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#### BULLYING AND STUDENTS WITH EDUCATIONAL DISABILITIES: POLICY IMPLICATIONS

##### Overview

In Chapter Ten of our textbook my late co-author Bill Boshier and I include bullying as a part of our general discussion of student-on-student harassment. In our discussion we include a variety of cases where courts have held that school officials who exhibit *deliberate indifference* (i.e., know about or willfully avoid knowing about the possibility of serious harm to a student, but fail to take prompt and appropriate action) may be held liable when a student suffers harm. In these decisions the courts consistently rely on and expand a standard set by the United States Supreme Court in Davis v. Monroe County School Board (1999) where, in a *Title IX* case, the Court opined that “in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education....” Subsequent courts applied the Davis standard to situations where the harassment (including bullying) actually created a “hostile learning environment” keeping the harassed student from accessing educational opportunities available to all students and from making “meaningful educational progress.” (See also, Vacca, 2012) In a footnote in our Chapter we make the following prediction: “the same elements of analysis will be used in a claim of student harassment based on educational disability, especially where the student victim has an I.E.P.” (Vacca and Boshier, 2012)

*Students with Disabilities and Educational Progress.* The primary intent of various federal and state statutes covering students with disabilities is fourfold. First, that students with disabilities not be discriminated against solely because of their disability. Second, that they receive a free appropriate public education (FAPE), including necessary related services, designed to meet their unique needs, in the least restrictive environment (LRE). Third, that they be included (not excluded) in all school (academic, social, and extra-curricular) offerings and activities, to the extent practicable, with their age appropriate peers, in general education settings. Fourth, as the United States Supreme Court opined in Board of Education v. Rowley (1982), that students with disabilities have access to a “meaningful educational program...a program designed to deliver

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educational benefit to that student.” Thus, the emphasis in post-Rowley court decisions has been on students with disabilities making meaningful and measurable educational progress, receiving some meaningful educational benefit, and not regressing. Where the matter involves the *Individuals with Disabilities Education Act* (IDEA 2004), it is the student’s I.E.P. that serves as the fundamental document on which such a determination is made.

Recently I came across a very interesting federal district court case where plaintiff parents claimed that school officials failed to remedy bullying behavior by some students against their son (hereafter referred to as N.M.) and, as such, discriminated against and denied him FAPE under the mandates of special education law (IDEA, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act). The issue analysis and decision have implications for local school system policy.

### **N.M. v. Central Bucks County School District (2013)**

*Facts:* Briefly summarized the facts are these. According to an initial evaluation conducted when N.M. was in the fifth grade, he struggled academically since kindergarten. In a subsequent reevaluation report he was described as a student with a specific learning disability and he also met eligibility for special education services as “other health impaired” as a result of “his Post Traumatic Stress Disorder and Generalized Anxiety Disorder diagnosis.” In addition to discussing his reading and writing abilities and levels, the report cited, among other things, that he sometimes feels lonely, is often sad and pessimistic, sometimes cries easily, and socially he sometimes complains about being teased and has trouble making friends.

In the sixth grade (2007-2008), while his special education teacher stated that “he was not personally aware of any bullying or inappropriate social interactions in school,” he did speak with the parents about an incident “outside of school.” Overall, however, the teacher described N.M.’s sixth grade experience as “very successful not only academically, but [N.M.] seemed to enjoy the 6<sup>th</sup> grade as well.” His reading and writing goals and progress were included in the analysis.

Before his seventh grade year (2008-2009) began, N.M.’s mother asked N.M.’s school counselor to schedule him away from two students and that was done. Also, in the seventh grade another IEP was prepared and contained almost all of the same goals. It was during the seventh grade that school personnel became aware of specific issues. In March, 2009, N.M. was involved in two incidents with another student. N.M.’s mom reported the later incident to the counselor who rescheduled the other student’s classes—plus the student was disciplined. In May 0f 2009, N.M.’s mom reported a “bullying incident” involving another student in the community. Assistance was offered by the school counselor but N.M.’s mom declined the help. She wanted to deal with it herself. The mom and the counselor were not aware of any other incidents during the remainder of the seventh grade. Also, N.M.’s special education teacher was not aware of any social problems.

In the summer of 2009, in response to parents’ request, N.M was scheduled so that he would be separated from students with whom he had conflicts. Also, a plan was developed to quickly address concerns about bullying. Nevertheless during his eighth grade year N.M. was involved in a series of school-related incidents.

In January 2010, N.M.'s mom called the school counselor to talk about an "attendance exception" because she stated that her son was enduring "constant bullying." She also asked about private schools. In February, 2010, while N.M.'s mother had reported two same-day physical and verbal incidents, the District was unable to verify any physical altercation but did corroborate the verbal exchange for which a student was disciplined. Despite the incidents the counselor stated that she did not see anything about N.M.'s behavior or demeanor that concerned her. District witnesses later reported that they did not observe any social, emotional, or "bullying" issues, and that the District acted in N.M.'s best interest to "investigate and, if necessary, address such incidents." At the same time, tracking of N.M.'s academic progress was continued.

On February 22, 2010, N.M.'s parents removed him from school based on his psychiatrist's order for homebound instruction. That same day they notified the District that they were seeking a private placement at the District's expense. On March 10, 2010, the IEP team drafted an IEP in which N.M.'s progress monitoring results in writing, word recognition, and vocabulary were reported as largely the same as those reported in the February and March 2010 IEP's. The following day N.M. began to attend a private placement (New Hope Academy [NHA]).

