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Student Harassment and Bullying, Title IX, and UCP Compliance



Southern Section Workshop

Presented by,
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OVERVIEW

- Discriminatory Harassment & Bullying in Schools
- Title IX Compliance
- Uniform Complaint Procedures
- Special Considerations
- Tips & Best Practices



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Discriminatory Harassment & Bullying in Schools




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FEDERAL LAW

- Section 504 of the Rehabilitation Act (1973)
- Title II of the Americans with Disabilities Act (1990)
- Title VI of the Civil Rights Act (1964)
- Title IX of the Education Amendments (1972)
- Individuals with Disabilities Education Act (IDEA)



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PROTECTED CLASSES



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OFFICE FOR CIVIL RIGHTS

- OCR Enforces:
 - Section 504
 - Title II of the ADA
 - Title VI of the Civil Rights Act (1964)
 - Title IX



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WHAT IS HARASSMENT?

Harassment is behavior which creates a hostile environment for individuals *because* of their race, sex, color, national origin, or disability.



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HOSTILE ENVIRONMENT

- OCR determines a “hostile environment” by considering:
 - Type of harassment - physical v. verbal
 - Frequency and severity of conduct
 - Age/relationship of parties
 - Student’s disability/race
 - Setting/context act takes place
 - Other relevant factors



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Discriminatory Harassment & Bullying in Schools

- Harassment/Bullying Conduct
 - Verbal acts, i.e., name-calling
 - Graphic and written statements
 - Physical conduct
 - Conduct that is physically threatening, harmful or humiliating



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Discriminatory Harassment & Bullying in Schools

Harassment commonly occurs:

- Classrooms
- P.E./Gym
- Recess
- Hallways/lockers
- Bathrooms
- Off-Campus
- Cafeteria
- School Bus
- Electronically



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When Are School Districts Liable?

Legal Standard

- School districts violate federal civil rights statutes when:
 - Harassment is based on race, color, origin, sex or disability
 - It's serious enough to create hostile environment
 - School is aware or reasonably should have been aware of existence
 - Fail to take appropriate and effective responsive action



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HARASSMENT v. BULLYING

- Terms are often used interchangeably
- Bullying triggers federal civil rights laws where it meets the heightened legal standard for harassment
 - Does not include "typical schoolyard bullying and teasing"
- Bullying must be sufficiently severe or pervasive to create a hostile environment



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School Response to Harassment

- Schools are required to:
 - take *immediate and appropriate* action to investigate
 - conduct a *prompt, thorough, and impartial* inquiry
 - if discriminatory, schools must take steps to end harassment, eliminate hostile environment, and prevent reoccurrence



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Appropriate Measures to Prevent Recurrence

- Separating accused and victim
- Provide counseling for both parties
- Disciplinary action against accused
- Reaffirm school policy against harassment
- Conduct staff training to recognize incidents of harassment
- Host class discussions regarding harassment



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Time to Eat Peanuts!

Hypothetical

- Seven-year-old with peanut allergy has 504 Plan
 - Meal accommodations, epinephrine, peanut-free table in cafeteria, prohibition on peanut products in class
- Peers teased student about her peanut allergy
 - Resulted in student leaving the room in tears

Unlawful harassment?



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Importance of Training and Documentation

**STAFF
TRAINING**

DOCUMENTATION




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DOCUMENTATION OF INVESTIGATIONS

Antioch Unified School District, OCR Case No. 09-13-1293
(March 10, 2015)

- African American student with ADHD and ODD reported being verbally harassed in P.E. class
- Student was experiencing name-calling, including “black, fat, and ugly”
- AP investigated the issue by speaking with the two alleged perpetrators, P.E. teachers, and other students concerning the alleged harassment, but never interviewed the target student



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DOCUMENTATION OF INVESTIGATIONS

Antioch Unified School District, OCR Case No. 09-13-1293
(March 10, 2015)

- OCR reviewed the District's responses to UCP complaints over a three year period
- OCR found that some investigations "were missing information such as interview notes, including interviews with the complainants, and documentary evidence."
- OCR determined that this supported a finding that "the District generally failed to respond promptly and effectively with regard to allegations of race and disability harassment."



