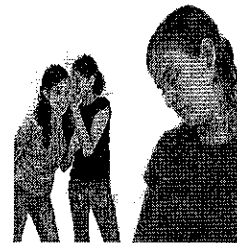


LOUISIANA TECH UNIVERSITY SCHOOL LAW INSTITUTE

BULLYING AND HARASSMENT PART 2 – FEDERAL CONSIDERATIONS

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BULLYING AND HARASSMENT OFFICE OF CIVIL RIGHTS (OCR)

- o OCR enforces various federal laws prohibiting discrimination on the basis of race, color, national origin, sex, and disability
 - Title IX of the Education Amendments Act of 1972 (Title IX) prohibits discrimination on the basis of sex
 - Title VI (Title VI) of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin
 - Section 504 of the Rehabilitation Act (Section 504), the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA) prohibit discrimination based on disability

**BULLYING AND HARASSMENT –
AS VIOLATION OF FEDERAL LAW**

- Violations of these laws may occur when:
 - Bullying or harassment is based on race, color, national origin, sex, or disability,
 - The bullying and harassment is sufficiently serious to have an adverse effect on the student's education
 - The district is on notice of the conduct, but the bullying or harassment is not adequately addressed or is ignored.

Dear Colleague Letter: Harassment and Bullying
(October 26, 2010)

**HYPOTHETICAL EXAMPLE OF SEXUAL
HARASSMENT** *DEAR COLLEAGUE LETTER (OCR 2010)*

- Routine sexually-based name calling, rumors of sexual behavior, and threatening texts and e-mails
- Teacher and coach witnessed name calling and heard rumors
- Teacher and coach noticed student's anxiety and declining class participation
- Only attempt to resolve was to require student to work the problem out directly with harassers

HYPOTHETICAL RESULT – SEXUAL HARASSMENT OCCURRED

- Reasons this would be considered sexual harassment:
 - Bullying took form of sexual comments, jokes, gestures, rumors, and name calling
 - Reached point of adversely effecting student's school performance
 - School failed to investigate and take steps calculated to end the harassment
 - Students cannot be required to confront harassers

HYPOTHETICAL EXAMPLE OF DISABILITY HARASSMENT *DEAR COLLEAGUE LETTER (OCR 2010)*

- Student with learning disability repeatedly called "stupid," "idiot," and "retard", was hit by students, and had personal property thrown in trash
- Occurred in school and on school bus
- Complained to guidance counselor that he was being "teased"
- School board offered student counseling services, but did not discipline offending students
- Harassment continued, resulting in academic falloff and increased absenteeism.

HYPOTHETICAL RESULT – DISABILITY HARASSMENT OCCURRED

- Reasons this would be considered disability harassment:
 - Conduct was based on student's disability
 - Sufficiently pervasive as to have an adverse effect on the student's performance
 - School system failed to recognize that the conduct could constitute bullying and harassment
 - Failed to take steps to prevent the bullying, such as disciplinary action, an / or monitoring to assure harassment did not resume

DISABILITY HARASSMENT – SECTION 504 AND THE ADA

- Defined by USDOE as intimidation or abusive behavior toward a student based on disability that creates a *hostile environment*
- *Hostile Environment* is defined as conduct sufficiently severe, pervasive, or persistent so as to adversely affect a student's ability to participate in or benefit from the educational program

Dear Colleague Letter: Disability Harassment
(July 25, 2000)

DISABILITY HARASSMENT – DENIAL OF FAPE

- Disability Harassment can also rise to the level of a denial of FAPE under IDEA
 - *Dear Colleague Letter (OCR 2010)*

- Both judicial and administrative decisions have found that bullying, or the inadequate response to bullying, can rise to the level of denial of FAPE when the harassment decreases the student's ability to benefit from his or her education

BULLYING HARASSMENT – RESPONDING EFFECTIVELY

- Develop procedures and take expedient and necessary steps to address and eliminate harassment or bullying, such as:
 - Separate the accused and the target
 - Provide counseling for the target and/or harasser
 - Take disciplinary action against harasser
 - Provide training or other interventions
 - Issue and widely distribute policies against harassment and procedures for reporting, including 504/ADA/Title IV coordinator information
 - Reconvene IEP meetings to address peer harassment
- *Dear Colleague Letter (OCR 2010)*

PRIVATE RIGHT OF ACTION – MONETARY DAMAGES

- Anti-discrimination laws also provide a private right of action for student-to-student discriminatory harassment in public schools

- United States Supreme Court set forth the elements that must be met for a Plaintiff to prevail in a damages action
 - *Davis v. Monroe County Bd. Of Education*, 119 S.Ct. 1661 (1991).

- Standard of Liability in Federal Court is much more stringent than in OCR investigation

STANDARD OF LIABILITY, COMPARISON OF OCR VS. *DAVIS*

OCR Standards

- District knew or should have known of conduct
- Conduct must be severe, pervasive, *or* persistent

- Interferes with or limits participation in programs or activities
- District must take steps to eliminate harassment and prevent it from occurring

***Davis* Standards**

- District must have actual knowledge
- Conduct must be severe, pervasive, *and* objectively offensive
- Effectively bars access to educational opportunity and benefit
- Must respond in manner not clearly unreasonable

*SANCHES V. CARROLTON-FARMERS BRANCH
INDEP. SCH. DIST., 647 F.3D 156 (5TH CIR. JULY 13, 2011)*

- After a dispute over a boy, one cheerleader began making sexually based comments to and spreading sexually based rumors about another student cheerleader
- Administrators responded, investigated, verbally warned student about conduct, held conference with the student and her mother, and separated the students
- No finding of sex discrimination because conduct not severe, pervasive, or objectively unreasonable, and administrators were not “deliberately indifferent” to student’s complaints

*MATHIS V. WAYNE COUNTY BOARD OF
EDUCATION, NO. 11-5979 (6TH CIR. AUGUST 23, 2012)*

- Upheld \$200,000.00 damages award for sexual harassment
- Two students on basketball team routinely subjected to sexually based harassment by older teammates
- Resulted in sexual assault of one student
- Delayed reacting to and disciplining the students related the assault
- Never specifically addressed or disciplined other actions that constituted harassment – considered to be “pranks” (Deliberate indifference)

T.K. V. NEW YORK CITY DEPT. OF EDUC.,
779 F. SUPP. 2D 289 (E.D.N.Y. 2011)
DENIAL OF FAPE

- Standard of Liability applied more broadly when issue is whether harassment resulted in denial of FAPE
- If parents can show that bullying interfered with a special education student's ability to obtain an appropriate education, school system can be responsible for reimbursement of private tuition expenses

FIRST AMENDMENT CONSIDERATIONS

- Should consider First Amendment issues when disciplining students based on harassment and bullying, particularly in situations involving off-campus communication, such as cyber-bullying
- Students maintain a right to free speech, but speech is NOT protected if it causes a substantial disruption to the educational process, or if there is a direct threat
- Split in circuits as to what constitutes "substantial disruption"
- Each matter should be considered on case by case basis