

- Failure to address reports of bullying or harassment of students with disabilities can result in a violation of FAPE
- Schools are obligated to promptly, thoroughly and effectively respond to reports of disability harassment or bullying
- Convene the student's IEP Team if bullying or harassment is impacting FAPE
- Consider conducting FBAs for student with chronic attendance issues
- Don't ignore Red Flags for Child Find

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## Bullying and Harassment of Students With Disabilities

There is no question that students with disabilities are particularly susceptible to bullying and harassment by other students. Students with disabilities may be bullied because of their disability or they may experience harassment because of their social skills or behavior. That bullying or harassment can significantly impact the student and may even result in a denial of FAPE.

Districts are required to take appropriate action when any student is being bullied or harassed. Failure to do so when the bullying or harassment is directed to a child with a disability can lead to a violation under the IDEA, Section 504 and/or the Americans with Disabilities Act (ADA).

The OCR has issued several *Dear Colleague* letters that specifically outline a school dis-

trict's obligations under these statutes to address instances of bullying and/or harassment of students with disabilities to ensure that the student continues to have access to and receive a free, appropriate public education.

Review this article to ensure that your District takes appropriate action to avoid liability in a disability harassment or bullying case.

[Read More about the School's Obligation to Address Bullying/Harassment on p. 3](#)

## Child Find and Mental Health Concerns

Under the IDEA, schools have a legal obligation to locate, evaluate and identify all children suspected of having a disability who may need special education services. "Child Find" is not just required for students who are struggling academically, but also applies to students with mental health issues, which is a growing area of concern, especially since COVID. It is critical that schools recognize red flags of mental health conditions so that the Child Find obligation is not missed. Failure to identify a student can lead to compensatory education awards.

[Review the Red Flags To Avoid Child Find Violations on p. 5](#)



## CASE LAW UPDATE

### A.H., A Student in the Woodland Hills S.D. Hearing Officer Decision

**Issue:** Whether the District denied the student FAPE by placing the student in outside placements and whether the District's manifestation determination was appropriate.

**Facts:** A.H. was enrolled in the District after previously attending a charter school as a regular education student. Within a few days of enrollment, A.H. exhibited significant behaviors and was placed in a therapeutic alternative education program. A.H. was subsequently evaluated and found eligible for special education under the category of emotionally disturbed.

While at the outside placement, A.H.'s behaviors improved; however, A.H. was found with a bag of marijuana in school. As a result a reevaluation was conducted and A.H. was placed in an APS with full time emotional support. A.H. however began to accumulate unexcused absences from the APS. The following year, A.H.'s absences continued. The IEP Team met multiple times to discuss A.H.'s school refusal and the student's PBSP was revised. The District did not conduct an FBA due to student's attendance. The student's multiple absences resulted in a lack of educational progress. Parent advocated for a return to the school district, arguing that student would attend school in that location. The District eventually agreed.

A.H. transitioned to the District's school. Within the first few weeks of school, A.H. participated in a fight where the victim was struck and kicked in the head while laying on the ground. The District concluded that the fight resulted in a serious bodily injury to the victim and moved for a unilateral 45 day placement. A manifestation determination was held and the team concluded that the actions were not a manifestation of the student's disability.

The parent entered into a separation agreement with the District, agreeing to enrollment in the District's online academy for 45 days. At the conclusion of the 45 days, A.H. chose to stay enrolled in the online academy.

**Parents First Claim:** The District denied A.H. FAPE while enrolled in the APS by failing to provide appropriate behavioral interventions to address the Student's refusal to attend school.

**Holding:** The District violated its FAPE obligation by failing to initiate an FBA when the student began accruing significant absences.



Although the District held multiple IEP meetings to discuss the issue of student's attendance and offered accommodations to the student, none of this worked to help improve A.H.'s attendance. The Hearing Officer ruled that the District should have attempted an FBA to ascertain the causes of the school refusal and develop an appropriate response. She found that even though the student was absent, the District should have made an attempt to conduct the FBA.

