

Bullying & Harassment Based on Disability



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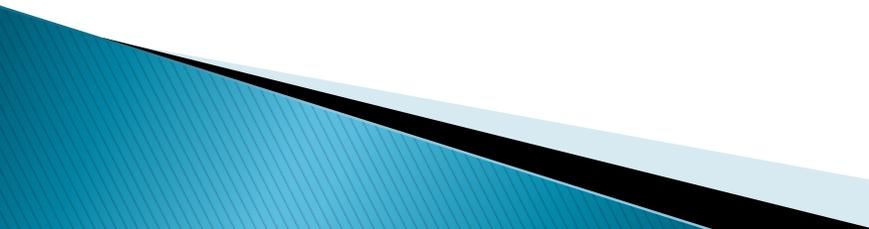
BASIC RIGHTS

Under the Individuals with Disabilities Act

- ▶ Right to a Free, Appropriate, Public Education (FAPE)
 - In the Least Restrictive Environment (LRE)

THE CSE PROCESS

Steps

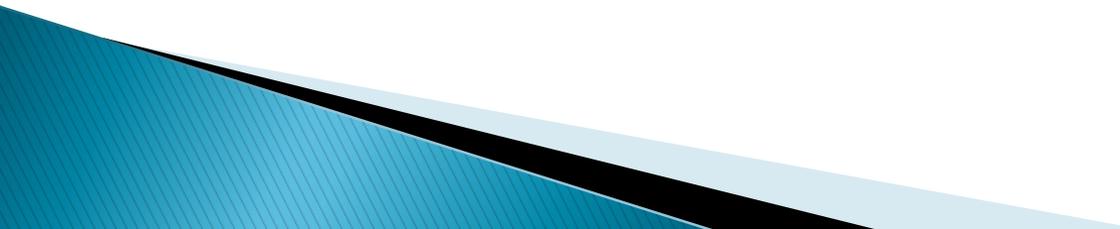
- ▶ Identification based on suspected disability
 - ▶ Referral for Evaluation
 - ▶ Initial IEP Meeting
 - Members of the Committee
 - Determination of Eligibility, Classification, Recommendation
 - Development of the IEP
 - ▶ Provision of Special Education Related Services/Programs
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PROCEDURAL SAFEGUARDS

- ▶ At every step in the CSE process Parents have available to them built in protection or rights provided to them by law

THE CSE PROCESS

Identification/Referral
Based on suspected
Disability



REFERRAL

- ▶ Should be in writing
 - ▶ May be made by a parent, school a physician
 - ▶ May be made to CSE Chair/Building Principal
 - ▶ Parental consent before child is evaluated based upon the referral
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THE CSE PROCESS

Evaluation



EVALUATION

- ▶ Must be in all areas of suspected disability
 - ▶ Must include: psychological (if determined necessary by school psychologist); social history; physical; such other tests as are necessary to assess child's needs; classroom observation
 - ▶ District must consider evaluations obtained by the parent
 - ▶ Reevaluation at least every three years
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THE CSE PROCESS



THE CSE PROCESS

Who should be at the CSE Meeting?

- ▶ Parent(s)
- ▶ Regular and Special Education Teachers
- ▶ School representative who is knowledgeable about available resources
- ▶ Individual who can interpret the evaluation
- ▶ Other individuals who have knowledge or special expertise regarding the child
- ▶ When appropriate the child
- ▶ School Psychologist
- ▶ School Physician (requested by parent 72 hours prior)
- ▶ Additional Parent of student with a disability (at parental option)

THE CSE PROCESS

Initial IEP Meeting

Eligibility

- ▶ In order to be eligible to receive protection under the IDEA:
 - The Committee on Special Education (CSE) multidisciplinary team determines the student falls into one of thirteen disability categories AND requires special education services and programs
- ▶ It is not enough to simply have a disability
 - The disability must affect the student in such a way that they need a specially designed educational program or special services

THE CSE PROCESS

Initial IEP Meeting

Available Classifications

- ▶ Autism
- ▶ Deafness
- ▶ Deaf-Blindness
- ▶ Emotional Disturbance
- ▶ Hearing impairment
- ▶ Learning Disability
- ▶ Mental retardation
- ▶ Multiple Disabilities
- ▶ Orthopedic Impairment
- ▶ Other Health Impairment
- ▶ Speech or Language Impairment
- ▶ Traumatic Brain Injury
- ▶ Visual Impairment