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STUDENT AND STAFF TRAINING

Antioch Unified School District, OCR Case No. 09-12-1462
(Sept. 20, 2013)

- 8th-grade Student with Specific Learning Disability and Speech and Language Impairment reported that he had been harassed and threatened by other students since the 6th grade
- On one occasion, an older male student allegedly threatened the Student in the bathroom
- Student also reported that a male classmate threatened to beat him up after school



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STUDENT AND STAFF TRAINING

Antioch Unified School District, OCR Case No. 09-12-1462
(Sept. 20, 2013)

- School's Response:
 - School promptly investigated each incident
 - Provided Student with "bathroom buddy"
 - Disciplined the identified perpetrators
 - Moved the perpetrators' seats away from Student
 - Assigned 1:1 aide as part of Student's IEP when harassment continued



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STUDENT AND STAFF TRAINING

Antioch Unified School District, OCR Case No. 09-12-1462
(Sept. 20, 2013)

- OCR concluded that "the steps the District took were clearly not sufficient to end the harassment."
- Found that the District "did not take any systemic steps to educate students at the school about the inappropriateness and harmfulness of their conduct or to train staff about understanding, preventing, and responding to disability-based harassment."



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School District Liability for Monetary Damages

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)

- U.S. Supreme Court held that students subjected to discriminatory harassment may sue school district for damages when the district is "*deliberately indifferent* to the harassment, of which they have *actual knowledge*, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."



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TITLE IX



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TITLE IX

Title IX of the Education Amendment of 1972

"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." (20 U.S.C. § 1681, et seq.)



TITLE IX

Title IX applies to:

- Acts of discrimination on the basis of sex
- Acts of harassment on the basis of sex
- Acts of discrimination against pregnant and/or parenting students
- Acts of discipline on the basis of sex
- Acts of prohibiting and/or providing programs/activities on the basis of sex
- Acts of retaliation against an individual for asserting Title IX protections



TITLE IX

Sexual Misconduct

- Defined
 - Sexual harassment is unwelcome conduct of a sexual nature
 - It may include:
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal, nonverbal, or physical conduct of a sexual nature




TITLE IX

Sexual Misconduct

- Defined
 - Sexual violence is a form of sexual harassment.
 - It may include:
 - Rape
 - Sexual assault
 - Sexual battery, and
 - Sexual coercion.



TITLE IX




TITLE IX

School's Responsibility to Address Sexual Misconduct

- Same duty to respond as with all cases of harassment
- Where school *knows or reasonably should know* of an incident of sexual misconduct, school must take steps to understand what occurred and respond appropriately



TITLE IX

Interim Measures

- School may be required to take interim measures prior to or during investigation
- Interim Measures May Include:
 - Counseling
 - Extensions of time or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort services
 - Restrictions on contact between the parties
 - Increased security and monitoring of certain areas of campus
 - Any other similar accommodations



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TITLE IX

Interim Measures

- Must be specifically tailored → must be “individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education.”
- Must be available to both parties
- Schools “may not rely on fixed rules or operating assumptions that favor one party over another” when applying interim measures



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TITLE IX

Investigation Timeframe

- No fixed time frame to complete Title IX investigation
- Schools need only make a “good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution”



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TITLE IX

Standard of Proof

- In determining whether sexual misconduct occurred, schools have discretion to apply either:
 - Preponderance of Evidence Standard
 - Clear and Convincing Evidence Standard



TITLE IX

Informal Resolution of Complaints

- Schools may conduct an informal process, including mediation, to assist parties in voluntary resolution if certain conditions are met, including that the school determines informal resolution is appropriate and all parties voluntarily agree to participate



TITLE IX

Appeal Rights

- Schools are not required to provide appeal rights
- If school decides to allow appeal rights, the school may choose to allow appeal rights only to the accused



TITLE IX

CO-ORDINATOR



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TITLE IX

Title IX Coordinator

- Schools must designate at least one employee to act as a Title IX Coordinator to coordinate the school's responsibilities related to incidents of sexual misconduct.
- Responsible for handling Title IX complaints and investigations
- Monitor compliance with Title IX
- Circulate Title IX policy (ensure it meets federal and state requirements)
- Evaluate Title IX prevention measures



