

LEADERSHIP Insider

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PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

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School bullying poses legal issues for school boards

By Sonja Trainor

The issue of peer-to-peer bullying and harassment has reached a critical moment for school boards. Educators, parents, community members, and government regulators all seem to recognize that peer bullying can have dire consequences. Most agree that, as U.S. Secretary of Education Arne Duncan and President Obama point out, it is not an acceptable rite of passage for children.

What remains unclear is the extent to which schools and their officials should be held accountable for the harm that bullying causes, and to what degree the First Amendment allows school districts to regulate what students say to one another.

As media reports proliferate about desperate youth choosing to end their own lives after being bullied, states and school districts

have reacted with anti-bullying laws and policies. At press time, 46 states have anti-bullying laws. Many states have revised and strengthened their laws to include more conduct (i.e., cyberbullying), prescribe more procedures, institute reporting requirements, and require parental notice of incidents.

Also with the increased awareness of the devastating effects of bullying has come an increase in reported legal complaints filed against school districts. Between June 2010 and June 2011, NSBA's Legal Clips covered 18 different bullying actions against school districts either filed by parents or decided by courts. As these are the "tip of the iceberg"—cases that receive press coverage—the number of cases actually filed or decided is likely much higher.

Thus far, bullying and harassment victims tend not to win many cases against school districts unless they have a federal civil rights

claim in which the school district is found to have been deliberately indifferent to severe, pervasive, or objectively offensive conduct based on race, sex, or disability. School attorneys Séamus Boyce and Andrew Manna provide in their article below an overview of the harassment standard courts currently apply. There is some indication, however, that courts may loosen that standard. (See the sidebar on *T.K. v. New York City Dep't of Educ.* on page IV)

Courts are also putting the brakes on extreme disciplinary measures taken by districts against harassers or bullies, whose words have First Amendment protection in some cases. Read school attorney Karla Schultz's article on page III for useful tips on handling bullying situations without violating the First Amendment. This issue of *Leadership Insider* provides you with tips and tools to help you arrive at the right policy for your district at this crucial moment.

School Liability for Bullying & Harassment

By Séamus P. Boyce & Andrew A. Manna

Think your school district cannot be held liable for student bullying? Think again. Victims of bullying and their families have a number of potential claims against school districts and officials. As a school leader, you need to be informed on the standard of liability so you can take steps to avoid losing a lawsuit. While many other legal issues can arise from incidents of student bullying, including investigations conducted by the U.S. Departments of Education and Justice, we are focusing on civil liability in our analysis below.

The five-part harassment test

Peer harassment liability for schools is not new. Schools have been on notice for many

years that, if they fail to address incidents of harassment, they are at risk of being liable for the harm caused. Only in the last decade, however, has the harassment cause-of-action evolved into the primary liability standard for student bullying.

Although each jurisdiction has its nuances, schools generally are held to what we refer to as the "five-part test of liability for peer harassment." This test has evolved from the standard for Title IX peer sexual harassment.

1. **The student is a member of a statutorily protected class.** Under federal civil rights laws, protected classes are gender, race, and disability. This part of the test is generally simple to assess and courts do not spend much time on it.

2. **The peer harassment is based upon**

the protected class. Is the student being harassed because of gender, race, or disability? This analysis is not as easy as it might sound. For example, several courts have ruled that harassment of a victim who does not con-

HOW DOES YOUR STATE LAW COMPARE?

Only Montana, Michigan, South Dakota, and Hawaii do not have laws specifically dedicated to the issue of peer bullying, although Michigan's state education agency has a detailed model anti-bullying policy. Many states with existing laws have modified them in recent months.

Check out NSBA's online charts addressing state anti-bullying statutes: www.nsba.org/SchoolLaw/Issues/Safety/Resources/Table.pdf and www.nsba.org/SchoolLaw/Issues/Safety/Resources/Definitions.pdf.

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About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands. For more information, visit www.nsba.org/na.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join, provided they are members in good standing of their state school boards associations.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for the exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

form to gender stereotypes may be actionable sex-based harassment under Title IX.

3. **The harassment is severe, pervasive, and objectively offensive.** This is a fact-driven analysis that often balances the shocking conduct of the harassment versus its frequency. For example, sexual assault

does not need to occur numerous times for this part of the test to be satisfied.

4. **A school official with authority to address the harassment has actual knowledge of it.** The school has to know about the harassment for liability to exist under the five-part test.

WHITE HOUSE AND U.S. DEPARTMENT OF EDUCATION FOCUS ON BULLYING AND HARASSMENT IN SCHOOLS

The Obama administration has paid unprecedented attention to the issue of bullying and harassment in public schools, as the timeline below shows.