**Parent's Second Claim:** Parent claimed that the manifestation determination held after the student's fight was not appropriate and resulted in a denial of FAPE.

**Holding:** The Hearing Officer concluded that the fight resulted in a serious bodily injury to the victim, allowing the District to unilaterally remove A.H. for a period of 45 days. She found that the victim, who did not return to school after the assault, would have experienced extreme pain while being kicked in the head while lying defenseless on the ground. Therefore, the manifestation determination did not result in a denial of FAPE.

The District offered appropriate supports to the student, including access to assigned teachers and a case manager who was available to provide special education supports while the student was enrolled in the online academy. The student made progress in this setting and was not denied FAPE.



# Addressing Bullying and Harassment

(Continued from page 1)

**Disability-Based Harassment:** The US Department of Education has defined disability-based harassment as intimidation or abusive behavior toward a student with a disability that creates a hostile environment by interfering with or denying a student's . However, Courts have held that harassing conduct that is not related to a student's disability is not considered disability-based harassment under Section 504 or the ADA. Harassing conduct can include verbal acts and name-calling; graphic or written statements, including use of cell phones or the internet or physically threatening, harmful or humiliating conduct.

**Bullying:** The US Department of Education outlined the difference between bullying and harassment in a Dear Colleague Letter. Bullying involves acts of aggression by an individual who has real or perceived power over the targeted individual that are repeated or have the potential to be repeated over time. Such aggressive behavior can include overt physical behavior or verbal, emotional or social behaviors like excluding or isolating a person from social activities or destroying the person's reputation.

Regardless of whether the actions are defined as bullying or harassment, the District must still respond if they know or should have known about the conduct.

**Duty to Respond:** No law requires a school district to proactively prevent all incidents of disability based harassment or bullying. However, OCR and Courts can find violations of the IDEA; Section 504 and/or the ADA where the District knows or should have known about the bullying or harassment and the

school does not respond appropriately. District must take reports of disability-based harassment or bullying seriously; investigate the incident and take appropriate steps to eliminate the conduct. The District's response is not required to be perfect, nor is the school required to expel the bully or harasser. However, OCR has held that the response needs to be prompt, thorough and effective.

Moreover just because the district's reasonable response does not immediately stop the bullying or harassment does not render the District liable. However, the District is required to continue to address ongoing issues and develop new or additional responses if the bullying or harassment does not end.

**FAPE Review:** In addition to taking action to end the bullying or harassment, the District should also consider whether and to what extent the harassment or bullying affected the disabled student's ability to receive FAPE. IEP or 504 Teams should consider whether the victim needs to be evaluated or reevaluated to review the student's needs and whether additional supports or services need to be provided. An evaluation may not be necessary but revisions to the student's 504 or IEP may be needed to add supports such as counseling, social skills groups or psychological services. A student who is afraid to come to school may need an FBA and a Positive Behavior Support Plan. A student who has missed a significant amount of school as result of bullying may need tutoring or ESY services. Changing the victim's placement should only be considered if the student is unable to receive FAPE in their current setting.



