

Legally Speaking

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Investigating Reports of Bullying and Harassment

By James A. Robinson, General Counsel,
Joan Reubens, Bullying Prevention Specialist, and
Jan Urbanski, Ed.D., Director of Special Projects

Headlines:

"PICKED ON: A Pasco County fourth grader says he was racially harassed and bullied at his school."

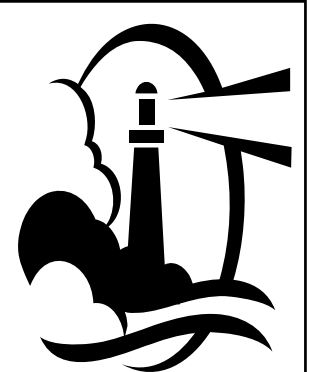
"SUING THE SCHOOL: The mom of a teen beaten at her Broward County middle school sues the district, saying the school should have done more to protect her daughter, the Miami Herald reports."

These are just two of a growing number of headlines, which reveal a major focal point in our society, and an area of increased liability for school districts.

Both Florida statute and board policy require that all reports of bullying and harassment be investigated. Every site has an administrator or designee responsible to investigate reports of bullying and harassment. Because there is a legal duty to investigate, failure to do so, or to do so properly, could expose the district to liability.

So, the first thing to keep in mind is that all reports of bullying must be investigated. The procedure will vary depending on how and where the report was received and whether the incident involves students or adults. Please refer to the Report of Bullying/Harassment Received flowchart for specific steps. The flowchart is available in the Public Outlook Folder under the Prevention Office

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Mission Statement

The mission of the Office of General Counsel is to provide the highest quality legal services to the Pinellas County School Board, the superintendent and the district by ensuring timely and accurate legal advice and effective representation on all legal matters.

OCR Gives Guidelines on Bullying and Harassment

By James A. Robinson, General Counsel and Laurie Dart, Associate Counsel

On Oct. 26, 2010, the U.S. Department of Education's Office for Civil Rights (OCR) issued guidance in the form of a "Dear Colleague" letter to school districts throughout the country reminding school officials that failure to address certain forms of bullying by students may subject the district to liability under a number of

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Investigating

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and then go to the 'Bullying' folder to Flowchart for Investigating Reports of Bullying.

The procedures for investigating an incident of bullying do not differ greatly from the procedures for investigating any other type of misconduct. However, one notable difference is that the law and policy require that all involved in the alleged bullying or harassment be interviewed separately.

The process for investigating a report consists of the following steps:

- The principal/designee or appropriate district administrator initiates the investigation, which must be completed within 10 working days;
- The investigator interviews the victim, alleged perpetrator and witnesses separately to gather pertinent information which may include:
 - Description of the alleged bullying incident;
 - Location(s) of the alleged bullying incident;
 - Identity of all involved;
 - Relationship between those involved to determine difference in power or status;
 - Demographics of those involved (age, grade, gender, race, etc.);
 - Circumstances surrounding the incident;
 - Frequency and severity of the behavior;
 - Pattern(s) of behavior and
 - Impact of the incident on the learning environment;
- The parent/legal guardian of all students involved must be notified on the same day an investigation has been initiated.

Upon completion of the investigation, whether the incident was determined to be substantiated or unsubstantiated,

the following steps must be followed:

- Provide the principal/designee with a written report including recommended remedial steps;
- Complete a Final Disposition Form including a follow-up plan and recommendations and send to the Prevention Office at the administration building;
- Notify parents of students or the adults involved of the outcome of the investigation and the follow-up plan;
- Follow up with other assessments or actions as needed and
- All incidents of bullying and harassment, whether substantiated or unsubstantiated must be entered into School Environmental Safety Incident Reporting (SESIR). For information on how to do this go to the Public Outlook Folders under the Prevention Office and then go to the 'Bullying' folder to SESIR and Bullying Incidents.

