



Stop Bullying or Start Paying: How Courts Are Ruling on a Growing Epidemic

**Tri-State Regional Special Education Conference
Thursday, November 5, 2010**

Special Education Today, October 25, 2007:

Bullying behavior costs Florida school \$4 million

A Tampa, Fla., jury Monday ordered a Jewish community day school to pay \$4 million for failing to keep a student safe from a bully at the school, the St. Petersburg Times reported Tuesday.

The newspaper said the boy's parents sued Hillel School of Tampa after a school bully broke his arm in January 2004. The boy was 12 years old at the time.

According to the newspaper, the parents complained to the school's principal after they learned the student had assaulted their son at least twice in 2003. Their son, now 16, has permanent nerve damage in his left hand, the newspaper said.

Source: Special Education Connections, Special Education Today, October 25, 2007

I. Introduction

Recent media attention has placed school bullying squarely in the legal spotlight. To date, very few courts have awarded monetary damages to the families of students who have been bullied in school. However, change is in the air – it is safe to assume that cases asking for monetary damages will increase in light of the sheer number of bullying/harassment cases that are being filed. Parents and students are filing lawsuits and OCR complaints against school districts in record numbers for failing to protect children from bullies, administrators are taking stronger disciplinary actions against aggressors, an industry of anti-bullying programs and laws have swept the nation and hardly a week goes by without hearing a news report about a student committing suicide (or otherwise suffering) after being bullied. Making matters more complicated, the law is in its relative infancy and the applicable standards of review vary across the country.



II. Applicable Laws

A. Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794; Implementing Regulations: 34 C.F.R. Part 104

1. Section 504 prohibits discrimination on the basis of disability in programs and activities that receive or benefit from Federal financial assistance from the Department of Education. The United States Department of Education's Office for Civil Rights (OCR) enforces and has jurisdiction to investigate complaints arising under Section 504.
2. "No otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).
3. Pursuant to 34 C.F.R. 104.33(a), school districts are responsible for providing a free appropriate public education (FAPE) to students with disabilities. Section 104.33(b)(1) defines an appropriate education as the provision of regular or special education services that are designed to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students. Disability harassment by a school employee may result in a denial of FAPE to a disabled student. Los Angeles (CA) Unified School District, 46 IDELR 198, 106 LRP 57230 (OCR Western Division 2006).

B. Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. 12131; Implementing Regulations: 28 C.F.R. Part 35

1. Title II prohibits discrimination on the basis of disability by state and local governmental entities. The Office for Civil Rights similarly enforces and investigates complaints arising under Title II.
2. "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.



C. Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. 1400 et. seq.; Implementing Regulations: 34 C.F.R. Part 300

1. The IDEA assures “that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. 1400(d)(2)(A).
2. A claim may not be brought under IDEA directly to federal or state court; a plaintiff must first exhaust his or her administrative remedies by requesting a due process hearing pursuant to state and federal law. Monetary damages are not available under IDEA. The Office of Special Education and Rehabilitative Services (“OSERS”) monitors and enforces compliance with IDEA.

D. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681; Implementing Regulations: 34 C.F.R. Part 106

1. Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance.
2. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. 1681(a).

E. Section 1983, 42 U.S.C. 1983

1. Section 1983 claims require that the plaintiff establish (1) that the defendant deprived him or her of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law. A local government cannot be held liable under Section 1983 on a respondeat superior basis. *Monell v. Dep’t of Social Services*, 436 U.S. 658, 691-92 (1978). Instead, a local governmental entity is liable only for acts it is responsible for, meaning acts the entity has embraced as policy or custom. *Id.* at 690-91. To prove liability under Section 1983 against a public entity, the plaintiff must prove:
 - a. The alleged deprivations were conducted pursuant to an express policy, statement, ordinance, or regulation that, when enforced, caused the constitutional deprivation;
 - b. The conduct was one of a series of incidents amounting to an unconstitutional practice so permanent and well-settled as to constitute a “custom or usage” that carries the force of law; or



c. The conduct was a decision of a municipal policy maker with final policymaking authority in the area at issue. *McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000); *McTigue v City of Chicago*, 60 F.3d 381, 382 (7th Cir. 1995); see *Monell*, 436 U.S. at 690-91.

