

# **Establishing Deliberate Indifference to a Hostile Environment**

## **Under Civil Rights Laws:**

### **Reliance on Civil Rights Regulations and Guidance**

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#### **Abstract**

This law review article addresses the concerns of the discriminatory harassment of students in this nation's K-12 schools. When a young person is being treated badly in a serious, persistent, or pervasive manner, is required to attend school, and is feeling the helplessness of not being able to get the harm to stop, this situation is a form of trauma that is known to cause profound, lasting damage. Under this nation's civil rights statutes, schools are required to correct situations where a student who is within a protected class is experiencing discriminatory harassment. Unfortunately, they often do not do so.

A common barrier to recovery in litigation in these situations revolves around the question of whether the school was deliberately indifferent to this discriminatory harassment. In some cases, the courts have held that given the evidence that the principal "did something" in response to reports of harmful conduct, even though what the principal did was wholly ineffective in stopping the ongoing harm, then this was sufficient evidence of lack of deliberate indifference.

Under civil rights regulations, if school officials suspect that a hostile environment is present for a student, that official is required to conduct a prompt, unbiased, and thorough investigation. If a hostile environment is found to exist, school officials are required to take steps reasonably calculated to stop the harassment, prevent retaliation, remedy the harm to the target,

and correct any aspects of the environment that may be supporting the continuing harm. Clearly, a necessary response should require more than simply “doing something.”

This law review article addresses how plaintiff counsel can rely on the civil rights regulations as evidence related to the question of deliberate indifference. While failure to comply with civil rights regulations cannot alone demonstrate deliberate indifference, these regulations are one consideration that can be consulted when assessing the appropriateness of a school’s response.

This law review article can also provide assistance to attorneys representing school districts. The best way for schools to avoid liability is to ensure that school officials are following the guidance presented in the civil rights regulations.

## **Article**

When a young person is being treated badly in a persistent manner, is required to attend school, and is feeling the helplessness of not being able to get the harm to stop, this situation is a form of trauma that is known to cause profound, lasting damage. Under this nation’s civil rights statutes, schools are required to correct situations where a student who is within a protected class is experiencing discriminatory harassment.<sup>1</sup> Unfortunately, they often do not do so.

OCR issued a *Dear Colleague Letter* in 2010. *Dear Colleague Letters* provide guidance to school districts about what OCR thinks the laws and regulations require. This *Dear Colleague Letter* outlined what constitutes discriminatory harassment under all of the civil rights regulations as follows:

Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.<sup>2</sup>

The need to address the school culture was thoroughly addressed throughout the *Dear Colleague Letter*. The requirements set forth included:

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. ... In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.<sup>3</sup>

In *Davis v. Monroe County Board of Education*, the Supreme Court held that schools can be held financially liable if they are “deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s authority,” so long as the harassment is “so severe, pervasive, and objectionably offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>4</sup>

The argument presented in this article is that to assist the court or a jury in making a determination of deliberate indifference, it is essential that these triers of fact understand what schools are required under the civil rights regulations and guidance to do to investigate and intervene in these situations. Without such background insight, these triers of fact will have no effective basis to determine whether the actions of the school officials were deliberately indifferent.

Fortunately, there are recent helpful court decisions that have held that while failure to comply with guidelines from the OCR cannot alone demonstrate deliberate indifference, they are one consideration that can be consulted when assessing the appropriateness of a school’s response.<sup>5</sup> This article will set forth why and how reliance on the civil rights regulations can be exceptionally helpful in establishing that school officials were deliberately indifferent to a hostile environment for a student.

### **The Question of Deliberate Indifference**

Imagine you are this student:

D.S. was less than eighty pounds and under 5'5" in the seventh grade. DS recalls other students calling him names, including "bitch," "faggot," and "queer," almost every day of seventh grade. He also claims he was regularly pushed in the hallways and cafeteria. ... In the eighth grade, the name-calling D.S. experienced in the seventh grade continued several times a week. The pushing in the hallways, cafeteria, and gym also persisted.<sup>6</sup>

Realize that D.S. is required by law to attend school. As a result of this pervasive and persistent harassment:

D.S. begged not to go to school, and D.S. recalls missing "a lot of school" while attending Rutledge. D.S. could not sleep, lacked an appetite, and suffered from gastrointestinal problems. Stiles stated that she was afraid D.S. would commit suicide. D.S. recounted multiple injuries stemming from the bullying at Rutledge, including fractured ribs, busted mouths, a busted nose, bruises, a compression fracture, wedging vertebrae, and back pain.

A three-judge panel of the 6th Circuit deemed the school not to be deliberately indifferent to the discriminatory harassment D.S. was experiencing under civil rights laws and thus could not recover damages. What was the reasoning of the court?

[E]ach time D.S. or his mother communicated a specific complaint of harassment, the school investigated promptly and thoroughly by interviewing D.S., interviewing other students and teachers, taking detailed notes, and viewing video recording when available. At the conclusion of each investigation, the administrators disciplined students found guilty of wrongdoing either with a verbal warning or a suspension. ... The school also took proactive steps to reduce opportunities for future harassment: teachers separated D.S. in class from students known to bother him, (an administrator) took steps to place D.S. in separate classes from his identified perpetrators in the eighth grade ... and (administrator) ultimately approved the hiring of a substitute teacher to monitor D.S. in school.

Based on the repetitive acts of harassment suffered by D.S., it is clear that a hostile environment existed for D.S. based on a perception that he was gay. Bullying prevention professionals would maintain that is not possible to effectively address a hostile environment

simply by investigating and applying consequences to identified aggressors the few times the situations were so egregious that D.S. or his mother reported. In addition to the more egregious hurtful acts, D.S. was experiencing daily insult--that no student should be forced to suffer.

When it becomes known to a school officials that harassment is pervasive, that is, involved hurtful behavior by a number of students, and persistent, that is, has continued despite interventions with in the instances that have been reported, the situation can not be effectively addressed merely by investigating and intervening in individual reported incidents. A hostile environment exists. To address the hostile environment requires investigating and addressing the elements of the environment that are acting to further the pervasive and persistent harassment of the student or group of students.

### **Harms Associated with Bullying and Harassment**

Before delving into the intricacies of proving deliberate indifference, let's first consider the harms plaintiff counsel is seeking to address and provide a remedy for. A recent commentary in Pediatrics, outlined the harms associated with being bullying:

Bullying can have life-long health consequences. It has been associated with stress-related physical and mental health symptoms, including depression, anxiety, post traumatic stress, and suicidal ideation. When bullying is motivated by discrimination or an attack on someone's core identity (eg, their sexual orientation), it can have especially harmful health consequences. The effects of bullying are not limited to the bullied. Bystanders who witness bullying may experience mental health consequences (eg, distress) as well.<sup>7</sup>

According to the Centers for Disease Control and Prevention, outcomes of bullying can include depression, anxiety, participating in interpersonal or sexual violence, substance use, poor social functioning, and low school performance and attendance. Those who engage in bullying, those who are bullied and those who witness bullying are all at higher risk of suicide. Bullying contributes to vulnerability when present with other risk factors. Risk is especially acute among lesbian, gay, bisexual, transgender and questioning (LGBTQ ) youth.

