



Investigating Complaints of Discrimination, Harassment, and Bullying: With a Twist!

**ACSA Every Child Counts Symposium
January 16, 2014**

Sarah L.W. Sutherland, Attorney
Danniss Woliver Kelley
619.595.0202
ssutherland@DWKesq.com



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www.DWKesq.com

SAN FRANCISCO
275 Battery Street
Suite 1150
San Francisco, CA 94111
TEL 415.543.4111
FAX 415.543.4384

LONG BEACH
115 Pine Avenue
Suite 500
Long Beach, CA 90802
TEL 562.366.8500
FAX 562.366.8505

SAN DIEGO
750 B Street
Suite 2310
San Diego, CA 92101
TEL 619.595.0202
FAX 619.702.6202



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About Our Firm

Danniss Woliver Kelley is a diverse firm that has distinguished itself over a 30-year history as the best education law firm in California. One of the nation's largest women-owned law firms, DWK is proud to be considered the "thought leaders" in education law: the firm that best knows the legal issues our clients face, and even more importantly, how to resolve them. Our range of experience at Danniss Woliver Kelley and the communication between our practice groups provide an unmatched resource. Since we have clients throughout the state, we are aware of trends that impact your interests. We recognize issues that others may fail to spot, and work in close collaboration with clients to devise practical strategies for resolution.

We were one of the first law firms in California to dedicate its practice to serving public schools. We advise school districts, community college districts and county offices of education with passionate conviction and insight. We find our work enormously rewarding. Since 1978, we have stood shoulder-to-shoulder with our clients, working together for the betterment of California education.

We offer high-quality, effective, and prompt legal services in any area the district may require. Our practice groups are comprised of experienced attorneys who possess thorough knowledge of the issues and challenges facing public schools. Our practice groups cover the areas of:

- Labor Relations
- Personnel Management & Human Resources
- Business, Property & Construction
- Special Education & Student Services
- Counsel to Governing Boards
- Charter Schools
- Litigation

Because we have clients throughout the state, we are aware of trends that enable us to represent you better. Our team approach to client service means that while specific attorneys represent your district, several others will remain informed of the district's issues so that they may assist if needed. We pride ourselves on the breadth and depth of experience within the firm and on the promptness with which we respond to clients' inquiries. We regard ourselves as members of your team at all levels of our service.



Shareholder

San Diego
ssutherland@dwkesq.com
Tel: 619.595.0202
Fax: 619.702.6202

Sarah L.W. Sutherland is a Shareholder in the San Diego office and co-chair of the firm’s Special Education and Student Issues Practice Group. She is an advocate for public education, and has dedicated her career to serving school districts, county offices and special education local plan areas (SELPA). Sarah’s legal experience on behalf of school districts includes petitioning and responding to requests for due process, due process hearings, appeals of special education due process hearings, student discipline proceedings, policy development and revision, student transfers, and student’s first amendment rights and responsibilities. She is also well versed and experienced in legal issues surrounding charter schools, including petition review, oversight, special education compliance, student rights and discipline, and revocation. Sarah litigated one of the longest due process hearings in the history of the Individuals with Disabilities Education Act (IDEA), has successfully compelled charter school compliance with special education and other laws, and guided authorizers through charter revocations where needed. She has also proven successful in practical, results oriented representation and dispute resolution, and effectively represented special education local plan areas and county offices of education involving cutting edge charter school and special education cross-over issues. Sarah’s expertise in student, special education and charter school issues uniquely poises her to deal with the complex issues that require in-depth knowledge and experience in each area. While at the University of Hawai’i she was actively involved in the community, serving various non-profit organizations and government agencies. She became interested in charter schools when working at the Governor’s Office in Hawai’i, and special education and student issues while working at the San Diego Unified School District. Her interest was peaked because both areas allowed her to work directly with educators on issues involving education.