2. Section 1983 states in relevant part: “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

F. Equal Protection Clause of the Fourteenth Amendment, U.S. Constitution, amend. XIV

1. The Equal Protection Clause prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. To be successful, equal protection claims must prove “different or disparate treatment compared to general education students by reason of disability, thereby depriving the student with a disability the equal protection of the law.” See *S.S. v. Eastern Kentucky University*, 50 IDELR 91, 532 F.3d 445 (6th Cir. 2008).

2. “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *S.S.*, 532 F.3d 445, citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

3. Equal protection clause violations are difficult to prove because a plaintiff must demonstrate intentional or purposeful discrimination – that a decisionmaker singled out a particular group for disparate treatment at least in part for the purpose of causing adverse effects for the student with a disability. *Werth v. Board of Directors of the Pub. Sch. of Milwaukee*, 47 IDELR 67 (E.D. Wis. 2007), citing *Nabozny v. Podlesny*, 92 F.3d 446, 453-54 (7th Cir. 1996).



III. STATE LAW CONSIDERATIONS

As of March of 2007, at least THIRTY states have enacted harassment, intimidation, and/or bullying legislation applicable to public schools.

1. **Illinois:** The Illinois School Code (105 ILCS 5/10-20.14(d)) provides that: “The school board, in consultation with the parent-teacher advisory committee and other community-based organizations, must include provisions in the student discipline policy to address students who have demonstrated behaviors that put them at risk for aggressive behavior, including without limitation, bullying, as defined in the policy.”
2. **Texas:** The Texas Education Code (Section 37.001) provides that the “Student Code of Conduct must prohibit bullying, harassment, and making hit lists and ensure that district employees enforce those prohibitions; and provide, as appropriate for students at each grade level, methods, including options, for: (1) managing students in the classroom and on school grounds; (2) disciplining students; and (3) preventing and intervening in student discipline problems, including bullying, harassment and making hit lists.”
3. **Louisiana:** (R.S. 17:416.13(B)(1)): “By not later than August 1, 2001, each city, parish, and other local public school board shall adopt and incorporate into the student code of conduct as provided in this Section a policy prohibiting the harassment, intimidation and bullying of a student by another student.”

B. Bullying = Harassment?

Yes. Courts generally equate bullying with harassment and use the words interchangeably.

C. What is fastest growing type of harassment?

Harassment based upon disability is a form of discrimination prohibited by Section 504 and Title II and is one of the fastest growing “types” of bullying identified by courts. Disability harassment under Section 504 and Title II is intimidating or abusive behavior toward someone based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities in the District’s program.



D. Bullying Defined

1. Bullying is generally defined as intentional aggressive behavior that involves an imbalance of power or strength and is repeated over time.
2. Bullying can be physical, emotional, sexual, verbal or non-verbal.
3. Physical bullying includes punching, poking, strangling, hair pulling, beating, and biting.
4. Emotional/non-verbal bullying includes rejection, extortion, defamation, humiliation, blackmail, manipulation of friends, isolation, and peer pressure.
5. Sexual bullying includes exhibitionism, voyeurism, sexual propositioning, sexual harassment, physical contact and assault of a sexual nature.
6. Bullying is more than just a disagreement between two students that evolves into fighting; it is more than two friends who repeatedly pick on each other. Bullying occurs when there is a perceived or actual imbalance of power between a bully and the victim.

E. Identifying the Bully/Victim

Bullies typically target students who are seen as different and less powerful. In general, bullies target students who:

- Are unable to defend themselves
- Have little social support – few friends
- Are uninvolved in extra-curricular activities
- Are among low achievers in academics and sports
- Are not popular or focused on by adults in school
- Have less developed social skills
- Have difficulty communicating – especially in stressful situations
- Avoid being noticed or assertive



F. Can school districts be liable for the actions of harassing students?

Generally speaking, no. A school district will generally not be held responsible for the actions of harassing students, but rather for its own response to the acts of the harassing students. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 641-42 (1999).

