



Legal Protections

For Bullied and Harassed Students Primer

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Legal protections are available under civil rights laws for students who are within what is called “protected classes.” At the federal level, this includes sexual harassment and harassment based on sexual orientation or identify, race, national origin, religion if grounded in national origin, and disabilities.

States also have constitutional provisions and statutes that protect against discrimination, most generally including sex, race, color, religion, and national origin. Some state statutes have been expanded to include other protected classes, including sexual orientation or identity.

It also may be possible to file a law suit against a district grounded in a tort claim or violation of civil rights under a federal statute, 42 U.S.C. Section 1983. Students with disabilities receive additional protections.

Civil Rights Protections for Students

Several federal laws govern discriminatory harassment based on protected class. These laws are enforced through agency actions by the U.S. Department of Education’s Office for Civil Rights (OCR).¹ The statutes also provide the basis for to file a law suit against the school. These are the federal civil rights statutes:

- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by an educational program or activity receiving federal funds.² Title IX also prohibits gender-based discrimination, including discrimination based on sex-role stereotyping based on sexual orientation or identity.³
- Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any educational program or activity receiving federal funds.⁴ Title VI includes discrimination based on religion, if grounded in national origin.⁵
- Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance.⁶
- The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability.⁷ This provision has not yet been applied to students suffering from obesity, but in June 2013, the American Medical Association classified obesity a disease.⁸ If a student is obese and this student’s pediatrician considers this to be a disease condition, and the student is being bullied on this basis by students and/or staff, a harassment claim under ADA may be possible.

Violation of Civil Rights

The legal standard is this: Public school districts violate federal civil rights laws when discriminatory harassment based on race, color, national origin, sex, or disability is sufficiently serious to create a hostile environment, and school staff encourage, tolerate, do not adequately address, or ignore such harassment.

Let's break this down to questions:

- Was a student repeatedly bullied by one or more students or staff member based on the student's membership or perceived membership in a protected class?
- Was the bullying sufficiently serious to significantly interfere with the student's learning or activities at school? If this is the case, this is considered a "hostile environment."
- Did a staff member who had authority to take corrective action, which includes teachers, know or should this person have known of the conduct or have actual knowledge of a significant risk of harm? "Should have known" in the standard for an agency enforcement action. "Knew" is the standard for liability.
- Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?

Therefore, if a student:

- Is in a protected class or is perceived to be, for example perceived to have a minority sexual orientation.
- Is being repeatedly harassed either by one student or many students or by a staff member.
- This is causing the student to be distressed and this is interfering with the student's ability to learn or participate in other school activities.
- The school knows about this--or should.
- The school does not address both the individual incidents and investigate and address aspects of the hostile environment that may be supporting this harassment.

Then, it would appear the school is in violation of federal and state civil rights laws.

Hostile Environment

In 2010, the U.S. Department of Education released a *Dear Colleague Letter* to schools that addressed the interrelationship between bullying and discriminatory harassment. The *Letter* stated:

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.⁹

The legal standards addressing the required school response were set forth in Vance, a Sixth Circuit case.

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.¹⁰

Unfortunately, in some circuits, this standard has been weakened.¹¹

Especially if a student is a member of a class that receives protection under civil rights laws, but even if not, it is important to focus on holding the student or students who have been hurtful accountable for remedying the harm and stopping further harm.

However, if a hostile environment exists in a school, the environment itself is the critical factor that is supporting the ongoing harm and must also be addressed. This was made clear in the 2010 *Dear Colleague Letter*:

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.

Numerous examples then followed in this *Letter* that described situations where the school did take steps to punish the known perpetrators, but failed to take steps to address the overall hostile environment that was furthering these hurtful acts and was required by OCR to further correct the situation.

Agency Action or Law Suit

If a harassment situation at school meets the standards for discriminatory harassment, the parent can file a complaint with either OCR or the state's department of education. The parent can also file a lawsuit on behalf of his or her child based on a violation of these statutes.

A variety of public advocacy organizations may be able to assist in such a suit. Such organizations will be most interested if there are a group of similar students within a protected class who are routinely targeted.

If the situation is such that a parent chooses to pursue an agency enforcement action or litigation, one of the best outcomes would be a settlement, where the district agrees to the engage in comprehensive actions to address the challenges.