Persistent absenteeism is also a major concern associated with student success. A recent study focusing on YRBS data that compared the responses on being bullied in-person and electronically and missing school because of feeling of lack of safety demonstrated that students who were bullied in either venue were more likely to miss school, with those who were bullied in both venues at the highest risk of missing school.<sup>8</sup>

There are significant concerns regarding the association of bullying and school violence. A comprehensive study of school shootings by the Secret Service published in 2004, demonstrated that bullying is associated with shootings found that almost three-quarters of the school shooters reported they were persecuted, bullied, threatened, attacked or injured by others prior to the incident.<sup>9</sup>

Based on an analysis of the 2015 YRBS data, in a recent study published by *Pediatrics* students who are bullied were twice as likely to bring weapons to school.<sup>10</sup> Researchers found that the victims of bullying were more likely to bring weapons if they had also been in a fight, been threatened or injured at school, or skipped school out of fear for their safety. Each additional risk factor increased the likelihood of bringing a weapon to school.

It is necessary to “connect the dots” between bullying and traumatic stress disorders. One recent study revealed a high incidence of Post Traumatic Stress Disorder (PTSD) symptoms among students who reported they were bullied and a strong association between frequency of exposure to bullying and such symptoms.<sup>11</sup> Further, those students with the worst PTSD symptoms were the students who both engaged in and were bullied.

The association between bullying and PTSD was described:

People who have experienced events of an interpersonal nature show significantly higher levels of PTSD symptoms than those who have experienced other types of events. Bullying is an interpersonal event, and there are many salient aspects of children’s development that may make repeated bullying experiences especially harmful. Bullying happens at a time when the brain is undergoing development in several bio-psycho-social systems that regulate behavior. During childhood and adolescence there is a gradual development and strengthening of brain systems

involving a variety of cognitive, emotional and behavioral systems, from self-regulation and emotional processing to executive functions, from social connectivity to perception of threat. In adolescence, bullying might affect the development of executive functioning, including attention, response inhibition, organization and planning. The effects of bullying on the development of these biopsychosocial systems are not known, but a developmental perspective on trauma is needed both for understanding how the diagnosis of PTSD can be applied to this population, as well as for how potential traumatic effects can be reduced.<sup>12</sup>

Researchers have outlined how the experience of being bullied by peers becomes biologically embedded in the physiology of the developing child, which in turn modifies health and behavior.<sup>13</sup> A new study has documented that the brains of high school students who experienced persistent bullying appeared to have actually shrunk in size in a manner similar to adults who experienced early life stress, such as childhood maltreatment.<sup>14</sup> This study clearly shows that unrelenting victimization appears to actually be reshaping the teens' brains in a manner that has profound implications for their mental health.

The National Child Traumatic Stress Network describes two forms of traumatic distress.<sup>15</sup> Acute traumatic events involve experiencing, witnessing, or a threat of a serious injury to yourself or another. Chronic traumatic situations that occur repeatedly over periods of time and result in feelings of fear, loss of trust in others, decreased sense of safety, guilt, and shame. Bullying situations could involve acute trauma, chronic trauma, or both. However, normally the situation is more chronic.

### **Effectiveness of Bullying Prevention Efforts**

Let's next consider the current level of effectiveness of efforts to better address bullying and harassment in K-12 schools. More significant efforts to address bullying and harassment were implemented during the Obama Administration. However, the first federal website addressing bullying, Stop Bullying Now, [www.stopbullyingnow.hrsa.gov](http://www.stopbullyingnow.hrsa.gov), was initiated in 2004. This site shifted to the StopBullying.Gov web site, [stopbullying.gov](http://stopbullying.gov), early in the Obama

Administration.

The StopBullying.Gov website was the outreach vehicle for the Federal Partners in Bullying Prevention. Federal Partners in Bullying Prevention Steering Committee, is an interagency effort co-led by the Department of Education and the Department of Health and Human Services that works with other agency partners to coordinate policy, research, and communications on bullying topics. The Federal Partners in Bullying Prevention launched into prominence in August 2010 with the first Federal Partners in Bullying Prevention Summit.<sup>16</sup>

Readers may appropriately inquire: Have these initiatives been effective?

Here is the evidence: The Centers for Disease Control directs a bi-annual national survey called the Youth Risk Behavior Survey (YRBS). <https://www.cdc.gov/healthyyouth/data/yrbs/index.htm>. The YRBS was developed in 1990 to monitor health behaviors that contribute markedly to the leading causes of death, disability, and social problems among youth and adults in the United States. The survey asks questions of 8th grade and 11th grade students. Some states conduct their own survey. A question on bullying was added in 2009.<sup>17</sup> In 2009, 19.9% of students reported being bullied in the past year. In 2017, 19.0% of secondary students reported being bullied in the past year. The CDC considers the data from 2009 to 2017 to reflect no improvement.

Other than the fact that there has been no improvement, it is hard to know how these numbers translate. Quite likely, close to 20% of this nation's students are not experiencing what would be characterized under civil rights standards as a "hostile environment." A "hostile environment" exists for a student if that student is experiencing severe, persistent, or pervasive harassment that is denying or limiting that student's access to educational opportunities and benefits provided by the school.

Helpful data has become available to the author through a survey used by the Eugene 4J School District in Eugene, Oregon. The State of Oregon uses two different surveys similar to



YRBS at a state level. On these surveys, the Eugene 4J data on bullying has been roughly equivalent to the state-reported levels of bullying. Further the data from the Oregon surveys is similar to the data from the YRBS. Therefore, there is reason to believe that the data from the Eugene 4J survey is likely roughly equivalent to other districts--or at least within a reasonable range.

The Eugene 4J survey asks the questions in a way that reveal frequency of these incidents. This is very helpful as a way to better understand these kinds of situations. Students who are frequently experiencing being treated badly are at profoundly greater risk of long lasting harm.

Most specifically, the Eugene 4J survey asks if middle school or high school students have experienced bullying (defined as) or harassment (defined as) Never, Rarely (fewer than 3 times a year), Sometimes (1 to 3 times per month), or Often (Once a week or more).

Of greatest concern are those students who are experiencing someone bullying or harassing them once a week or more. Students who are experiencing being treated badly with this frequency are likely experiencing chronic trauma. This situation would also very likely meet the standard for a hostile environment, if the student is a member of a protected class.

