

**BULLYING & HARASSMENT  
OF STUDENTS WITH  
DISABILITIES**

How Should  
Schools  
Respond?

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The slide features a dark green background on the left and a lighter green background on the right. The title is centered in white text on the dark green background. The subtitle is in white text on the lighter green background. The author's name is at the bottom center in white text on the dark green background.

**GUIDANCE FROM OCR**

- **October 26, 2010: "Dear Colleague" letter from Assistant Secretary for Civil Rights, Russlynn Ali**
  - Explained a school's obligations to protect students from student-on-student harassment on the basis of sex; race, color and national origin; and disability;
  - Clarified the relationship between bullying and discriminatory harassment

The slide has a dark green header with the title in white. The main content is on a light beige background with a dark green border. The text is in a dark green color.

**IF IT LOOKS LIKE A DUCK, AND QUACKS  
LIKE A DUCK . . .**

**TREAT IT LIKE A DUCK!**



## **ENFORCEMENT OR LIABILITY?**

- |  |   |
|--|---|
| <ul style="list-style-type: none"><li>■ <b>OCR Guidance</b><ul style="list-style-type: none"><li>■ Knew or should have known</li><li>■ Severe, persistent or pervasive</li><li>■ Interferes with or limits participation</li><li>■ Eliminate the harassment and prevent it from recurring</li><li>■ Multiple remedial measures; may be required to respond to parental demands</li></ul></li></ul> | <ul style="list-style-type: none"><li>■ <b>Court standard</b><ul style="list-style-type: none"><li>■ Actual knowledge</li><li>■ Severe, pervasive and objectively offensive</li><li>■ Effectively bars access</li><li>■ Respond in a manner not clearly unreasonable</li><li>■ Not required to respond to the remedial demands of the parents</li></ul></li></ul> |
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## RESPONDING TO HARASSMENT

- Take immediate, appropriate steps to investigate or otherwise address the harassment
- Take steps to end the harassment
- Prevent retaliation
- Prevent the harassment from recurring

## LET'S GET OSERS INVOLVED

**August 20, 2013: Office of Special Education and Rehabilitative Services (OSERS) Dear Colleague Letter on Bullying of Students with Disabilities.**

- Provides an overview of a school district's responsibilities under IDEA to address bullying of students with disabilities;
- Indicates bullying of a student with a disability **on any basis** may result in a denial of the right to a free appropriate public education.

**July 25, 2000: Office for Civil Rights (OCR) and Office of Special Education and Rehabilitative Services (OSERS) Joint Dear Colleague letter on Prohibited Disability Harassment**

## JUST IN CASE YOU MISSED IT . . .

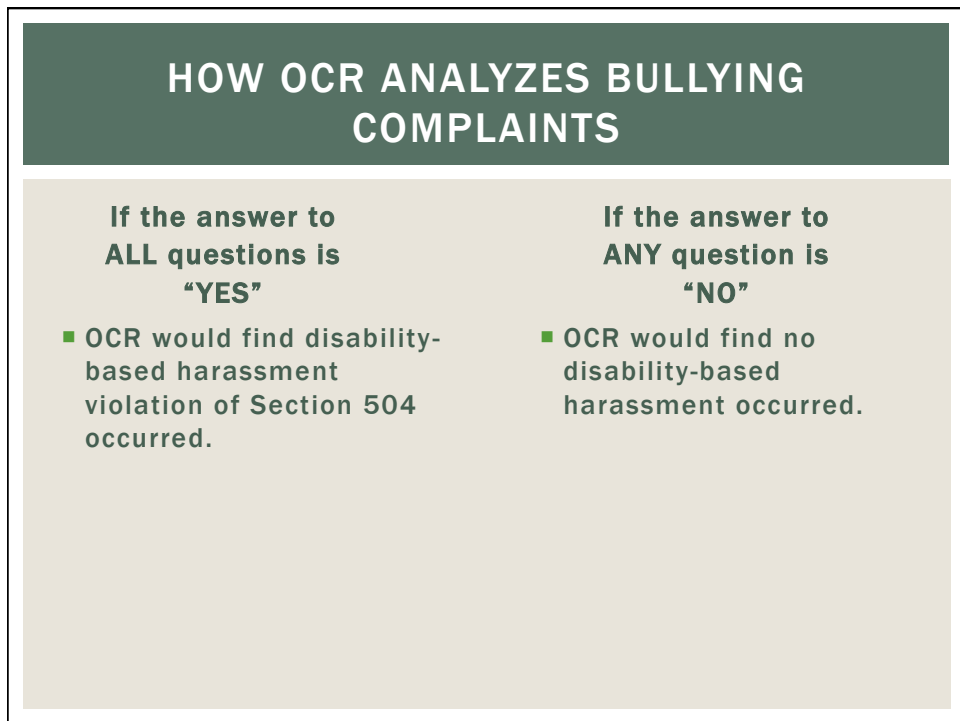
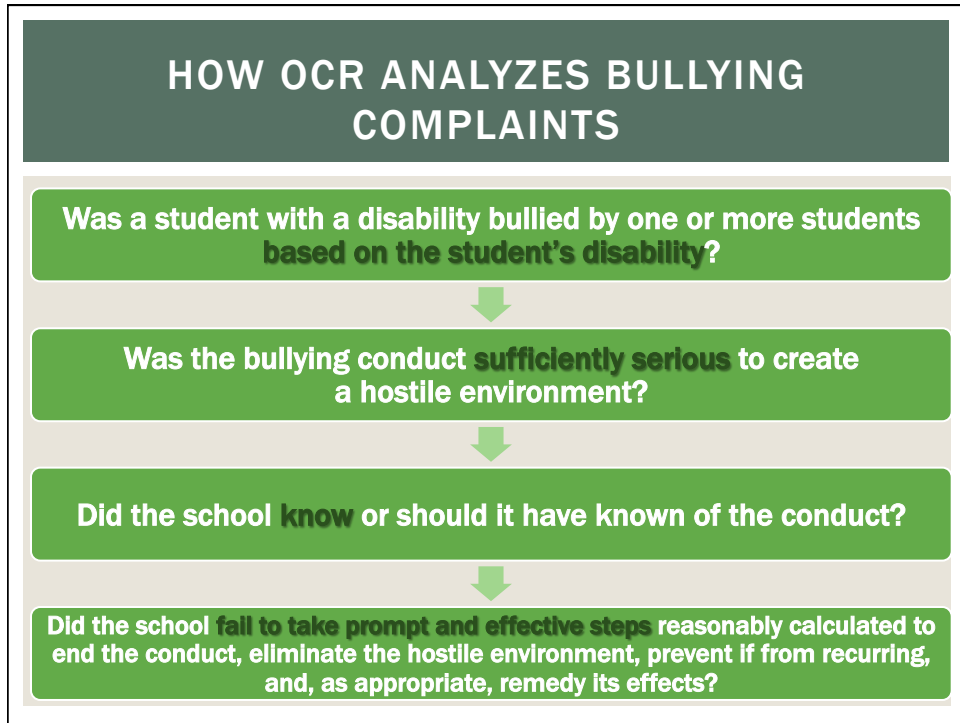
- **October 21, 2014: Dear Colleague letter from Assistant Secretary for Civil Rights Catherine E. Lhamon,**
  - Addresses the obligation of schools to respond to the bullying of students with disabilities, including students entitled to services only under Section 504 of the Rehabilitation Act.
  - Discusses the actions schools must take when bullying interferes with the education of a student with a disability who is bullied **on any basis**;
  - Provides insight into how OCR analyzes complaints involving bullying of students with disabilities.