Education

- » University of Colorado, Boulder (B.A., summa cum laude)
- » William S. Richardson School of Law at the University of Hawai’i, Manoa (J.D. and Public Policy Certificate with an emphasis on public education)

Practice Areas

- » Special Education and Students
- » Charter Schools
- » Governing Boards

Admission

- » State Bar of California

Memberships & Associations

- » California Bar Association

» California Council of School Attorneys

Media/Publications

- » **Special Education & Students Coffee Break Webinar - Unilateral Residential Placements: Where Are We?**
- » **Special Education & Student Coffee Break Webinar - Diastat Administration & Related Sticky Issues**
- » **Charter Authorizers "201" Webinar: Charter Petitions - Tips, Tricks and Politics**
- » **Special Education & Students Coffee Break Webinar: County Mental Health Services Following Suspension of AB 3632 - Now What?**
- » **Charter Authorizers "201" Webinar Series: Charter Renewal, Revisions and Revocation**
- » **Charter Authorizers Webinar Series: Charter Schools As LEAs**
- » **The Uneasy Mix of Charter Schools and Special Education**
- » **Charter Authorizers Webinar Series: Setting High Standards Before and During the Petition Process, Part I**



Associate

San Diego
ptownsend@DWKesq.com
Tel: 619.595.0202
Fax: 619.702.6202

Pamela S. Townsend is an associate in the San Diego office and a member of the firm’s Labor, Employment and Personnel and Special Education and Student Issues Practice Groups. Prior to joining DWK, Ms. Townsend volunteered as an attorney with the Family Justice Center Legal Network where she counseled and represented underprivileged victims of domestic violence through the restraining order process. While in law school, Ms. Townsend was a law clerk at a San Diego-based law firm. In this position, she gained extensive experience handling a wide range of civil litigation matters at various stages including conducting substantial legal research, drafting dispositive motions, drafting strategy memoranda, and assisting with trial preparation, mediation conferences, and court appearances. Ms. Townsend also assisted in the representation of public entities including San Diego Unified School District.

Education

- » University of San Diego School of Law (J.D.)
- » University of California, San Diego (B.A.)

Practice Areas


- » Labor, Employment and Personnel
- » Special Education and Students

Admission

- » State Bar of California

Memberships & Associations

- » San Diego County Bar Association
- » San Diego Lawyers Club



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ACSA's Every Child Counts Symposium
January 16, 2014

Presented by:
Sarah L.W. Sutherland, Attorney
Pamela S. Townsend, Attorney
Dannis Woliver Kelley

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What to Expect

- Review similarities and differences between:
 - Discrimination
 - Harassment
 - Bullying
- Review the complaint procedures required to address complaints of discrimination, harassment, and bullying
 - Involving students eligible for special education?
- Best practices and tips for initiating, conducting and concluding investigation of allegations of bullying, discrimination, and harassment.

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Discrimination-Definitions

- Treating a person differently based on their membership in any protected classification (disability, gender, gender identity, gender expression, nationality, race or ethnicity, nation of origin, religion, sexual orientation) without a legitimate, nondiscriminatory reason.
- Prohibited by both state and federal law. (Cal. Educ. Code § 220; Cal. Code Regs. tit. 5, §§ 4900-4965; Title VI of the Civil Rights Act of 1964 (race, nation of origin); Title IX of the Education Amendments of 1972 (sex); Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (disability)).

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Harassment Definitions

- Federal and state anti-discrimination laws are also violated where student-on-student harassment creates a hostile environment, the district is on notice, and it does not act to address it.
- Harassing conduct may include verbal acts, graphic and written statements, or other conduct that may be physically threatening, harmful, or humiliating, regardless of the form it is transmitted.
- Harassment does not have to include intent to harm the victim, and need not be directed at a specific person or group of people over a prolonged period of time.
- It is not the label for the conduct that determines whether it is harassment, but whether the conduct creates a hostile environment for the protected class of students.

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Harassment Definitions

- Ultimately, the school district has notice of harassment if a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment. This includes harassment occurring in plain sight (hallways or classes) and harassment discovered in the context of investigating particular misconduct, which, taken together, may create a hostile environment.
- Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the district's services, activities, or opportunities. When such harassment is based on race, color, national origin, sex, or disability, it violates civil rights laws.

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Bullying-Definitions

Any severe or pervasive physical or verbal act or conduct (including communications made in writing or by means of an electronic act, sexual harassment, hate violence, harassment, threats or intimidation creating a hostile environment) directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

- (A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.
- (B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.
- (C) Causing a reasonable pupil to experience substantial interference with his or her academic performance.
- (D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

(Education Code § 48900(r)(1))

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Who is a Reasonable Pupil?