G. Are damages available to parents when they file lawsuits or OCR complaints alleging bullying under Section 1983 and Title II?

Yes, although it should be noted that OCR does not award damages and instead, orders school districts to take corrective action. Damages are not available for simple teasing and name-calling. See *Werth v. Board of Directors of the Pub. Sch. of Milwaukee*, 47 IDELR 67 (E.D. Wis. 2007). For damages to be assessed in peer-on-peer harassment cases, the conduct must be “serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 641-42 (1999).

H. Can one act of harassment/bullying support a finding of liability against a school district?

1. Generally speaking, no. In *Davis*, the Supreme Court held that a single instance of severe peer-on-peer harassment was not enough to support damages against a school district (*Davis*, 526 U.S. at 652-53):
2. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to [give rise to liability], we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to know peer sexual harassment with the practical realities of responding to student behavior.
3. It should be noted that OCR has more recently opined that one incident may form a “hostile environment,” depending on the circumstances. *Philadelphia (PA) School District*, 46 IDELR 169, 33 NDLR 146 (OCR Eastern Division 2006).



I. What is the applicable legal standard used by federal courts in harassment cases?

1. Deliberate indifference standard (*Davis* test). This standard is used by the majority of federal courts addressing the issue of peer-on-peer harassment [*Davis v. Monroe County Board of Education* , 526 U.S. 629 (1999)]
2. The harassment must be severe, pervasive and persistent
3. The harassment must have a concrete, negative effect on the victim's ability to participate in or benefit from educational programs or activities
4. The school district had actual knowledge of the harassment
5. The school district was deliberately indifferent to the harassment (failure to respond adequately and promptly to redress the situation; responses that are clearly unreasonable in light of known circumstances)

J. May students be disciplined for bullying that occurs off campus?

1. First, does Board policy allow discipline for off campus misconduct?
2. Second, is there a nexus between the off campus misconduct and disruption to the school? Typically, school districts must have evidence that the off-campus activity may cause serious disruption to the educational process before it can take disciplinary action. See *Kyle Packer v. Board of Education of the Town of Thomaston*, 246 Conn. 89, 717 A.2d 117 (Conn Sup. Ct. 1998).
3. In deciding whether to uphold the discipline, courts look at whether there is evidence that the student's behavior materially and substantially interfered with the educational process and the extent to which the First Amendment protects the student's activities. Discipline is frequently upheld when the school district demonstrates material and substantial disruption occurred or when the student's online statements are defamatory or obscene, or constitute fighting words.
4. Keep in mind that if you decide to discipline students for off-campus bullying, this "long arm of the law" potentially increases a school district's liability for peer-on-peer harassment that occurs off campus, specifically in situations where action is NOT taken against the aggressor.



K. Cyberbullying

1. The last five years has seen the emergence of cyberbullying – use of email, websites, internet chat rooms, mobile text messaging to belittle and embarrass others.
2. Students use the internet to bully and belittle others by:
 - a. Posting classmates’ photographs online and asking others to “rate them”
 - b. Doctoring pornographic photographs by adding peers faces or names to them
 - c. Using e-mail to send vicious or embarrassing material
 - d. Using digital phone cameras to take embarrassing photographs in locker rooms and then sharing the photographs electronically with others
 - e. Engaging classmates in instant messaging and tricking them into revealing sensitive personal information they will later share broadly with others
3. Commonly used online communities: MySpace, Facebook, YouTube, Friendster, Xanga, Schoolfizz, Multiply, Hi-5, Vox, Tagworld, Bebo, and CyWorld.
4. Online photo and video sharing sites: Flickr, Kodak Gallery, Photobucket, and Fotolog.
5. The First Amendment does not protect the following categories of speech:
 - a. Fighting words
 - b. Speech that incites others to imminent lawless action
 - c. Obscenity
 - d. Certain types of defamatory speech
 - e. True threats
A “true threat” is speech that a reasonable person would foresee as being interpreted by those to whom the statements were directed as “a serious expression of intent to harm or assault.” Factors to



consider when determining whether the student's speech constitutes a true threat are:

- The context in which the statements were made
- The reaction of the listener(s) and others
- The nature of the comments
- The nature and history of the person making the threat

L. Preventative advice

1. Create a school environment where students feel safe reporting instances of bullying that either occurs to them or that they witness. Integrate character education into the general education curriculum to ensure students learn about the need for empathy for others.
2. Do not ignore complaints of bullying – do not simply chalk a complaint up as ‘boys being boys’ or ‘girls being girls.’
3. Review your school's bullying policies and procedures. Ensure they are well written and straight-forward. The more complicated they are, the greater the likelihood you will not correctly follow them. Ensure they are internally consistent and that they are consistent with what is published in the parent/student handbook. All too often the board revises its policy, only to find that years later, the parent/student handbook contains out-of-date language.
4. Implement one process for all types of harassment complaints. Often school districts adopt excellent sexual harassment policies/procedures, but neglect to adopt similar documents for other types of harassment.

M. Create a simple investigation report

1. The report should list the complainant, describe the alleged incident, note the steps taken in the investigation, and advise parents of the outcome. Include a section for the principal and parents to sign, indicating that the investigation has been closed and the finding reported to the parents. Separate forms would be used for the victim and harasser.
 - a. Train staff members how to listen for and respond to complaints of bullying. Staff members must be proactive and responsive.
 - b. The building administration must model a “top down” approach to dealing with instances of bullying.



- c. Train staff members to report instances of bullying they believe are committed by their own colleagues.
 - d. Establish a timeline for investigating claims
2. Include each step of your district's investigation process, such as interviewing teachers and students, in the timeline.

N. Steps to take when handling a complaint of bullying

1. Refer to your written policy/procedures to guide you through the process and, most importantly, **FOLLOW THEM**
2. Conduct a THOROUGH INVESTIGATION
 - a. Interview the alleged victim
 - Most students will be reluctant to fully disclose what has happened, perhaps because they are embarrassed or they fear retaliation.
 - The person conducting the interview should discuss any worries the student has about talking with an adult about the incident.
 - The person conducting the interview should ask open-ended questions, allowing the student to fill in details on his/her own. The person conducting the interview should be careful not to put words into the student's mouth. Questioning can become more direct as the conversation continues.
 - b. Interview the alleged harasser
 - Again, keep the interview open-ended: "have you had any interaction with Suzy this week?"
 - If the student makes an admission, ask the student to write the statement down, or sign the statement that the staff member types out. This is important for record-keeping and discipline.
 - c. Interview all witnesses to the incident(s) (students and staff members) -- This step is often overlooked, but is a critical one to help corroborate the incident.
 - d. Consider collecting reports from the alleged victim's friends -- It is common for victims of harassment to confide in their friends.



3. Good record keeping and notes of interviews are critical
 - a. OCR and courts are favorably disposed to find in favor of the school district when it can substantiate its investigations with notes and other written records.
 - b. When you tell OCR that “I interviewed student A with Principal Jane Doe for 35 minutes on November 19, 2008 and student B with Dean John Doe for 20 minutes on November 20, 2008,” OCR will be favorably disposed to believe the district’s version of events.
4. Remember that an **INVESTIGATION DOES NOT REQUIRE A FORMAL COMPLAINT**. In situations where the victim does not wish to file a complaint, this does not absolve a school district of the responsibility to investigate and remedy the situation. Although rare, sometimes you will find it necessary and practical to conduct an investigation without a formal complaint.
5. **REPORT THE FINDINGS** of your investigation to both the parents of the alleged harasser and the alleged victim. OCR and federal courts almost always hone in on this fact as a telling one – did you follow through with notice to parents? If you didn’t, it implies that you predetermined your decision and didn’t follow the investigation through to completion.
6. **TAKE ACTION**. Even in situations where you are unable to verify the incident, the building administration must take action. Examples include calling the alleged harasser into the office and stressing that harassment is not permitted. This meeting must be documented, since it will be critical information for a future investigation as to whether or not the district responded appropriately.
7. Take **DISCIPLINARY ACTION**, if warranted. If the incident is verified, the principal should take disciplinary action against the harasser.
8. Conduct **INSERVICES** for students and staff
 - **STAFF INSERVICES**: Inservice staff members annually regarding discrimination laws and retain proof of the inservicing and a list of attendees.
 - **STUDENT INSERVICES**



