Disability Harassment: An Emerging Claim or an OCR Pipe Dream?

by Carolyn A. Waller

Consider this: a fifth grader is teased during class by other students, who call him "stupid," "retarded" and "a reject." Sound pretty typical? Let's also assume that the student is ADHD, and the teasing takes place with the knowledge of his teacher, who does nothing to intervene on his behalf. If the student's parents file a disability harassment claim, how likely is it to survive a motion to dismiss?

On first blush such a claim may seem to be nothing more than busy work for the school board attorney. However, this may be too hasty a judgment. In the past few years, the disability harassment claim in the educational setting has become an area of interest for the Department of Education's Office of Civil Rights (OCR) and has been raised in a handful of cases in the federal courts. Complainants typically look to two federal statutes to support their claims:

1. Section 504 of the Rehabilitation Act of 1973, which states that "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[1]
2. Title II of the Americans with Disabilities Act of 1990 (ADA), which states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[2]

In looking at the language in these two statutes, two points should be kept in mind. First, they are distinct from one another, inasmuch as Section 504 is a funding statute and as such applies to *all* educational institutions receiving federal funds, including colleges and universities. On the other hand, Title II applies to all state and local entities, including public school districts and public institutions of higher education, regardless of whether they receive federal funds. Second, neither statute includes the word *harassment*. To find a claim for harassment under either statute, courts have to do a good deal of interpretation.

Thus far, very few federal courts have had the opportunity to hear a disability harassment claim against a school or college under Section 504 or Title II. Nonetheless, those that have considered such claims have recognized a potential cause of action. In addition, a growing number of OCR decisions have addressed allegations of disability harassment. In July 2000, OCR wrote to public school administrators nationwide, forecasting the development of this claim, outlining a legal framework for it, and providing guidance on how to minimize the risk of future liability.[3]

Of course, the million-dollar question for the local school administrator is, "What is the risk of liability?" Assessing liability risk is a tall order when the elements of the legal claim are undetermined and, indeed, when the very existence of such a claim remains uncertain. Be that as it may, OCR is treating charges of disability harassment as viable claims with a discernible prima facie case. Under these circumstances, school board attorneys need to understand the likely shape of any potential disability harassment claim and become familiar with OCR's position in order to suggest practical steps their school boards and administrators can take to minimize the risk of future conflict with OCR or the federal courts.

The Landscape in the Federal Courts: Adoption of the Title VII Standard

Currently, there are four federal court decisions that address this claim—only three of which are published. All four borrow heavily from the structure of the hostile work environment/sexual harassment claim of Title VII of the Civil

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1. 29 U.S.C. §794(a).
2. 42 U.S.C. §12132.
3. This letter was a joint effort between OCR and the Office of Special Education and Rehabilitative Services (OSERS) and can be accessed online at http://www.ed.gov/offices/OCR/docs/disabharassltr.html (last visited October 11, 2002).

Rights Act of 1964.[4] The first decision, in *Gaither v. Barron*, a 1996 case from an Alabama district court, made no distinction between harassment in the workplace and harassment in the classroom. The plaintiff, a ninth-grade student with a hearing loss, alleged that when he failed to hear the teacher's order to turn around and face the front of the class, the teacher approached him and butted his head against the plaintiff's head.[5] The court noted that while "neither the ADA nor the Rehabilitation Act specifically address harassment claims," several courts had found harassment in the work environment under these statutes. It then granted the defendant's motion to dismiss because, "[u]nder the hostile *work* [emphasis added] environment theory, the defendant's alleged harassment must be *based on* the protected characteristic (here—the plaintiff's disability)."[6]

The following year, in *Guckenberger v. Boston University,* a class action lawsuit brought against a private university, another federal district court agreed that both the ADA and Section 504 support claims of a hostile learning environment. Further, the court held that "the flexible Title VII standards for establishing a hostile work environment claim apply to hostile learning environment claims brought under the federal statutes prohibiting discrimination against persons with disabilities."[7] Using Title VII as a guide, the court outlined five factors a plaintiff must allege to survive a motion to dismiss:

1. The plaintiff is disabled.
2. The plaintiff has been subject to unwelcome harassment.
3. The harassment is based on the plaintiff's disability.
4. The harassment is severe or pervasive enough to alter the conditions of the plaintiff's education and create an abusive educational environment.
5. There is a basis for institutional liability.[8]

Ultimately, the court granted the defendant's motion to dismiss because the plaintiffs alleged facts that, if true, were offensive but not sufficiently severe or pervasive enough to alter the conditions of the plaintiffs' education.[9]

This five-prong test, based on the framework of the Title VII hostile work environment claim established in *Harris v. Forklift Sys.*,[10] was adopted by another district court in a 1998 decision. In *Pell v. the Trustees of Columbia Univ.*, a graduate student and employee of Columbia University alleged, among other things, harassment based on her disability.[11] The plaintiff raised multiple claims of sexual harassment and disability harassment as both an employee and a student, including, as a disabled student, a claim of hostile learning environment pursuant to Section 504. In her complaint, she alleged that she was repeatedly accused of faking her dyslexia, was told again and again that she was mentally retarded, lazy, and stupid and should be in the mentally retarded Olympics—all, she alleged, for the purpose of ostracizing her and compelling her to leave the program.[12] The decision in this case marks the first time a disability harassment claim based on Section 504 and the ADA survived a motion to dismiss in the federal courts. In denying the defendant's motion, the court stated that the complaint was "replete with the 'sharply-pointed, crudely-crafted, and frequently-launched "slings and arrows" that courts have found sufficient to establish severe and pervasive harassment that alters a plaintiff's *working* conditions [emphasis added].'"[13] Like the courts before it, this court made no distinction between establishment of sexual harassment in the workforce and establishment of disability harassment in the classroom.

The most recent federal court to address the disability harassment claim in the classroom did so in the context of a Wisconsin student-on-student claim in *Rick C. v. Lodi School Dist.*[14] The plaintiff was a middle school student with an emotional disability. He alleged that during the sixth grade, his peers called him "stupid," "a reject," and "a retard." In addition, one student allegedly stated between five and ten times that the plaintiff had sex with his mother. These taunts allegedly were made in the presence of his teacher and were in response to the fact that the student's mother came to school to tutor him. The district court recognized that Section 504 creates a cause of action for disability harassment and, in refusing to grant the defendant's motion for summary judgment, also found that this claim includes student-on-student disability harassment. It further stated that "[h]arassment based solely on an individual's handicap which is so severe and pervasive [as] to deny him educational benefits would violate the Rehabilitation Act"; whether or not the harassment in this case was based solely on the defendant's disability was a matter of fact to be decided by the jury.[15]

4. 42 U.S.C. §2000(e) (1964) *et seq*. Title VII expressly prohibits discrimination on the basis of race and sex with respect to the "compensation, terms, conditions, or privileges of employment," 42 U.S.C. §2000e-2(a)(1), and, like Title II of the ADA and Section 504 of the Rehabilitation Act, it contains no express prohibition of harassing conduct based on the protected characteristics which, in the case of Title VII, are race and sex.

5. *Gaither*, 924 F. Supp. 134, 135 (M.D. Ala. 1996).

6. *Id*. at 136 (emphasis in original).

7. *Guckenberger*, 957 F. Supp. 306, 314 (D. Mass. 1997).

8. *Id*. at 314.

9. *Id*. at 315.

10. 510 U.S. 17, 21 (1993).

11. 1998 U.S. Dist. LEXIS 407, 56 (S.D.N.Y. 1998) (unpublished opinion).

12. *Id.* at *37–38.

13. *Id.* at *56, citing *Guckenberger*, 957 F. Supp. at 315 (citations omitted).