- Reasonable pupil is defined as:
 - A pupil, *including those with exceptional needs*, "who exercises average care, skill and judgment in conduct for a person of his or her age, or for a person of his or her age with his or her exceptional needs." (Educ. Code § 48900(r)(3).) (emphasis added.)
 - Special education students are included within the definition of "reasonable pupil" and are afforded the same protections against bullying as their general education peers.

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Cyber-Bullying

- "Electronic act" means transmission of a message, text, sound, or image, or post on a social network Internet Web site, by means of an electronic device (a telephone, wireless telephone, or other wireless communication device, computer, or pager).
- As of January 1, 2013, the Education Code defines "post on a social network Internet Web site" to include "burn pages," "creating a credible impersonation of another actual pupil" and "creating a false profile" when done for any purposes listed in (r)(1). It also clarifies an electronic act shall not constitute pervasive conduct solely on the basis that it has been transmitted on the Internet or is currently posted on the Internet.
- As of January 1, 2014, the Education Code was amended to further define "electronic act" to include the creation and transmission of a communication that originated on or off the schoolsite.

(Educ. Code § 48900(r)(2).)

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Cyber-Bullying: We Have the Technology

- Desktops/laptops;
- iPads/notebooks/tablets;
- Cell phones/smartphones;
- iPods/media players;
- Gaming devices;
- Cameras/video recorders; and
- Smartpens.

And you can't get away from it by going home!

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Cyber-Bullying and the Penal Code

- It is a violation of Penal Code section 653.2(a) to intentionally place another person in reasonable fear for his or her-or his immediate family's- safety:
 - By means of an electronic communication device,
 - Without consent of the other person,
 - For the purpose of imminently causing that other person unwanted physical contact, injury or harassment, by a third party,
 - Making personal identifying information available in electronic format, (e.g., a photograph).

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Examples of Bullying

- Racial Harassment
- Sexual Harassment
- Hate Violence
- Harassment, Threats, or Intimidation
- Destruction of Property
- Can be verbal, written, physical, emotional and need not be discriminatory

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Jurisdiction Over Complaints of Bullying, Harassment, Discrimination?

- School Districts
 - student discipline, uniform complaints, due process procedures
- County Offices of Education
 - transfer and discipline appeals
- California Department of Education
 - compliance complaints, uniform complaints
- Office of Administrative Hearings
 - due process complaints
- Office for Civil Rights-U.S. Dept. of Ed. And Civil Rights Division-U.S. Dept. of Justice
 - discrimination and harassment based on protected status
- And state and federal courts. . .

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Stop Bullying Now

- *"Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."*
— U.S. Dep't. of Educ., Office of Civil Rights,
"Dear Colleague" Letter: Harassment & Bullying,
October 26, 2010

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"Hostile Environment" Defined: Dear Colleague Letter, 55 IDELR 174 (OCR 2010)

"Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."

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Eliminating the Hostile Environment: Dear Colleague Letter, 55 IDELR 174 (OCR 2010)

- Not enough for a school to simply discipline the offending students in order to address hostile environment and federal anti-discrimination issues.
- "A 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 are the duties even if the harassment is covered by an anti-bullying policy and regardless of whether the school was alerted to the misconduct by a student's complaint.

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When is Discipline Enough?

- Bullying can implicate legal obligations under both state and federal antidiscrimination laws when it rises to the level of racial harassment, or any other harassment based on a federally protected status (e.g. race, disability).
- While it is important to respond to misconduct that meets the definition of bullying under state law, using only the district's anti-bullying policy may result in a resolution that does not fully address misconduct that also arises to harassment under federal anti-discrimination law.
- Any time bullying or harassment involves a protected classification, the district must not only consider whether the student misconduct amounted to bullying under California law, but also whether it violated federal and state anti-discrimination law.

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When is Discipline Enough?

- While some student on student harassment may constitute "bullying" under state law, if it involves a protected classification or creates a hostile environment, it triggers additional anti-discrimination responsibilities.
- It is important to address the incident of bullying by disciplining or otherwise addressing the perpetrator, but it is also important to address the hostile environment it can create and the impact on the victim or group of victims at school.
- Race, gender, or disability based harassment should be brought to administrations attention immediately for action and follow up, to ensure the action corrected the behavior and the hostile environment it created.