IV. Recent Bullying Cases

A. *Patterson v. Hudson Area Schools*, 109 LRP 351 (6th Cir. 2009)

Grade level: 9th grade

Aggressor: students

1. Facts:

- a. The student was ridiculed repeatedly between 6th and 9th grades. He was called “queer,” “faggot,” “pig,” “gay,” etc. and was pushed in the hallway frequently. Students removed his clothes from his gym locker and urinated on them. Students used permanent markers to write disparaging remarks on the outside and inside of his lockers at school.
- b. The harassment culminated in a sexual assault of the student in the high school locker room, where a male classmate jumped on the student’s shoulders and rubbed his penis and scrotum on the student’s neck and face. That perpetrator was ultimately expelled from school.
- c. The school district placed the student in a resource class during 8th grade which helped, but during 9th grade, removed this accommodation.

2. Holding:

- a. The 6th Circuit reversed and remanded the case to the District Court for trial, holding that the student had raised genuine issues of material fact that would support a finding of liability and damages against the school district.
- b. The court held that the school district had actual knowledge that its efforts to remediate the situation were ineffective and that it continued to use those exact same methods despite the fact that they obviously did not work.



B. *Fairfield-Suisun (CA) Unified S.D., 108 LRP 63938 (OCR Western Div. 2008)*

Student's identified disability: burn victim

Grade level: 14-year old

Aggressor: students

1. Facts: The student suffered severe burns as a toddler, affecting her appearance. Portions of her face and hair were missing in addition to her right hand.
2. Holding:
 - a. OCR held that the school district improperly treated the taunting of a burn victim as a dispute between teenage girls instead of properly treating it as disability-based harassment.
 - b. OCR identified several flaws with the district's response to the situation, including the failure to interview student witnesses to the harassment and failing to inform the student's parent of the outcome of the "investigation."
 - c. OCR called the district's response "lackluster" and criticized the district for failing to investigate an egregious situation of harassment/bullying.
 - d. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances.
 - e. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.
3. Lessons: Conduct an investigation and follow up with the student who was subject to the harassment after the investigation to see if it is recurring.



C. Philadelphia (PA) School District, 46 IDELR 169, 33 NDLR 146 (OCR Eastern Division 2006)

Student's identified disability: Speech Impairment, stuttering

Grade level: 8th grade

Aggressor: student

1. Facts: The student was identified by the nickname "Radio" underneath his 8th grade class picture in the yearbook. Each 8th grade student completed a form containing information for publication in the yearbook. It was surmised that a fellow student inserted this nickname without the student's knowledge or permission.
2. Holding: The school district violated Section 504 and Title II of the ADA by failing to properly respond after they learned that the derogatory nickname had been published.
 - a. OCR did not fault the yearbook supervisor for not catching this prior to distribution of the yearbook, since "Radio" has an innocuous meaning. OCR held that the yearbook supervisor did not create a hostile environment when she approved the nickname for publication.
 - b. However, OCR held that the school district did have a responsibility to investigate the incident after the yearbooks were distributed and the student's parent complained about the nickname. It turned out that "Radio" is the nickname of a movie character who stuttered when he spoke and was ridiculed.
 - c. The district purported to conduct an investigation, but failed to report any findings to the student's parent or take any other steps to address the negative effects the incident may have had on the student.
3. Lessons: OCR found fault specifically with the fact that 1) the district did not properly investigate the alleged misconduct and 2) did not report any findings to the student's parent. The fact that the students were out of the school (during summer break) did not absolve the district from conducting a prompt investigation of the matter.