14. 32 Individuals with Disabilities Education Law Report 232 (hereinafter IDELR) (D.C.Wis. 2000). The hypothetical outlined in the beginning of this article was in fact premised on this case.

15. *Id.*

The Supreme Court Speaks: Development of the Classroom Sexual Harassment Claim

Even though the few lower federal courts that have addressed disability harassment in the classroom have adopted a standard based on the hostile work environment claim under Title VII of the Civil Rights Act, a more likely candidate for comparison is Title IX of that act. Title IX prohibits discrimination on the basis of gender by educational institutions that receive federal financial assistance.[16] Development of the Title IX claim, however, is of fairly recent date. In fact, at the time three of the four decisions discussed above were handed down, the Supreme Court had yet to outline the elements of the hostile learning environment claim under Title IX, and many believed that such a claim would be identical to the hostile work environment claim of Title VII. We have since learned that it is not.

Title IX is similar to Section 504 of the Rehabilitation Act, as discussed above, in that it is a funding statute that applies to *all* educational entities receiving financial assistance. In addition, like Section 504 and Title II of the ADA, the language of the statute neither references harassing conduct nor clearly establishes a private right of action.

Although a private right of action under Title IX was first recognized by the U. S. Supreme Court in 1979,[17] it wasn't certain until 1992 that claims brought pursuant to Title IX could lead to an award of monetary damages. At that time, the Court made clear its position that a teacher's intentional discrimination against a student on the basis of sex could be held a violation of Title IX.[18] The ruling did not, however, delineate the precise elements of a prima facie case. That burden was left to the lower courts.

On the heels of that decision, the Supreme Court turned its focus away from Title IX and back toward Title VII when, in 1993, it first held that Title VII prohibits sexual harassment in the *workplace* when it creates a hostile work environment. The Court explained that a hostile work environment claim exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." Conduct that is "merely offensive" and "not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[19]

There are two important elements of this Title VII claim that bear repeating. First, the standard established by the Court is a "reasonable person" standard: so long as the conduct creates an objectively hostile and abusive environment, it is sufficient to constitute a violation of Title VII. Second, this standard establishes a strict liability standard for employers. If the conduct is severe enough to create such a hostile environment, it is a violation—regardless of who in management knew about the claim and regardless of what actions they may have taken to investigate or respond to that claim. In essence, what the Court found was that if the environment was in fact hostile, the employer is presumed to have had constructive notice of the activity.[20]

The recognition of a hostile work environment claim under Title VII created great debate about whether a similar claim existed under Title IX and, if so, whether the courts should apply the framework established for the hostile work environment claim or create some alternative approach (see Table 1). At the Department of Education, OCR adopted the position that the claim *was* available under Title IX and *was* identical to the Title VII claim in terms of establishing a prima facie case; it therefore proceeded with its investigations of complaints in accordance with that understanding.[21] Some federal courts agreed with this approach; others rejected it for an alternative theory.

By 1998, the courts of appeal had established a sufficient number of alternative theories regarding the existence and shape of a hostile learning environment claim to induce the Supreme Court to clear the air. In *Gebser v. Lago Vista Independent School District*, the Court found that there did indeed exist a hostile learning environment claim pursuant to Title IX against a school system employee who had discriminated against a student. However, it rejected the Title VII analogy and explained that the standards of the two claims were quite distinct. A school district, the Court said, will be held liable under Title IX only if "an official who at a minimum has authority to address the alleged discrimination . . . has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."[22] In other words, liability will be imposed only if the school official is

16. *See* 20 U.S.C. § 681(a), which reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

17. Cannon v. University of Chicago, 441 U.S. 677 (1979). In this case, the plaintiff alleged that she was denied admission to medical school on the basis of her sex.

18. Franklin v. Gwinnett, 503 U.S. 60, 74–84 (1992). The school district in this case argued that the remedies available to individual plaintiffs are limited to equitable relief.

19. Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (citations omitted). Prior to the *Harris* decision, the only possible theory of sexual harassment was the *quid pro quo* theory: a demand for sexual favors in exchange for a job benefit, or to avoid an adverse job consequence.

20. *Id.*

21. *See* Department of Education, Office of Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034 (March 17, 1997).

22. 524 U.S. 274, 283–85, 290 (1998).

Table 1. Distinctions between the Hostile Work Environment Claim of Title VII and the Hostile Learning Environment Claim of Title IX

A side-by-side comparison of Title VII and Title IX demonstrates that there may be policy reasons for creating a higher bar under Title IX, and ultimately under Section 504 and Title II in the arena of disability discrimination. A public school district that finds itself in the unsavory position of defendant in a sexual harassment lawsuit quickly learns that Title IX does not afford the same levels of protection that Title VII provides to private employers.

The Hostile Work Environment Claim	The Hostile Learning Environment Claim
A strict liability standard Employers may be liable for the harassing conduct even if there is no evidence that someone with the authority to stop the harassing conduct was aware of it.	*A deliberate indifference standard and an arguably higher bar for the type of conduct that will qualify as harassment.* Plaintiffs must demonstrate that someone with the authority to stop the harassing conduct had actual knowledge, and that they responded with deliberate indifference. In addition, the type of conduct that will qualify as harassment may be more stringent; the claim is designed to reach only "extreme student misconduct."
Damages capped Damages are capped to protect employers from runaway jury verdicts.	*No damages cap* Title IX places no limit on the size of jury verdicts.
Mandatory administrative process Title VII requires complainants to first seek resolution through the EEOC. Only after the EEOC issues a right-to-sue letter may a plaintiff file suit in federal court.	*No administrative process* Title IX provides complainants with an immediate right of action. There is no mandatory administrative process.
Statute of limitations period is short A complainant has 180 days from the time the last alleged incident occurred to file a complaint with the EEOC. Failure to meet this deadline is fatal to her claim.	*Statute of limitations period is tolled* For the purposes of public school districts, most potential complainants are juveniles under the age of majority. As such, the statute of limitations period does not work to limit the time in which they have to file a claim until they reach the age of majority. As a result, claims may be brought years after any alleged harassing conduct.

"deliberately indifferent" to the harassment. In this case, a student made allegations of molestation against a teacher, and there was evidence that parents of other students had complained to the school that the same teacher had made sexually inappropriate comments in front of students. In applying the deliberate-indifference standard in this case, the Court found that even if the teacher was guilty of the alleged molestation, the plaintiff had failed to establish a claim under Title IX because the alleged abuse she suffered was not a "plainly obvious consequence" of the principal's failure to follow-up on earlier complaints.[23]

The impact of this decision was immediate. It provided much-needed clarity and guidance for the lower courts. It also reined in OCR, which for the first time, began to include in its investigations questions about whether the school district was aware of the alleged harassment, and if so, whether the response to it was appropriate.[24]

Nevertheless, the Supreme Court was not done talking about sexual harassment. In the 1999 term, it further detailed the precise elements of the sexual harassment claim under Title IX, finding that schools could be liable for the sexually harassing conduct of not only its employees but also its students. The case of *Davis v. Monroe County Board of Education* involved a fifth-grade boy who allegedly taunted, teased, and inappropriately touched a classmate over a five-month period.[25] Writing for the majority in a 5–4 decision, Justice Sandra Day O'Connor held that although a student may be awarded damages under Title IX for the alleged sexual harassment of a fellow student, this cause of action is limited to the following conditions:

23. *Id*. at 291.

24. *See, e.g.*, Crocket County (Tenn.) School Dist., 34 IDELR 186 (2000).
25. 526 U.S. 629 (1999).

