protected characteristic, such as sex, gender, race, religion, or disability?**

Policy FFI (Local) in most districts states that if the principal or designee determines that the bullying allegations, if true, would constitute prohibited discrimination, the investigations should proceed under Policy FFH (Local) instead. Thus, if the bullying claims implicate harassment based on sex, gender, race, religion or disability, the investigation may need to be completed by another individual and the actions taken in response may differ.

6. **How can we avoid labeling conduct as “bullying” if it doesn’t actually constitute bullying?**

When investigating claims of bullying, describe the conduct rather than label it. For example, an investigation should describe the actions that the students engaged in (such as name-calling, fighting, teasing, taunting), the words used, where the conduct occurred, how often it occurred, whether there was an injury, and whether the conduct is prohibited under the Student Code of Conduct. Even if the behavior does not meet the definition of bullying, a student may still be punished in accordance with the Code of Conduct.

**WHAT SHOULD WE KNOW ABOUT FEDERAL LAW?**

1. **Is bullying prohibited by federal law?**

There is no federal law that specifically addresses “bullying” although several versions are currently pending in the federal Legislature. Currently, students may bring “bullying” claims under one or more federal civil rights laws, depending on the circumstances. If the bullying is based on a protected characteristic, it could fall under one of the following federal anti-discrimination laws: Title IX, which prohibits discrimination and harassment on the basis of sex and gender; Title VI, which prohibits discrimination and harassment on the basis of race, color or national origin; and Section 504 and the ADA, which prohibit discrimination and harassment on the basis of disability. Students could also claim that a school district’s failure to protect them from harm violated their constitutional rights, which are brought as Section 1983 claims.

2. **How can bullying by peers trigger school district liability for discrimination or harassment under federal anti-discrimination laws?**

Federal anti-discrimination laws prohibit schools from discriminating against students by denying access to school programs, activities or services on the basis of the student’s sex/gender (Title IX), race (Title VI), or disability (Section 504 and ADA). In some circumstances, bullying
or harassment of a student by his or her peers has been found by the courts to be so “severe or pervasive” that it effectively barred the student’s access to school. If the school knew about the peer harassment but failed to reasonably respond or was “deliberately indifferent” to the harassment, the school may have violated federal law.

Thus, a bullying claim may implicate federal anti-discrimination laws where:

1) The student suffered peer-on-peer harassment;
2) The harassment was based on a protected characteristic (sex/gender, race, or disability);
3) The harassment was sufficiently severe and pervasive enough to create a hostile educational environment;
4) The school knew of the harassment; but
5) The school did not reasonably respond, or was “deliberately indifferent.”

Deliberate indifference is a fairly high standard. Federal courts have required plaintiffs to show that school personnel actually knew of the harassment and either completely ignored it, or responded unreasonably.


At the Motion to Dismiss stage, the court refused to dismiss a due process claim against the district after a student suicide, allegedly provoked by bullying. The complaint alleged that the district failed to train its staff and enforce its anti-bullying policies. The court held that the complaint alleged sufficient facts to suggest that the district “acted with deliberate indifference in refusing to enforce the policy.” Thus, the due process argument was allowed to proceed. However, the court rejected the “state-created danger” theory of liability. Equal protection arguments were also dismissed since the complaint alleged that the district was indifferent to bullying of all students, girls and boys, disabled and not. The court permitted the Title IX theory to go forward as the complaint alleged facts sufficient to show deliberate indifference of known harassment. The 504 claim was dismissed as there was no pleading to show that the school was even aware of, or discriminated against the student due to his disability.


This case arose from the suicide of a middle school student. The parent alleged that this was the culmination of pervasive and continual bullying that the school failed to prevent or stop, despite the existence of anti-bullying policies. Originally, the court refused to dismiss the case. Then, after a 5th Circuit decision in Doe v. Covington County Schools, this court reluctantly dismissed the case. Key Quote:

Following Covington, in the absence of a special relationship between the school and the student, public school officials who enact anti-bullying policies do not violate a student’s constitutional due process rights by failing to enforce such
policies, no matter how pervasive the bullying, no matter how hateful, and no matter how many lives, in addition to Asher’s, are lost.


The Court dismissed the parent’s Section 504 and Title II claims concluding that the District’s response to peer harassment was wholly inadequate, but was not based on the student’s disability. The court said that the record showed that the school “had a consistent policy of ignoring bullying against all students.” But there was no evidence that this student was bullied or treated differently by the school because of his disability.

Comment: While the court is very critical of the school in this case, it is important to remember that this was at the Motion to Dismiss stage of the case. At that stage of the litigation, the court is required to accept as true all of the plaintiff’s allegations, and to view those allegations in the light most favorable to the plaintiff.


The district’s practice of investigating incidents of disability harassment against a student with bipolar disorder did not protect it from a §504 claim. The district's motion for judgment was denied since a math teacher's failure to address reported incidents of bullying could amount to deliberate indifference. Additionally, the student attempted to address the bullying in math class at an IEP team meeting, but the ARD committee members did not address his concerns.