Tort Liability

There are two other possible legal theories upon which a public school might be sued in situations of bullying or harassment. At this point in time, these theories generally have not been very effective against public schools.¹²

Tort Law

Tort law provides a framework for determining liability. Negligence claims against schools are based on the premise that a school is liable for the consequences of staff conduct if it results in injury to a student. Each of the following elements must be assessed:

- Did the school have a duty to protect the student in the particular situation?
- What was the reasonable standard of care under the circumstances, and did the school apply that standard?
- If there was a breach of the standard, was it a significant factor in causing the injury?
- Did the student contribute to the injury through his or her own negligence?
- Was there substantiated injury?

The specific negligence that would most likely be applied in a situation of peer aggression is negligent supervision. Adequate student supervision is dependent upon the age of the students and circumstances involved.

A key factor in whether adequate supervision was provided is whether a school had notice of the potential hazard or issue. The failure to supervise appropriately after receipt of such notice may create liability for negligent supervision.

A challenge in bringing tort law claims is that public officials are provided with what is called "official immunity" in many situations. This varies from state-to-state.

Title 42 of the U.S. Code, Section 1983

Section 1983 of Title 42 of the U.S. Code was enacted as part of the Civil Rights Act.¹³ In a claim under Section 1983, the plaintiff must prove: a person subjected the plaintiff to conduct that occurred under color of state law, and this conduct deprived the plaintiff of rights, privileges, or immunities guaranteed under federal law or the U.S. Constitution.

Two theories of Section 1983 liability are based on the Supreme Court decision in *DeShaney v. Winnebago County Dep't of Soc. Servs.*: (a) an affirmative duty to protect someone held in state custody and (b) state created danger.¹⁴

While the Court in *DeShaney* acknowledged a duty to protect persons in state custody, at this point in time only three classes of persons are entitled to such protection are prisoners, arrestees, and persons involuntarily committed to mental institutions.¹⁵

Arguments have been raised that compulsory attendance laws create a "special relationship" between public school students and a school system that gives rise to such an affirmative duty.¹⁶ Thus far, such arguments have been unsuccessful.

The four elements constitute a state created danger:

- A state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted.
- A relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential

harm brought about by the state's actions, as opposed to a member of the public in general.

- The harm ultimately caused was foreseeable and direct.
- A state actor was deliberately indifferent to the situation.

Public school environments are created and under the control of school staff who are public officials. Clearly it is foreseeable that a student could be victimized by other students and possibly staff at school.

The critical questions in any case will be whether the harm was foreseeable and direct and whether the school staff was deliberately indifferent to this situation.

Students with Disabilities

Students with disabilities face an increased risk of being bullied. Some also engage in bullying behavior or are both bullied and targeted.

Schools are required to take steps to reduce the bullying of and by students with disabilities and remedy the harmful effects.

Three federal laws govern situations related to bullying of or by students with disabilities. Two discussed above protect against discriminatory harassment, Section 504 and ADA. The third statute is Individuals with Disabilities Education Act (IDEA).¹⁷

The importance of addressing the risks associated with bullying and students with disabilities was recently reinforced by the U.S. Department of Education in two *Dear Colleague Letters*. These *Letters* provide guidance that public schools must follow.

In 2013, the Department's Office for Special Education and Rehabilitation Services (OSERS) issued a *Letter* that called upon schools to address bullying of or by students with disabilities who are receiving services under the IDEA.¹⁸

In 2014, the Department's Office for Civil Rights (OCR) issued a *Letter* that placed the same requirements on students who schools serve under Section 504.¹⁹

It is also the responsibility of schools under Section 504 and IDEA to ensure that students receive what is called a Free Appropriate Public Education or FAPE. This will be referred to as "appropriate education."

Bullying of student with a disability on any basis (whether based on the student's disability or not) can result in a denial of an appropriate education that must be remedied.

In determining whether a student was denied an appropriate education, OSERS or OCR will consider:

- Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of an appropriate education?
- If the answer is "yes," did the school act to ensure an appropriate education by promptly determining whether the student's educational needs were still being met, and if not, making changes to his or her IEP or Section 504 plan?