1. *The harassment must be sufficiently "severe, pervasive*, and *objectively offensive.*"[26] This phrase is not identical to the definition adopted by the Court for harassment under Title VII. For the Title VII claim, the Court used the language "severe, pervasive, *or* objectively offensive."[27] In interpreting the two decisions separated by only a few years time, some argue that this distinction indicates the Court's intent to set a higher bar for all hostile learning environment claims. Others argue that the higher bar applies to claims brought for student-on-student harassment but not to harassment of a student by a teacher or other school employee. And still others argue that the shift from *or* to *and* is inconsequential and that the definition of sexual harassment is not dependent on whether the conduct occurred in the workplace or in the schoolroom.
2. *The harassment must have the "systemic effect" of denying the student equal educational opportunity or benefit.* This element was not well defined in the decision, although O'Connor wrote that the Court "does not contemplate, much less hold, that a mere decline in grades is enough to survive a motion to dismiss."[28]
3. *The district must have had "actual knowledge" of the harassment.* As already discussed, this requirement is distinct from the standard in Title VII, which adopts the constructive-notice standard. Moreover, while the opinion does not explicitly identify *who* must have actual knowledge, it does repeatedly refer to the conduct of administrators as the source of potential liability. In other words, it does not seem to consider knowledge by a teacher as sufficient to confer liability on the school district.[29]
4. *The district must have responded with "deliberate indifference*." This, too, is distinct from the Title VII hostile work environment claim, which does not provide employers this escape route from liability. The "deliberate indifference" standard is borrowed from Section 1983 cases and is well defined in that arena, which speaks of deliberate indifference as an "intentional choice" and not merely a "negligent oversight."[30]

O'Connor's decision notes that the claim under Title IX is aimed at extreme student misconduct and callously indifferent school officials and excludes claims based on name-calling, teasing, and one-time incidents of harassment.

The Impact of Title IX Case Law on the Disability Harassment Claim

What will be the likely impact of these Title IX decisions on potential claims of disability harassment under Title II and Section 504? It is logical to assume that in the future federal courts will reassess the early decisions that looked to Title VII and will modify their approach to more closely align it with Title IX standards. However, at this time, except for the student-on-student disability harassment case discussed above, there have been no published federal decisions addressing disability harassment since the Supreme Court's 1998 and 1999 Title IX decisions. We are left with no choice but to wait and see.

There are indications, however, that these Supreme Court decisions have already affected OCR's approach to its investigations into disability harassment complaints. In 1998, the year the Supreme Court laid out the framework for a claim of sexual harassment in the classroom in *Gebser*, OCR was already recognizing both teacher-on-student and student-on-student disability harassment claims and had adopted the Title VII standard of hostile work environment in investigating such claims under Title II and Section 504.

In one case decided in the spring of 1998, the complainant, a public school student, complained of disability harassment because his teacher repeatedly called him names like "stupid" and "lazy" and indicated that "he was unwanted in her class." In its decision, OCR ruled that a school district could be liable for such disability harassment by an employee if "(1) the harassing conduct is sufficiently severe, persistent, or pervasive to limit a student's ability to participate, or to create a hostile or abusive educational environment; and (2) the employee acted with apparent authority or was aided in carrying out the harassment by his/her position of authority."[31] This standard is in keeping with Title VII in that it does not mention whether the school system had actual knowledge of the harassment or consider the adequacy of the system's response to it. By the summer of 1998, OCR seems to have modified its approach. For example, in its decision on another complaint, this one asserting a student-on-student disability harassment claim, OCR stated for the first time that when

26. *Id.* at 633, 651.
27. *Harris*, 510 U.S. at 21.
28. *Davis*, 526 U.S. at 652.
29. *See, e.g., id.* at 651, where the Court imagines a case in which "district administrators" have actual knowledge of some harassing conduct and fail to respond.
30. *Id.* at 642 (citing Board of Comm'rs of Bryan City. v. Brown, 520 U.S. 397 [1997] and Canton v. Harris, 489 U.S. 378 [1989]).
31. Irvine (Cal.) Unified School Dist., 29 IDELR 620 (OCR 1998). Although OCR dismissed this complaint for lack of corroborating evidence, the decision suggests that if OCR had found such evidence, it would have considered the allegations sufficiently severe and pervasive enough to find the school district in violation of Title II and Section 504.

