

Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

November 2014

www.nassaubar.org

Vol. 64, No. 3

Protecting Students with Disabilities from Bullying

Bullying is not a recent phenomenon, but within the past ten to fifteen years the dialogue surrounding bullying has changed, shifting from a rite of passage for every school aged child to a problem with lasting psychological, physical and academic effects on both the victim and the bully.

The focus in the social sphere, particularly after the 1999 Columbine High School shooting, moved to those effects and how to prevent bullying in the future. Not only are researchers, educators and parents shifting their thought process to the prevention and eradication of bullying, but the government and court system are as well.

Lawmakers and Courts have joined the dialogue by addressing the pervasive issue of bullying through protecting the classes of citizens research has shown to be targets. In particular, laws have been passed such as the New York State Dignity for All Students Act (DASA) to protect students who are the most vulnerable to bullying, including students with disabilities.

Students with disabilities are an extremely vulnerable population and are more at risk of becoming victims of bullying and harassment than their typically developing peers. Schools and school districts have not only a legal responsibility, but a higher moral responsibility to respond to disability harassment. Students with disabilities are already at a disadvantage when it comes to appropriate social skills and positive interactions with peers. Bullying, a negative peer interaction, leaves students with disabilities even further behind and at an even greater disadvantage, both socially and academically, than their typical peers.

What is Bullying?

According to stopbullying.gov, bullying is “unwanted, aggressive behavior that involves a real or perceived power imbalance and the behavior is repeated or has potential to be repeated over time.” Bullying can lead to “disability harassment.” According to the United States Department of Education (USDOE), disability harassment is “intimidation or abusive behavior towards a student 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 institution’s program.”

In a 2013 Dear Colleague letter from the OCERS/OSEP, the USDOE defines bullying as “aggression within a relationship where the aggressor has more real or perceived power

than the target.” Usually students with disabilities have a lower social status than their typical peers. This may explain why disabled students are three times as likely to be victims of bullying. The key to bullying is an imbalance in power. Courts have addressed the issue of confrontations between students where no actual or perceived imbalance of power is present and generally considered these incidents to be horseplay and not actual bullying.



Sandra M. Gumerove

T.K. v. New York City Department of Education

A seminal New York case out of the Eastern District of New York, *T.K. v. New York City Department of Education*, gives an extensive explanation of bullying and its effects on students with disabilities. In this case the Court states that overall, studies have shown that students with disabilities are “less popular, have fewer friends and struggle more with loneliness” than their typically developing peers. Students with learning disabilities and students with Asperger’s Syndrome often lack social awareness, have a difficult time processing and interpreting social cues, and are less likely to form healthy peer relationships, leaving them more vulnerable to bullying and harassment as a result.

Massachusetts has adopted the strongest statute among the States that requires that a student’s Individualized Education Plan (hereinafter “IEP”) address the skills needed to avoid bullying whenever an evaluation indicates that a child has a disability that will leave them vulnerable to bullying.

Since studies have shown that students who are victims of bullying in school have no other escape than to avoid going to school, it is the school’s responsibility to immediately respond to incidents they know of, or should know of, to prevent the victim from regressing academically, which can result in a denial of a free and appropriate public education (hereinafter “FAPE”) and liability for the school district.

The Court in *T.K.* points out that “being the victim of bullying is related to sliding grades, absenteeism, poor academic achievement, being lonely, exhibiting withdrawal behaviors, difficulty acting assertively or being aggressive.” The Court further points out that students who struggle academically are more likely to be “victims or bully-victims, which is defined as a student who is both a victim and a bully at different times.”



Patricia Craig

Is a School District's failure to address bullying a denial of FAPE?

The question then becomes, what is a school required to do to stop bullying of students with disabilities? School districts and schools are obligated under the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA") to provide a FAPE to all children with disabilities that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.

The "IDEIA provides procedural and substantive safeguards for special education students with respect to the education programs tailored to them." To meet the IDEIA requirements, school districts in New York must provide "a program with special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits."

