

MEMORANDUM

To: OMNI Institute, c/o Erin Ingoldsby, Ph. D.; and Emily Murillo, MSW

From: The Legal Center for People with Disabilities and Older People (Randy Chapman, Esq.; Alison Daniels, Esq.; and Randy Parcel, Esq.)

Date: December 20, 2013

Subject: Colorado and Federal Statutes and Legal Guidelines re Bullying

I. Introduction

The purpose of this memorandum is to summarize Colorado and federal statutes and guidelines that provide, or may have the potential to provide, legal causes of action or other forms of recourse for persons with disabilities who are victims of bullying. Before listing those specific legal sources, several threshold comments are in order.

First, this memorandum reflects efforts to identify the most relevant statutes and guidelines on this issue, but there certainly may be other authorities that are not listed below. In addition, in the future there may be statutes enacted, regulations promulgated, and court decisions rendered that may either add to or subtract from the sources listed in Part III below.

Second, the sources listed in Part III below are not limited to statutes and other legal guidelines that refer specifically to “bullying”. Research indicates that other types of conduct, such as harassment, which do not fall within a strict statutory definition of “bullying”, can provide a basis for causes of action or other legal recourse for persons with disabilities who are subjected to bullying-type conduct. For example, there is legal support in certain circumstances for an argument that harassment = bullying = discrimination, when the person subjected to that conduct is a person with disabilities. Thus, statutes that refer to discrimination and make no mention of bullying still may provide a basis for relief in certain circumstances when people with disabilities are bullied or harassed.

Third, the summary in Part III below is broken into the following categories: Settings: schools, public accommodations and transportation, housing, employment, services, and criminal liability. Settings then are separated into Colorado and federal statutes and legal guidelines. Finally, certain of those legal guidelines are divided into “Primary” and “Secondary” sources, based upon an admittedly somewhat subjective evaluation of the directness and strength of their applicability to bullying or harassment.

II. Definitions

Ask someone to define “bullying”, and they probably will answer like U.S. Supreme Justice Potter Stewart wrote in 1964 regarding the definition of pornography: “I know it when I see it.” Although no federal statutory definition of bullying has been found, Colorado statutes do provide a specific definition in the context of school law in C.R.S. §22-32-109.1(1)(b):

"Bullying" means any written or verbal expression, or physical or electronic act or gesture, or a pattern thereof, that is intended to coerce, intimidate, or cause any physical, mental, or emotional harm to any student. Bullying is prohibited against any student for any reason, including but not limited to any such behavior that is directed toward a student on the basis of his or her academic performance or against whom federal and state laws prohibit discrimination upon any of the bases described in [section 22-32-109 \(1\) \(II\) \(I\)](#).

It is important to note that the statute referenced above specifically includes in its “bases” a person with a disability or need for special education.

The above definition has a close relationship to, but does not directly overlap, Colorado’s definition of “harassment” in its criminal code in C.R.S. §18-9-111(1)(h), which provides in part:¹

(1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she:

.....

(e) Initiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene; or

.....

(h) Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to, another in a manner likely to provoke a violent or disorderly response.

Because of the close relationship between the two definitions, and also because courts often do not distinguish between bullying and harassing conduct in their decisions, the listings in Part III below include statutes that address both types of conduct with respect to persons with disabilities.

¹ This definition is contained in Colorado’s general criminal code, and is not directly related to persons with disability.

III. Statutes and Other Legal Authorities

A. Schools

(1) Colorado Laws

(a) Primary:

(i) **C.R.S. §22-32-109.1**—This statute requires school boards to develop plans and policies concerning bullying prevention, reporting systems for incidents of bullying, and related safety plans. Also requires disciplinary actions for both students who bully and those who take retaliatory actions [subpart (2)(a)(i)(K)]; and contains specific reporting requirements [subpart (2)(b)(IV)(G)].

(ii) **C.R.S. §§22-30.5-116 & 22-30.5-501, et seq.**—This statute requires state charter schools to develop plans and policies similar to those described in (i) above.

(b) Secondary:

(i) **C.R.S. §§22-93-101, et seq.**—This statute provides for a school bullying prevention and education grant program and an education “cash fund”, but then provides in C.R.S. §22-93-105 (3) and (4) that no general fund moneys will be appropriated for that fund and that the Department of Education is not required to solicit money for that purpose.

(ii) **C.R.S. §22-32-144**—This statute contains aspirational statements regarding schools’ uses of “restorative justice” with respect to, e.g., bullying.