school systems are aware of harassing conduct, they must respond in a manner that is "reasonably calculated to prevent recurrence and ensure that individuals are not restricted in their participation or benefits as a result of a hostile environment created by students or staff."[32]

While OCR has not adopted the "deliberate indifference" standard outlined by the Supreme Court, its decisions do demonstrate a drift away from a strict liability theory (e.g., "constructive knowledge") and toward a negligence standard and acceptance of a requirement that appropriate school administrators have "actual knowledge" of the harassing conduct. This seems to indicate that OCR recognizes that Title IX decisions on sexual harassment will have some bearing on the future structure of a disability harassment claim but is unwilling to accept the very high deliberate-indifference standard until it is certain that the courts will apply such a standard.

A review of OCR decisions bears this out. In a 2000 decision, OCR described the following three-factor test for establishing a disability harassment claim under Title II and Section 504:

> (1) harassing conduct that is sufficiently severe, persistent, or pervasive that it limits or denies a student with a disability the ability to participate in programs or activities, (2) a [school district] has notice that the harassment has occurred, and (3) the [school district] has not taken action to investigate, and respond effectively to the harassment if found to be occurring.[33]

This same test has also been used by OCR in student-on-student disability harassment claims.[34]

Interestingly enough, however, this is not the message OCR sent to school districts. As mentioned earlier, in July 2000 OCR and OSERS jointly notified public school administrators nationwide of their need to guard against disability harassment claims. Further, despite the Title IX decisions by the Supreme Court, and despite the approach taken by OCR in conducting its own investigations, this letter defines disability harassment under Section 504 and Title II of the ADA as intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program.

The letter goes on to explain that

> [w]hen harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate the student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program.[35]

While many of the practical recommendations contained in the letter could be quite useful, it is safe to say that its discussion regarding what constitutes disability harassment is reflective of a clearly outdated standard that OCR itself is currently unwilling to apply to these claims.

Conclusion

Disability harassment is indeed a potential risk for school districts, if for no other reason than that OCR is investigating and pursuing complaints charging this form of harassment and demonstrating a willingness to hold school districts accountable for what it perceives as violations of federal law. However, based on an analysis of parallel developments in the arena of sexual harassment in the educational setting, it seems unlikely that any future successful disability harassment claim will look much like the one outlined in OCR's letter to school administrators.

Nonetheless, there are several things about the claim that school officials and attorneys can keep in mind. First, it is unclear whether a disability harassment claim even exists under Title II or Section 504. The word *harassment* does not appear in either statute. The fact that Title VII and Title IX support harassment claims, while perhaps persuasive, does not mean we can assume that such a claim exists under Title II or Section 504. Second, even if we assume that such a claim does exist, it is unlikely that a school district will be held accountable for harassing conduct if it had no knowledge of that conduct. Finally, it is likely that the best protection—and perhaps the only needed protection—against future disability harassment claims is a strategy that administrators very likely have already adopted: an effective antiharassment policy that is widely disseminated and appropriately implemented. ■

32. Manteca (Cal.) Unified School Dist., 30 IDELR 544 (OCR 1998).

33. Crockett County (Tenn.) School Dist., 34 IDELR 186 (OCR 2000). In this case, a sixth-grader complained of harassment by her science teacher, who allegedly told the class that she had to give the student more time on an assignment or the student "would go home and tell her daddy." The teacher also allegedly wrote disparaging remarks in the student's daily planner. In applying this new framework to the facts of the case, OCR found that even if the reported incidents were true, they was not severe, persistent, or pervasive enough to rise to the level of harassing conduct.

34. *See, e.g.*, Dade County (Fla.) School Dist., 34 IDELR 101 (OCR 2000).

35. *See* http://www.ed.gov/offices/OCR/docs/disabharassltr.html (last visited October 11, 2002).