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Davis v. Monroe County Bd. of Educ.

- The court held:
 - Funding recipient ("School") can be liable for money damages for student-on-student harassment, but only when:
 - 1) School has actual knowledge of the bullying/harassment;
 - 2) School acted deliberately indifferent to the harassment; and
 - 3) Harassment is so "severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to educational benefits or opportunities."

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Liability When is enough enough?

- Harassment based on a student's disability, sex or sexual orientation are fast growing areas of litigation.
- Courts equate bullying with harassment.
- One single act generally will not support a finding of liability:
 - "Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to (give rise to liability), we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct." (Davis v. Monroe)

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Liability Damages

- School districts may be found liable for the failure to respond or failure to respond appropriately to acts of harassment by students.
- Monetary damages are available under California Education Code Section 220, Section 1983, Section 504, Title IX and the ADA.

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Liability Damages

- Damages are not available directly under the IDEA.
 - What about unilateral private placements?
- But, intentional discrimination on the basis of disability may result in liability under Section 504, the ADA, Section 1983 and state laws.
- Also, consider whether changes in placement or additional supports needed due to disability related teasing are required to provide FAPE.

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Donovan v. Poway Unified School District (2008) 167 Cal. App. 4th 567

- Students sued in California state court alleging they were victims of peer sexual orientation harassment.
- Harassment included death threats, being spit on, physical violence, vandalism to personal property and anti-gay epithets.
- As a result, students became anxious and depressed and finished their senior year in an independent study program.

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Donovan v. Poway Unified School District (cont'd)

- Students kept detailed log of the harassment and gave it to school officials (Principal, Superintendent and Assistant Principal) but the harassment continued.
- Students filed suit against the District and the school officials individually.
- Jury found the Students were subjected to sexual orientation harassment, found the district liable under Section 220 for failing "to take immediate and appropriate corrective action," and found the individual school officials liable for acting with "deliberate indifference" towards the harassment.

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Donovan v. Poway Unified School District (cont'd)

- California Court of Appeal upheld the jury verdict in favor of the students.
- Court noted that Section 220 prohibits discrimination based upon protected characteristics. Section 220 claim is similar to one under Title IX:
 - Plaintiff must show he or she suffered "severe, pervasive and offensive" harassment that effectively deprives plaintiff of the right to equal access to educational benefits and opportunities and the school district acted with deliberate indifference in face of such knowledge.

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Donovan v. Poway Unified School District (cont'd)

- Court found the Principal did "little, if anything, to curb the anti-gay environment" and the testimony demonstrated students felt at ease making inappropriate comments openly in front of teachers and other students, even during classes."
- Court found the Assistant Principal failed to investigate or otherwise respond to complaints of harassment, other than to state that anti-gay language was against the rules.

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Donovan v. Poway Unified School District (cont'd)

- **Impact:**
 - This decision reminds districts that they have an affirmative obligation to protect students from harassment. Districts and individual administrators may be personally liable for allowing bullying to go unchecked. It is very important for districts to thoroughly investigate all harassment claims, document the investigation and follow-up to ensure the actions taken are effective.

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Hot Topic

- OCR and the DOJ have interpreted their enforcement obligations under Title IV and Title IX to include eradicating sex and gender based discrimination. See Arcadia Unified School District, OCR Case No 09-12-1020/DOJ Case No 169-12C-70
- This is true without regard to the outcome of AB 1266 ("Transgendered Bill of Rights")

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Liability Lessons Learned

- Avoiding a finding of deliberate indifference:
 - Antidiscrimination and complaint resolution policies;
 - Training of staff and students;
 - Implementation of policies;
 - Prompt and careful investigation;
 - Appropriate and timely corrective action; and
 - Follow up and further action if necessary.

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Liability Lessons Learned

- Atmosphere of indifference not tolerated.
- Responsiveness and follow up are key.
- Document investigations, responses and actions, and success of those actions.

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What Does this Mean for Special Education Students?