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TITLE IX

Grievance Procedures

- School districts must adopt and publish grievance procedures
- Grievance procedures must provide for prompt and equitable resolution of sex discrimination complaints



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TITLE IX

Notification/Posting Requirements

- School districts must regularly and consistently notify the public that it does not discriminate on the basis of sex in its educational programs or activities
- As of July 1, 2017, school districts must post Title IX requirements in a “prominent and conspicuous location” on the district and school websites



TITLE IX

Notification/Posting Requirements

- Posting on District and School Website Must Include:
 - Name and contact information of Title IX Coordinator
 - Title IX rights of students and the public
 - Title IX responsibilities of the district
 - Links to info about such rights and responsibilities
 - Description of how to file a Title IX complaint
 - Explanation of the statute of limitations for a Title IX complaint
 - Explanation of how the complaint will be investigated and how the complainant may further pursue the complaint
 - Link to the OCR complaints form, and the contact information for the OCR office



TITLE IX

Self-Evaluate

- School districts must continuously evaluate their Title IX policies and practices
- Modify any of these policies and practices which do not/may not meet the requirements of Title IX
- Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies



CALIFORNIA LAW

“No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid.”

Cal. Ed. Code § 220



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CALIFORNIA LAW

At a minimum, school districts must:

- Adopt policy prohibiting discrimination and harassment, intimidation, and bullying on the basis of a protected characteristic
- Adopt and implement complaint/investigation process
 - Must include timeline for the investigation/resolution of complaint
 - Provide appeal process to complainant
- Identify staff person responsible for implementing policy
- Publicize information regarding policy annually
- Adopt curriculum and instructional methods that promotes a safe learning environment
- Investigate all allegations of discrimination and implement effective corrective actions when necessary

(Cal. Ed. Code § 234.1)



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Gender/Sexual Orientation-Based Harassment

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

- Two high school students were subjected to anti-gay slurs, physical violence, and death threats
- The students filed several complaints with the school principal and other school administrators
- District told involved students that their conduct violated school rules, but never investigated the complaint
- The students continued to experience anti-gay harassment and eventually finished high school through an independent student program



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Gender/Sexual Orientation-Based Harassment

Donovan v. Poway Unified School Dist. (cont.)

- Title IX elements govern an action for peer sexual orientation harassment under Cal. Ed. Code § 220
- When investigating sexual orientation harassment, school may be liable if:
 - Student suffered “*severe, pervasive and offensive*” harassment which deprived the student of equal access to educational benefits and opportunities
 - School had “*actual knowledge*” of the harassment
 - School acted with “*deliberate indifference*”



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Gender/Sexual Orientation-Based Harassment

Donovan v. Poway Unified School Dist. (cont.)

- Court found that school administrators failed to follow-up or investigate the students' repeated complaints
- Court held that the District responded with “deliberate indifference” to the students' complaints



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UNIFORM COMPLAINT PROCEDURES



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UNIFORM COMPLAINT PROCEDURES

What is the UCP?

- Provides for the process of filing, investigating, and resolving complaints for allegations of unlawful discrimination by a local agency (and for alleged violations of federal or state law or regulations governing educational programs)

Purpose

- Adopted by CDE to provide a standard process through which school districts handle complaints



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UNIFORM COMPLAINT PROCEDURES

Scope of UCP

- Complaints alleging unlawful discrimination, harassment, intimidation, or bullying of a protected group
- "Williams" complaints
- Complaints regarding unlawful pupil fees
- Local Control Funding Formula/Local Control Accountability Plan (LCFF/LCAP)
- Federal Categorical Aid Programs
- State Categorical Aid Programs



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UNIFORM COMPLAINT PROCEDURES

District Policies and Procedures

- District must adopt policies and procedures consistent with UCP regulations
- Policies must ensure complainants are protected from retaliation and that identity of complainant alleging discrimination, harassment, intimidation or bullying remains confidential as appropriate



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UNIFORM COMPLAINT PROCEDURES

Notice

- Districts must annually notify its students, employees, and parents, in writing, of the District's complaint procedures, including the opportunity to appeal to the CDE



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UNIFORM COMPLAINT PROCEDURES

Filing Complaints

- A complaint of discrimination must be filed "not later than six months from the date the alleged discrimination occurred, or the date the complainant first obtained knowledge of the facts of the alleged discrimination."
- Complaint must be in accordance with the complaint procedures of the school district



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UNIFORM COMPLAINT PROCEDURES

Who can file a complaint?