The Eugene 4J survey revealed that in spring 2018, 6.4% of secondary students reported they were being bullied once a week or more and 5.5% reported they were harassed once a week or more. A total of 8.8% of students reported being bullied or harassed once a week or more--combining the data and eliminating duplications. Of additional concern, 63% of students who reported being bullied once a week or more and 68% of students who were harassed once a week or more also reported they would not ask a school staff member for help. This data has remained roughly consistent since the district implemented the survey in 2009. The approach implemented by the district to reduce bullying/harassment and to more effectively respond has not changed significantly.

### **Anti-Bullying Statutes and District Policies**

There is no federal law addressing bullying. All fifty states have enacted statutes governing bullying. Most of these statutes were enacted or revised based on guidance that was provided in 2010 by USDOE. USDOE issued a document and maintains a page on the Stopbullying.gov web site entitled *Key Components in State Anti-Bullying Laws*.<sup>18</sup>

What the state statutes have done has been to reduce the focus of schools in situations of bullying to the establishment of rules, setting up a student reporting system, investigating upon a report, and making a determination of whether the accused student committed acts that warrant a disciplinary consequence, generally a suspension. This is at the same time that schools are under significant pressure to reduce suspensions. Thus the guidance provided to principals is in conflict: Suspend students who engage in bullying. Don't suspend students.

There are several concerns related to bullying prevention statutes as compared to requirements under civil rights regulations that are important to understand:

- There is no evidence that any of these laws are having any positive impact in reducing bullying or supporting a more effective response to bullying by the school. In some states with more comprehensive statutes, the rates of reporting bullying are increasing.<sup>19</sup>
- The protections under the statute are only present if the bullied student reports. The vast majority of bullied students do not report because this does not often resolve the situation and very often makes things worse.<sup>20</sup>
- Because the focus is on the creation of a disciplinary policy, the primary emphasis of principal has been directed to a determination of whether the accused student has committed an act that has caused such a “significant disruption” at school to warrant a suspension.<sup>21</sup>
- The vast majority of bullying incidents do not meet the standards of “substantial disruption.” Most students who are experiencing persistent bullying are experiencing

ongoing hurtful acts from other students and staff that are of a more minor nature. The significant emotional harm is the result of the ongoing, chronic nature of the hurtful behavior, as well as the failure of school staff to get this hurtful situation to stop. It is important to focus on the combination of these factors: “I am frequently being treated badly AND even though staff see this or I have reported this, nothing has been done to stop this.”

- In states that require annual public reports of bullying the situation is far worse, because the principal is highly motivated to not consider any report to be “bullying.”<sup>22</sup>
- Many statutes use the term “harassment” in the statute of acts to be prohibited. The USDOE guidance further suggested that the statutes reference classes of students who are more often bullied—essentially the identification of classes of students who receive protection under civil rights statutes.<sup>23</sup> This has likely created significant confusion for principals—causing them to think that all reported incidents or situations should be addressed under the policy enacted pursuant to the anti-bullying statute, which only calls for an assessment of whether the accused student engaged in a “substantial disruption” and should be punished. The civil rights regulations call for a significantly more comprehensive response.<sup>24</sup>
- The statutes rarely call for more extensive measures to reduce bullying behavior. Sometimes, the statutes call for training of staff. However, most often, such training is limited to a focus on what bullying is under the statute, what the policy and rules are, and how to enforce the rules.<sup>25</sup> There is no focus on proactive efforts to reduce bullying or to assist staff in the steps necessary to establish a more positive climate and respond to a wide range of hurtful incidents.

Essentially, the state anti-bullying statutes are a huge part of the problem. This is why when a student or that student’s parent reports bullying, the school’s response most often is not

effective.

### **Civil Rights Protections**

Several federal laws, as well as state laws, govern discriminatory harassment based on “protected class.” “Protected classes” are those minority groups that have traditionally been discriminated against. At the national level this includes race and national origin, sex and sex role stereotyping, and disabilities. At the state level, religion is generally also specifically included. At the federal level, religion is included if this is associated with native origin.

It is not necessary that the student be a member of the “protected class.” The laws also protect students who are being treated badly because of the perspective they are a member of a “protected class.”

Significant concerns are present for students who are not members of a protected class. At this point in time in our statutory scheme of things, they have significantly fewer protections-- despite experiencing equivalent harm. A possible strategy to bring ensure equivalent protections for these students is if they are experiencing what could be diagnosed as mental health concerns is further outlined in the footnote.<sup>26</sup>

The federal civil rights statutes are these:

- **Title VI of the Civil Rights Act of 1964.**<sup>27</sup> Prohibits discrimination on the basis of race, color, or national origin in any educational program or activity receiving federal funds. Title VI includes discrimination based on religion, if grounded in national origin.
- **Title IX of the Education Amendments of 1972.**<sup>28</sup> Prohibits discrimination on the basis of sex by an educational program or activity receiving federal funds. Title IX also prohibits gender-based discrimination, including sex-role stereotyping based on sexual orientation or identity.

- **Section 504 of the Rehabilitation Act of 1973 (Section 504).**<sup>29</sup> Prohibits discrimination on the basis of disability in programs or activities receiving federal funds.
- **The Americans with Disabilities Act of 1990 (ADA).**<sup>30</sup> Prohibits discrimination on the basis of disability.

These civil rights laws are enforced through agency actions by the U. S. Department of Education's Office for Civil Rights (OCR) or state departments of education. Filing a complaint in this manner will start what is called an "agency action" to determine whether the district's actions are in accord with the laws and regulations. Withholding funds is the outcome of a negative finding.

### **Applying This to Litigation**

The framework for the analysis of civil rights cases was set forth in two Supreme Court cases, *Gebser v. Lago Vista Indep. School Dist.* and *Davis v. Monroe County Board of Education*, both private suits for damages under Title IX.<sup>31</sup>

In *Gebser*, the Court held that a school district was not liable for teacher-on-student sexual harassment unless it had actual knowledge of the harassment and responded to that knowledge with deliberate indifference. The Court rejected the use of agency principles to impute liability for the misconduct of teachers and declined to impose direct liability under what amounted to a negligence standard.<sup>32</sup>

With respect to the question of which school staff member has knowledge, the Court determined that this must "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf."<sup>33</sup> The Court also addressed the degree of knowledge required, stating "some prior allegations of harassment may be sufficiently minimal and far afield from the conduct underlying the plaintiff's Title IX claim that they would not alert a school district official of the risk of a Title IX plaintiff's sexual harassment."<sup>34</sup>

Thus, the question of knowledge requires an assessment of (1) whether school officials with the authority to take corrective action (2) had sufficient knowledge of the discriminatory conduct.

The situation in *Davis* involved student-on-student harassment. The civil rights statute that was involved in *Davis* was Title IX. Lower courts have relied on *Davis* to hold that students may sue school districts for deliberate indifference to peer harassment based on race, color, and national origin under Title VI, as well as disability under Title II and Section 504.

