



## ADDRESSING THE CONCERNS ASSOCIATED WITH THE HARASSMENT OF STUDENTS WITH DISABILITIES

The concerns of harassment of students with disabilities are significant. As a 2013 *Dear Colleague Letter* from the The U.S. Department of Education’s (USDOE) Office of Special Education and Rehabilitation Services (OSERS) explained:

*Students with disabilities are disproportionately affected by bullying. For example, students with learning disabilities, attention deficit or hyperactivity disorder, and autism are more likely to be bullied than their peers. Any number of factors—physical characteristics, processing and social skills, or intolerant environments—may increase the risk that students with disabilities will be bullied. Due to the characteristics of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand the extent to which bullying behaviors are harmful, or may be unable to make the situation known to an adult who can help.<sup>1</sup>*

Further, the harms associated with bullying are clear.

*Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression.<sup>2</sup>*

### FEDERAL LAWS THAT PROVIDE PROTECTION FOR STUDENTS WITH DISABILITIES

Schools are required to take steps to reduce the harassment of and by students with disabilities and remedy the harmful effects. Three federal laws govern situations related to harassment of, or by, students with disabilities: Section 504 of the Rehabilitation Act of 1973 (Section 504). The Americans with Disabilities Act of 1990 (ADA), and Individuals with Disabilities Education Act (IDEA).<sup>3</sup>

The terms “bullying” and “harassment” are often used interchangeably. If a student within a protected class, such as a student with disabilities, is experiencing serious, persistent, or pervasive hurtful treatment, this should be considered “discriminatory harassment.”

To receive services under IDEA a student must meet more stringent standards related to having a disability, challenges that impact their academic performance. The plan of action for this student is called an Individual Education Plan (IEP). An IEP contains Academic Objectives, Functional Objectives, and Supplemental Aids and Services. Supplemental Aids and Services are provided to enable children with disabilities to be educated with students without disabilities to the maximum extent appropriate.

Students with disabilities who are able to make progress in a regular classroom, with support, are generally placed on a 504 Plan. A 504 Plan contains Accommodations. Within Accommodations, behavior management support may include services to support social emotional skills, which is similar to the Functional Objectives in an IEP.

It is the responsibility of schools under both Section 504 and IDEA to ensure that students receive a Free Appropriate Public Education or FAPE. Harassment of student with a disability on any basis, whether based on the student’s disability or not, can result in a denial of FAPE that must be remedied.

The 2013 OSERS *Letter* addressed students receiving services under IDEA.<sup>4</sup> In 2014, USDOE’s Office for Civil Rights (OCR) issued a *Dear*

*Colleague Letter* that made it clear that addressing the harassment of students with disabilities is also governed under Section 504.<sup>5</sup> A very helpful guide was created by OCR, entitled *Parent and Educator Resource Guide to Section 504*, will provide additional insight into the information presented in this document.<sup>6</sup>

These *Letters* clearly state that in situations where students with disabilities are experiencing discriminatory harassment, the school must conduct a proper investigation.<sup>7</sup> If the hurtful conduct was sufficiently serious, pervasive, or persistent to interfere with the student’s ability to participate in the services offered by a school this must be fully addressed in an IEP or Section 504 meeting. The school must take prompt and effective steps reasonably calculated to end the harassment, prevent it from recurring, remedy the harm to the target, and eliminate the hostile environment.

### ADDRESSING CONCERNS IN AN IEP OR 504 MEETING

To hold an effective IEP or Section 504 Team meeting the school must conduct an evaluation/investigation to support its decision-making.

Any involvement in harassment or aggressive behavior raises a “red flag” that the student has difficulties in social skills relationships that must be better addressed through functional skills objectives and instructional opportunities or behavioral accommodations.

However, it is exceptionally important that the IEP or 504 meeting not focus solely on how the targeted student’s disabilities are affecting behavior that appears to be contributing to other students being hurtful. The primary focus of the meeting must be on the actions necessary to correct the hostile environment. These actions should be addressed under Supplemental Aids and Services or Accommodations.

One issue that frequently comes up with respect to students who have disabilities is how school staff treat this student in front of other students. If school staff are treating a student with disabilities in a way that is disrespectful or insulting or if school staff ignore when other students treat this student badly, it will be important to insist that the school take steps to make sure this stops.

It is not permissible to talk about what might happen in terms of discipline to any other students being hurtful in the targeted student’s IEP or 504 meeting. It will be necessary to generally discuss what the school intends to do in regards to any situations where any student is hurtful. This is in the context of actions reasonably calculated to stop the hurtful behavior and prevent retaliation. Any specific restrictions on this student’s actions should be shared with the targeted student.