- August 2010: The first White House Summit on Bullying is held. NSBA Executive Director Anne Bryant attends. The Department of Education announces its website, www.stopbullying.gov a comprehensive "one stop" site for resources on bullying and prevention. Education Secretary Arne Duncan asserts that a "reinvigorated Office for Civil Rights [OCR] means complaints of bullying and harassment will be vigorously investigated." Duncan also notes the Safe and Supportive Schools pilot program, which aims to help states to measure school safety and to intervene at schools with the greatest need.

- October 2010: The OCR issues guidance in the form of a "Dear Colleague" letter "clarifying" when peer bullying may constitute discriminatory harassment in violation of federal civil rights laws. Read the letter at www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

- December 2010: NSBA General Counsel Francisco Negrón submits a letter to the Department of Education expressing concern that the "Dear Colleague" letter, which appears to broaden the scope of possible civil rights violations for which school officials may be held accountable, would have many unintended consequences and could be extremely difficult for schools to implement. Read that letter here: <http://legalclips.nsba.org/?p=3588>.

Duncan publishes a memorandum to state leaders outlining key

components of strong state anti-bullying laws and policies. Read that memorandum here: www2.ed.gov/policy/gen/guid/secletter/101215.html. The Federal Partners in Bullying Prevention Task Force calls for submissions from the public of field-based practices to combat bullying.

- March 2011: The White House Conference on Bullying Prevention is held. NSBA then-President Earl Rickman attends. Duncan, President Obama, and First Lady Michelle Obama stress that bullying is not a normal rite of passage and that we have an obligation to ensure that schools are safe.

The OCR responds to NSBA's concerns about its "Dear Colleague" letter, taking issue with NSBA's assertion that the letter could invite misguided litigation, and states that the vigilance it encourages should help insulate schools from liability. To read the dialogue between the OCR and NSBA, go to <http://legalclips.nsba.org/?p=5708> and follow the links under the editor's note.

- May 2011: The office of Sen. Tom Harkin (D-Iowa) announces that Harkin, who is chairman of the Senate Health, Education, Labor and Pensions Committee, and Sen. Kirsten Gillibrand (D-N.Y.), have introduced The Successful, Safe, and Healthy Students Act of 2011 (SSHSA), SB 919. If passed, it would authorize \$1 billion for grants to states to develop comprehensive, data-driven, and evidence-based programs to advance student achievement by promoting student health and wellness, preventing bullying, violence, and illegal drug use, and fostering a positive school climate.

5. **The school is deliberately indifferent to the harassment.** This fifth and final part of the test is the most important, because it is where schools have control. Even if the school knew of the severe, pervasive, and objectively offensive harassment because of protected class, the school will not be liable under the five-part test unless it was *deliberately indifferent* to the harassment. Similarly, even if the judge might have handled the situation differently, the school will not necessarily be found to be deliberately indifferent. What is important is that the school took reports of harassment seriously, investigated, and took action to address the harassment.

Other types of liability

The five-part test is what has gained the most traction in harassment and bullying cases brought against school districts and their officials, but schools need to be aware of other theories that have been used.

Families often try to claim constitutional violations, such as violation of due process or a student's right to equal protection under the law. These types of claims have not had much success. Because these claims argue that a student was treated differently from others in violation of recognized rights, however, courts may adopt a test similar to the five-part harassment test when analyzing them.

Schools also should be aware of legal claims under state law. The most common state law claim is negligence in its various forms, including allegations that the school negligently supervised the students or trained its personnel. A plaintiff will often allege negligence in addition to a claim of

harassment because it does not require actual knowledge.

Depending on the immunity available in the jurisdiction, potential liability exists for school districts and their officials in a negligence suit. If, for instance, a court defines the duty of supervision at high school to include supervising student conduct in the locker room, and the school failed to have any supervision in the locker room, there may be liability for negligence for acts of bullying that occur there.

In addition to negligence, bullying lawsuits often cite state anti-bullying laws as a basis for liability. None of these attempts have led yet to liability, but we do not see the effort waning. As bullying statutes become more detailed in their procedural requirements, thereby removing school officials' discretion to address bullying incidents on a case-by-case basis, we may see courts decline to award immunity to school officials who fail to follow statutory procedures.

Tips to avoid liability

To avoid liability, it is important to follow a few simple rules of thumb. First, develop and implement an effective policy. Schools should have a solid system for bullying reporting that is adequately communicated to students, parents, and staff.

Each report of bullying should be taken seriously and investigated. If the report is substantiated, the school should address the bullying and monitor progress toward elimination of the conduct as well as similar conduct toward the victim and other vulnerable students by the bully and others.