The Individualized Education Plan (hereinafter "IEP") is the tool by which a school administers those services and Committees on Special Education (hereinafter "CSE") develop those IEPs. The Court in Walczak states that the CSE is "required to consider four factors in developing a student's IEP: (1) Academic achievement; (2) Social development; (3) Physical development; and (4) Managerial or Behavioral needs."

This being said, the ultimate question is whether bullying can be a basis for a denial of FAPE claim in New York. The USDOE has required schools to be responsible for addressing bullying incidents for the past several years whether they knew or should have known about these incidents. The Court in T.K. states the rule to be followed by school districts when responding to bullying incidents: (1) schools must take prompt and appropriate action (2) investigating whether the reported harassment occurred, and (3) if the harassment is found to have occurred the school must take "appropriate steps to prevent it in the future." Therefore, the Court in T.K. did not impose a new standard on schools. They merely repeated the standard required by the USDOE.

In order to find a denial of FAPE the bullying of the student with disabilities must have limited or denied the student's ability to participate in or benefit from the school district's educational plan. The Court in T.K. states that it is "not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability."

The Court provides a test to determine whether a denial of FAPE has occurred. The parents must provide evidence that: (1) the student was a disabled student who was the victim of harassment from peers; (2) the school was given notice of the harassment; (3) the school district failed to take reasonable steps to address the harassment; and; (4) the student was denied some educational benefit as a result. The Court further states that, as per the USDOE Reminder Letter in 2000, a student is not required to prove that he or she was denied all of her educational benefit, but merely that he or she may suffer adversely as a result of the bullying. The Court goes on to say that "a child may achieve substantial educational gains despite the harassment and yet still

may have been seriously hindered...whether the bullying rose to this level is a question for the fact finder".

The Court gives an example of bullying that would amount to a denial of FAPE stating, "[A] hypothetical student with a disability is verbally teased by other students and on one occasion is tackled, hit with a binder, and has his personal affects thrown in the garbage. The student approaches teachers and guidance counselors who suggest counseling, but they do nothing to punish the bullies. The bullying then continues and the student, who was once doing well, begins showing the signs of victimization at the hands of other children. The school in this hypothetical responded in part to the bullying, in offering the student counseling to deal with what he was going through. But it did not respond adequately. It did not fully investigate the bullying or punish those who were perpetrating the harassment. In this example, the school deprived the student of his educational benefit."

In a Dear Colleague Letter dated August 20, 2013 the Office of Special Education and Rehabilitative Services (OSERS) jointly with the Office of Special Education Programs (OSEP) addresses the situation where the student with a disability engages in bullying behavior. It states that the "IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior," and "consider examining the environment to determine if changes to the environment are warranted." This would include instituting or amending a behavior intervention plan and providing additional counseling or other services.

What steps must a School District take to address bullying?

A Dear Colleague Letter from the Office of Civil Rights in 2010 lists the appropriate steps for school districts to follow. The list includes, but is not limited to, providing counseling for the victim and/or the bully, separating the bullying and the victim, taking disciplinary action against the bully, providing sensitivity training to both the bully and the larger school community and issuing new policies against bullying.

Subsequent to the decision in T.K., New York enacted DASA. DASA incorporates many of the elements set forth in the T.K. decision. Committees on Special Education must address the impact of bullying on the special education student in the IEP in order to ensure that the student is receiving a free and appropriate public education. Thus, New York schools and school districts have an affirmative duty to ensure that students with disabilities as well as general education students are protected from bullying.

Saundra M. Gumerove, a Special Needs Attorney with Saundra M. Gumerove, Esq., P.C., represents and works with individuals with disabilities and their families on a wide range of issues, including special education, guardianship, estate planning and supplemental needs trusts. She is Vice Chair of the NCBA Elder Law, Social Services and Health Advocacy Committee, and a member of the NCBA Education Law Committee.

Patricia Craig is a Special Needs and Special Education associate at Saundra M. Gumerove, Esq. P.C. in Jericho and is a member of the NCBA Education Law Committee.