When addressing an appropriate education, the focus is on the educational needs of and services provided to the student. A school's investigation should determine whether that student's education has been affected by the bullying.

As part of an appropriate response to a bullying situation, the school is required to convene the IEP or 504 team to determine whether the student's needs have changed such that the IEP or 504 services plan is no longer providing a meaningful educational benefit.

The team must determine the extent to which additional or different activities or services are needed to address the student's individualized needs and then revise and implement the IEP or 504 plan. However, schools must avoid doing things like placing a student in a more restrictive environment as a way to address the bullying concerns.

Under IDEA, schools must establish objectives for both academic and functional skills. Functional skills are life-skills. A student who is being bullied or engaging in bullying will likely require additional or different functional skills objectives, specifically those related to improving this student's social-emotional competencies and relationship skills.

If a student with a disability is engaging in bullying, the situation must be investigated thoroughly to determine whether this student's inappropriate behavior is associated with his or her disability. For example, the symptoms associated with trauma or conduct disorder include aggressive behavior that could be considered bullying.²⁰

It is also possible that this young person's aggressive behavior is in response to being disparaged by other students.²¹ Both of these kinds of situations should

result in an IEP or 504 meeting to determine whether additional or different educational services, including functional skills objectives, are required.

If a student has a disability and is being bullied, engaging in bullying, or both, it will be important to document what is happening and then make a specific request for an IEP or 504 meeting.

There are three key issues that must be addressed:

- Make sure that the discussion focuses on the educational services that the student needs to improve his or her social-emotional competencies and relationship skills.
- Address all issues related to how staff interact with the student.
- Lastly, there are additional hostile environmental issues that must be addressed--specifically what the school intends to do to ensure that all students with disabilities are well-supported by their peers.

1 <http://www2.ed.gov/about/offices/list/ocr/index.html>.

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

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

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

5 OCR, 2010 *Dear Colleague Letter*, *supra*.

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

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

8 <http://www.ama-assn.org/ama/pub/news/news/2013/2013-06-18-newama-policies-annual-meeting.page>

9 OCR, 2010 *Dear Colleague Letter*, *supra*.

10 *Vance v. Spencer Cnty. Pub. Sch. Dist.* 231 F.3d 253, 261 (6th Cir. 2000).

11 A document written by the author is on the Embrace Civility in the Digital Age website, *Deliberate Indifference to a Hostile Environment*. <http://www.embracecivility.org/legal/>.

12 An excellent law review article by Weddle provides extensive coverage of these legal issues and points to the need for statutory change to ensure that schools dedicate more attention to the concerns of students who are being harmed by their peers while under schools' care. Weddle, D. (2010) *You're On Your Own Kid: But You Shouldn't Be*. *Valparaiso University Law Review*, Vol. 44, p. 1083.

13 *Civil Action for Deprivation of Rights* 42 U.S.C. § 1983.

14 *DeShaney v. Winnebago County Dep't of Soc. Servs.* 489 U.S. 189 (1989)

15 *Estelle v. Gamble*, 429 U.S. 97 (1976); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983) and *Youngberg v. Romeo*, 457 U.S. 307 (1982).

16 *Graham v. Indep. Sch. Dist.*, 22 F.3d 991 (10th Cir. 1994).

17 *Section 504 of the Rehabilitation Act; The Americans with Disabilities Act; Individuals with Disabilities Act*. 20 U.S.C. § 1400 et seq.

18 U.S. Department of Education, Office of Special Education and Rehabilitation Services (August 20, 2013) *Dear Colleague Letter Keeping Students with Disabilities Safe from Bullying*. <https://blog.ed.gov/2013/08/keeping-students-with-disabilities-safe-from-bullying/>.

19 U.S. Department of Education Office for Civil Rights, (2014) *Dear Colleague Letter on bullying of students under Section 504*. <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

20 Rose, C. A., Swearer, S. M., & Espelage, D. L. (2012). Bullying and students with disabilities: The untold narrative. *Focus on Exceptional Children*, 45(2), 1-10.

21 Rose, C. A., Espelage, D. L., & Monda-Amaya, L. E. (2009). Bullying and victimization rates among students in general and special education: A comparative analysis. *Educational Psychology*, 29, 761-776,