In *Davis*, the Supreme Court held that schools can be held financially liable if they are “deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s authority,” so long as the harassment is “so severe, pervasive, and objectionably offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>35</sup>

In accord with *Gebser*, the liability standard in *Davis* is based on the principle that recipients of federal funds should be held liable only for their own misconduct and not the misconduct of others. In several locations in the decision, the *Davis* decision addressed the two aspects of the situation over which school officials have control:

The statute’s plain language confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.<sup>36</sup>

These factors combine to limit a recipient’s damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the harassment occurs.<sup>37</sup>

Where, as here, the misconduct occurs during school hours and on school ground--the bulk of G. F.’s misconduct, in fact, took place in the classroom--the misconduct is taking place “under” an “operation” of the funding recipient. ... In these circumstances, the recipient retains substantial control over the context in which the harassment occurs.<sup>38</sup>

Breaking the *Davis* standard down, the five elements of a case include:

- Student is a member of, or perceived to be a member of, a protected class under federal statutes and the hurtful behavior is associated with the student’s protected class status, or perception thereof.
- The school has actual knowledge of the harassment.
- The student or students engaging in the harassment are under the school’s authority.
- The harassment is so severe, pervasive, and objectionably offensive that it is depriving the student of access to the educational opportunities or benefits provided by the school.
- The school has been deliberately indifferent to this harassment.

OCR issued a *Dear Colleague Letter* in 2010. *Dear Colleague Letters* provide guidance to school districts about what OCR thinks the laws and regulations require. This *Dear Colleague Letter* outlined what constitutes discriminatory harassment as follows:

Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.<sup>39</sup>

There are three critically important words to note: “*serious, persistent, or pervasive.*” The hurtful behavior or incidents may be considered *serious*—that is has involved physical violence, threats, or other serious incidents that have caused a substantial disruption.

However, these civil rights statutes also apply if the student is being *persistently* being treated badly by one or a small a group of students or if the hurtful treatment is more *pervasive*—that is many different students are being hurtful.

The persistent or pervasive language may or may not be incorporated into state statute. Even if it is, the principal may be more inclined to ignore this because in the thinking of the principal, a student should not be subjected to disciplinary action for behavior that has not been *serious* and caused a substantial disruption in the school.

The determination of whether the student was a member of, or perceived to be a member of, a protected class under federal statutes and the hurtful behavior is associated with the student's protected class status, or perception thereof, the student or students engaging in the harassment were under the school's authority, and whether the harassment is so severe, pervasive, and objectionably offensive that it is depriving the student of access to the educational opportunities or benefits provided by the school is generally a straightforward determination.

The two factors that are most often the subject of litigation are whether the school had actual knowledge and whether the school acted with deliberate indifference to the harassment. This article is focusing solely on the question of deliberate indifference.

### **Deliberate Indifference**

In *Davis*, the United States Supreme Court explained that deliberate indifference occurs “only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” *Davis*, 526 U.S. at 648. The Supreme Court made it clear that school districts are not required to “purge” their schools of “actionable peer harassment” or engage in “particular disciplinary action.” *Id.* at 648-49.

An assessment of whether the school official's response was deliberately indifferent requires an analysis of how the school official responded. Key language from *Davis* on how this assessment is to be made was nicely summarized in *Vance v. Spencer Cnty. Pub. Sch. Dist.*, a subsequent case:

The pivotal issue before us is what is required of federal assistance recipients under the “deliberate indifference standard.” The recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment. See *Davis*, 526 U.S. at 642, 119 S.Ct. 1661 (discussing *Gebser v. Lago Vista School Dist.*, stating liability arose from recipient's official decision not to remedy the violation). “[T]he deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.” *Davis*, 526 U.S. at 645, 119 S.Ct. 1661.



In describing the proof necessary to satisfy the standard, the Supreme Court stated that a plaintiff may demonstrate defendant's deliberate indifference to discrimination "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* at 648., 119 S.Ct. 1661 ...

The recipient is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules, but rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648-649, 119 S.Ct. 1661. The deliberate indifference standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Id.* at 648, 119 S.Ct. 1661. The standard does not mean that recipients must expel every student accused of misconduct. See *id.* Victims do not have a right to particular remedial demands. See *id.* Furthermore, courts should not second guess the disciplinary decisions that school administrators make. See *id.*.

In *Vance*, an early Sixth Circuit case addressing student-on-student harassment, the school argued that it could not be held to be deliberately indifferent because it responded every time that the student reported concerns.<sup>40</sup> The Court rejected this argument, stating:

Although no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably in light of the known circumstances. Thus, where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. 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.<sup>41</sup>

In a subsequent Sixth Circuit case, *Patterson v. Hudson Area Schools*, the Court determined that the student-on-student harassment had occurred over years and the school had repeatedly used the same ineffective method to address it, which could have led a jury to find to be deliberate indifference, subjecting the district to liability.<sup>42</sup> After the case was remanded for trial, the jury returned a verdict of \$800,000 for the plaintiff. However, the District Court set aside the verdict, stating:

In the instant case, the Court finds that the uncontroverted evidence is that Defendant's teachers and administrators responded to each and every incident of harassment of which they had notice.<sup>43</sup>

School districts, and their ally in many of these cases, National School Board Association (NSBA), have subsequently argued, in reliance on the district court decision in *Patterson*, that if every time the student reported in incident, the principal investigated and intervened this should be sufficient to avoid a determination that the school was deliberately indifferent. In a comment associated with the filing of an amicus brief, this statement was published by NSBA:

“The Court of Appeals clearly should uphold the district court’s decision and refrain from adopting the standards the plaintiffs cite that come from guidance documents issued by the U.S. Department of Education’s Office for Civil Rights,” said Francisco M. Negrón, Jr., NSBA Associate Executive Director and General Counsel. “Upholding the Supreme Court’s standard allows school officials, who are in the best position to develop strategies to create safe learning environments for all students, and to do so, without being needlessly exposed to unwarranted liability.”<sup>44</sup>

In the Second Circuit case of *Zeno v Pine Plains*, the school district in this case had argued:

[T]hat its disciplinary response could not constitute deliberate indifference because it immediately suspended nearly every student who was identified as harassing Anthony. In addition, it contacted students' parents or withdrew privileges (such as the right to participate in extracurricular activities).<sup>45</sup>

The evidence in the *Zeno* case demonstrated that punitive responses delivered by the school against those who were harassing Zeno were not only not preventing further hurtful interactions, they were making things worse because of retaliation. This led Zeno to resist reporting, unless the incident was egregious--a typical behavior of targeted students. In addition to the fact that the school investigated and responded to reported incidents, the school had a policy against bullying, a process to handle reports, trainings for staff and students, and had provided information to parents. The jury awarded Anthony \$1.25 million in damages, which the

court reduced to \$1 million.