(iii) **C.R.S. §22-33.5-1803**—This statute creates within the DOE a “school resource safety resource center”, to assist schools in, *inter alia*, bullying prevention and education.

[NOTE: Most of the above statutes are the result of Colorado HB11-1254, enacted in 2011].

(2) Federal Laws and Guidelines

(a) Primary:

(i) **U.S. Department of Education “Dear Colleague” Letters**--Since 2000, the United States Department of Education has issued three “Dear Colleague” letters on the subject of bullying and harassment in schools: OCR letter dated July 25, 2000; OCR letter dated October 26, 2010; and OSERS letter dated August 20, 2013. Collectively, these letters refer to most of the specific federal statutes listed below.

(ii) **20 U.S.C. §§1400, et seq.—The Individuals with Disabilities Education Act (“IDEA”).** “[A]ny bullying of a student with a disability that results in the student not

receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.” OSERS letter dated August 20, 2013, pages 2-3. Further, in situations where a student has not yet been identified as a child with a disability under the IDEA, a school’s child find obligations may be triggered by the bullying of that child. *Id.* at p. 2, citing 34 C.F.R. §§300.11 & 300.201.

(iii) **29 U.S.C. §794 (“Section 504”)**—This statute makes it unlawful for employers and organizations (including but not limited to schools) that receive federal financial assistance to discriminate against persons with disabilities. Although the statute makes no specific reference to bullying or harassment, the Office of Civil Rights of the U.S. Department of Education has stated: “Disability harassment is a form of discrimination prohibited by Section 504....” OCR letter dated July 25, 2000, page 1.

(iv) **42 U.S.C. §§12131, et seq. (Title II of Americans with Disabilities Act [“ADA”])**—This statute prohibits discrimination against people with disabilities by state and local agencies (including school districts), departments, special use districts and other instrumentalities (including public institutions of higher education, whether or not they receive federal funds). The statute makes no specific reference to bullying of persons with disabilities, but footnote 2, page 1 of the OSERS letter dated August 20, 2013, makes reference to this statute as a possible source of “additional responsibilities”.

(v) **Case Law Research Source**—For further research of leading court decisions discussing the applicability of federal statutes in cases that involve bullying or harassment in schools, see Randy Chapman’s Ability Law Blog at <http://randychapman.wordpress.com>, and under “Search” enter bullying.

(b) Secondary:

(i) **42 U.S.C. §§2000d, et seq. (Title VI of Civil Rights Act of 1964 [“CRA”])**—This statute prohibits discrimination on the basis of race, color, sex, religion, or national origin in programs and activities receiving financial assistance. This statute makes no reference to persons with disabilities, but is referenced in the OSERS letter described in (a)(iv) above.

(ii) **20 U.S.C. §§1681, et seq. (Title IX of Educational Amendments of 1972)**—This statute prohibits sex discrimination in education programs or activities that receive federal financial assistance. Again, this statute makes no reference to persons with disabilities, but is referenced in the OSERS letter described in (a)(iv) above.

B. Public Accommodations and Transportation

(1) Colorado Laws

(a) Primary: C.R.S. §24-34-701—This statute makes it unlawful for an operator of a public accommodation, resort or amusement to publish or circulate any written or other materials that are intended to discriminate against a person because of his or her disability, as well as other

grounds, e.g., race or religion. Although the statute does not specifically mention bullying or harassment, one can reasonably argue that such activities constitute such conduct.

(b) Secondary: **C.R.S. §24-34-601**—This statute makes it unlawful to discriminate against persons with disabilities in places of public accommodation, including transportation. The statute makes no reference to bullying or harassment, but if the actions of the person who is in charge of the accommodations constitute such conduct, a claim may be possible, using the rationale that “disability harassment is a form of discrimination...” per the July 25, 2000 OCR letter, paragraph III.A(2)(a)(iii) above. This rationale will be referenced below in discussions of other statutes as the “2000 OCR Rationale”.

(2) Federal Laws—Secondary: The statutes below make no specific reference to bullying or harassment, but claims may be possible under the 2000 OCR Rationale.

(i) **42 U.S.C. §§12131, et seq. (Title II of ADA)**—In addition to the institutions described in paragraph III.A(2)(a)(iv) above, this statute makes it unlawful to discriminate against persons with disabilities by public transportation services, including city buses and public rail transit.