“WHETHER OR NOT THE BULLYING IS RELATED TO THE STUDENT’S DISABILITY, ANY BULLYING OF A STUDENT WITH A DISABILITY THAT RESULTS IN THE STUDENT NOT RECEIVING MEANINGFUL EDUCATIONAL BENEFIT CONSTITUTES A DENIAL OF FAPE UNDER IDEA THAT MUST BE REMEDIED.”

2013 OSERS GUIDANCE

“BUILDING ON OSERS’S 2013 GUIDANCE, TODAY’S GUIDANCE EXPLAINS THAT THE BULLYING OF A STUDENT WITH A DISABILITY ON ANY BASIS CAN RESULT IN A DENIAL OF FAPE UNDER SECTION 504 THAT MUST BE REMEDIED. . .”

October  
21, 2014  
OCR  
Guidance



## HOW OCR ANALYZES BULLYING COMPLAINTS

**Was the student receiving IDEA FAPE or Section 504 FAPE services?**

<p style="text-align: center;"><b>IF "YES"</b></p> <ul style="list-style-type: none"> <li>■ Consider whether the bullying (harassment) resulted in a denial of the right to FAPE under Section 504.</li> </ul>	<p style="text-align: center;"><b>IF "NO"</b></p> <ul style="list-style-type: none"> <li>■ No FAPE violation</li> </ul>
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## HOW OCR ANALYZES BULLYING COMPLAINTS

**Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of IDEA FAPE or Section 504 FAPE services?**

<p><b>IF "YES"</b></p> <ul style="list-style-type: none"> <li>■ Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, making changes, as necessary, to his or her IEP or Section 504 plan?</li> </ul> <p style="text-align: center;"><b>IF "YES"</b></p> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> <p>○ No FAPE violation</p> </div>	<p><b>IF "NO"</b></p> <ul style="list-style-type: none"> <li>■ No FAPE violation                             <ul style="list-style-type: none"> <li>▪ Inquiry complete</li> </ul> </li> </ul> <p style="text-align: center;"><b>IF "NO"</b></p> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> <p>○ OCR would consider if the student is receiving FAPE, and, if not, find the school violated its obligation to provide FAPE.</p> </div>
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“WHEN BULLYING RESULTS IN A DISABILITY-BASED HARASSMENT VIOLATION, IT WILL NOT ALWAYS RESULT IN A DENIAL OF FAPE. . . WHEN A STUDENT WHO RECEIVES IDEA FAPE SERVICES OR SECTION 504 FAPE SERVICES HAS EXPERIENCED BULLYING RESULTING IN A DISABILITY-BASED HARASSMENT VIOLATION, HOWEVER, THERE IS A STRONG LIKELIHOOD THAT THE STUDENT WAS DENIED FAPE.”

October  
21, 2014  
Dear  
Colleague  
Letter, p.7

## OCR PROMOTES BEST PRACTICE

- Unless it is clear from the investigation that bullying did not affect the student’s receipt of a free appropriate public education, the school should promptly **convene the IEP or Section 504 team** to determine whether and to what extent:
  - The student’s **educational needs have changed;**
  - The **bullying impacted the student’s receipt of IDEA FAPE services or Section 504 FAPE services;** and
  - **Additional or different services,** if any, are needed, and to ensure any needed changes are made promptly.
    - Safeguard against putting the onus on the student with the disability to avoid or handle the bullying

## CHANGE IN ACADEMIC PERFORMANCE OR BEHAVIOR

- A sudden decline in grades;
- The onset of emotional outbursts,
- An increase in the frequency or intensity of behavioral interruptions
- A rise in missed classes or sessions of Section 504 services