The jury instruction provided was:

Deliberate indifference means that the defendant's response or lack of response to the alleged harassment was clearly unreasonable in light of the known circumstances. Deliberate indifference may be found where a defendant takes remedial action only after a lengthy and unjustifiable delay or where defendant's response was so inadequate or ineffective that discriminatory intent may be inferred. In other words, deliberate indifference requires a finding that the District's actions or inactions in response to known harassment effectively caused further harassment to occur.<sup>46</sup>

In review, the Second Circuit found that the jury could have determined that the school's responses were inadequate. The suspensions and other disciplinary actions had not deterred other students who took up the harassment. The harassment became increasingly severe, including threats on the student's life and physical abuse. The disciplinary actions had little or no effect on the racial taunting in the hallways. Outside organizations had offered assistance, including programs that specifically addressed racial discrimination, both of which the district refused. The Court concluded:

Responses that are not reasonably calculated to end harassment are inadequate. ... The jury could have found and apparently did find that the District's remedial response was inadequate -- and deliberately indifferent -- in at least three respects.

First, although the District disciplined many of the students who harassed Anthony, it dragged its feet before implementing any non-disciplinary remedial action -- a delay of a year or more. ... At some point after Anthony's first semester, the District should have done more, and its failure to do more "effectively caused" further harassment. ...

Second, the jury could have reasonably found that the District's additional remedial actions were little more than half-hearted measures. ... Although actually eliminating harassment is not a prerequisite to an adequate response, ... the District's actions could not have plausibly changed the culture of bias at SMHS or stopped the harassment directed at Anthony. ...

Finally, despite the District's present argument that it did not know its responses were inadequate or ineffective, a jury reasonably could have found that the District ignored the many signals that greater, more directed action was needed.<sup>47</sup>

## **Recent Decisions Regarding Deliberate Indifference That Raise Significant Concerns**

The Sixth Circuit's more recent decision in *Stiles v Grainger* raises significant concerns about a shift in the reasoning in this Circuit.<sup>48</sup> The fact that *Vance* was also a Sixth Circuit case, increases the concern about the decision in *Stiles*. The basis upon which the student D.S. in the *Stiles* case was treated and the harms he suffered were set out in the introduction.

It is important to note several things about this fact situation, that the research set forth below will provide further insight into. D.S. was being daily harassed, by being called names and being pushed and shoved. He did not report these incidents to school officials--and the vast majority of students do not do. The fact that this level of harassment was occurring in such a pervasive and persistent manner, leads to the conclusion that the environment in the school was exceptionally hostile to D.S. Recall the statements in *Davis* about the school having control over the environment.

In the decision, the Court essentially ignored the overall situation that the harassment of D.S. was ongoing and focused only on the actual incidents reported to the principal by D.S. In other words, the Court ignored the fact that despite the interventions by the school official, in the incidents D.S. reported to the school, D.S. was suffering almost daily harassment--a hostile environment which no amount of intervention in the more egregious instances would address.

It is unknown whether the approach of the Court was based on how the case was pled and presented by plaintiff's counsel. What appears to be occurring in the presentation of these cases is a specific enumeration of the instances of harassment that were reported to the principal by the student, which the school then responds to by demonstrating how the principal responded in each of these reported cases.

In effect, by following this approach, plaintiff's counsel appears to be placing too great of a focus on individual reported incidents in pleadings, presentation, and arguments in the case

and an insufficient attention to the overall concern of the existence of a hostile environment that is contributing to persistent and pervasive harassment. Even minor acts, such as name-calling and pushing in the hallways should be considered evidence of chronic traumatic events that result in significant emotional distress. The manner in which these cases are being presented could, unfortunately, contribute to the tendency of the court to then focus solely on the school's response in these reported incidents.

It is possible that plaintiff's counsel is proceeding in this manner because of the required element under *Davis* of "knowledge." Nothing in the language of *Davis* requires that the "knowledge" element should cause the case to focus solely on individual incidents that are reported by the harassed student. What is required is that the school official have actual knowledge that this harassment is occurring. Evidence that will support a finding of knowledge could include repeated student or parent reports, staff reports, and prior school records.

Further, when the question is whether the school official has knowledge that a hostile environment exists, which is supporting pervasive or persistent harassment of a student or group of students, such knowledge is established by evidence of the repeated incidents.

As noted above, the Sixth Circuit concluded that the plaintiff had failed to create a triable issue as to whether the school had exhibited deliberate indifference to D.S.'s situation. The limited response of the school officials was to investigate each incident D.S. reported and responding as deemed appropriate, separating D.S. from the students who continued to harass him, and eventually hiring an aide to monitor his situation--which any middle school student will tell you is a recipe for causing greater harassment in situations where the aide is not present.

The Sixth Circuit found the situation factually different from *Vance* and *Patterson* because the school engaged in multiple investigations, several in-school suspensions, and class scheduling that separated D.S. from his harassers and that D.S. was occasionally considered to be an instigator--which was curious reasoning given that a police officer had suggested that D.S.

take up martial arts.

Lastly, and demonstrating its abject lack of basic humanity given the ongoing harassment and numerous physical injuries suffered by D.S., the Court stated.

*(T)he course of known harassment in this case lasted one-and-a-half years in comparison to over three years in Patterson. ... One-and-a-half years of similar, but not rote, responses to incidents that each involved a different student or group of students do not amount to clearly unreasonable conduct, even if they might become so over the course of a longer period of time.*<sup>49</sup>

The school officials took no actions whatsoever to investigate and address concerns related to the environment and context in which the harassment was occurring. Their sole focus was on the harassers, with no focus on the hostile environment that was clearly supporting the ongoing harassment.

The other recent case in this area, also decided in spring 2016, was *S.B. v. Harford County*, a Fourth Circuit case.<sup>50</sup> Here is the description of the challenges faced by S.B.

S.B. was a student with disabilities such as Attention Deficit Hyperactivity Disorder, weak visual-spatial ability, and a nonverbal learning disability. There is no question but that his years at Aberdeen High School, which he entered in the fall of 2010, were difficult ones. S.B.'s fellow students often bullied him, sometimes severely. Some of S.B.'s classmates insulted him using homophobic slurs. Others sexually harassed or physically threatened him. And S.B. faced — and sometimes contributed to — racial tensions with his classmates; in one significant episode, S.B. responded to three black students who had been calling him names with a racial epithet and made other threatening remarks.<sup>51</sup>

In this case, there were questions regarding whether the school knew that S.B. was being harassed based on disability, as there were also gender and race-related incidents. For the purpose of this article, we will address the Court's reasoning on the issue of deliberate indifference. The Fourth Circuit wrote:

*[T]he record shows conclusively that the school in fact investigated every single incident of alleged harassment of which it was informed by S.B. or his parents. And in nearly every case, the school disciplined offenders with measures ranging from parent phone calls to detentions to suspensions. Finally, as the district Court*

emphasized, from January 2013 to June 2013, the school assigned a paraeducator—a school professional who works with students—to accompany S.B. during the school day to ensure S.B.'s safety as well as to provide objective witness to alleged acts of bullying.<sup>52</sup>

Here again, note that although it was clear from the facts presented that a hostile environment existed, no actions were taken by the school to investigate and address factors within the environment that were resulting in pervasive and persistent harassment of S.B. Also note the reliance on a staff monitor--which bullying prevention experts would indicate is likely to increase the exclusion of the student being harassed and the risk of bullying whenever the staff monitor is not present.