### REEVALUATION OR INVESTIGATION

Under IDEA, students must be reevaluated if the school determines that the student’s needs indicate that reevaluation is necessary or if the child’s parent or teacher requests a reevaluation.<sup>8</sup> Section 504 requires school districts to conduct periodic reevaluations of students with disabilities. Challenges in participating in class related to being treated badly by other students should give rise to a reevaluation. The term used in the context of discriminatory harassment is “investigation.” The terms “investigation” and “reevaluation” should be considered to be the same in a situation of suspected harassment of a student with disabilities.

Under IDEA, a parent of a child with a disability has the right to an independent educational evaluation (IEE) at paid for by the school district if the parent disagrees with an evaluation or reevaluation obtained by the school district.<sup>9</sup> An IEE means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the child.<sup>10</sup> "Public expense" means that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.<sup>11</sup>

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate a due process hearing to show that its evaluation is appropriate and an additional evaluation is not necessary. The school district must provide information to parents about where an IEE may be obtained and the school district criteria applicable for IEEs.<sup>12</sup> However, the district must provide parents an opportunity to demonstrate that unique circumstances justify an IEE that does not meet the district's criteria.<sup>13</sup> In situations of discriminatory harassment, the district's normal criteria is likely not to be applicable.

In order to ensure the parent's right to an independent evaluation, it is the parent, not the district, who has the right to choose which evaluator will conduct the IEE.

An argument must be made to the district that if any investigation by the school upon a report of harassment of a student with disabilities has not been fully addressed and the response has not met the requirements of ensuring that prompt and effective steps reasonably calculated to end the bullying, prevent it from recurring, remedy the harm to the target, and eliminate the hostile environment, then clearly the parent has the right to disagree with this investigation/evaluation and request an IEE at public expense.

If the district disagrees with this, the district has to request a due process hearing. If the situation warrants, the parent can use this rejection as an additional basis for establishing that the district is being deliberately indifferent to the discriminatory harassment of their child and file a discriminatory harassment complaint with OCR.

School districts are not accustomed to having a parent request for an IEE conducted for the purpose of responding to harassment, so this likely will be a new experience for the district. The author of this resource is establishing professional services providing IEEs addressing discriminatory harassment and intends to provide resources, training, and mentoring to other professionals so that they can effectively prepare an IEE in these situations. This document is the first step in this process.

While IDEA provides for an IEE at public expense, Section 504 does not expressly do so. However, a significant statement as made in the *Parent and Educator Resource Guide to Section 504* appears to open the door to this possibility.

*A parent may have a specialist or other educational professional, who is independent of the school, test his or her child. fn. 63. <sup>14</sup>*

Footnote 63 reads:

*Note that Section 504 does not specifically address whether a school district must reimburse a parent if the parent has the student evaluated by professionals who are not affiliated with the school district.*

The wording of this is significant. This language opens the door for such a request to be made even though the law does not "specifically" allow for this--especially in situations when a student is experiencing discriminatory harassment that has not been effectively addressed.

An argument can be made that if a student with disabilities who is receiving services solely under Section 504 is being harassed and this harassment has created a hostile environment and that the school has

conducted an inadequate evaluation of the situation—essentially has not implemented comprehensive efforts reasonably calculated to both stop the harassment and correct the hostile environment—the most productive way to proceed would be for the district to pay for an IEE to gain greater insight into the situation to develop and appropriate intervention plan.

Under such a situation, if the district refuses a reasonable request by a parent, that includes documentation of the concern of harassment, for an IEE for a child receiving Section 504 services, the failure to approve this reasonable request could certainly provide additional evidence of the deliberate indifference of the district to the harassment. The parent can use this rejection as an additional basis for filing a discriminatory harassment complaint with OCR.<sup>15</sup>

## POSITIVE RESOLUTIONS

Based on extensive guidance in the field of bullying prevention, issues that should be addressed in the context of Supplemental Aids and Services or Accommodations should include:

- An identification of the strengths and challenges of the student with disabilities that can be incorporated into a Positive Action Plan to support this student in gaining more effective social relationship skills and greater resilience. Focusing on strengths and engaging in a Collaborative Problem Solving approach with this student, so that the student is fully engaged in the decision-making regarding this is essential.
- An identification of the circumstances under which the hurtful behavior directed at the student is most often occurring—including location, activities, which staff members are present to support a Safe Passages Plan that may include increased monitoring or other accommodations to ensure greater safety in these locations and under these circumstances.
- An identification of any concerns associated with staff behavior, such as treating the student in a hurtful manner in the presence of other students or ignoring or not responding effectively when students are being hurtful and a plan of action that ensures appropriate training and performance requirements.
- A general assessment of the challenges and motivations of those students who are being hurtful to fully understand the challenges and motivations behind those being hurtful to ensure that all appropriate protections are put into that are reasonably calculated to stop the harassment and any retaliation, as well as to support the actions necessary to correct the hostile environment.
- The proposed disciplinary interventions to address the hurtful behavior of these students. The targeted student has the right to be informed of all disciplinary interventions that relate directly to him/her/them.<sup>16</sup> It is highly recommended that an approach be implemented to ensure any hurtful student or staff member be held accountable in a restorative manner that seeks to remedy the harm, not resorting to entirely ineffective suspension of students.
- An assessment of the overall school climate to determine concerns that may be impacting this student, as well as other students with disabilities, and the identification and implementation of positive strategies to ensure greater inclusion of students with disabilities. This will necessarily include an assessment of behavior management approaches that the school is using that may result in discouraging students with disabilities, as well as public shaming or exclusion of these students.
- A commitment that the well-being of the targeted student and the efforts of the school will be regularly monitored and evaluated to ensure effectiveness.