D. *Caverna (KY) Independent Schools, 46 IDELR 141, 106 LRP 35863 (OCR Eastern Div. 2006)*

Student's identified disability: ADHD and moderate/severe hearing loss

Grade level: middle school

Aggressor: student

1. Facts: The student's parent argued that her son's classmates choked him, assaulted him in a bathroom, shoved him in a urinal, stole his hearing aid and damaged his coat. OCR was unable to establish that the student was subjected to harassment.
2. Holding: OCR found no evidence that the student's classmates targeted him for harassment because of his disability.
3. Lessons: Although some of the incidents admittedly occurred, the school district took steps to investigate and discipline the students involved.

E. *Jenison (MI) Public School District, 47 IDELR 81, 107 LRP 1165 (OCR Midwestern Division 2006)*

Student's identified disability: Asperger's Syndrome, ADHD and LD

Grade level: 8th grade

Aggressor: student

1. Facts: No staff members observed the student being bullied; however, many staff members were aware of a dispute between the student and her former best friend, described as an ongoing feud. OCR held that the school district had no reason to believe that the student was being harassed. Instead, OCR held that staff members who received reports that the student was bullied described those reports as evidencing an ongoing feud between the student and her former friend, which did not rise to the level of disability related harassment. The mother was unable to corroborate her claim that she specifically notified the district about disability-related harassment.
2. Holding: OCR held that the 14 year old student diagnosed with Asperger's Syndrome, ADHD and a Learning Disability was not discriminated against on the basis of disability.
3. Lessons: OCR differentiates between bullying and "disputes among peers." In this case, OCR placed great importance on the fact that neither the student nor her mother ever described the problem as discrimination based on disability until after the OCR complaint was filed.



F. *Greenport (NY) Union Free School District, 50 IDELR 290, 108 LRP 53139 (OCR Eastern Division 2008)*

Students' identified disability: two brothers were both diagnosed with peanut allergies

Grade levels: twin brothers in 6th grade

Aggressor: students

1. Facts:

- a. The first incident involved a student calling one of the brothers "peanut butter boy" and offered him peanut butter.
- b. The second incident involved a student telling one of the brothers that he was going to go to the grocery store, get peanut butter, and smear it all over the student.
- c. The third incident involved another student's threat to expose one brother to peanut butter by saying "Don't make me get peanut butter, I know your allergies."
- d. OCR found that in each instance, the school district responded promptly by disciplining the student aggressors and by conducting student inservicing on the inappropriateness of teasing and the significance of peanut allergies.

2. Holding: OCR found that the district promptly and effectively responded to three instances where the boys alleged that fellow students were teasing them based on their peanut allergies.

G. *Los Angeles (CA) Unified School District, 46 IDELR 198, 106 LRP 57230 (OCR Western Division 2006)*

Student's identified disability: undisclosed

Grade level: 8th grade

Aggressor: teacher

1. Facts: The student's IEP team recommended that he be retained in 8th grade.

- a. The U.S. History teacher was displeased, and repeatedly told his colleagues, the student and the student's parents that the student should not have been retained.

- b. The teacher engaged in a series of actions against the student, including a 50-point deduction from a paper for including a cover sheet and refusing to allow the student to take a test. The student



was five minutes late for class on the day of the test because the nurse was not present in her office to dispense his medication.

- c. Finally, the teacher announced during class that due to a certain student's complaints, the teacher would be changing how he taught the class and gave out homework. The teacher told the student something to the effect that "he shouldn't get too comfortable in the classroom." He then suggested to the class that they consider suing the student who was causing all the problems for having special privileges.
2. Holding: OCR applies a different treatment analysis to allegations involving incidents perpetrated by employees. A school district violates Section 504 and Title II if:
 - a. An employee, acting within the scope of his or her official duties;
 - b. Treats a student differently based on disability;
 - c. In a way that interferes with or limits the ability of the student to participate in or benefit from a school district program or activity without a legitimate nondiscriminatory reason.
 3. In this case, OCR held that the school district violated Section 504 and Title II when it learned that a teacher was harassing a student but failed to take action to stop the harassment from occurring and address the specific problems that the student was experiencing.
 4. Lessons: The administration was aware of the circumstances, but minimized them. The school district provided the parent with no verbal or written notice of the outcome of their investigations. The school argued that it acted appropriately by offering to reassign the student to another U.S. History class, which the parent rejected (until mid-year). While not making a firm holding, it seemed clear that OCR felt that this offer was insufficient.