The standard enunciated in these two cases essentially boils down to a determination that even if a student is experiencing pervasive and persistent harassment and is clearly suffering significant harms, all a principal must do is investigate any incident the student bravely reports and respond in some manner and the school can avoid liability.

Reducing the analysis of the reasonableness of a school response to a determination of how a school official responded to reported incidents ignores the clear language in *Davis* that school officials not only have authority over students who have engaged in harassment, but also the underlying environment.

What was either unsuccessfully argued or was dismissed by the Court was the clear fact that if different students or groups of students are harassing a protected class student, the critical issue of concern is not the behavior of these individual students, but the fact that a hostile environment exists that is supporting many students in thinking that their hurtful actions are acceptable. A failure by school officials to recognize this is clearly unreasonable in light of the circumstances and constitutes deliberately indifference to the fact that within this school a hostile environment exists that is supporting these pervasive and persistent hurtful actions.

If a hostile environment exists, no amount of intervention with individual students will

stop the pervasive and persistent harassment. The school has control over both the harassers and the environment which is supporting the harassment. Unless and until the school addresses the nature of the hostile environment, the harassment is guaranteed to persist.

The critically important other factor to recognize is that in both of these cases, arguably, the principals were following the directives of their respective state statutes. They had rules in place. They told students to report. It appears that the principals only responded at the times when the brave students did report. The responses were largely disciplinary responses--which research has clearly established have limited to no effectiveness in changing behavior.<sup>53</sup>

### **Missing Insight From Regulations and Guidance**

Reducing the analysis of a school response to a determination of how a school official responded to reported incidents ignores the clear language in the civil rights regulations and guidance that has been provided to schools. What the school is required to do under civil rights laws and regulations if a hostile environment is suspected is conduct a prompt, thorough, and unbiased investigation. If a hostile environment is found to be present, the school must take prompt and effective steps reasonably calculated to end the hurtful conduct, prevent it from recurring, remedy its harmful effects on the target, and correct the hostile environment to reduce the potential the hurtful acts will continue.<sup>54</sup>

These requirements provide the basis for knowing what schools should do—but often do not do in response to a report of bullying under the state statute. Normally what principals do is investigate to determine whether the accused student's actions created a sufficient disruption to constitute a violation of the disciplinary code and therefore sanctions should be imposed.

The following is the nature of such regulatory and other guidance. From *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), pages 12-3 (footnotes omitted).

If a student sexually harasses another student and the harassing conduct is



sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations. On the other hand, if, upon notice, the school fails to take prompt, effective action, the school's own inaction has permitted the student to be subjected to a hostile environment that denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex. In this case, the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.

...

Once a school has notice of possible sexual harassment of students -- whether carried out by employees, other students, or third parties -- it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again. These steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action. As described in the next section, in appropriate circumstances the school will also be responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed. ...

(T)he school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. However, in all cases the inquiry must be prompt, thorough, and impartial.

...

If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both. ... In some cases, it may be appropriate to further separate the harassed student and the harasser, ... or directing the harasser to have no further contact with the harassed student. Responsive measures of this type should be designed to minimize, as much as possible, the burden on the student who was harassed. ...

Steps should also be taken to eliminate any hostile environment that has been

created. For example, if a female student has been subjected to harassment by a group of other students in a class, the school may need to deliver special training or other interventions for that class to repair the educational environment. If the school offers the student the option of withdrawing from a class in which a hostile environment occurred, the school should assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record. Other measures may include, if appropriate, directing a harasser to apologize to the harassed student. If a hostile environment has affected an entire school or campus, an effective response may need to include dissemination of information, the issuance of new policy statements, or other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports that conduct.

In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances, the school may be required to make arrangements for an independent reassessment of the student's work, if feasible, and change the grade accordingly; make arrangements for the student to take the course again with a different instructor; provide tutoring; make tuition adjustments; offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances. As another example, if a school delays responding or responds inappropriately to information about harassment, such as a case in which the school ignores complaints by a student that he or she is being sexually harassed by a classmate, the school will be required to remedy the effects of the harassment that could have been prevented had the school responded promptly and effectively.

Finally, a school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses. At a minimum, this includes making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation. To prevent recurrences, counseling for the harasser may be appropriate to ensure that he or she understands what constitutes harassment and the effects it can have. In addition, depending on how widespread the harassment was and whether there have been any prior incidents, the school may need to provide training for the larger school community to ensure that students, parents, and teachers can recognize harassment if it recurs and know how to respond.

*The Dear Colleague Letter* from OCR in 2010 informed schools that they must respond to

situations of discriminatory harassment that they know or reasonably should know about.<sup>55</sup> The examples included make clear that to avoid an adverse agency action, schools must not only intervene in reported incidents, they must engage in comprehensive efforts to change the school culture that underlies such incidents. The need to address the school culture was thoroughly addressed throughout the *Dear Colleague Letter*. The requirements set forth included:

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

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

When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.<sup>56</sup>

The action steps that were outlined in this *Dear Colleague Letter* included:

- Separate the accused harasser and the target, provide counseling for the target and/or harasser, or take disciplinary action against the harasser.
- 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 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.
- Take steps to stop further harassment and prevent any retaliation against the harassed student, the person who made the complaint 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.

On the StopBullying.Gov web site, a hard to find page describes the difference between the bullying prevention statutes and actions schools are supposed to take if there are concerns of discriminatory harassment under civil rights laws.<sup>57</sup> The most important text on this page is this:

**What are a school's obligations regarding harassment based on protected classes?**

Anyone can report harassing conduct to a school. When a school receives a complaint they must take certain steps to investigate and resolve the situation.

- Immediate and appropriate action to investigate or otherwise determine what happened.
- Inquiry must be prompt, thorough, and impartial.
- Interview targeted students, offending students, and witnesses, and maintain written documentation of investigation
- Communicate with targeted students regarding steps taken to end harassment
- Check in with targeted students to ensure that harassment has ceased

When an investigation reveals that harassment has occurred, a school should take steps reasonably calculated to:

- End the harassment,
- Eliminate any hostile environment,
- Prevent harassment from recurring, and
- Prevent retaliation against the targeted student(s) or complainant(s).

