(internal citations omitted).

2. Consistent with the court's holding in Ellenberg, OCR found a violation of §504 where one district failed to consider a student's eligibility for a §504 Plan after it found him ineligible for IDEA services. Oxnard (CA) Elementary School District, 111 LRP 34492 (OCR, 2011). Although the district had knowledge that the student might need 504 accommodations based upon the IEP team's discussions, consistent with its policy that students may only be considered for 504 services upon the parents' referral, the district did not consider the student's eligibility under 504. OCR wrote,

"Any policy or practice that limits Section 504 evaluations solely to instances where parents expressly request them is unlawful."

Further, OCR explained, "[o]nce the IEP team determined that the Student did not qualify for an IEP, under the circumstances of this case, it should have considered whether the Student qualified for a Section 504 plan..."

## C. Intentional Discrimination by Schools and Personnel

1. Typically, a claim for discrimination under Section 504 requires more than mere negligence. *See, e.g.*, Sellers by Sellers v. School Bd. of the City of Manassas, 141 F.3d 524 (4th Cir., 1998). To prevail, the student must assert and prove either bad faith or gross misjudgment on the part of school district officials. Heidemann v. Rother, 84 F.3d 1021 (8th Cir., 1996). *But see*, Essen v. Bd. of Educ. of the Ithaca City Sch. Dist., 1996 WL 191948, 24 IDELR 30 (N.D.N.Y. 1996).

2. In J.D.P. by Pope v. Cherokee County, Ga., Sch. Dist., 735 F.Supp.2d 1348 (N.D.Ga. 2010), the court declined to award parents compensatory damages under ADA or Section 504 for their claims of intentional discrimination inflicted by employees of an after school care program contracted with the district. On a day when the student's 1:1 aide was absent, the after school officials implemented a physical restraint process as a result of the student's behaviors. Notwithstanding the employees' unfamiliarity with the student's BIP or 504 plan, the evidence did not demonstrate that their actions were unreasonable in light of their professional determination that his behavior put himself and others at risk.

3. To state a viable ADA or Section 504 claim, parents have to show: (1) that the student was a child with a disability as defined by Section 504; (2) that the student was denied the benefits of the school's programs or otherwise discriminated against; and (3) that the district acted with bad faith or gross misjudgment. M.C. and R.C. v. Arlington Cent. Sch. Dist. et al., 2012 WL 3020087 (SDNY., 2012). In M.C., the

parents were unable to convince the court that district administrators who interrogated their son for hours and forcefully took the student to the hospital against the parents' wishes because staff believed he was suicidal, intentionally discriminated against the student on the basis of his Asperger's. The court held that while the staff's behavior may have risen to the level of a bad decision, it was not the sort of "conscious shocking" behavior that violates the Constitution. Further, the court reasoned that "if [the staff members] truly believed [the student] to be suicidal, it is hard to see how their conduct does not amount to prudent behavior."

4. Where the school district provided FAPE in accordance with IDEA, student's Section 504 claim failed for not proving that district's preventing him from going back to school was in bad faith or a result of discriminatory animus. Sch. Dist. of Wisconsin Dells v. Z.S., 295 F.3d 671 (7th Cir., 2002).

5. A student's claim survived a summary judgment where a fact finder could reasonably conclude that administrators acted with deliberate indifference to the strong possibility that they were violating a student's rights under Section 504 at a school function. Smith v. Maine Sch. Admin. Dist. No. 6, WL 68305 (D. Me. 2001). However, most authorities have rejected the idea of Section 504 or title II damages liability against individuals. Since Section 504 only applies to entities that receive federal funding, courts hold there is ordinarily liability for entities only, not persons. *Id.*

6. A school district did not discriminate against a child with Type I diabetes and asthma due to absences caused by his disability when it decided not to promote the student to seventh grade. Hernando (FL) County Sch. Dist., 31 IDELR 89 (OCR 1999). OCR determined the school's decision not to promote the student was based on the student's failure to master the subject matter. OCR also determined that the student's performance was not hampered by any failure of the district to accommodate his needs. OCR concluded that the district did not discipline the student on the basis of behavior caused by his disability, rather on his inability to master the subject matter.