## Responding To A Disability-Based Complaint

	<p>The OCR, in a <i>Dear Colleague Letter</i>, explained key steps that District's should take to respond to a disability harassment complaint.</p>
<b>Disability Harassment Complaint Has Been Filed</b>	<ul style="list-style-type: none"> <li>• Ensure that all complaints are taken seriously</li> <li>• Staff should be trained to notify administration immediately if they receive a complaint or are aware of bullying or harassment</li> <li>• District must take immediate and appropriate action to investigate or otherwise determine what occurred</li> <li>• Investigation must be prompt, thorough and unbiased</li> </ul>
<b>Investigate</b>	<ul style="list-style-type: none"> <li>• Specific investigation should be done on a case by case basis based on the circumstances of the complaint</li> <li>• Gather facts from the complainant, respondent, and all possible witnesses</li> <li>• Review other information such as video footage or documents provided</li> <li>• Be thorough and DOCUMENT the investigation</li> </ul>
<b>Did Disability Harassment Occur?</b>	<ul style="list-style-type: none"> <li>• Determine whether the conduct rose to the level of harassment</li> <li>• Was it sufficiently severe, persistent or pervasive?</li> <li>• Was the conduct based on the student's disability?</li> </ul>
<b>Take Responsive Action</b>	<ul style="list-style-type: none"> <li>• If discriminatory harassment occurred, a district must take prompt and effective steps that are reasonably calculated to end the harassment, eliminate a hostile environment and prevent the harassment from recurring</li> <li>• Can include but not be limited to separating the students, scheduling changes and discipline</li> <li>• Provide training to all students to teach them about harassment and bullying</li> <li>• Provide supportive measures</li> </ul>
<b>Consultation with IEP Team</b>	<ul style="list-style-type: none"> <li>• If the harassment or bullying has effected the student's ability to receive FAPE, convene the IEP Team to determine if additional supports are necessary</li> <li>• The student may need a new evaluation or an FBA, additional counseling or psychological services or more support from the special education teacher</li> <li>• Only change the victim's placement if necessary to receive FAPE</li> </ul>

## Addressing Mental Health Concerns

*(Continued from p. 1)*

It is important that teachers and Principals understand the red flags associated with new or increased mental health issues and what to do if they see these red flags or are made aware of them by the student or parent. Often these can be mischaracterized as defiant, unmotivated or behavior issues that are met with discipline. Teachers and Principals should be trained on these issues so they know what to look for and to ensure they are reported to the Special Education Department. Often these issues are simply dealt with by the Principal and the Special Education office is not even made aware that they are occurring.

These red flags do not necessarily mean that the child needs special education services or even an evaluation, but they should not be ignored. Teams should discuss students with increased behavior issues and consider these signs to determine if support, rather than discipline is needed.

Often students with mental health needs are first referred to the District's Student Assistance Program (SAP) before an evaluation is considered. This approach may be fine in some circumstances; however, be sure to monitor the student's response to ensure that this level of support is appropriate. If the student continues to have difficulty, the District should not rely on SAP alone and should consider whether the student needs additional supports. The student may qualify under the IDEA as emotionally disturbed or Other Health Impaired.

### RED FLAGS

- Increased absences or tardies
- Sudden drops in academic performance, including participation in class or grades
- Withdrawal from friends or activities
- Suddenly sleeping in class or not turning in assignments

- Changes in behavior
- Suicide threats
- Student reports to teacher, guidance or nurse of depression or anxiety
- Student begins school based therapy

### PARENT REPORTS

Sometimes parents will report to the teacher, guidance or the Principal information that also should be considered under Child Find:

- Student recently received a mental health/psychiatric diagnosis
- Student was recently hospitalized for mental health issues
- Parents request homebound instruction for a mental health issue
- Student recently prescribed medication for a mental health condition
- Parent reports increased issues at home

### THE EVALUATION

If the team believes that these red flags or reports warrant an evaluation, in addition to obtaining input from the staff, student and parents, always issue a Release to obtain records and input from the student's outside mental health provider. Consider any outside evaluations or input provided by the parent.

Also consider whether an FBA should be conducted as part of the evaluation. Evaluate the student's behaviors to get a full picture of how the student's mental health needs may be impacting their education. Again, take these issues seriously to ensure that students receive the supports they need.





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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

Andrews & Price, LLP is the pre-eminent law firm in Western Pennsylvania in the practice of Public Sector Law. Our attorneys have more than 60 years of combined experience servicing School Districts. We provide a full range of legal services to our clients, including serving as Solicitor for various school districts, serving as special counsel for special education due process hearings, presenting seminars relating to the Reauthorization of IDEA and representing our clients in all types of litigation, including defense of numerous civil rights suits in federal and state Court.



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### *Consult Your Solicitor!*

*The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.*