On August 12, 2010, the District issued a Reevaluation Report in which N.M. was identified as having a disability in mathematics and other impairments due to PTSD and general anxiety. One of his parents and his science teacher rated him as "clinically significant for anxiety, depression, and withdrawal." His special education teacher did not agree. On August 23, 2010, N.M.'s IEP team drafted an IEP that contained significant changes to address his social/emotional needs as well as new goals to address mathematics and his feelings of frustration or being overwhelmed in the school environment. It also contained a Behavioral Intervention Plan (BIP) to provide for coping skills, social skills, and self-regulating breaks. N.M.'s parents had consented to the reevaluation. Also a medical diagnosis had not been provided. Instead, data gathered from N.M.'s parents and teachers were provided for the reevaluation of N.M.'s social/emotional functioning.

*Hearing Officer's [HO] Decision.* The parents brought an administrative proceeding seeking compensatory education for the period running from March 31, 2008, to March 10, 2010. Also they requested reimbursement for N.M.'s tuition at NHA. On February 22, 2011, the HO denied their claim. In his opinion, while the evidence presented a close case, the parents did not meet their burden of persuasion by a preponderance of the evidence shown in the record. What is more, the parents had not shown that the School District denied N.M. a FAPE with respect to either reading or writing. Finally, said the HO, "the record does not preponderantly support the claim that the student was denied FAPE through the District's programming in written expression. The baselines, goals and progress monitoring weigh in favor of a finding that the District provided FAPE in this regard."

Regarding N.M.'s "emotional needs and social issues" the HO concluded that parents failed to show a denial of FAPE. In his view, the District was proactive in every regard when such needs were brought to its attention, school witnesses testified that they did not see any school-based difficulties in terms of "bullying or peer relations," and N.M.'s general affect "was engaged, pleasant, and seemingly not affected by the reported incidents."

*Federal District Court Action.* On May 19, 2011, plaintiff parents filed their Complaint in federal district court. On July 21, 2011, defendant School District filed an Answer. On November 15, 2011, both sides filed separate motions for judgment on the administrative record. The parties then filed separate responses to the arguments raised by the other. On January 27, 2012, the district court judge held a hearing on the parties' pending motions for judgment on the administrative record. The district court judge referred the case to a United States Magistrate Judge for a report and recommendation on the parties' pending motions. Subsequently the Magistrate Judge found that plaintiffs' claims under IDEA, Section 504, and the ADA lacked merit. *See*, 992 F.Supp.2d 452 (E.D. Pa. 2013)

*Decision.* On January 15, 2014, on consideration of the Report and Recommendation of the United States Magistrate Judge, the United States District Court Judge: (1) approved and adopted the Report and Recommendation, (2) denied plaintiffs' motion for judgment on the administrative record, and (3) granted defendant's motion on the administrative record. *See*, 2014 U.S. Dist. LEXIS 8571 (E.D. PA 2014)

In my view, in approving and adopting the Magistrate Judge's Report and Recommendations the District Court Judge accepted the Hearing Officer's findings that plaintiffs' failed to demonstrate that the School District IEPs did not confer a significant learning or a meaningful benefit by failing to address N.M.'s academic needs in reading, writing, emotional needs, and bullying. In fact the record also showed that NM made progress. In essence, evidence in the administrative record demonstrated that the School District provided a meaningful education (progress made) and did not deny N.M. FAPE. What is more, the HO did not clearly err in weighing the evidence presented during the administrative hearing.

### **Policy Implications**

While *N.M. v. Central Bucks School District* (E.D. Pa. 2014) is but one court decision from one jurisdiction, it is nonetheless instructive. At a time when local school districts are wrestling with an escalation of disciplinary issues spawned by student-on -student bullying, it is especially important to include efforts to keep students with disabilities free from the ill behavior of other students—ill behavior (bullying) that can be linked to preventing students with disabilities from accessing a meaningful and appropriate education in the mainstream of the school. As stated at the outset of this commentary, students must be kept free from a "hostile learning environment." To put it another way, all students, including students with educational disabilities, must not be denied free access to educational opportunities—opportunities intended to result in "meaningful educational benefit."

What follow are some suggestions for consideration gleaned from the N.M. case.

Local school board policies must make it clear that:

- The Board intends to provide all students with equal access to educational opportunities in a positive and disruption-free educational environment—an educational environment conducive to each student making meaningful academic and social progress.

- Where students are covered under special education law, sustained efforts shall be made to ensure compliance with the requirements (procedural and programmatic) contained in the student's IEP.
- No student shall be denied access to meaningful and appropriate educational opportunities in the mainstream of the school because of harassment and ill-behavior of other students.
- Student-on-student harassment in any form (verbal, written, physical, or electronically communicated) shall not be tolerated in school, on school property (including school buses), and at school sanctioned and/or sponsored events and activities.
- All reports of student-on-student harassment shall be: (1) made to the building principal or his/her designee, and (2) immediately investigated. Where found to be credible a plan to formally address each situation shall be developed and implemented.
- Parents of students involved in such reports shall be notified of the situation and involved in the process.
- Students found in violation of the school system's anti-harassment policy shall be subject to formal disciplinary action as outlined in the school systems' *Code of Student Conduct*.

**Final Thought:** The reader is reminded that the *duty of care* owed to students increases where a *special relationship* exists. In my view, providing a free appropriate public education (FAPE) to students with disabilities in the general education (mainstream) context of a school creates such a *special relationship*—one where the *duty to protect* the safety and welfare of the student, and to preserve the integrity of his/her IEP are of paramount importance.

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