If an investigation reveals that discriminatory harassment has occurred, the school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action or identified the harassment as a form of discrimination. Unlawful harassment based on race, color, sex, religion, national origin, ethnicity, marital status, age, sexual orientation or disability must be referred to the Office of Equal Opportunity for investigation.

When a report of bullying is received, an initial determination should be made whether the reported "bullying" or "harassment" meets the definitions in **Board Policy 5517.01, Policy on Bullying and Har-**

assment. A complaint that alleges an isolated act of aggression, such as a shove or a punch, may well warrant a discipline referral, but not further investigation as an act of bullying since bullying involves systematic and chronic behavior. The complaint should be recorded on the final disposition form as *unsubstantiated* as to bullying, and any disciplinary action noted. Does the report disclose that the alleged act of bullying or harassment is outside the jurisdiction of the district, meaning either (1) that it did not occur on school grounds, at a school sponsored event or while using district transportation or equipment, or (2) that it did not cause or threaten to cause substantial and material disruption at school? If so, there is no basis for the school to proceed further with the investigation. Again, complete the final disposition form as *unsubstantiated* for lack of jurisdiction, and give the reason why. (Please confer with the Office of General Counsel whenever proceeding forward with an investigation involving an off-campus act other than one occurring on school transportation or at a sponsored event.) Although the incident may be beyond the scope of the district's jurisdiction, providing information to assist the individuals involved may be appropriate, and should be noted on the final disposition form.

Remember, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. Regardless of the extent of the investigation or the outcome, administrators and designees must follow district policy and procedures to ensure a safe learning and work environment for all, and to minimize the district's liability exposure. For additional information or assistance with investigations contact the Prevention Office at 588-6130. ■

How Long Can Students With Disabilities Be Suspended?

By David Koperski, Associate Counsel

Of all the rules relating to the education of students with disabilities, some of the most discussed, and misunderstood, are the rules relating to discipline and, specifically, the suspension and expulsion of disabled students. The education of students with disabilities is governed by two federal laws, the Individuals with Disabilities Education Act (IDEA) and Section 504, as well as additional state rules and school board policies.

Students qualifying under the IDEA and related state and district rules are referred to as exceptional student education (ESE) students. Every ESE student has an individual educational plan (IEP), except for those ESE students who qualify as gifted, and they have an educational plan. An IEP is a written statement of the educational program designed to meet the student's individual needs. An IEP has two general purposes: to set reasonable learning goals for a student and to state the services that the district will provide for the student. The IEP is developed jointly by the school staff, the parents of the child and the student when appropriate.

Other students may qualify under a different definition of "disability" in Section 504 and have a Section 504 Plan, which outlines what accommodations the student will receive. Students with Section 504 Plans are those that have a physical or mental impairment that substantially limits one or more major life activities. The law also protects those students who have a record of, or are regarded as having, such an impairment. The Section 504 Plan, like an IEP, is written by a team, including parents and the student when appropriate. The purpose of the Section 504 Plan is to identify the accommodations a student needs in order to give them an opportunity to

perform at the same level as their non-disabled peers.

This article provides a brief review of the law and other rules regarding the allowable length of discipline of ESE and Section 504 students and whether and what services must be provided during the suspension or expulsion.

ESE Discipline

Under federal law, ESE students may only be suspended for up to 10 days in a school year without being provided those educational services that school personnel deem necessary to allow the student to access the curriculum and progress toward meeting the IEP goals. In other words, services must be provided on day 11. The key in determining whether a day counts as one of the 10 is not whether the student is on school grounds, but whether services are provided to the student. For example, a typical out-of-school suspension (student receives no educational services) would count toward the 10-day period. However, an in-school suspension would also count if the student did not receive the necessary services, and a bus-only suspension would count if the student has no other way of getting to school. On the other hand, an in-school (or even out-of-school) suspension would not count toward the 10 days if the student received the necessary services.