- Complaint shall be filed by a person who:
 - Alleges he or she personally suffered, or
 - Believes an individual or any specific class of individuals has been subjected to the following:

Unlawful Discrimination Intimidation Harassment Bullying



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UNIFORM COMPLAINT PROCEDURES

Investigation and Written Report

- School districts must conduct and complete investigation, and prepare a written decision within 60 calendar days from the date of the receipt of the complaint
- The investigation shall include an opportunity for the complainant to present the complaint(s) and evidence or information leading to evidence to support the allegations



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UNIFORM COMPLAINT PROCEDURES

Investigation and Written Report

- Dismissal of the complaint may result due to a lack of evidence to support the allegations if:
 - Complainant refuses to provide investigator with documents or other evidence related to the allegations in the complaint
 - Complainant otherwise fails or refuses to cooperate in the investigation
 - Engages in any other obstruction of the investigation



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UNIFORM COMPLAINT PROCEDURES

Written Report Should Include:

- Findings of fact
- Conclusions of law
- Disposition of the complaint
- Rationale for such disposition
- Corrective actions, if warranted
- Notice of the complainant's right to appeal the local agency's decision to the State Department of Education; and
- Procedures to be followed to initiate such an appeal

(Cal. Code Regs., tit. 5, § 4631(e).)



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UNIFORM COMPLAINT PROCEDURES

Appeal Rights

- Complainant may appeal district's decision to the CDE within 15 days of receiving the decision
- Must be in writing
- Must specify basis for the appeal of the Decision and whether the facts are incorrect and/or law is misapplied
- Must include copy of original complaint and a copy of the decision



UNIFORM COMPLAINT PROCEDURES

Appeal Rights

- District's Obligations:
 - Must forward the following to the CDE:
 - A copy of the original complaint
 - A copy of the decision
 - A summary of the nature & extent of the investigation conducted by the District (if not covered in the decision)
 - A copy of the investigation file, including, but not limited to, all notes, interviews and documents submitted by the parties or gathered by the investigator
 - A report of any action taken to resolve the complaint
 - A copy of the District's complaint procedures



Special Considerations Concerning Disability-Based Harassment

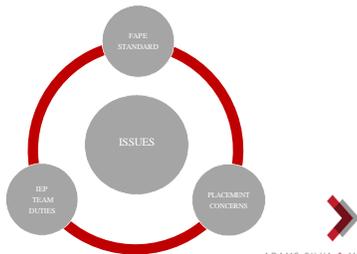


Special Considerations Concerning Disability-Based Harassment

Under the IDEA, school districts “have an obligation to ensure that students with disabilities who are targets of peer bullying continue to receive a FAPE in accordance with their IEPs.”
(Joint OSERS/OSEP 2013 Dear Colleague Letter)



Special Considerations Concerning Disability-Based Harassment



Special Considerations Concerning Disability-Based Harassment

FAPE

➤ “Whether or not the bullying is related to the student’s disability, any bullying of a student with a disability that results in the student not receiving meaningful benefit constitutes a denial of FAPE under the IDEA that must be remedied.”



Special Considerations Concerning Disability-Based Harassment

Placement Considerations

- Unless the student is no longer able to receive a FAPE, the district should keep the student in the current placement



Special Considerations Concerning Disability-Based Harassment

IEP Team Responsibilities

- Convene IEP meeting to determine whether student is receiving a FAPE
- School cannot attempt to resolve bullying by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education services



Special Considerations Concerning Disability-Based Harassment

OCR	v.	OAH
Section 504 and Title II Claims <ul style="list-style-type: none"> • Issues <ul style="list-style-type: none"> • Whether the student's civil rights have been violated • Whether the student has been discriminated against on the basis of his or her disability • Focuses on school district's compliance with procedures established by OCR 		IDEA Claims <ul style="list-style-type: none"> • Issues <ul style="list-style-type: none"> • Whether the school district failed to provide the student with a FAPE • Focuses on school district's compliance with substantive FAPE obligations





Special Considerations Concerning Disability-Based Harassment

Hypothetical

- Peter is a student with a learning disability who receives special education services under the IDEA
- Several classmates repeatedly call student "stupid," "idiot," and "retard" in class
- On the bus, students throw books and pencils at Peter
- Peter complained to his teacher that the other students always pick on him

➤ How should the school respond?