## THE CASE LAW

### FAPE Denied

- *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3<sup>rd</sup> Cir. 2004)
- *M.L. v. Federal Way School Dist.*, 394 F.3d 634 (9<sup>th</sup> Cir. 2005)
- *T.K v. New York City Department of Education*, 63 IDELR 256 (E.D.N.Y. 2014).
- *D.A. v. Meridian Joint Sch. Dist. No. 2*, 113 LRP 6930 (D. Idaho 2013)
- *St. Louis City Sch. Dist.*, 12 ECLPR 11 (SEA MO 2014).
- *In Re: Barnstable Pub. Schs.*, 111 LRP 48728 (SEA MA 2011)
- *In re: Student with a Disability*, 113 LRP 26976 (SEA KY 2013)

### No Denial of FAPE

- *J.M. v. Department of Educ., State of Hawaii*, 69 IDELR 31 (D. Hawaii 2016)
- *S.S. v. District of Columbia*, 114 LRP 41194, 2014 WL 4650885 (D.D.C. 2014)
- *N.M. v. Central Bucks School Dist.*, 992 F.Supp.2d 452 (E.D. Pa. 2014)
- *J.E. v. Boyerton Area Sch. Dist.*, 111 LRP 72439 (3<sup>rd</sup> Cir. 2011)
- *T.B. v. Waynesboro Area Sch. Dist.*, 56 IDELR 67 (M.D. Pa. 2011)
- *Southmoreland Sch. Dist.*, 111 LRP 50995 (SEA PA 2011)
- *Harrisburg City Sch. Dist.*, 55 IDELR 149 (SEA PA 2010)



## NO DENIAL OF FAPE

- ***Estate of Lance v. Lewisville Independent School Dist.*, 743 F.3d 982 (5<sup>th</sup> Cir. 2014)**
  - A school district's obligation to provide special-needs student free appropriate public education (FAPE), as required under Rehabilitation Act, was satisfied by district's implementation of valid individualized education plan (IEP) under IDEA
    - Parents consented to the design and implementation of the student's IEP and behavior improvement plan (BIP) at every stage of his time at elementary school prior to his suicide,
    - His IEP was developed through IDEA's procedures and was reasonably calculated to enable him to receive meaningful access to educational benefits.

## FAPE DENIED

- ***T.K v. New York City Department of Education*, 63 IDELR 256 (E.D.N.Y. 2014)**
  - Where there is a legitimate concern that bullying will severely restrict a disabled student's educational opportunities, as a matter of law the individualized education program (IEP) team is required to consider evidence of bullying in developing an appropriate IEP.
  - Where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the individualized education program (IEP).

## FAPE PROCEDURAL VIOLATION

- *T.K. and S.K. v. New York City Department of Education*, 67 IDELR 1 (2d Cir. 2016)
  - District allegedly informed the parents of a third-grader with LD that peer bullying was not an appropriate topic for discussion at the student's IEP meetings.
  - Holding that the parents had good reason to believe that peer harassment would interfere with their daughter's ability to make educational progress, the 2d Circuit ruled that the district impeded the parents' participation in the IEP process.
    - "Denying [the] parents the opportunity to discuss bullying during the creation of [the student's] IEP not only potentially impaired the substance of the IEP but also prevented them from assessing the adequacy of their child's IEP,"
  - The 2d Circuit did not decide whether the failure to address bullying in the student's IEP amounted to a substantive denial of FAPE.

## BULLYING & CHILD FIND

- Bullying can be a red flag that either the student being bullied or the student engaging in bullying may be a student with a disability in need of special education and related services.
- *Krebs v. New Kensington-Arnold Sch. Dist.*, 69 IDELR 9 (W.D. Pa. 2016). Allegations district failed to evaluate a teenager's need for special education and related services despite having knowledge of her bullying-related diagnoses of anxiety, depression, and anorexia nervosa were sufficient to state claims for relief under Section 504 and IDEA.
- *Rose Tree Media School District*, 111 LRP 6194 (SEA PA 12/05/10) District violated child find where it failed to evaluate a student whose erratic behaviors may have made him a target for bullies and whose emotional and social difficulties may have led him to misinterpret normal childhood interactions.
- *Anaheim City Sch. Dist.*, 113 LRP 28570 (SEA CA 06/13/13) Incidents of bullying alone indicated that the student might be a child with a disability in need of special education and related services,
- *Great Valley Sch. Dist.*, 114 LRP 17102 (SEA PA 03/17/14) Third-grader who required a full-time personal care assistant to stop the child's mistreatment of peers needed to be evaluated for special education.

<p><b>RECENT CASES</b></p>	<p>Addressing Bullying or Harassment</p>
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<p><b>WAS A STUDENT BULLIED BY ONE OR MORE STUDENTS BASED ON A PROTECTED CHARACTERISTIC?</b></p>	<p><b>RACE, NATIONAL ORIGIN, COLOR, SEX, DISABILITY</b></p>
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**“WHILE STUDENTS WITH DISABILITIES TEND TO BE BULLIED MORE FREQUENTLY THAN THEIR NONDISABLED PEERS, THE FACT BULLYING OCCURS DOES NOT ESTABLISH A DISCRIMINATORY ANIMUS.”**

*Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 115 LRP 5586 (EDNY 2015)*

## DISABILITY BASED DISCRIMINATION

- *M.P.T.C. v. Nelson County Sch. Dist., 68 IDELR 19 (W.D. Ky. 2016)* For purposes of the student’s Section 504 claim, there was no evidence the bullying was based on his disability. Bullying incidents included:
  - Putting gum in his hood
  - Stabbing him with a pencil
  - Physical assaults on a bus, in the bathroom and in a parking lot
  - Basketball thrown in his face
  - Verbal harassment of a sexual nature
- *Dodson v. Cartwright Elem. Sch. Dist., 67 IDELR 146 (D. Ariz. 2016)*
  - Conclusory statements that the district disregarded harassment because of the student’s disability were insufficient. Complaint alleged name calling and generalized insults such as “white trash,” “white shit,” “fat ass,” and “whore.”