H. *Yucaipa-Calimesa (CA) Joint Unified School District, 47 IDELR 231, 107 LRP 1805 (OCR Western Division 2006)*

Student's identified disability: ADHD and bipolar disorder

Grade level: high school

Aggressor: teachers

1. Facts:

a. The student's parent maintained that the student's first period teacher (general education class) called him "lazy" repeatedly.

b. The mother requested that the student be removed from that general education first period class and placed in a special education class; the school district agreed to effect that change immediately. The following day, the student arrived in the special education classroom. The special education teacher told the student to go to the counseling office (for unexplained reasons). The teacher did not provide the student with a hall pass. When the student arrived in the counselor's office without a hall pass, the staff directed him to immediately return to class. After checking the computer, they directed him to return to his first period general education class (since the computer schedule had not been updated).

c. The student entered the general education classroom and the teacher told him to leave the classroom. The student became upset, using profanity, and refused to leave. Campus security removed the student from the classroom and charged the student with disturbing the peace.

2. Holding: The school district did not promptly or adequately investigate claims that staff members were harassing a high school student diagnosed with ADHD and bipolar disorder.

3. Lessons: Staff members must be "on the same page." OCR found fault with the fact that the district, on more than one occasion, provided the parent with the incorrect form to lodge her discrimination complaint against the district. Also, the district completed an investigation of the situation, but it did not inform the parent of the results nor did it provide parent with a summary of the District's appeal process. There was, in fact, no evidence that the district conducted an evaluation.



I. *S.S. v. Eastern Kentucky University*, 50 IDELR 91, 108 LRP 38433 (6th Cir. 2008)(Kentucky)

Student's identified disabilities: cerebral palsy, ADHD, dyslexia, PDD and post-traumatic stress disorder

Grade level: middle school (the University operated the Laboratory Middle School that the student attended and provided training to and supervision of the student teachers).

Aggressor: students

1. Facts: The student was involved in numerous physical and verbal altercations with other students.
 - a. The student successfully completed 6th, 7th and 8th grades at the school and thereafter filed a lawsuit against Eastern Kentucky University.
 - b. The Court found that the school took prompt and affirmative steps to address the incidents of harassment involving the student. The Court could not identify anything that the school district could have done differently to stop the harassment.
2. Holding: The school did not violate the ADA, Section 504 or Section 1983. The school properly investigated and responded by disciplining the students involved, conducting interviews, monitoring the student and separating him from his harassers, holding mediation sessions, communicating with his parents and providing training to the student body regarding name-calling.
3. Lessons: Interestingly, the Sixth Circuit cautioned that although it applied the Davis deliberate indifference standard in this case, in the future, it might very well apply a different standard, a nod to the different standards of proof being applied in disability harassment cases throughout the country. The concurring opinion is a must-read – it advocates the use of a negligence standard in peer-on-peer harassment cases.



J. Werth v. Board of Directors of the Pub. Sch. of Milwaukee, 47 IDELR 67 (E.D. Wis. 2007)

Student's identified disability: congenital bone disorder (cleidocranial dysostosis syndrome). The student had a hump on his back and was considerably smaller in stature than his classmates.

Grade Level: 9th grade

Aggressor: students during woodshop class (40 students, one teacher)

1. Facts: The student alleged that his woodshop classmates threw blocks of wood (5x) at the student (the blocks of wood hit him on his back/neck; each block was approximately 1/2 " thick and 4"x4" square). The teacher did not respond until the third incident, at which time he wrote up one student and suspended two students. On a later date, another student threw safety glasses (1x) at the student, who suffered a concussion and cracked teeth, which had to be pulled.
2. Holding: The Court dismissed the student's Section 504 and Title II claims, determining that the student failed to establish either a constitutional violation or a pattern of severe and pervasive harassment.
 - a. The Court concluded that the harassment was not related to the student's disability and that the isolated incidents were not severe or pervasive
 - b. The Court held that school districts do not have a duty to protect students from injuries by other individuals, meaning that the student was required to allege more than mere inaction on the part of the teacher.