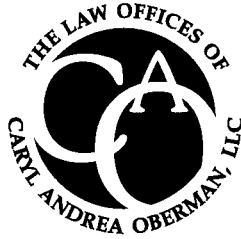


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## REMEDIES AVAILABLE TO BULLIED SPECIAL NEEDS YOUTH

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This article will focus on remedies available for students with disabilities who are bullied in public school settings, and primarily focus on student-on-student harassment. While students with disabilities have the same general constitutional protections as all other students, they are also covered by three federal statutes specific to those with disabilities: Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. Section 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. Section 12131 et seq., and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400 et seq..

Why the special protection? The United States Department of Education reports that 32% of all middle and high school students have been bullied, and that one in ten dropouts cite bullying as the cause for their leaving school. That is most certainly bad enough, but 60% of students with disabilities report having been bullied. For students who have autism spectrum disabilities, 88% report having been bullied in school. The visibility and vulnerability of many of these students make them prime targets for harassment, or worse.

As a general matter, a school district can be held liable for student-on-student bullying of a protected class member if the educational entity is deliberately indifferent to the harassment, has actual knowledge of it, and the harassment is so severe, pervasive or objectively offensive as to deprive the victim of access to educational opportunities or benefits. *See Davis v. Monroe County Board of*

*Education*, 526 U.S. 629 (1999). Students with disabilities are a class protected from discrimination, of which harassment is one example, under Section 504 and the ADA. Under the IDEA, the educational entity has additional responsibilities that do not simply extend to harassment based on the student's disability and status as a member of a protected class. Because there is an affirmative duty to provide free and appropriate public education in the least restrictive environment, *any* harassment that deprives a student with disabilities of that right requires an appropriate and effective response, regardless of the basis for the harassment.

### SECTION 504 and the ADA

Section 504 of the Rehabilitation Act of 1973 is an anti-discrimination statute modeled on, and generally interpreted consistently with, other federal antidiscrimination statutes, such as Title VI of the Civil Rights Act and Title IX. Section 504 provides that no otherwise qualified individual with a disability shall, "solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The ADA for the purposes of this discussion is coextensive with Section 504. All public schools and state educational agencies receive federal money, and so all are covered by Section 504. The ADA also covers public entities that do not receive federal funds. To be considered a member of the class of individuals protected by Section 504 and by ADA, a student must have a physical or mental impairment that substantially limits one or more major life activities, have a record of such impairment, or be regarded as having such an impairment. Under the ADA Amendments, the impairment and its effect must be determined based on the status of the student on his or her worst day, and in the absence of medications or ameliorating factors. The same criteria are used under Section 504. Both Section 504 and the ADA provide a federal cause of action for both injunctive relief and money damages.

Simple negligence is not sufficient to entitle a claimant to money damages. Rather, there must be some showing of intent. In the educational context, intent can be proven through a showing of gross mismanagement or deliberate indifference once on notice of the harassment. Actual malice or animus is not necessary. (Although animus can sometimes be established in staff-on-student harassment cases, it is not as usual to find provable school district animus in cases involving student-on-student bullying).

The Office for Civil Rights, which is charged with enforcement of the antidiscrimination provisions of the ADA and Section 504, has issued two “Dear Colleague” guidance letters addressing disability-based harassment, the first in 2000 and the second in 2010. Both are included in these materials.

### **The IDEA**

The IDEA creates a comprehensive remedial process to redress violations of a student with disability’s right to a free appropriate public education in the least restrictive environment. The administrative procedures available under that process must be exhausted before a federal action under IDEA can be brought. The IDEA itself does not provide for money damages (although it does provide a reimbursement remedy for privately-obtained educational services under some circumstances), and actions for violation of IDEA rights cannot be brought under Section 1983, which does. *A.W. v. The Jersey City Public Schools*, 486 F. 3d 791 (3d Cir. 2007).

If a remedy for school-based disability harassment is sought under Section 504, the ADA or another statute, combining a claim for money damages for past harms and a request for prospective injunctive relief, many courts have required claimants to exhaust their administrative remedies under the IDEA before bringing federal actions, if *any* of the relief sought is even potentially available through the

administrative process. In the Third Circuit, there is a trend toward requiring such exhaustion even if the availability of any actual relief through the administrative process is quite tenuous.

Now the good news: harassment of an individual with disabilities, whether or not that harassment is based on the disability itself, may constitute a denial of that individual's right to a free, appropriate public education, entitling that individual to a prospective injunctive remedy and to compensatory education for the deprivation of educational opportunity. *Shore Regional High School Board of Education v. P.S.*, 381 F. 3d 194 (3d Cir 2004). In an appropriate case, such harassment may render the entire school placement inappropriate, and entitle the student to publicly funded placement in a different, or even in a private, school. *See J.E. v. Boyertown Area School District*, 2011 WL 5838479, 57 IDELR 273 (3<sup>rd</sup> Cir. Nov. 21, 2011).

Moreover, characteristics or behaviors that make a student with a disability more likely to be bullied or harassed must be addressed through that student's individualized education program (IEP), the cornerstone of IDEA protections. Skills must be taught, appropriate responses to bullying explored, and means of obtaining assistance delineated.

Selected cases on disability-based bullying are attached to these materials.

### **The Remedial Process**

Administrative complaints for disability-based harassment can be filed with the Office for Civil Rights, charged with Section 504 and ADA enforcement. Claims for violations of Section 504 can also be filed directly in federal court, but only if they seek remedies not even potentially available through the IDEA's

administrative hearing process. Clever pleading will no longer obviate the exhaustion requirement.

Harassment claims under Section 504, and denial of educational benefit because of harassment claims under the IDEA, can be filed with Pennsylvania's Office for Dispute Resolution (ODR) ([odr-pa.org](http://odr-pa.org)) for disposition at an administrative due process hearing. Some courts have also required aggrieved parties to attempt to exhaust their ADA claims in the administrative process, although administrative hearing officers uniformly refuse to hear them because of lack of jurisdiction.

Any party aggrieved by the decision of the administrative hearing officer can appeal to state or federal court. The appeal to state court is a traditional appeal. The appeal to federal court is an oddly hybrid "quasi- de novo" action, initiated through a conventionally pled complaint. Like most civil rights plaintiffs, prevailing plaintiffs in IDEA actions, administrative or court, are usually entitled to reimbursement of reasonable attorneys' fees and costs.

The IDEA/IEP process is underused as a vehicle for remedying bullying and harassment, and holds promise for providing effective and reasonably prompt redress when money damages are not the remedy sought.