## DISABILITY BASED DISCRIMINATION

- *Dorsey v. Pueblo Sch. Dist.* 60, 115 LRP 51297 (D. Colo. 2015).
  - A student with hypoglycemia and asthma did not allege a connection between her disability and bullying by her peers which included physical assaults and theft of her snacks.
  
- *M.S. v. Marple Newtown Sch. Dist.*, 115 LRP 462 (E.D. Pa. 2015)
  - Harassment claim failed because parents failed to link classmate's "staring" or "leering" to student's anxiety disorder.

## DISABILITY BASED DISCRIMINATION

- *K.R.S. v. Bedford Cmty. Sch. Dist.*, 65 IDELR 272 (S.D. Iowa 2015).
  - A student's teammates' general knowledge of his special education services, along with their comments that he was "stupid" and "dumb," an "idiot" and a "moron" established a link between the alleged harassment and the student's disability.
  - Teammates did not have to understand the precise nature of his impairment (SLD) to hold the district responsible for alleged disability-related harassment.

## GENDER DISCRIMINATION

- ***Eilenfeldt v. United C.U.S.D. #304 Board of Education*** 30 F.Supp.3d (C.D.Ill.)
  - Students called J.M. a rapist, pedophile, and child molester, and stated that he was attracted to young boys.
  - Each of these alleged insults are about deviant sexual conduct, but are unrelated to J.M.'s gender or his failure to conform to gender norms.
  - Absent allegations that students harassed J.M. *because* of his male gender or his failure to conform to male gender norms, the Court concludes that Eilenfeldt has failed to state a claim under Title IX.

## GENDER DISCRIMINATION

- ***Eilenfeldt*** provides a good example of how a district should not respond:
  - Eilenfeldt continued to report instances of bullying to Nelson and J.M.'s teachers, but almost nothing resulted from these complaints. Instead, they usually blamed J.M. for the bullying.
    - Winbigler said that J.M. "gives back about as much as he gets" and that he just "needs to stay away from certain kids" and "learn how to make life easier for himself."
  - In another example, Eilenfeldt complained to Nelson that it was difficult for J.M. to focus on learning because students had been calling him sexually perverted names, repeatedly punching him in the head, and kicking him in the legs.
    - Nelson responded that the bullying was J.M.'s fault and simply assigned him a seat on the school bus.
  - While finding no Title IX violation on the facts alleged, the court allowed the plaintiff to amend the complaint and found sufficient facts to proceed on the Section 1983 claims.

## GENDER DISCRIMINATION

- **Thomas v. East Orange Board of Educ., 998 F.Supp.2d 338, 307 Ed. Law Rep. 201 (D.N.J. 2014)**
  - A reasonable jury could not conclude K.T. was bullied because of her gender.
    - was bullied by both male and female students
    - Nothing in the record indicates or suggests that she was bullied because she is a girl.
    - K.T. believed that she was being picked on because of her mother's weight.
    - Plaintiff argues that one student called K.T. a “bitch” and a “whore,” and that another told K.T. that she was going to make her a “lesbian.” However, these incidents alone are insufficient to establish that the bullying was gender-based. Furthermore, to the extent that these isolated incidents may be related to K.T.'s gender, no reasonable juror could conclude that they amount to the “severe and pervasive” discrimination necessary to maintain a claim under the NJLAD.
  - Southernness is not a protected trait.

**WAS THE BULLYING  
CONDUCT “SUFFICIENTLY  
SERIOUS” TO CREATE A  
HOSTILE ENVIRONMENT?**

**NATURE OF THE  
CONDUCT:  
SEVERE,  
PERSISTENT or  
PERVASIVE  
SEVERE,  
PERVASIVE and  
OBJECTIVELY  
OFFENSIVE**

## NATURE OF THE CONDUCT

- ***Carmichael v. Galbraith*, 2014 WL 2767590 (5<sup>th</sup> Cir. 2014).**
  - Middle school student committed suicide.
  - The Carmichaels' complaint alleges that Jon was bullied throughout "[t]he 2009–2010 school year."
    - "On numerous occasions, Jon was accosted by a group of boys in the locker room—oftentimes having his underwear removed—while Defendant Watts observed."
    - During "[t]he last of these incidents ... just before Spring Break—a few days before Jon took his life," members of the football team "stripped [Jon] nude and tied him up" and "placed [Jon] into a trash can" while calling him "fag," "queer," and "homo."
    - "A number of students in the locker room observed this deplorable behavior," and one of these students "videotaped the attack and uploaded it to YouTube."
  - Reversed the district court's dismissal of the case on the narrow ground that the conduct was not pervasive stating, "The removal of a person's underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character."