- Special education students may be even more susceptible to acts of bullying/harassment.
- The same bullying/harassment laws that apply to general education students apply to special education students.
- When bullying victim is a special education student, the negative effects of bullying may result in a loss of an educational benefit for the victim.
- When alleged bully is a student with special needs, the most important consideration should be determining whether the "bullying behavior" is related to his or her disability.

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EFFECTS OF BULLYING ON FAPE

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Can Bullying Lead to a Denial of FAPE?

- Bullying must constitute discrimination in order to violate Section 504 or ADA.
- This is not the case when it comes to establishing a denial of FAPE under IDEA.
- Bullying can adversely impact a child's educational program regardless of whether the bullying is related to the disability. If the District fails to appropriately respond, it can lead to a denial of FAPE.

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T.K. v. New York City Dep't of Educ. 56 IDELR 228 (E.D.N.Y. 2011)

- Facts-
 - 12 year old girl with SLD.
 - Ostracized by peers, pushed, and ridiculed daily.
 - Grades declined, but she was still passing.
 - Parents sent several letters to the school regarding the bullying.
 - Allegations that principal ignored parents attempts to discuss the bullying.
 - Parents placed student in a private school.

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**T.K. v. New York City Dep't of Educ.
56 IDELR 228 (E.D.N.Y. 2011)**

- Held:
 - Standard to determine whether bullying denied FAPE: "Whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities."
 - Victim of alleged bullying doesn't have to show that the bullying prevented all opportunity for an appropriate education but only that the bullying is likely to affect the opportunity of the student to receive an appropriate education.

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**T.K. v. New York City Dep't of Educ.
56 IDELR 228 (E.D.N.Y. 2011)**

- Held, (cont'd):
 - The bullying does not need to be related to a particular disability.
 - Evidence showed:
 - 1) student was bullied;
 - 2) her parents alerted the district to the bullying incidents;

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**T.K. v. New York City Dep't of Educ.
56 IDELR 228 (E.D.N.Y. 2011)**

- Held, (cont'd):
 - 3) the district failed to take reasonable steps to address the bullying; and
 - 4) as a result, student withdrew emotionally and did not want to attend school.
 - Not enough for district to show student was still achieving academic growth. "The law recognizes that a student can grow academically, but still be denied the educational benefit that is guaranteed by the IDEA."

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T.K. v. New York City Dep't of Educ.
56 IDELR 228 (E.D.N.Y. 2011)

- Distinguishing bullying from horseplay:
 - Every childhood disagreement does not amount to bullying.
 - “What distinguishes bullying from other forms of childhood aggression, whether a hard-fought basketball game or rough-and-tumble play, is unequal and coercive power.”
 - “There must be at least a perceived advantage for the bully either physical or psychological.”

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M.L. v. Federal Way Sch. Dist.
394 F.3d 634 (9th Cir. 2005)

- 9th Circuit held:
 - If teacher is deliberately indifferent to the teasing of a child with a disability and the abuse is so severe that the child can derive *no benefit*, the child has been denied a FAPE. (stricter standard than in T.K.)
 - Court noted this was the first time any court had addressed “whether unremedied teasing can lead to a denial of FAPE.”
 - Removing student after only five days of alleged bullying did not give the district a reasonable opportunity to prevent the teasing.

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Student v. La Canada Unified School District, (2006) OAH Case No. 2005090199

- 14 year-old student. Eligibility: OHI.
- Due to his disabilities Student had a history of attention issues and problems with peers.
- Student was regularly teased starting in 2002-2006. Examples of teasing included: called “weird and annoying”, spat on, punched, harassed by P.E. class including teacher’s aide, ketchup squirted on him, dirt thrown at him, gym clothes stolen.

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Student v. La Canada Unified School District (cont'd)

- Facts (cont'd):
 - In 2003, Parents requested a transfer to NPS based on the bullying. Denied by District but pursuant to settlement agreement, Student transferred to different school within the District.
 - Bullying continued.
 - When Parents reported incidents of bullying, school staff largely ignored their reports.
 - Parents paid for psychological therapy as a result of the bullying and private tutoring in order to keep student caught up with academics.