Long v. Murray County Sch. Dist., 113 LRP 25671 (11th Cir. 2013) unpublished

The 11th circuit affirmed the dismissal of a §504 claim involving the suicide of a high school student with Asperger's Syndrome, allegedly due to severe disability-based bullying. The district's swift action to address each individual incident of harassment, and reasonable belief that its remedial actions were successful, shielded the district from the allegation that its response was unreasonable. The parents were unable to establish that the district was deliberately indifferent based upon the information it had at the time.


The court found a parent’s complaint adequate to proceed when it alleged the student was labeled as having poor social skills and was mocked for his social difficulties. The student was allegedly subjected to at least 32 incidents of disability-related harassment over the course of three years, but the district allegedly failed to investigate or take action to prevent future incidents of bullying. The parents sufficiently pleaded deliberate indifference.

3. How can we determine whether bullying might be discrimination based on a protected characteristic?
Claims of bullying must be investigated pursuant to Board Policy FFI (Local). If it appears that the student was teased or picked on for reasons related to his or her disability or race, that could trigger an investigation into potential disability or racial discrimination.

**OCR GUIDELINES**

1. **Does the U.S. Department of Education apply the same standard as the federal courts?**

No. The Department of Education’s standard for investigating and responding to bullying claims is MUCH higher than the “deliberate indifference” standard applied by the federal courts. Deliberate indifference typically means that the school failed to respond reasonably to known harassment. The Department of Education, by contract, expects districts to prevent harassment from occurring in the first place, eliminate harassment of which it knows or should have known, and remediate its effects. As recipients of federal funds, school districts are subject to the standards enunciated by the U.S. Department of Education.

2. **How does the Department of Education enforce these standards?**

The Department’s Office for Civil Rights (OCR) is responsible for enforcing anti-discrimination laws in the school system. OCR has jurisdiction over discrimination and harassment claims under Title IX (sex/gender), Title VI (race, color, or national origin), and Section 504 and Title II of the ADA (disability). Bullying claims could fall under OCR’s jurisdiction if the bullying is harassment based on one of these protected characteristics.

   A District may be held liable under Section 504 and Title II for student-on-student disability harassment if it was aware of the harassment, or in the exercise of reasonable care should have been aware of the harassment, but failed to take immediate and appropriate action to address the harassment and prevent its recurrence.

OCR Investigation, July 12, 2010, 56 IDELR 84.

3. **What guidance has OCR provided to school districts regarding investigation and response to bullying claims made by students?**

In October 2010, OCR issued a “Dear Colleague” letter to school districts that addressed the problem of bullying in schools. The letter reminded school districts that “bullying” may constitute prohibited harassment which could trigger additional responsibilities under one or more of the federal anti-discrimination laws enforced by OCR. The letter set forth a high standard and provided guidance to school districts on how to meet that standard.

OCR’s “Dear Colleague” letter states that “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.” OCR indicates that it expects school personnel to “understand
their legal obligations to address harassment,” and that by doing so, schools can “prevent harassment from occurring and respond appropriately when it does.”

Having a clear anti-discrimination policy in the school, along with curriculum focused on character/respect, is one method of meeting the prevention standard. Schools are further instructed to promptly investigate bullying or harassment claims, follow up with students when harassment or bullying is suspected, take measures beyond disciplining the bullies, and ensure students have a safe environment in which they can report harassment. Schools should ensure the victim has counseling and other remedial measures, as needed, and that measures beyond discipline (such as education and/or counseling) are put in place with those found to have been involved in the bullying.

Follow these steps to ensure compliance with OCR Guidelines:

1. Have well publicized policies prohibiting harassment and procedures for reporting and resolving complaints.

2. Address harassment incidents about which the school knows or reasonably should have known.

3. Take immediate and appropriate action to investigate or otherwise determine what occurred.

4. If an investigation reveals that discriminatory harassment has occurred, take prompt and effective steps reasonably calculated to
   a. End the harassment,
   b. Eliminate any hostile environment and its effects, and
   c. Prevent the harassment from recurring.

OCR’s “Dear Colleague” letter includes the following advice:

Steps to end the harassment:
• Separate the accused harasser and the target,
• Provide counseling for the target and/or harasser, and
• Take appropriate disciplinary action against the harasser.
(These steps should not penalize the student who was harassed)

Steps to eliminate any hostile environment and its effects:
• (Depending on extent) provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students,
their families, and school staff can recognize harassment if it recurs and know how to respond,

- Provide counseling for the target and/or harasser,
- Provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment, and
- Include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment.

**Steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses:**

- Make sure that the harassed students and their families know how to report any subsequent problems,
- Conduct follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and
- Respond promptly and appropriately to address continuing or new problems.

4. **How can we ensure that we are complying with Board Policies, as well as OCR guidelines?**

Every staff member should be aware of the Board Policies regarding bullying and harassment and should be able to refer students and parents to the proper policy. If staff members are not aware of these policies, it is likely that they are not following them. For example, FFI (Local) requires all staff members to promptly report claims of bullying to the campus principal or designee. However, teachers, nurses, or counselors may be unaware of this obligation. If a student is complaining about bullying to a staff member, that staff must member MUST report it according to FFI Local.
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