Special Considerations Concerning Disability-Based Harassment

Hypothetical

- School officials offered Peter counseling and a social-emotional evaluation
- School does not discipline the offending students
- The harassment continues and Peter begins to demonstrate aggressive and violent behaviors, which often results in the disruption of class

➤ Do you think the school's response was appropriate?

➤ If not, what other actions should the school have taken to remedy the harassment?

OFF-CAMPUS SPEECH & CYBERBULLYING

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OFF-CAMPUS CONDUCT & CYBERBULLYING

- Cyberbullying is harassment that takes place over digital devices (e.g., cell phones, computers, tablets)
- Common Outlets:
 - Social Media
 - Facebook, YouTube, Instagram, Snapchat, and Twitter
 - Text Messages
 - Instant Messages
 - Email

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OFF-CAMPUS CONDUCT & CYBERBULLYING

- Cal Ed. Code § 48900(r)(2)(A) – Bullying by means of an electronic act:
 - Originated on/off campus
 - Transmitted through electronic device by
 - Message, text, sound, video or image
 - Post on a social network website
 - “Burn page”
 - “Credible impersonation”
 - “False profile”

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OFF-CAMPUS CONDUCT & CYBERBULLYING

Common Issues

- Jurisdiction Issue
 - Does the school district have the authority to discipline for conduct that occurs off school property?
 - In the digital age, what, if anything, is truly off campus?
- First Amendment Issue
 - First Amendment protections extend to students; however, free speech rights may be limited in the school setting. (*Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969))



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OFF-CAMPUS CONDUCT & CYBERBULLYING

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)

- **Tinker Test**
 - School officials may not limit student speech unless the speech:
 - (1) causes a material and substantial disruption, or it is reasonable to forecast that the speech will cause a material and substantial disruption, in school; or
 - (2) interferes with the rights of other students to be secure and left alone



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OFF-CAMPUS CONDUCT & CYBERBULLYING

- Since *Tinker*, courts have upheld a school's authority to regulate certain student off campus and/or online speech
- "9th Circuit Test"
 - Schools may discipline a student for off-campus speech if:
 - (1) the speech is closely tied to the school (known as the Nexus test), or it is reasonably foreseeable that the off-campus speech would reach the school (known as the Foreseeability test); and
 - (2) the speech causes, or it is reasonable to forecast that the speech will cause, a material and substantial disruption in school, or interferes with the rights of students to be secure and left alone at school (i.e., the *Tinker* test)



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OFF-CAMPUS CONDUCT & CYBERBULLYING

J.C. v. Beverly Hills Unified School District (2010) 711 F.Supp.2d 1094

- 8th-grader J.C. uploaded video on YouTube that bullied another student, calling her a "slut," "spoiled," and "ugly"
- Students involved missed a portion of class, parent of targeted student kept her from school for one day
- School administrators suspended J.C. for two days and made her delete the video



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OFF-CAMPUS CONDUCT & CYBERBULLYING

J.C. v. Beverly Hills Unified School District (2010) 711 F.Supp.2d 1094

- Court held school violated J.C.'s First Amendment rights
- Video did not cause a substantial disruption and it was not reasonably foreseeable that it would cause a substantial disruption at school
- Mere teasing and name-calling that causes "some emotional harm to a student" is not enough



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OFF-CAMPUS CONDUCT & CYBERBULLYING

Shen v. Albany Unified School District, 2017 WL 5890089 (N.D. Cal. 2017)