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Student v. La Canada Unified School District, (2006) (cont'd)

- Facts (cont'd):
 - District's response to bullying:
 - IEP noted that "talking out in class and inappropriate interactions with peers were behavioral concerns impeding Student's learning."
 - In Junior High School, Student developed close relationship with Principal and the bullying decreased some because Principal would walk around campus to make sure no inappropriate conduct was taking place.
 - Occasionally bullies were disciplined or told to write apology notes to Student.
 - As a result of bullying, Student was diagnosed with anxiety and depression.
 - Parents requested due process.

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Student v. La Canada Unified School District, (2006) (cont'd)

- ALJ held:
 - District knew Student was an easy target for bullying but did not offer any support or supervision to prevent the bullying.
 - Principal's efforts in junior high school were minimal.
 - Student suffered harm and did not benefit from his education because District did not prevent the bullying or teasing. Student was denied FAPE.
 - Denial of FAPE even though Student was able to maintain grades despite the bullying.
 - "Educational benefit is not measured only by grades and scores on standardized tests."

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BULLYING AND CHILD FIND

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Bullying as a Trigger for Child Find

Under IDEA, districts have an ongoing obligation to identify, locate and evaluate students with disabilities or those suspected of having disabilities and needing special education and related services. (20 U.S.C § 1412(a)(3).)

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Bullying as a Trigger for Child Find

- Two ways districts can violate its child find duties in regards to bullying:
 - 1) Failing to identify/evaluate victims of bullying or perpetrators of bullying. These incidents can raise red flags that the victim/perpetrator is a student in need of special education and related services.
 - 2) Neglecting to address a bullying incident by a special needs student through the failure to reevaluate student for potential additional disability.

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Rose Tree Media Sch. Dist. 111 LRP 6194 (SEA PA 2010)

- **Facts:**
 - 4th grade student reported to school counselor he was teased in school.
 - Parents took Student to a child psychologist because he was upset about school.
 - Parents requested evaluation from school because Student was "hyper" and having a rough time with peers.
 - During eval, District learned:
 - Student was seeing a psychiatrist,
 - Had taken Strattera and Ritalin with little effect,
 - Teacher reported Student had problems with organization, impulsivity, interrupting others and immature responses.

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- **Facts (cont'd):**
 - District evaluation concluded a variety of sources to support two potential eligibility criteria: ADHD and significant anxiety.
 - Despite evidence of disability, District declined to find Student eligible and recommended Parent pay for private psychotherapy.
 - In 6th grade, Parents reported to school that other students were posting insulting comments about Student via Facebook.
 - During 6th grade year, District investigated five separate incidents involving Student and other peers: Student being teased, Student pushing others, Student being pushed and Student being spit on.

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- **Facts (cont'd):**
 - District re-evaluated Student and concluded he was not eligible for special education but that he was a protected handicapped student under Section 504.
 - School psychologist determined Student's "anxiety" played a role in his behavior which led to him being bullied.
 - Parents requested IEE and District filed for Due Process on the issue of eligibility.

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Rose Tree Media Sch. Dist. 111 LRP 6194 (SEA PA 2010)

- ALJ held:
 - Did not need to determine whether Student was bullied or what measures the District took to protect the Student, but whether the behaviors Student exhibited that may have made him a "target for bullying" and his social/emotional difficulties constituted a disability for which he was entitled to receive special education and related services.
 - The many incidences of Student bullying others and in turn being bullied by his peers should have raised red flags that Student had a disability (ADHD and Anxiety Disorder) for which special education and related services were necessary for him to receive an educational benefit.

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Rose Tree Media Sch. Dist. 111 LRP 6194 (SEA PA 2010)

- Impact:
 - Districts should be on the look out for red flags that a student who is bullied or is bullying other may have a disability and be in need of special education and related services.
 - Examples of possible red flags:
 - Aggressive behaviors,
 - Extensive discipline record,
 - Erratic behaviors,
 - Emotional and social difficulties which lead the Student to misinterpret normal childhood interactions.

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HOW TO INTERVENE: DISCIPLINE AND SPECIAL EDUCATION STUDENTS

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Follow Complaint Procedures

- Know your district's policies and procedures related to discrimination, harassment, and bullying.
- When a complaint is received, refer it to the proper department for handling and don't stop addressing it until the discriminatory behavior stops.
- Follow up!! Follow up!! Follow up!!