## NATURE OF THE CONDUCT

- ***Oilveras v. Saranac Lake Central School Dist.*, 2014 WL 1311811 (N.D.N.Y.)**
  - For harassment to be actionable it must be 'severe, pervasive, and objectively offensive' and discriminatory in effect.
  - Plaintiff's complaints of harassment do not rise to the level of severe and pervasive racial hostility required to establish a Title VI violation. Plaintiff complained of approximately six incidents of known alleged racial hostility occurring over a period of four years.
    - C.J.C. called Plaintiff A.O. a "Muslim" and "blackie,"
    - A fifth grade boy, J.K., posting on Plaintiff A.O.'s MySpace page that she was a "fucked up black girl" and recommended that she commit suicide
    - Alleged that K.A. had called her "nigger" one time during social studies class.
    - D.I. called her a "dweeb" and said "at least I'm not black."
    - S.W. and J.B., who Plaintiff A.O. clearly identified as her "friends," commented on how white their clothing was, and then said, in front of Plaintiff A.O., "[o]h wait, we can't say that because that's racist."
    - Plaintiff left her backpack at school under a staircase on the last day of school. When she returned to retrieve it, someone had removed the contents of the backpack, destroyed most of her belongings, and, using her deodorant, had written the words "fuck nigger" on the concrete that extended from underneath the stairwell.



## NATURE OF THE CONDUCT

- ***Doe v. Rutherford County, Tennessee Bd. of Ed.*, 2014 WL 4080163 (M.D.Tenn. 2014)**
  - Jane Doe, June Doe, and Sally Doe (the “Doe Sisters”) Jane Doe, June Doe, and Sally Doe (the “Doe Sisters”) were enrolled in, and played basketball for, Siegel High School.
  - Between November 29 and October 2, 2012, Jane Roe (the coach's daughter) sexually assaulted them by placing her finger in or near their rectums or vaginas (cornholed them) without their consent during and after practice on multiple occasions.
  - Despite reporting these incidents multiple times and at multiple levels, the administration slow-walked its investigation of the incident, downplayed the seriousness of the allegations, meted out only token discipline to Jane Roe (and no one else), protected Jane Roe, the coach (her father), and the team over the Doe Sisters' personal safety, retaliated against the Doe Sisters for complaining about the sexual harassment, and constructively forced them out of the school.
- Although none of the Doe Sisters sought medical or mental health treatment from the incidents, inserting (or attempting to insert) a finger in another person's rectum or vagina reasonably could be construed as a “sexual” act that is a severe violation of an individual's body and personal privacy. Indeed, administration officials testified that they found the actions shocking, sexual in nature, or otherwise appalling.
- Although the Does were not cornholed after their father reported the conduct, other girls on the team continued to engage in this practice and did so in front of the Doe Sisters.
- Under the circumstances, a reasonable jury could conclude that cornholing or similar initiation practices were pervasive at SHS (or at a minimum within the girls' basketball team) and that the prospect of future harassment pervaded the Doe Sisters' educational experience.

## NATURE OF THE CONDUCT

- ***Zeno v. Pine Plains Central School District*, 702 F.3d 655 (2<sup>nd</sup> Cir. 2012)**
  - The evidence presented at trial demonstrated that, from 2005 through 2008, many students in the District taunted, harassed, menaced, and physically assaulted Anthony. His peers \*667 made frequent pejorative references to his skin tone, calling him a “nigger” nearly every day. They also referred to him as “homey” and “gangster,” while making references to his “hood” and “fake rapper bling bling.” He received explicit threats as well as implied threats, such as references to lynching.
  - Hence, the jury reasonably could have found that the harassment Anthony endured went beyond the non-actionable “simple acts of teasing and name-calling among school children.”
  - The evidence showed more than mere verbal harassment; Anthony also endured threats and physical attacks.
  - The harassment continued for over three-and-a-half years.

**DID THE SCHOOL KNOW  
OR SHOULD IT HAVE  
KNOWN OF THE  
CONDUCT?**

**KNOWLEDGE**

**KNOWLEDGE**

- *V.S. v. Oakland Unified Sch. Dist.*, 65 IDELR 234 (N.D. Cal. 2015).
  - Without deciding whether officials of a California district had notice of disability-based bullying on a school bus, the court held that the parent of a student with a severe intellectual disability pleaded viable claims under Section 504. Parent's complaint alleged the bus driver told the parent the student was being bullied because of her echolalia and that she had contacted district officials about the bullying and had not gotten a response.
  - Districts must respond to all reports of harassment and bullying, including those coming from third-party service providers.

## NO KNOWLEDGE

- ***Visnovits v. White Pine County Sch. Dist.*, 65 IDELR 167 (D. Nev. 2015).**
  - A school district has no obligation to detect unreported incidents of bullying. A high schooler's statement that she did not report prior incidents of bullying by another student in her yearbook class undermined her claim.

## NO KNOWLEDGE

- ***Moore v. Chilton County Board of Education*, 1 F. Supp. 3d 1281 (M.D. Ala. 2014)**
  - Parents of a high school student, who jumped to her death from an interstate overpass, failed to establish a claim for disability discrimination under the ADA or Section 504. The evidence was insufficient to show the school had actual knowledge of the harassment.
  - Plaintiffs cite no evidence that sheds light on what authority A.M.'s teachers or bus driver had to take corrective measures in response to complaints of peer-on-peer disability harassment and, as stated, make no cogent argument that these individuals qualify as appropriate persons.
  - The assistant principal presents affirmative evidence that she had no knowledge of any bullying against A.M. and that she never received a complaint of peer-on-peer disability-based harassment (or any other bullying activity) against A.M., from either a student, a teacher, or A.M.'s parents.

## SOCIAL MEDIA EVIDENCE

- *Doe v. Los Angeles Unified Sch. Dist.*, 2017 WL 1531150 (C.D. Cal. 2017)
  - Plaintiff will be permitted to offer evidence tending to show that defendants were aware of a racially hostile educational environment and/or the risk of serious racial-harassment on campus during the week of March 23, 2015. Insofar as plaintiff can show that defendants were aware of the statements being made online before and during the relevant time period, those statements are relevant to show the adequacy of defendants' response in light of what they knew.