THE CSE PROCESS

Development of the IEP

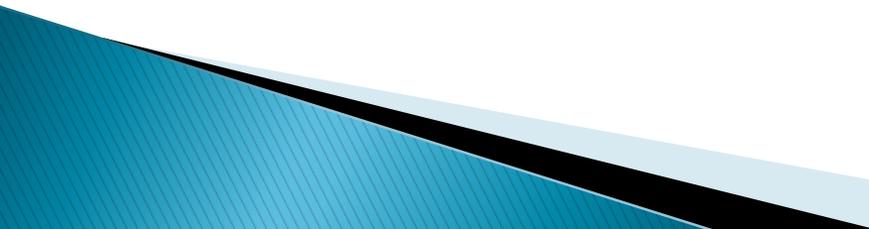
Memorializing
the Recommendations of the CSE



AREAS TO CONSIDER

- ▶ **S**ocial Development
 - ▶ **P**hysical Development
 - ▶ **A**cademic/Educational Achievement and Learning Characteristics
 - ▶ **M**anagement Needs
- 

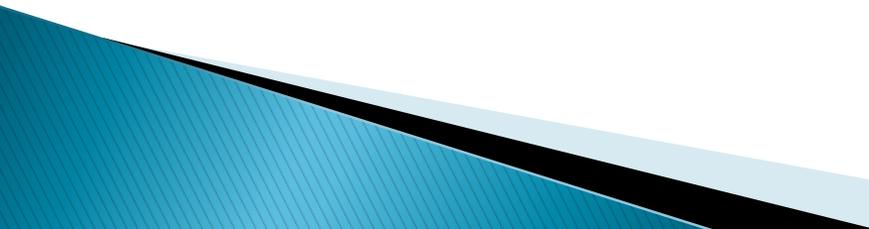
PRESENT LEVELS OF PERFORMANCE

- ▶ Should contain strengths, weaknesses and needs in all four areas – social, physical, academic and management needs (SPAM)
 - ▶ Cornerstone of the IEP – Dictates programs, services and goals
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MEASURABLE ANNUAL GOALS

- ▶ The IEP shall list measurable goals, including academic and functional goals, consistent with the student's needs and abilities

DUE PROCESS HEARING STAGES

- ▶ Due Process Hearing
 - ▶ Aggrieved (i.e. losing) party may appeal to the State Review Office (SRO)
 - ▶ After SRO's decision, aggrieved party may seek judicial review (in state or federal court)
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ATTORNEYS' FEES

Districts are responsible for payment of reasonable fees if Parent attorney prevails

SUSPENSION OF SPECIAL EDUCATION STUDENTS

- ▶ Special Education Students have more protections than non-special education students under IDEA if suspended greater than ten (10) school days
- ▶ Greater than 10 school days triggers a change in placement
 - DAYS MUST BE CONSECUTIVE OR CUMULATIVE IF A PATTERN

Liability Involving Student with a Disability (SWD)



Liability Involving Student with a Disability (SWD)

- ▶ Who is protected:
 - IDEA
 - Student with IEP
 - Student in the referral process.
 - Student who should have been referred
 - Child-find (34 CFR §300.111)
 - Significance of disability.

Liability Involving Student with a Disability (SWD)/Child Find

- ▶ *Compton Unified School District v. Addison*, 54 IDELR 71 (9th Cir. 2010)
 - A school district's delay in referring a student for special education services, who for several years demonstrated academic, behavioral, and emotional difficulties, amounted to a violation of the IDEA's "child find" requirement. The school district argued it did not affirmatively refuse to take action.

Liability Involving Student with a Disability (SWD)/Child Find

- ▶ *Compton Unified School District v. Addison*, 54 IDELR 71 (9th Cir. 2010)
 - The court rejected the school district's argument that the school district's choice to ignore the student's disabilities allows the district to escape its "child find" obligations. The court refused to interpret the IDEA to produce such "absurd results."

Liability Involving Student with a Disability (SWD)/Child Find

- ▶ *Regional School District No. 9 Board of Education v. Mr. and Mrs. M.*, 53 IDELR 8 (D. Conn. 2009)
 - Noting that “the standard for triggering the Child Find duty is suspicion of a disability, rather than factual knowledge of a qualifying disability[,]” the school district should have begun an evaluation for special education once it was informed that a student with clinical depression would not start school on time due to admission to a psychiatric hospital.

Liability Involving Student with a Disability (SWD)

- ▶ Section 504
 - Student with 504 Plan.
 - Student in the referral process.
 - Student who should have been referred.
 - Child-find (34 CFR §104.32)

Liability Involving Student with a Disability (SWD)

- ▶ Responsibilities
 - Policies and procedures
 - Investigation
 - “When responding to harassment, a school must take immediate and appropriate action to investigate” (*Dear Colleague Letter*, 55 IDELR 174 (OCR 2010));
 - The lack of incident reports “is significant because it raises questions about whether the school was actually on notice, or if it was, whether it was deliberately indifferent.” (*T.K. and S.K. v. New York City Dept. of Ed.*, 56 IDELR 228 (E.D.N.Y. 2011));

Liability Involving Student with a Disability (SWD)