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Transfers Based on Bullying

AB 1156 (effective July 1, 2012)

- Provides priority consideration for requested inter-district transfer of a pupil who has been determined by personnel of either the school district of residence or the school district of proposed enrollment to have been the victim of an act of bullying committed by a pupil of the school district of residence. (Educ. Code § 46600(b))

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Considerations for Special Education Students

- Students eligible for special education are entitled to procedural safeguards in some disciplinary situations.
- Before the district can impose a disciplinary removal that results in a "change of placement," a manifestation determination must occur, and result in findings that:
 - The conduct was not caused by – or have a direct and substantial relationship to – the student's disability; and
 - The conduct was not the direct result of the failure to implement the IEP.

(34 C.F.R. § 300.530(e)).

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Considerations for Special Education Students

- When a special education student's misconduct involves the Internet, email, texts, cell phones, or other electronic devices, the district should consider, minimally:
 - Is an IEP team meeting warranted to consider the misconduct?
 - Should the student be assessed for behavioral needs and interventions?
 - Does the student need behavioral goals? Do existing goals need to be revised?
 - Does the student need a behavior support plan? Does the existing plan need to be revised?

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Considerations for Special Education Students

- If the IEP team determines the behavior that occurred was not a manifestation of the student's disability and a disciplinary change in placement results, the child who is removed must continue to receive FAPE so as to progress toward meeting the goals set out in the child's IEP.
 - 34 C.F.R § 300.530

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Detroit City Sch. Distr. 111 LRP 1824 (SEA MI 2010)

- Facts:
 - Student was eligible for special education based on a cognitive impairment.
 - Student chased another pupil and threw snow in her face.
 - Student had already been disciplined twice in the same year for bullying.
 - Manifestation determination team decided behavior was not related to Student's disability.
 - School decided to transfer student rather than impose suspension.

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Detroit City Sch. Distr. 111 LRP 1824 (SEA MI 2010)

- Facts (cont'd):
 - Student was kept at home for one month until transfer was approved.
 - During that time, school sent home text books and projects for Student to complete, but no other instruction.
 - Student's IEP called for 25 hours of SAI.

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Detroit City Sch. Distr. 111 LRP 1824 (SEA MI 2010)

- ALJ held:
 - “Under IDEA, if misconduct is not determined to be a manifestation of the child’s disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration at the procedures would be applied to children without disabilities, except...”

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Detroit City Sch. Distr. 111 LRP 1824 (SEA MI 2010)

- ALJ held (cont'd):
 - “the child MUST continue to receive educational services that enable the child to continue to participate in general education curriculum and to progress towards goals in child’s IEP.” (emphasis added.)

Simply providing textbooks and projects is not the same as 25 hours of SAI, thus the school district denied Student a FAPE when it did not provide student instruction for the month she was out of school waiting on the transfer.

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ACTION PLAN

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Action Plan

- Identify and discuss the problem of bullying, and assess bullying at schools.
- Examine basis for bullying and identify appropriate ways to intervene.
- Discuss appropriate ways to support the bullied child and the bully.
- Provide implementation timeline for program.
- Support site level committees, as needed.
- Supply parent and student training material.
- Supply posters for classrooms.

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Action Plan

- Review and revise your board policies to ensure bullying and harassment/discrimination are addressed.
- Create a climate where students feel safe reporting bullying/harassment.
- Review bullying/harassment procedures.
 - Remember, it's not enough to discipline the bully. Must also eliminate the hostile environment.
- Implement a streamlined investigation process.
- Train staff members and students-BE PROACTIVE.

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SAN FRANCISCO
275 Battery Street, Suite 1150
San Francisco, CA 94111
TEL 415.543.4111
FAX 415.543.4384

LONG BEACH
115 Pine Avenue, Suite 500
Long Beach, CA 90802
TEL 562.366.8500
FAX 562.366.8505

SAN DIEGO
750 B Street, Suite 2310
San Diego, CA 92101
TEL 619.595.0202
FAX 619.702.6202

THANK YOU FOR PARTICIPATING!
PLEASE CONTACT US WITH
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Sarah L.W. Sutherland
ssutherland@dwkesq.com
619.595.0202

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