**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?**

**DELIBERATE  
INDIFFERENCE**

## DELIBERATE INDIFFERENCE

- **Zeno v. Pine Plains Cent. School Dist., 702 F.3d 655 (2<sup>nd</sup> Cir. 2012)**
- At the conclusion of the trial, the district court instructed the jury regarding deliberate indifference as follows:
  - 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.

## DELIBERATE INDIFFERENCE

- **Zeno v. Pine Plains Cent. School Dist., 702 F.3d 655 (2<sup>nd</sup> Cir. 2012)**
- Responses that are not reasonably calculated to end harassment are inadequate. See, e.g., *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir.2000) (“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.”)
- 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
  - Second, the jury could have reasonably found that the District's additional remedial actions were little more than half-hearted measures. For example, it coordinated mediation, but did not inform Mrs. Zeno when or where it would be held. Its additional programs either (1) did not focus on racial bias or prejudice, or (2) made attendance optional.
  - Finally, the District ignored the many signals that greater, more directed action was needed

## DELIBERATE INDIFFERENCE & CONTROL

- ***Oliveras v. Saranac Lake Central School Dist.*, 2014 WL 1311811 (N.D.N.Y.)**
  - While the vandalism of Plaintiff A.O.'s backpack and the writing on the concrete next to it were reprehensible, the incident did not occur because of Defendants' deliberate indifference.
  - In order for a funding recipient to be held liable under a theory of "deliberate indifference," the funding recipient must have substantial control over both the alleged harasser and the environment in which the harassment occurs.
  - Although the "backpack incident" occurred on school property, both Plaintiffs and Defendants were unable to identify the perpetrator(s).
  - The incidents that occurred outside of school cannot cause Title VI liability because Defendants did not have substantial control over either the harasser or the environment in which the harassment occurred.

## DELIBERATE INDIFFERENCE

- ***Estate of Barnwell v. Watson*, 2014 WL 4248451(E.D. Ark. 2014)—Title IX and Section 504**
  - District knew the student had physical oddities including a pronounced accent relating to Asperger's syndrome;
  - District knew the student had been bullied at his previous school;
  - District knew the student was having trouble getting to class on time due to other students blocking his passage;
  - Student had an altercation with another student in his algebra class in which, over the course of the class period, a female student told him he sounded "fruity" and called him a "faggot," to which he responded by calling her a "nappy headed bitch" and ended up hitting her.
  - Student wrote his school counselor a letter stating that he wanted to leave school because he had no friends and that he couldn't handle "being an outcast for four more years."
  - Five days after his mother met with the counselor, the student was taunted and called "faggot" by a number of students during the entire period. He went home and shot himself.
  - District did not develop a plan to investigate or address bullying during an IEP meeting

## NO DELIBERATE INDIFFERENCE

- *J.J. v. Olympia Sch. Dist.*, 2017 WL 347397, (W.D. Wash. Jan. 24, 2017)
  - Upon receiving actual notice of the harassment in 2012, the coaching staff cancelled the remainder of the team's participation at camp, reported the matter to District personnel, and then reported it to the Washington State's Child Protective Services and the police.
  - After an extensive investigation, the District determined that the student athletes had been inadequately supervised at the time of the 2012 incident, thereby leading the District to terminate Coach Galloway.
  - In light of the remedial measures taken by the District, the Court finds as a matter of law that the response to reports of J.J.'s sexual harassment in 2012 was not clearly unreasonable.

## NO DELIBERATE INDIFFERENCE

- *Nevills ex rel. A.N. v. Mart Indep. Sch. Dist.*, 65 IDELR 164 (5th Cir. 2015, unpublished).
  - Parents who alleged that their son had a tic disorder failed to show that a Texas district was deliberately indifferent to disability-based peer harassment during their son's fifth-, sixth-, and seventh-grade years.
  - The principal documented her investigation of each reported incident of bullying, including punishments administered. These records along with teacher training and schoolwide assemblies on bullying showed the district was not deliberately indifferent.
- *G.M. v. Dry Creek Joint Elem. Sch. Dist.*, 64 IDELR 231 (9th Cir. 2014, unpublished).
  - District personnel appropriately responded to five reported incidents of disability-based bullying by a PE classmate. The PE teacher and the school counselor speak to the offender about his misconduct, and the PE teacher prohibited the offender from working with the student. In addition, the assistant principal suspended another schoolmate who punched the student's arm hard enough to cause bruising.

## NO DELIBERATE INDIFFERENCE

- ***Doe v. Galster*, 2014 WL 4653063 (7<sup>th</sup> Cir. 2014)**
  - Facts
    - Middle school student, born in Russia, subject to bullying and harassment
  - Claims
    - Titles VI and IX
      - Equal protection
- No deliberate indifference in school's response to harassment
  - Teachers spoke to classmates about their conduct
  - Teachers involved guidance counselors in response to some actions
  - Teacher ordered classmate, who dumped Doe's papers on the floor, to pick up papers
  - Teacher ordered students to drop sticks
  - Students received detentions
  - Parents were called after some incidents
  - Administrators moved the harassed student's locker farther away from the primary harasser and assigned the students to different study groups
  - Administrator recommended expulsion of perpetrators of physical harassment

## NO DELIBERATE INDIFFERENCE

- ***Estate of Lance v. Lewisville Independent School Dist.*, 743 F.3d 982 (5<sup>th</sup> Cir. 2014)**
  - School district's reasonable response to reported incidents of student-on-student harassment of special-needs student, who ultimately locked himself in school nurse's bathroom and hanged himself, was not deliberately indifferent to harassment, as required to support parents' claim under Rehabilitation Act, where district:
    - Investigated two documented altercations involving student and punished all students involved
    - Had a pattern of responding to other incidents involving student and promoting his relationship with other students,
    - Adopted anti-bullying policies that were appropriate and up to national standards, and
    - Provided employee training presentation on bullying and harassment.
- ***Moore v. Chilton County Board of Education*, 1 F. Supp. 3d 1281 (M.D. Ala. 2014)**
  - A claim the school district should have done more in response to student-on-student harassment is insufficient to establish deliberate indifference.