**What should a school do to resolve a harassment complaint?**

- Appropriate responses will depend on the facts of each case.
- School must be an active participant in responding to harassment and should take reasonable steps when crafting remedies to minimize burdens on the targeted students.
- Possible responses include:

- Develop, revise, and publicize:
  - Policy prohibiting harassment and discrimination
  - Grievance procedures for students to file harassment complaints
  - Contact information for Title IX/Section 504/Title VI coordinators
- Implement training for staff and administration on identifying and addressing harassment
- Provide monitors or additional adult supervision in areas where harassment occurs
- Determine consequences and services for harassers, including whether discipline is appropriate (Note the very limited perspective on discipline of the hurtful student. This is not the primary focus, as it is under state anti-bullying statutes.)
- Limit interactions between harassers and targets
- Provide harassed student an additional opportunity to obtain a benefit that was denied (e.g., retaking a test/class).
- Provide services to a student who was denied a benefit (e.g., academic support services).

Correcting a hostile environment requires more actions than simply investigating to determine whether the hurtful student violated the disciplinary code, deciding on a punishment, and then telling the targeted student that the situation has been handled.

### **Legal Basis for Consideration of the Regulations and Guidance**

The question of the appropriateness of reliance on the civil rights regulations and guidance appears to not have been raised in many cases.

In the case of *Jane Does 1–10 v. Baylor Univ.*, Case No. 6:16-CV-173-RP, the court noted that while failure to comply with guidelines from the OCR cannot alone demonstrate deliberate indifference, they are one consideration that can be consulted when assessing the appropriateness of a school’s response.<sup>58</sup> The court stated as follows:

Second, Baylor argues that non-compliance with regulatory and administrative guidance from the Department of Education (“DOE”)— which Plaintiffs reference in their Complaint— cannot serve as the basis for establishing deliberate indifference. While the Court agrees that a school’s failure to comply with certain DOE guidelines generally cannot, alone, demonstrate a school’s deliberate indifference, see *Gebser*, 524 U.S. at 291–92, it also agrees with numerous courts that DOE regulations may still be consulted when assessing the appropriateness of a school’s response to reports of sexual assault. See, e.g., *Butters v. James Madison Univ.*, --- F. Supp. 3d ---, 2016 WL 5317695, at \*11 (W.D. Va. Sept. 22, 2016) (“[A] school’s compliance . . . with the [Dear Colleague Letter] can be a factor that the court considers”); *Doe v. Forest Hills Sch. Dist.*, No. 1:13-CV-428, 2015 WL 9906260, at \*10 (W.D. Mich. Mar. 31, 2015) (“ Although failure to comply with

Title IX guidance does not, on its own, constitute deliberate indifference, it is one consideration”).<sup>59</sup>

While failure to comply with these regulations and guidance alone cannot serve as the basis for establishing deliberate indifference, this DOE guidance provides an excellent basis for the jurors, along with other evidence, to consider whether the actions and inactions of the defendants should be considered to have been deliberately indifferent.

Plaintiff counsel is strongly encouraged to request judicial notice of the applicable civil rights regulations, *Dear Colleague Letters*, and other guidance issued by OCR.

In addition, expert opinion can be sought to evaluate the effectiveness of the school's response in accord with this regulations and guidance. In this manner, the protection of students from the harmful impact of being treated badly by their peers can be better addressed in court-- hopefully leading to more proactive response measures implemented by school leaders.

## **Conclusion**

Given the profound, life long harms students suffer in situations of persistent harassment that has created a hostile environment, it is essential that schools be held accountable for responding in a manner that is reasonably calculated to stop the harassment, prevent retaliation, remedy the harm to the target, and correct the hostile environment that is supporting the persistent harm.



1 Title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d-2000d-7; Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681-1688; 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.

2 U.S. Department of Education, Office for Civil Rights (October 26, 2010) Dear Colleague Letter on Harassment and Bullying. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

3 *Id.*, pp. 3-4.

4 *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999) p. 646-647.

5 *Doe 1 v Baylor University*. 240 F.Supp.3d 646 (W.D. Texas, 2017). <https://www.leagle.com/decision/inadvfco171116000318>

6 Based on the facts in this case: *Stiles v. Grainger County*, No. 01-91360 (6th Circuit, March 25, 2016).

7 Schuster MA, & Bogart LM. (2013) Did the ugly duckling have PTSD? Bullying, its effects, and the role of pediatricians. *Pediatrics*. 2013 Jan;131(1):e288-91.

8 Steiner RJ, Rasberry CN. Brief Report: Associations between in-person and electronic bullying victimization and missing school because of safety concerns among U.S. high school students. *J Adolesc*. 2015; 43:1- 4.

9 Vossekuil, B., Fein, R.A., Reddy, M.Borum, R., Modzeleski, W. (2004) The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States. U.S. Secret Service and U.S. Department of Education. <https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf>

10 <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/Victims-of-Bullying-Twice-as-Likely-to-Bring-Weapon-to-School.aspx>.

11 Idsoe, T., Dyregrov, A. & Idsoe, E.C. (2012) Bullying and PTSD Symptoms. *J Abnorm Child Psychol* 40:901–911. <http://www.uis.no/news/being-bullied-can-cause-trauma-symptoms-article62673-8865.html>

12 Idsoe, *supra* at 902.

13 Vaillancourt, T., Hymel, S., & McDougall, P., (2013). The biological underpinnings of peer victimization: Understanding why and how the effects of bullying can last a lifetime. *Theory into Practice*, 52, 241-248.

14 Quinlan, E.B, Barker, E.D, et al, (2018) Peer victimization and its impact on adolescent brain development and psychopathology *Molecular Psychiatry* (2018)

15 National Child Traumatic Stress Network. Defining Trauma and Child Traumatic Stress. <http://www.nctsn.net.org/content/defining-trauma-and-child-traumatic-stress>.

16 U.S. Education Secretary to Keynote Department's First-Ever Bullying Summit. (2010) <https://www.ed.gov/news/media-advisories/us-education-secretary-keynote-departments-first-ever-bullying-summit>

17 <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/trendsreport.pdf>.

18 <https://www.stopbullying.gov/laws/key-components/index.html>.



19 The Dignity Act for All Students in New York has been touted as a very comprehensive statute. <http://www.p12.nysed.gov/dignityact/>. There has been an increase in the percentage of students reporting being bullied since its passage: Youth Risk Behavior data for New York state. <http://apps.nccd.cdc.gov/youthonline/App/Results.aspx?LID=NY>.