7. A school district did not intentionally discriminate against a student classified with an emotional disturbance even though it placed him in a time-out room 85 times during a single school year. Baltimore County (MD) Pub. Schs., 57 IDELR 23 (OCR 2011). OCR determined that based upon the student's BIP mandating the student's participation in the "behavior learning support program," which incorporated use of the time-out room coupled with the student repeatedly engaging in aggressive behavior, the district did not engage in any discriminatory conduct.

8. Although the school district's policy for providing free school lunches to students

who attended the public school was facially neutral, it had a disparate impact on students with disabilities who attended a non-public school at the district's expense. C.D. v. New York City Dep't of Educ., 2009 WL 400382 (S.D.N.Y., 2009).

**D. Discrimination By Peers on Basis of Disability**

1. Lackawanna City (NY) School District, 116 LRP 48259 (OCR July 28, 2016). The district failed to respond appropriately to a Dignity for All Students Act (DASA ) complaint alleging that school staff subjected a child covered by Section 504 to harassment on the basis of his disability. Although the principal investigated whether the incidents that gave rise to the complainant's complaint constituted harassment of the Student on the basis of his disability, and notwithstanding the principal's recommendation to the complainant that he file a DASA complaint, there is no indication that the principal investigated whether the incidents in question constituted disability harassment, or took any further action in response to the complaint's filing of a DASA complaint, or whether the complainant's allegations of harassment were substantiated, or that the principal notified the complainant of her findings.

2. In K.M. ex rel. D.G. v. Hyde Park Cent. School Dist., 381 F.Supp.2d 343 (S.D.N.Y., 2005), the court held among other things that a school district's deliberate indifference to pervasive, severe disability-based harassment that effectively deprives disabled student of access to school's resources is actionable under ADA and Rehabilitation Act.

   Here, the student was diagnosed with PDD-NOS and dyslexia. In the student's §504 Complaint, plaintiff alleged that D.G. suffered disability-based peer-to-peer harassment throughout the 2000-01 school year and the first two months of the 2001-02 school year, and that the defendants' failures to intervene amounted to intentional disability discrimination on behalf of school personnel. The plaintiff alleges that such harassment included being called "stupid," "retard," and other "disability-related insults" and acts of physical aggression and intimidation while in school and on the school bus. At 348. Each time, the harassment was reported to school officials.

   The court noted that although "[s]chool district liability for peer-to-peer disability-based harassment under Section 504 and the ADA has not been directly addressed by the United States Supreme Court or the Second Circuit, [] the Supreme Court has addressed school district liability for peer-to-peer sexual harassment in violation of Title IX."at 359.

   The court held that, "a school district's deliberate indifference to pervasive, severe

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disability-based harassment that effectively deprived a disabled student of access to the school's resources and opportunities would be actionable under Section 504 and Title II." at 360. Therefore, in response to the district's motion for summary judgment, the court held that there were triable issues of fact precluding a grant of summary judgment on the Section 504 and Title II claims in favor of the district. The court reasoned that, "a reasonable juror looking at the evidence discussed above, could conclude that [the student] was subjected to severe and pervasive peer abuse, that this abuse was known to teachers and administrators in the district, and that it so altered the conditions of [the student's] school experience that he felt he could not attend school for the better part of a year." at 361.

3. OCR's *Dear Colleague Letter of October 26, 2010*; http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

   a. This letter informs districts that tolerating or not adequately addressing peer harassment or bullying based on race, color, national origin, sex, or disability which is *sufficiently serious to create a hostile environment* may violate the civil rights laws, including, but not limited to Section 504 and ADA.

   b. The letter clarifies that schools are "responsible for addressing harassment incidents about which it *knows or reasonably should have known.*"

      **NOTE**: In In re: Dear Colleague Letter of October 26, 2010, 111 LRP 32298 (OCR 2011), OCR noted that although the standard articulated in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) was that districts may be liable for monetary damages for harassment about which they have actual knowledge, the standard set forth in the DCL was the same standard OCR articulated in its 2001 Sexual Harassment Guidance and other prior guidance documents.

   c. Further, the letter reminds districts that by limiting their responses to a specific application of an anti-bullying or other disciplinary policy, they may fail to properly consider whether the student misconduct also results in discrimination in violation of students' federal civil rights.