## NO DELIBERATE INDIFFERENCE

- ***KF ex rel. CF v. Monroe Woodbury Central School Dist.*, 531 Fed.Appx. 132 (2<sup>nd</sup> Cir. 2013)**
  - Whatever response KF and AF might have hoped for, Monroe-Woodbury was not “deliberately indifferent” such that it “cause[d CF] to undergo harassment or [made her] liable or vulnerable to it.”
- ***Doe v. Big Walnut Local Sch. Dist.*, 57 IDELR 74 (6<sup>th</sup> Cir. 2009)**
  - The district developed a safety plan to prevent further bullying of a student with cognitive impairment.

## NO DELIBERATE INDIFFERENCE

- ***I.F. v. Lewisville Indep. Sch. Dist.*, 2016 WL 7734555 (E.D. Tex. 2016)**
  - Allegations of harassment.
    - a sexual assault on September 28, 2012
    - incidents of sexual harassment following the alleged assault in the form of “bullying” and “cyberbullying.” in the form of Twitter posts, re-posts, comments, and “likes,”
    - Instagram posts made in February of 2013.
  - Promptness of investigation
  - In response to the January 2013, cyberbullying complaint involving a social media post, LISD interviewed nineteen (19) students alleged to have been involved, and reviewed copies of social media posts and photographs provided by Plaintiff. Twitter posting and re-post of a tweet that had occurred while school was in recess during the Winter Break.
  - While LISD concluded that the conduct did not amount to “bullying” as defined by its policy, it nonetheless found it to be hurtful and improper, and addressed it by meeting with the students involved, advising them not to engage in such conduct, and by contacting their parents. These are actions that were clearly directed at attempting to address
  - In response the Instagram posts LISD promptly reported the matter to the Carrollton Police Department, which commenced an investigation. This investigation resulted in two (2) students charged with criminal harassment. Further, LISD suspended its student for three (3) days, and then assigned the student to LISD’s Disciplinary Alternative Education Program for thirty (30) days as punishment.
  - This response by LISD was clearly a reasonable attempt to address the improper conduct and ameliorate it, and was not deliberately indifferent, as a matter of law.

## THE DELIBERATE INDIFFERENCE QUESTION

- *Doe v. Rutherford County, Tennessee Bd. of Ed.*, 2014 WL 4080163 (M.D.Tenn. 2014). The record shows
  - Coach Bush and Principal Bridgeman may have violated school harassment reporting policies by failing to report the incidents correctly,
  - School officials dragged their feet for months in response to potentially serious allegations of sexual harassment,
  - AP Martin told the Doe Sisters to keep the matter secret so as not to damage SHS's reputation, and
  - The school did not attempt a formal investigation until (a) the basketball season was nearly over, and (b) the Does' repeated complaints began to boil over,
  - AP/AD Lykins failed to investigate the incident adequately,
  - The perpetrator of the incident received only insubstantial and private discipline for her conduct,
  - Coach Bush promoted Jane Roe to captain even after the allegations came out.
  - Administration never formally informed at least the girls on the basketball team and their parents—let alone the rest of the student body—about the incidents and their inappropriateness at any point in the nearly *fourteen weeks* that elapsed between the incidents and the date the Doe Sisters left the team.

## A JURY WILL NEED TO DECIDE WHICH SIDE IS CORRECT

- In light of these facts, a jury reasonably could agree with the basic premise of the Does' theory of the case: SHS and the RCBE placed SHS's reputation and the interests of the girls' basketball team over the Doe Sisters' interests, and SHS and RCBE officials consequently did their best to “cover up” the incidents and ensure that they were not publicized.
- On the other hand, a jury might agree with the defendant that
  - SHS and the RCBE appropriately responded to the allegations (or at least that the response was not “clearly unreasonable”),
  - The limited discipline imposed on Jane Roe successfully prevented the Doe Sisters from suffering further acts of harassment,
  - Mr. Doe and, in particular, Mrs. Doe's conduct became increasingly unreasonable, and
  - The Does' grievances were more about seeing justice served on Jane Roe than on protecting the daughters from further sexual harassment.

## HARASSMENT VS. FIRST AMENDMENT

- Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 568–69 (4th Cir. 2011).
  - Fourth Circuit found that the school did not violate the website creator's First Amendment rights when she was suspended for nine days for creating a “hate website” in violation of the school policy against “harassment, bullying, and intimidation,” because the website met the Tinker test for being disruptive to the school environment.