20 Data from 2015 NCVS indicated that only 43% of students who reported someone had bullied them at school said that they told an adult. U.S. Department of Education (December 2016) Student Reports of Bullying and Cyberbullying From the 2015 School Crimes Supplement to the National Crimes Victimization Survey. <https://nces.ed.gov/pubs2017/2017015.pdf> ation Survey. <http://nces.ed.gov/pubs2015/2015056.pdf>; The Youth Voice Project study asked students who were bullied and distressed if they reported. Only about a third of these bullied students reported. Of this third, things got better after they reported only about a third of the time. Things stayed the same about a third of the time. Things got worse about a third of the time. Davis, S. and Nixon, C. (2013) Youth Voice Project: Student Insights into Bullying and Peer Mistreatment. Research Press: Illinois; Davis S. and Nixon, C. (2011) Youth Voice Project, National Data Set. Youth Voice Project. <http://www.youthvoiceproject.com>.

21 Specifically in the guidance associated with the Key Components is this: “Consequences Includes a detailed description of a graduated range of consequences and sanctions for bullying.” <https://www.stopbullying.gov/laws/key-components/index.html>.

22 While the rate of student reporting of being bullied has steadily climbed in New York, a state with a very comprehensive anti-bullying statute, one recent year 71% of New York City schools reported zero bullying incidents.

23 Specifically in the guidance associated with the Key Components is this: Protected Groups. Explains that bullying may include, but is not limited to, acts based on actual or perceived characteristics of students who have historically been targets of bullying and provides examples of such characteristics. Makes clear that bullying does not have to be based on any particular characteristic. <https://www.stopbullying.gov/laws/key-components/index.html>.

24 There is a page on the StopBullying.Gov web site that explains the difference. Here is the path to find this: Go to: <https://www.stopbullying.gov/laws/index.html>. Note on the bottom, the following statement: “There is no federal law that specifically applies to bullying. In some cases, when bullying is based on race or ethnicity, color, national origin, sex, disability, or religion\*, bullying overlaps with harassment and schools are legally obligated to address it. Read more about when bullying overlaps with harassment and how to report it to the U.S. Department of Education’s Office for Civil Rights and U.S. Department of Justice's Civil Rights Division. See also Federal Laws. This just links to main pages of these sites.

However, if you access the individual state pages, there is a Question and Answer such as this: Do Alabama anti-bullying laws and regulations include protections for specific groups? Yes. Alabama anti-bullying laws prohibit acts that are reasonably perceived as being motivated by any characteristic of a student, or by the association of a student with an individual who has a particular characteristic, if the characteristic falls into one of the categories of personal characteristics contained in the model policy adopted by the department or by a local board and implemented at each school. Alabama schools that receive federal funding are required by federal law to address discrimination on a number of different personal characteristics. Find out when bullying may be a civil rights violation. This last sentence links to this page: <https://www.stopbullying.gov/laws/federal/index.html>. If anyone were to follow this path, the last page does indeed provide some helpful guidance.

There is no link to this last page on the Key Components page in the discussion of Protected Groups at [www.stopbullying.gov/laws/key-components/index.html](http://www.stopbullying.gov/laws/key-components/index.html).

25 The StopBullying.gov page that provides insight into staff training states: Staff Training on Bullying Prevention “To ensure that bullying prevention efforts are successful, all school staff need to be trained on what bullying is, what the school’s policies and rules are, and how to enforce the rules. Training may take many forms: staff meetings, one-day training sessions, and teaching through modeling preferred behavior. Schools may choose any combination of these training options based on available funding, staff resources, and time.” <https://www.stopbullying.gov/prevention/at-school/index.html>.

26 Any student who is diagnosed with a mental health challenge--such as a trauma disorder, depression, or anxiety--is considered a student with a disability under Section 504. Any student with a disability who is being treated badly, on any basis, and who is experiencing a hostile environment that is interfering with their learning is experiencing discriminatory harassment under Section 504. Students who are experiencing a hostile environment because they are being persistently treated badly, quite likely could be diagnosed with a mental health challenge. Thus, the strategy to support students who might not otherwise be considered to be in a protected class, such as those with a weight problem who are very frequently treated badly, would be an inquiry into their mental health status. Once a mental health challenge is diagnosed, the persistent hurtful incidents they are experiencing become a civil rights matter.

27 Title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d-2000d-7.

28 Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681-1688.

29 Section 504 of the Rehabilitation Act of 1973. 29 U.S.C § 794.

30 The Americans with Disabilities Act of 1990. 42 U.S.C. §§ 12131-12134.

31 Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274 (1998) and Davis v. Monroe County Board of Education, 526 U.S. 629, 119 S. Ct. 1661 (1999)

32 Gebser, 524 U.S. at 284-86.

33 Gebser, 524 U.S. at 277.

34 Gebser, 524 U.S. at 291.

35 Davis 526 U.S. 646-647..

36 Davis 526 US at 644.

37 Davis 526 US at 645.

38 Davis 526 US at 645.

39U.S. Department of Education, Office for Civil Rights (October 26, 2010) Dear Colleague Letter on Harassment and Bullying. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

40 Vance, 231 F.3d at 253.

41 Vance 231 F.3d at 262.

42 Patterson v. Hudson Area Schools, 551 F. 3d 438 (6th Cir. 2009),

43 Patterson v. Hudson Area Schools, 724 F. Supp. 2d 682, 696 (ED Mich., 2010).

44 National School Board Association (2015) Court Urged to Maintain School District Flexibility in Responding to Disability Harassment Complaints. <https://www.nsba.org/newsroom/press-releases/court-urged-maintain-school-district-flexibility-responding-disability>.

45 Zeno v. Pine Plains, 702 F.3d 655, 664 (2nd Cir 2012).

46 Zeno, 702 F3d

47 Zeno, 702 F3d

48 Stiles v. Grainger County, No. 01-91360 (6th Circuit, March 25, 2016).

49 Stiles at 18 (slip).

50 S.B. v. Harford County, No. 15-1474 (4th Circuit, April 8, 2016),

51 S.B. at 4 (slip)

52 S.B. at 16 (slip).

53 When school staff use authoritarian practices to address student misbehavior, this results in an increase in bullying and other forms of aggression. Cornell, D. and Huang, F.L. (2016) Authoritative School Climate and High School Student Risk Behavior: A Cross-sectional Multi-level Analysis of Student Self-Reports. *Journal of Youth and Adolescence*; Konstantina, K. and Pilos-Dimitris S. (2010) School Characteristics as Predictors of Bullying Among Greek Middle School Students. *International Journal of Violence and School* 11 Septembra 2010. 93-113. See also, Yoneyama, S and Naito, A. (2003). Problems with the paradigm: The school as a factor in understanding bullying (with special reference to Japan). *British Journal of Sociology of Education*, 24: 315-330.

54 Id.

55 USDOE, Dear Colleague Letter, *supra*.

56 Id., pp. 3-4.

57 <https://www.stopbullying.gov/laws/federal/index.html>.

58 Doe 1 v Baylor University. 240 F.Supp.3d 646 (W.D. Texas, 2017)

59 Id at 659-660.