4. Preston v. Hilton Central Sch. Dist., 2012 WL 2829452 (W.D.N.Y., 2012). Here, the court explained that the district could be held responsible for peer-on-peer harassment if it is "deliberately indifferent" to disability-related bullying. A district's failure to investigate reports of alleged harassment may qualify as deliberate indifference, even if this failure is not motivated by any discriminatory animus.

According to the parents of a child with Asperger's Syndrome, the student was regularly harassed and bullied by his classmates on the basis of his disability. The alleged harassing conduct included the use of insults which specifically referenced the student's perceived disability. According to the parents, on multiple occasions, they notified multiple district employees of the ongoing harassment of the student by his peers, through telephone conversations, email correspondence and sit-down meetings. However, those individuals took little action to deter the harassment and imposed no discipline on the harassers.

Based upon these facts, the court held that the parents sufficiently stated a claim that the district acted with deliberate indifference to the student's harassment. Accordingly, the court dismissed the district's motion to dismiss.

## E. Athletics

### 1. *OCR's January 25, 2013 Dear Colleague Letter*

In this Letter, OCR reminded districts that under Section 504, districts must afford students with disabilities ("SWD") an equal opportunity to participate in extra-curricular activities, including athletics. According to OCR, affording SWDs an "equal opportunity" to participate in extracurricular athletics does not mean that *every* student with a disability is *guaranteed* a spot on an athletic team when other students must try out. Rather, districts may require that all students, with and without disabilities must meet the same, non-discriminatory eligibility standards to participate in school sports.

When developing these standards, districts must be cautious not to adopt eligibility standards based upon stereotypes or generalizations regarding disabilities. For example, where a student with a learning disability has met the lacrosse team's eligibility standards, a coach cannot refuse to allow the student on the team based on the belief that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. OCR wrote, "[t]he student, of course, does not have a right to participate in the games; but the coach's decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions)."

OCR encourages districts to consider offering alternative opportunities for sports participation (e.g. wheelchair basketball or tennis), where there are children in the school who are capable of and interested in participating in the modified sport. To encourage sports participation, districts must provide students with disabilities with the aids, services, modifications and accommodations needed to level the playing

field. Provided that these accommodations will not result in a fundamental alteration to the nature of the activity, students with disabilities are entitled to receive them if they enable participation.

2. Section 504 requires districts to make reasonable accommodations, but does not require them to provide accommodations that fundamentally alter the nature of a sporting event.

3. Athletic associations that receive federal funding through their members, those that hold competitions in facilities that receive federal funding, and those that have its coaches employed by schools that receive federal funding are all subject to Section 504. Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 94 F.3d 96 (2d. Cir., 1996).

4. Athletic association could not reasonably accommodate disabled athletes in enforcing its 8-semester eligibility rule; waiving the rule would fundamentally alter its program and pose an undue burden on the organization. Frye v. Michigan High Sch. Athletic Ass'n, Inc., 121 F.3d 708 (6th Cir., 1997); McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453 (6th Cir., 1997).

5. In Festus (MO) R-VI School District, 47 IDELR 17 (OCR 2006), OCR explained that districts do not violate Section 504 or the ADA by limiting participation in a team sport due to skill level. The learning-disabled student alleged that the district's varsity volleyball coach failed to afford her the same opportunity to participate in volleyball activities as non-disabled players, particularly with regard to the amount of playing time and coaching. The student alleged that she was one of the top six players on the team, was the only player with an IEP, and was treated differently by frequently being excluded from games. However, OCR dismissed the complaint because, while the student was a "very capable athlete, she was not considered one of the top six volleyball players by at least three coaches who were familiar with her level of play," and that the amount of playing time the student received was based on the coach's assessment of her skill level.

6. Similarly, in McFadden v. Grasmick, 485 F.Supp.2d 642 (D. Md. 2007), the plaintiff filed suit under Section 504, seeking declaratory and injunctive relief regarding the manner in which the defendants operated the statewide system of track and field competition. McFadden was a student-athlete who used a wheelchair. She alleged that the defendants unlawfully discriminated against her because their rules and protocols for assigning team points in state track and field competition precluded her from earning points for her team. The court denied her motion, because it was unlikely that she would establish that the defendants discriminated against her by maintaining a difference in the opportunity of

wheelchair racers, in contrast to non-wheelchair racers, to earn points for teams. The Maryland Public Secondary Schools Athletic Association (MPSSAA) successfully defended its neutral policy regarding *all* new events, which required that a certain minimum number of other schools must participate before points are awarded in any new event. The policy was designed to prevent any particular team from earning points for winning an event in which there is little or no competition. In his case, the court found that only one or two more schools in three of the larger school systems needed to offer "wheelchair racing" to satisfy the policy's rule in order for the points to count.