(ii) **42 U.S.C. §§12181, et seq. (Title III of ADA)**—This statute makes it unlawful to discriminate against persons with disabilities by public accommodations, which include places of lodging, entertainment and recreation; private educational institutions; medical and dental facilities; retail and grocery stores; and fitness centers.

C. Housing

(1) Colorado Laws—Secondary: **C.R.S. §§24-34-501, et seq.**—This statute makes it unlawful to discriminate against persons with disabilities in various types of housing transactions, such as showing, renting, selling and leasing of housing. The statute makes no specific reference to bullying or harassment, but a claim may be possible under the 2000 OCR Rationale.

(2) Federal Laws:

(a) Primary: **42 U.S.C. §§3631, et seq. (“Fair Housing Act”)**—This statute provides for criminal penalties for intimidation or attempts to intimidate a person regarding housing because of that person’s “handicap”. Bullying and harassment likely would qualify as such conduct. The statute also applies to persons who intimidate or attempt to intimidate persons who are providing assistance to or protection of a person with a “handicap”. The United States Supreme Court has held that this term has the same substantive meaning as “disability”. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

(b) Secondary: The statutes below make no specific reference to bullying or harassment, but claims may be possible under the 2000 OCR Rationale.

(i) **29 U.S.C. §794 (“Section 504”)**--This statute makes it unlawful for employers and organizations that receive federal financial assistance to discriminate against persons with disabilities. This would include the United States Department of Housing and Urban Development (“HUD”).

(ii) **42 U.S.C. §§12131, et seq. (Title II of the ADA)**—This statute makes it unlawful for state and local governments, including public housing authorities, to discriminate against persons with disabilities. See in particular 28 C.F.R. §35.150.

D. Employment

(1) Colorado Laws:

(a) Primary: **C.R.S. §24-34-402**—This statute makes it unlawful for an employer to harass or discriminate against an employee with a disability, with respect to compensation, terms and privileges associated with that employment.

(b) Secondary: **C.R.S. §8-2-124**—This statute makes it unlawful to use the federal government’s “e-verify program” to discharge, demote or otherwise discriminate against a person on the basis of that person’s disability.

(2) Federal Laws-Primary—**42 U.S.C. §12112(a) (ADA) & 42 U.S.C. §2000e-2(a) (Title VII of CRA)**—Two important federal court decisions have held that disability-based harassment in the workplace is actionable under the ADA, similar to the claim typically raised by employees under Title VII of the CRA. See *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001); and *Flowers v. Southern Regional Physician Services Inc.*, 247 F.3d 229 (5th Cir. 2001).

E. Services

Colorado-Primary: The statutes listed below become effective March 1, 2014, replacing current developmental disability statutes at C.R.S. §§27-10.5-115, *et seq.*

(i) **C.R.S. §25.5-10-221(2)**—This statute requires all service agencies to prohibit, *inter alia*, mistreatment or abuse of any person with intellectual or developmental disabilities who is receiving services.

(ii) **C.R.S. §25.5-10-230**--This statute makes it unlawful to discriminate against a person who is receiving developmental disabilities services on the basis that the person is receiving those services.

(iii) **C.R.S. §25.5-10-240**—This statute makes it unlawful to discriminate any person who has made a complaint or participated in a proceeding under the developmental disabilities statute.

(iv) **C.R.S. §25.5-10-236**—This statute provides that a violation of any of the statutes in (i), (ii) or (iii) above—or any other provisions of Article 10 of Title 25.5—gives rise to a civil cause of action by person adversely affected by the violation, including reasonable attorney fees.

F. Criminal Liability

(1) Colorado-Primary:

(i) **C.R.S. §18-9-121**—This statute imposes criminal liability for intimidation or harassment of a person because of his or her physical or mental disability.

(ii) **C.R.S. §18-19-111**—This statute imposes criminal liability for a wide range of harassing conduct. The statute is not specifically directed to persons with disabilities, but should be read in parallel with statute in (i) above because it covers some activities not included in (i).

(2) Federal—Secondary: **18 U.S.C. §249 (“Matthew Shepard Act”)**—This statute provides for criminal penalties for persons who willfully cause or attempt to cause bodily injury by use of firearms or other dangerous weapon to another person because of that person’s disability or other personal characteristics such as sexual orientation. It is important to note that threats to cause bodily harm do not violate this statute, whereas, for example, such threats probably would give rise to liability under the Fair Housing Act, discussed in III.C(2)(a) above.