In our district, students are not suspended, even with services, for more than 10 days in a school year. However, students may be reassigned to an alternate educational placement so long as they receive their IEP services. There has been some discussion in the district regarding a desire to follow other school districts in allowing a student to be suspended for more than 10 days in a year. Federal law would allow a student to be removed from

the school for more than 10 days in a year based upon several factors, but services must still be provided as described above starting on day 11, whether at home or some alternative site. Our district has chosen to have a bright line rule of no more than 10 days of out-of-school suspension in a school year in order to maintain consistency throughout the school system. This rule also avoids the risk of a challenge that suspensions at some point beyond 10 days amount to a change in placement, which is an ESE legal concept carrying various rules.

Further, the district cannot impose a change of placement on ESE students if the misconduct leading to the change in placement is a manifestation of their disability. This determination is made at a meeting of school personnel and parents where the group essentially asks whether the disability caused the misconduct. Various rules apply depending upon the answer to that question. Regardless, the team should assess why the misconduct occurred and prepare a behavioral plan, if one does not exist, and review it if it does.

Much of the confusion regarding ESE discipline can be clarified by remembering the key is whether services are provided on day 11, not whether the student is removed from his/her school or whether you call a removal a "suspension" or "expulsion," because those terms are usually used (i.e., for non-ESE students) to mean a complete removal of all education services.

Section 504 Discipline

Unlike ESE students, Section 504 students have no statutory right to services starting on day 11 of a suspension or expulsion. Section 504 is not as comprehensive as the IDEA.

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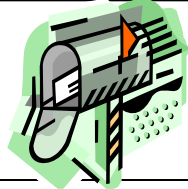
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Suspension of Students with Disabilities
(Continued from page 3)

Section 504 is essentially a non-discrimination (disability) statute that does not contain the numerous affirmative duties and funding that the IDEA contains. However, as is true with ESE students, a manifestation determination meeting must be held once a school seeks to suspend a student for a certain number of days. See **School Board Policy 2260.03, Section 504**. Also, the Section 504 Plan must be implemented whenever and wherever we choose to provide continuing educational services during a period of expulsion, such as at Teleschool, or disciplinary reassignment, such as Pinellas Secondary. ■

OCR letter
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federal civil rights laws. The Dear Colleague letter issued on Oct. 26, 2010, can be found on the U.S. Department of Education's website at the following link: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

The guidance letter explains that state anti-bullying and harassment laws and school district policies adopted pursuant to those laws may not go far enough to protect students from student-on-student

racial and national origin harassment, sexual and gender-based harassment and disability harassment.

OCR reminds districts that bullying should always be addressed by school administrators under their district's anti-bullying policy. However, it clarifies that when the bullying is based upon a student's protected status (*i.e.*, based upon one's race, sex, sexual orientation, disability etc.), schools must remember to implement their anti-discrimination policies, including the grievance procedures contained in those policies.

The guidance letter provides a summary of the civil rights laws enforced by OCR; a discussion of what types of bullying conduct could trigger liability under these federal laws, and some scenarios and tips to school officials in responding to bullying. The guidance letter underscores school officials' obligations to thoroughly investigate incidents of bullying and to take swift and effective remedial action to end such conduct. The civil rights laws enforced by OCR that are potentially implicated by acts of bullying include:

- Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex;
- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin;
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability and
- Title II of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability.

The key point is that school officials must be careful to assess the nature of the bullying to determine when it involves discriminatory harassment involving a federally protected characteristic such as race, sex, national origin, etc. If so, the OCR reminds schools that they "must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects and prevent the harassment from recurring."

School Board Policy 5517.01, Policy Against Bullying and Harassment – refers school officials to the harassment and discrimination policies for the investigation and proper handling of acts of harassment against federally identified protected categories, and acts of harassment, including sexual harassment, which do not meet the definition of bullying. Thus, our district is in compliance with OCR's guidance in this regard.

OCR simply wanted to remind school administrators that federal anti-discrimination laws apply when student bullying amounts to harassment based upon another student's race, color, national origin, and that such acts must be investigated according to appropriate harassment and discrimination policies, which is called for under our school board policies. ■