## ABOUT THE AUTHOR

I have a M.S. in Special Education from the University of Oregon and a J.D. from Willamette University College of Law. I entered the field of bullying prevention by writing the first book ever published on cyberbullying, *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats, and Distress* (2007, Research Press). I am also author *Cyber-Safe Kids, Cyber-Savvy Teens, Helping Young People Use the Internet Safety and Responsibly* (2007, Jossey Bass). *Cyber Savvy: Embracing Digital Safety and Civility* (2011, Corwin Press). I write frequently for the publication *District Administration*, as well as other publications for the education community. I am the author of a new book for school leaders, *Engage Students to Embrace Civility*. This book is available on Amazon.

I occasionally work as a trial consultant for attorneys who are suing school districts based on discriminatory harassment.

Of frustration and concern to the national experts I regularly communicate with, none of us are having any success in convincing school leaders of a need for a change in their approach.

The new approach I am launching to seek to address these concerns, of which this document is included, is three-fold:

- *Be Positively Powerful: An Empowerment Plan for Teens Who Are Bullied or Harassed* is a book for teens that outlines for them the situation, insight into neuroplasticity, seven positive strategies they can use to become more empowered, approaches they can take to respond to hurtful incidents that incorporate these strategies. This insight is grounded in positive psychology and trauma informed practices. This book is available on Amazon.
- *Positive Resolutions: How to Insist on a Positive Response by the School to the Bullying or Harassment of Your Child* is a forthcoming book that provides guidance to parents on how to document and insist on a more positive response by the school. This document has been provided to parents in conjunction with Positive Resolutions. In addition, a Documentation Guide and template for writing a description of what is happening is provided to parents, along with a template setting forth how to prepare a complaint. This book will be available on Amazon.
- In my local community, I am setting up Bullying Resolution Services to seek to offer Independent Educational Evaluations to students with disabilities who are being harassed and the school's response is not working. If this approach demonstrates effectiveness, I will create training to offer to professionals nationwide on how to do this.

1 USDOE, Office of Special Education and Rehabilitation Services (OSERS) (August 20, 2013) Dear Colleague Letter Keeping Students with Disabilities Safe from Bullying. Page 2. <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>. 2 Id., Page 2.

3 Section 504 of the Rehabilitation Act of 1973. 29 U.S.C § 794; The Americans with Disabilities Act of 1990. 42 U.S.C. §§ 12131-12134; Individuals with Disabilities Act. 20 U.S.C. § 1400 et seq.

4 USDOE, OSERS (2013), supra.

5 USDOE, OCR (2014) Dear Colleague Letter on bullying of students under Section 504. <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

6 USDOE, OCR, (2016) Parent and Educator Resource Guide to Section 504. <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>.

7 OSERS, supra at Page 3. Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive Free and Appropriate Education (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

8 34 C.F.R. § 104.35(a).

9 34 C.F.R. § 300.502(a)(1).

10 34 C.F.R. § 300.502(a)(3)(i).

11 34 C.F.R §300.502(b)(2).

12 34 C.F.R. §300.502(e).

13 <http://www.ed.gov/policy/speced/guid/idea/letters/2004-1/parker022004iee1q2004.doc>.

See also <https://www.wrightslaw.com/blog/iees-parents-have-the-right-to-select-an-evaluator-of-their-choice/>

14 USDOE, OCR, Parent and Educator Resource Guide to Section 504 at page 18.

15 If an agency action is implemented, in determining whether a student was denied FAPE, OSERS or OCR will ask: Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of FAPE? If the answer is "yes," did the school act to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, make changes to his or her IEP or Section 504 plan?

16 This is an express requirement set forth in civil rights guidance provided to schools related to Title IX. OCR and the courts generally apply the standards set forth in one civil rights statute to all such statutes. USDOE, OCR (2001) Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Other Third Parties, Page vii.; USDOE OCR (2011) Dear Colleague Letter regarding sexual harassment of students. Page 13.