

The Voice® Newsletter

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The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Special Needs Alliance member Amy C. O'Hara and her co-author, Marion Walsh. Amy is a partner with the New York law firm [Littman Krooks LLP](#), specializing in special needs planning, guardianships, elder law, estate planning and administration, and personal injury settlement consulting. Marion is an attorney with [Littman Krooks LLP](#) who focuses her practice on special and general education advocacy. Marion has worked in education law for over 15 years and has been an advocate for children in many capacities. She is a graduate of NYU Law School.

Bullying of the Special Needs Child and What Parents Can Do

Any child can be a victim of bullying or harassment, but research has shown that children with special needs are both more likely to be bullied or harassed and also more likely to be seriously harmed by it. In addition, children with special needs may be less likely to be able to seek help to stop it.

Bullying vs. Harassment

Bullying and harassment are similar but not legally the same. Bullying is unwanted, aggressive behavior by one child or a group of children against another child and is usually repeated over time. Bullying can include attacking someone physically or verbally, blackmailing, making threats, name calling, and deliberately excluding someone from a group. It causes an imbalance of power. Harassment is abusive behavior that annoys, threatens, intimidates or causes fear in another person.

State and federal civil rights laws protect students from harassment based on a protected category, such as race, gender, disability, ethnic origin and other categories when the harassment creates a hostile environment by interfering with or denying the student's participation in school. Specifically, under federal case law, in order to prevail in a harassment lawsuit, parents have to prove:

- The child is an individual in a protected category (e.g., gender, sex, ethnicity, race, disability);
- The child was harassed based on the his sex, ethnicity, race, disability or other protected category;
- The harassment was sufficiently severe or persuasive that it altered the student's education and created an abusive environment;
- The school district knew about the harassment; and

- The school district was deliberately indifferent to the harassment.

Certain bullying will also constitute harassment, but a child may be bullied without technically being harassed if he or she is not targeted based a protected category. While federal civil rights laws do not protect against bullying, parents may nevertheless be able bring a state action on a bullying claim based on negligence. Also, both bullying or harassment, if the acts deprive a child with a disability of educational benefit, may provide a legal claim based on a denial of a free appropriate public education under the Individuals with Disabilities Education Act.

Federal Legal Protections

Where disability or race is a component of the abuse, some federal courts have found that civil rights laws do protect the right of students to be free from both harassment and bullying.

Disability

In *K.M. v. Hyde Park Central School District*, 381 F. Supp.2d 343 (S.D.N.Y 2005), the United States District Court for the Southern District of New York recognized that a school district could face liability for peer harassment based on a student's disability, when a school district has been deliberately indifferent and the harassment causes loss of educational opportunity.

In the *K.M.* case, a 13-year-old eighth grade student with a learning disability was the victim of repeated instances of being called "stupid," "idiot," "retard," and other disability-related insults, as well as acts of physical aggression and intimidation while in school and on the school bus. He was physically beaten and his school books were thrown into the cafeteria garbage numerous times. The court held that "a school district's deliberate indifference to pervasive, severe disability-based harassment that effectively deprived a disabled student of access to the school's resources and opportunities would be actionable under federal law."

Race

In *Zeno v. Pines Plains Central School District*, 702 F.3d 655 (2d Cir. N.Y. 2012), the United States Court of Appeals for the Second Circuit sent a strong message to school districts by affirming a One million dollar jury award to a student who faced bullying and harassment based on race for over three and a half years. The student experienced harassment and bullying almost as soon as he began high school, and it never relented. The parents initiated 30-50 complaints to the school district about the bullying and harassment of their child. At a special education Individualized Education Program meeting in June 2006, the parents said that their child had experienced school as a "battleground."

The Second Circuit panel condemned the school district's inaction and found sufficient evidence in the record to support the jury's finding that the district's responses to student harassment "amount[ed] to deliberate indifference to discrimination." The court

found that the district's continued response to student harassment of the bullying was ineffective. For example, the district knew that disciplining the student's harassers did not deter others from bullying and harassing the student. Finally, the court found that the harassment would have a profound and long-term impact on the child's life and his ability to earn a living.

State Legal Protections

In addition to federal civil rights protections, many states have also codified specific legislation to protect students from bullying and harassment. For example, in New York, the Dignity for all Students Act prohibits harassment and bullying based on disability, race and other characteristics, including gender identity, weight and religious practices.

What Parents Can Do

Legal technicalities aside, bullying and harassment are serious. Bullying and harassment can cause a decline in educational achievement, anxiety, physical ailments, and missed classes. The legal right to an education includes the right to a safe learning environment free from bullying and harassment.

In every state, parents should expect school districts to adopt proactive, not just reactive, responses to bullying. In addressing bullying, a school district should, for example, consider: peer support groups, corrective instruction, supportive interventions, behavioral assessment or evaluation, behavioral management plans, school counseling and parent conferences.

Legal protections offer hope to parents of children facing bullying and harassment. The Zeno ruling encourages parents not to give up but to relentlessly report and document all bullying and harassment in writing. The parent and student in that case kept detailed and meticulous records for many years. For school districts, the Zeno ruling sends a clear message that staff must respond to student harassment and bullying in an effective way that actually targets and makes a reasonably calculated effort to stop the bullying and harassment. These responses could include, among other things, enforcing a zero-tolerance policy against bullying and harassment; holding mandatory training for all employees and student; engaging the victim of bullying in school-based counseling; and requiring the child who is bullying to engage in school-based counseling.

Parents should be aware that they may have powerful legal sanctions against their child's school district if bullying becomes a pattern. However, before bullying or harassment reaches a crisis point, school districts and parents should work together to prevent bullying and, if it occurs, stop it early. Parents should expect teachers to closely supervise students and to address any bullying and harassment promptly. Parents also play a crucial role in preventing bullying. If parents notice signs of withdrawal and anxiety in their child, they should ask their child about what is happening in school. Often they can work with their child's teachers to get to the root of the problem.

Six steps parents can take to address student bullying:

1. Review your school district's Code of Conduct to ensure that it incorporates anti-bullying provisions.
2. Ask about what steps the school is taking, including adequate supervision in the hallways and separate classrooms, to prevent bullying and harassment and to address it when it occurs.
3. Address concerns at your next Individualized Education Program meeting. Your team may be able to suggest further supports, such as a one-on-one aide, if warranted.
4. If your child is the victim of bullying or harassment or you believe bullying or harassment has occurred, do not delay in reporting this to your school district. If you fear your child will suffer retaliation, you can ask for additional supervision. Document your concerns and specific incidents in writing. If the school does not address your concerns, follow up. Be relentless.
5. Keep a log and journal of bullying and harassment and maintain documentation of any physical evidence, such as photos and medical records.
6. Most importantly, support your child. Make sure he or she receives any needed counseling or other support and address the problems immediately.

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