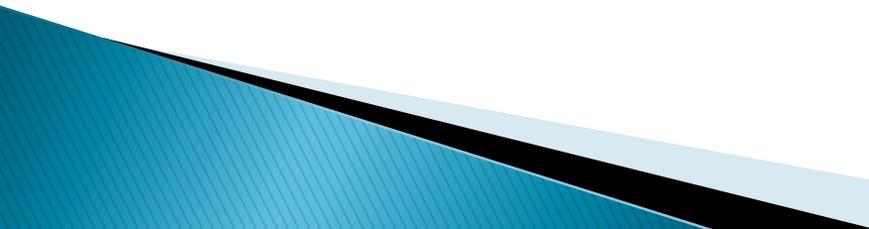
- Investigation
 - The District must respond, even when there is no complaint by the student (*Williamston Community Schools*, 56 IDELR 22 (OCR 2010));
 - But the school district must have a basis to suspect harassment based upon disability (*Ann Arbor Public Schools*, 56 IDELR 84 (OCR 2010));

Liability Involving Student with a Disability (SWD)

- ▶ Investigation

- However, the failure of a child or parent to state that harassment is due to disability does not absolve the school district from investigating (see *Hemet Unified School District*, 55 IDELR 328 (OCR 2009) saying a district did not properly investigate because it should have *inferred* from parent letters that harassment was disability-related).

Liability Involving Student with a Disability (SWD)

- Non-Discrimination
 - Not just passive.
 - Non-Discrimination requires that District must not allow peer harassment based on disability, particularly if it creates a hostile environment and the harassment is not adequately addressed or is ignored by the school (*Dear Colleague Letter*);
- 

Liability Involving Student with a Disability (SWD)

- Non-Discrimination
 - Damages may be available under 504 and the IDEA for disability-based student-on-student harassment under a five part test per *PRV Metropolitan School District of Washington Township*, 55 IDELR 199 (S.D.IN 2010) citing to *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661 (1999).

Liability Involving Student with a Disability (SWD)

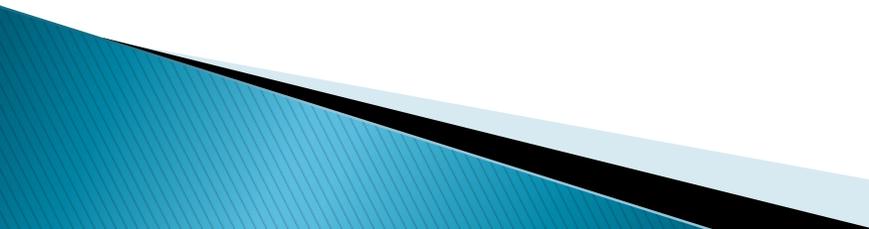
- Stop the inappropriate activity
 - Investigation is not enough; District must actually stop the inappropriate activity: bullying needs to be viewed, not from an incident-based perspective, but rather from a school-culture perspective (*T.K.*);
 - A school is responsible for *addressing* harassment incidents of which it knows or reasonably should have known (*Dear Colleague Letter*);

Liability Involving Student with a Disability (SWD)

- “If an investigation reveals that discriminatory harassment has occurred, 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 (Dear Colleague Letter)* (emphasis added);
- Once steps are determined to be needed, the District is required to make sure they are implemented (*Santa Monica-Malibu Unified School District, 55 IDELR 208 (OCR 2010)*).

Liability Involving Student with a Disability (SWD)

Recent Court Decisions

- Districts can be liable for monetary damages as a result of bullying/harassment of students
 - Discrimination law does not require that the district (or staff) intend to discriminate
 - A district can be liable for discrimination
 - If a student is bullied/harassed due to his or her protected difference; and
 - The district was deliberately indifferent
 - Deliberate indifference is the failure to take appropriate and reasonable actions to try to stop the bullying/harassment
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Liability Involving Student with a Disability (SWD)

- Off-campus actions
 - Can be disciplined if:
 - Endangers the health or safety (or morals) of students
 - Adversely affects the educative process.

Liability Involving Student with a Disability (SWD)

- Off-campus actions
 - Cyber-bullying
 - Must impact at school (see previous criteria for discipline)
 - Determine whether there is a First Amendment protection; exceptions:
 - lewd, indecent or offensive
 - foreseeable risk of substantial disruption within school

Liability Involving Student with a Disability (SWD)

- Assure FAPE for SWD under IDEA.
 - Bullying can be grounds for finding a District deprived a student of FAPE (see *T.K.* citing *M.L.* (Ninth Circuit), *Shore Regional* (Third Circuit), *Charlie F.* (Seventh Circuit)).
 - *T.K. v. New York City Board of Education* establishes a standard for denial of FAPE based on whether the district was deliberately indifferent *or* failed to take reasonable steps to prevent bullying that substantially restricted a child with a disability in her educational opportunities.