- School disciplined students for posting, writing approving comments on, and "liking" racially charged content on an Instagram account
- After learning of the posts, students gathered in school hallway, intensely talking, crying, and yelling about the posts
- Classroom instruction was halted to discuss the posts, several students struggled to attend class or perform schoolwork



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OFF-CAMPUS CONDUCT & CYBERBULLYING

Shen v. Albany Unified School District, 2017 WL 5890089 (N.D. Cal. 2017)

- Court held school had authority to discipline the students for their online speech
 - Found that content was readily visible to and targeted students, depicted school activities, and that school officials could reasonably expect the posts would reach the school since some of the targeted students would be affected by the content
 - Also found posts caused a "substantial disruption"
 - Online posts that denigrate a student's race, ethnicity, or physical appearance interfere with a student's right to be left alone



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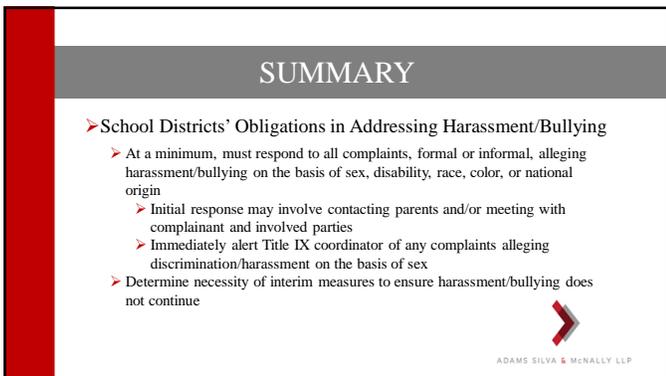
OFF-CAMPUS CONDUCT & CYBERBULLYING

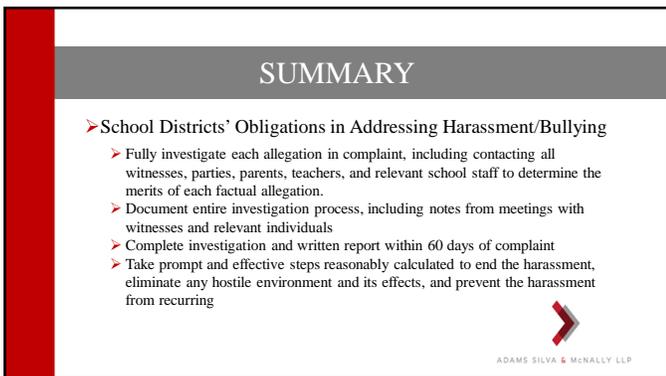
- Hypothetical
 - High school student Judy creates an interactive discussion group page on Facebook, titled "Students Against Sarah's Herpes"
 - Judy created page at home, on her computer, and after school hours
 - Judy invites 100 students to the page and encourages them to post derogatory remarks about student Sarah
 - Several students posted disparaging comments and photos, including photo of Sarah's face with the caption "Portrait of a Whore"
 - Sarah did not return to school for a week after the posts, and struggled to complete her schoolwork for the remainder of the school year



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TIPS & BEST PRACTICES




TIPS & BEST PRACTICES

- Develop and implement clear policies to address harassment and bullying
 - Review and update policies as needed
- Establish preventative policies and/or practices (e.g., counseling)
- Be Proactive
- Consider the necessity of interim measures prior to, and during, investigation
- Gather information from all students and/or witnesses involved
- Document all efforts!
- Conduct regular trainings for staff on responding to harassment and bullying
- Provide instruction to students on appropriate behaviors and how to respond
- Establish a confidential reporting system for students to safely report incidents of harassment/bullying
- Analyze whether harassment/bullying has denied special education student a FAPE



AVAILABLE RESOURCES

- CDE – Gender Equity/Title IX - <https://www.cde.ca.gov/re/di/eo/genequitytitleix.asp>
- U.S. Department of Education: Bullying, Harassment, and Civil Rights - <https://www.youtube.com/watch?v=a11tdJPHz2I&feature=youtu.be>
- <http://www.stopbullying.gov>
- CDE – Resolution of Discrimination/Harassment Complaint - <https://www.cde.ca.gov/re/di/eo/complaint.asp>



QUESTIONS




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