## HARASSMENT V. FIRST AMENDMENT

- Dunkley v. Greater Egg Harbor Regional High Sch. Dist., 216 F.Supp.3d 485 (D.N.J. 2016)
  - In December 2013, Dunkley, a senior at Cedar Creek High School, was suspended for two days for his out-of-school YouTube account, which contained a video criticizing a football teammate.
  - In February 2014, plaintiff was suspended for nine days for content on an out-of-school, anonymous **Twitter** account—called Cedar Creek Raw. The school became aware of the existence of the **Twitter** account through complaints from students and parents
  - The **Twitter** account garnered 50–100 followers during its existence. Plaintiff clearly intended the subjects of the tweets contained on that page to read them or hear about them, as well as the 50–100 other students who followed the page.
  - Parents and students complained to the school about plaintiff's **Twitter** page, and the school defendants were required by state law to investigate the complaints.
- Plaintiff's **Twitter** account implicated anti-**bullying** policies and procedures set in place to manage **harassment**, intimidation and **bullying** against other students, whether that **harassment**, intimidation and **bullying** occurs on-site or off-site.
- Because plaintiff's out-of-school speech reached into the school, constituted **harassment**, intimidation and **bullying**, and triggered the school's obligations under the Anti-**Bullying** Act, the Court cannot find that defendants violated plaintiff's First Amendment rights

## WHAT'S A SCHOOL TO DO?

- Take a strong stand against disability-based bullying & harassment.
- Investigate for disability harassment and document investigation
- Take reasonable steps to end the harassment
  - Discipline
    - Continued warnings may not be enough
  - Broad measures to address systemic issues
- Complaints need not be characterized as bullying or harassment--these specific words do not need to be used
- Consider whether bullying impacted FAPE
- Document interventions in writing
- Follow up

## WHAT'S A SCHOOL TO DO?

*From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

*Tim Mahoney, school attorney, Frazer & Feldman LLP:*

1. Ensure the IEP team has the right information to identify the student's abilities and needs.
  - Where bullying occurs, when and how often it happens, what form the bullying takes, and
  - The effect the bullying has on the student's education -- such as
    - access to services and/or
    - impediments to making progress on already-drafted goals.
  - The IEP team should include whoever investigates the bullying in the discussion. In addition, consult with behavioral specialists, school psychologists, social workers, and other specialists where appropriate to complement the team's expertise.

## WHAT'S A SCHOOL TO DO?

*From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

**Tim Mahoney, school attorney, Frazer & Feldman LLP:**

**2.** The IEP team should draft goals to correspond to each need.

Examples may include:

- goals to address learning to identify bullying behaviors and situations and what actions to take to report them;
- goals to improve social skills, such as sharing and taking turns;
- speech or counseling goals to learn pragmatics to address learning to interpret and respond to social cues and non-verbal language; and
- goals to address following the play transitions of peers.

## WHAT'S A SCHOOL TO DO?

*From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

**Tim Mahoney, school attorney, Frazer & Feldman LLP:**

**3.** Add or modify services to ensure the goals can be implemented.

- Consider supplementary services or program modifications, such as
  - preferential seating,
  - an aide to shadow the child during unstructured times to ensure safety,
  - early arrival or dismissal from class, or
  - the creation of a "safe harbor," allowing the student to discretely exit the classroom briefly when she is feeling bullied.

## WHAT'S A SCHOOL TO DO?

*From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

**Tim Mahoney, school attorney, Frazer & Feldman LLP:**

4. Describe in the management needs section supports the student may require that are not purely a direct program, service, or supplementary aid. These may include:

- Notation directing separation of the student from his aggressor by varying schedules or classroom assignments;
- Inclusion of a safety plan outlining what the student should do if he is feeling bullied; and
- Separate in-service training for school staff and classroom peers to address bullying and disabilities. Also include any schoolwide or districtwide positive behavioral supports or anti-bullying initiatives.

## WHAT'S A SCHOOL TO DO?

*From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

**Howle Knoff, creator and director, Project ACHIEVE:**

- The school district needs to analyze the situation from several perspectives: student/family, ecological, functional assessment, and instruction/intervention.
  - **Student/family:** Sit down with the student and his family to ensure that everyone has the same knowledge and understanding of the situation, including how the district will analyze and address it. Factor in the student's age, disability, and related developmental factors so that communication with him is at his level of understanding. The student and parents need to know that they will be protected by the school and what to do and whom to go to if the bullying continues or expands.

## WHAT'S A SCHOOL TO DO?

*-From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

**Howie Knoff, creator and director, Project ACHIEVE:**

- **Ecological:** Investigate all reported bullying (including cyberbullying) incidents -- that is, the "who, when, where, what, how, and how long." Identify the involvement and interactions of:
  - all aggressors, as well as peer groups that may be reinforcing or supporting their behavior;
  - all bystanders; and
  - all school staff who either witnessed or had prior knowledge of actual or potential bullying interactions.
- In addition, determine if other students -- including those with disabilities -- have similarly been bullied. This may reveal the existence of patterns and the potential need for individual, group, and/or whole-school intervention.

## WHAT'S A SCHOOL TO DO?

*-From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

**Howie Knoff, creator and director, Project ACHIEVE:**

- **Functional assessment:** Have selected district personnel conduct functional assessments (not functional behavioral assessments) of all bullying incidents to determine the underlying reasons for:
  - the bullying;
  - the prosocial, negative, or non-responses of bystanders, peers, and staff; and
  - how the interactions and responses of the student with a disability might be contributing to the bullying dynamics.
    - The victimized student might be behaving or reacting to the bullying in such a way that -- inadvertently -- he/she is "inviting" or exacerbating the bullying situation.

## WHAT'S A SCHOOL TO DO?

*From "How I Advise My Clients? Special Ed Connection, September 28, 2017*

*Howie Knoff, creator and director, Project ACHIEVE:*

- **Instruction/Intervention:** Develop an action plan and discuss it with the student and his parents prior to implementation.
  - This plan may have bully, peer, bystander, staff, and student facets.
  - Relative to the bully, disciplinary action may be included.
  - The student with a disability may be taught to be an "assertive early responder," learning and mastering specific bullying-prevention, problem-solving, and protection skills. He/she may also learn how to decrease any behaviors that might be provoking the bullying.