7. **2010 Amendment to 8 N.Y.C.R.R. §135.4(d)**

a. Previously, the Regulations of the Commissioner provided a four year limitation on senior athletic competition.

b. However, the Amendment has provided a waiver, which extends the age requirement and four year limitation by one year for students with disabilities who remain in high school for a 5th year.

c. The amendment is designed to offer students with disabilities continued socialization with teammates during practices and games and to further develop the student's skills and abilities associated with his or her participation in such sport, all while assuring the health and safety of the given student and the other students competing in the sport and preserving fair athletic competition. *See* Memorandum from SED on Proposed Amendment of Section 135.4, Relating to the Age Eligibility and Four-Year Limitations for Senior Athletic Competition (December 7, 2010) *available at* http://www.regents.nysed.gov/meetings/2010Meetings/December2010/1210p12a4.pdf.

d. The approval is made on a case-by-case basis and will only be made after a determination is made by the Superintendent or Chief Executive Officer of the School(s) ("CEO") that the student:

i. Has not graduated from high school as a result of his or her disability delaying his or her education for one year or more;

ii. Is otherwise qualified to compete in the athletic competition for which he or she is applying for a waiver and the student must have been selected for such competition in the past;

iii. Has not already participated in an additional season of athletic competition pursuant to a waiver granted under this subclause;

iv. Has undergone a physical evaluation by the school physician, which included an assessment of the student's level of physical development and maturity, and the school physician has determined that the student's participation competition will not present a safety or health concern for such student; and

v. The Superintendent or CEO has determined that the given student's participation in the athletic competition will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

e. Under this amendment, a student's participation in the additional season of athletic competition will not be scored for purposes of competition to ensure fair competition among students who may present different levels of physical maturity ad athletic ability.

f. Waivers will only be granted for non-contact sports (i.e. swimming and diving, golf, track and field, cross country, rifle, bowling, gymnastics, skiing and archery, and any other non-contact sports deemed appropriate by the Commissioner).

g. If the request for a waiver is denied, an appeal may be taken to the NYS Public High School Athletic Association within two weeks from receipt of the decision.

## F. Participation in Accelerated Programs

1. In a guidance letter dated December 26, 2007, OCR clarified a school district's obligations for students with disabilities and their participation in Advanced Placement (AP) and International Baccalaureate (IB) programs, as well as other accelerated programs and classes.

According to OCR, some school districts refused to allow students with disabilities to participate in such programs. OCR also found that some school districts required that students with disabilities who wished to participate must give up special education or related aids and services. However, OCR explained that such practices violate Section 504 because they deny students, on the basis of disability, the same opportunities given to non-disabled students to participate in or benefit from a school district's programs and services. Note also, requiring a student to forfeit special

education programs and services before permitting him/her to participate is a denial of FAPE under IDEA.

Schools need not admit students who are not otherwise qualified to participate in accelerated programs, regardless of disabilities. However, districts may not use any admission criteria that subject qualified students to discrimination on the basis of disability.

Since accelerated programs and classes are considered part of regular education, students with disabilities who are otherwise qualified for the accelerated programs are entitled to the same related aids and services they would receive pursuant to their Section 504 plan. *See*, "Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs" (2007), available at http://www.ed.gov/about/offices/list/ocr/letters/colleague-20071226.html.

## G. Report Cards and Transcripts

Section 504 does not prohibit districts from indicating on report cards that a child is receiving special education or related services. The report cards must provide information about the student's progress, but cannot indicate that the student has an IEP unless it also provides a meaningful explanation for the student's progress. *See* In re: Report Cards and Transcripts for Students with Disabilities, 108 LRP 60114 (OCR, October 17, 2008). However, Section 504 prohibits districts from indicating on a transcript that a student receives special education or related services. Note, transcripts may indicate that the student took a specific class with a modified curriculum. *Id.*