If the action plan is not working, try

something else. Of course, documentation is absolutely necessary. Records should be placed in the files of the victim and the bully.

We encourage you to consult your district's legal counsel regarding the evolving requirements of state and federal law in this area. These steps will help keep the school out of court and, more importantly, will go a long way toward addressing the problem of peer bullying.

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NSBA HELPS YOU GET THE CONVERSATION STARTED

NSBA is developing a tool kit called "Students on Board: A Conversation Between School Board Members and Students." The tool kit, designed to support the Pearson Foundation's Million Voice Project, helps board members discuss school climate issues with students. In it, school board members will receive practical, straightforward guidance on how to effectively gauge the school environment from one of the best sources available: the students. Are you interested in starting this crucial conversation in your district? For more information about the program, visit www.nsba.org/studentsonboard.

Free to Be Mean?

What are the First Amendment rights of bullies?

By Karla Schultz

Bullying is a hot topic in education right now. Increasingly, state legislatures are passing mandates for defining and addressing bullying. From the media, interest groups, and even the federal government come demands for schools to swiftly and definitively address mean conduct and speech by students.

But some decisions coming from the fed-

eral courts also are sending the message that anti-bullying measures could impinge on students' First Amendment rights. In other words, sometimes students are "free to be mean." This results in districts finding themselves in the lose-lose situation of potentially being sued both by the victim *and* the perpetrator of harassing or bullying conduct.

Public school officials have the authority to regulate student expression that causes, or is reasonably likely to cause, a material and substantial disruption. They also can regulate speech that is lewd, obscene, vulgar, defamatory, drug promoting, fighting words, true threats, and school-sponsored. Add to this mix the expectation under federal law that schools prohibit discriminatory speech or conduct aimed at students because of their race, national origin, sex,

or disability.

As the U.S. Department of Education's Office for Civil Rights (OCR) recently exhorted school districts in an October 2010 Dear Colleague letter: "... by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment." However, in that same letter, the OCR pointed out, without further guidance for schools, that "[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression."

Recently, some federal court decisions have put public schools on the losing end of that understatement because, as one court noted, there is no "categorical

WHAT ABOUT CYBERBULLYING?

The U.S. Court of Appeals for the Third Circuit in June issued two decisions *en banc* (all justices taking part), finding that the school district defendant had violated the student's free speech rights by disciplining that student for off-campus online speech.

Although these cases address off-campus student speech directed at school administrators, not fellow students, the decisions indicate courts' general reluctance to allow public schools to regulate students' off-campus speech that has little effect on campus.

Summaries of the two decisions, *J.S. v. Blue Mountain School Districts and Layshock v. Heritage School District*, are available at www.legalclips.nsba.org. Stay tuned: The parties are likely to petition the U.S. Supreme Court to consider these cases.

STANDARD OF LIABILITY

In April, a federal district court in New York applied a broad standard of liability to the New York public schools in the case of *T.K. v. New York City Dep't of Educ.*, No. 10-752 (E.D. N.Y. Apr. 26, 2011).

The court found that a disabled student had stated a valid claim that she was denied a free appropriate public education as required by federal law based on school officials' failure to remedy disability-based peer bullying and harassment.

Incorporating the standard set out in OCR's October, 2010 "Dear Colleague" letter, the court said: "When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education," "a school must take prompt and appropriate action." This is the first known application of the OCR's October, 2010 "Dear Colleague" guidance in a federal court.

At least in the disability arena, school districts should be aware that the standard of liability for peer harassment may be getting easier for plaintiffs to meet.

'harassment exception'" to the First Amendment's free speech clause.

First Amendment protections

It has long been recognized outside of the school setting that the protections of the First Amendment include the protection of what would usually be considered offensive speech. In 2001, now U.S. Supreme Court Justice Samuel Alito offered a reminder of that protection when he wrote for the Third Circuit that "[T]here is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another race or national origin or that denigrate religious beliefs." *Saxe College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001).

In *Saxe College*, the Third Circuit struck down as overly broad and unconstitutional a school district's anti-bullying policy. Two Christian parents claimed it violated their child's right to speak out against and distribute literature condemning homosexuality.

More recently, the Seventh Circuit court of appeals reiterated that point in the case of the student who wore a "Be Happy, Not Gay" T-shirt to express her religious disapproval of homosexuality: "... a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality ..." *Zamecnik v. Indian Prairie School Dist. #204* (7th Cir. 2011). As that court said, "people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life."

On the other hand, the Ninth Circuit court of appeals upheld the discipline of a student who wore a T-shirt to school on the "Day of Silence" bearing the words, "I will not accept what God has condemned" on the front and "Homosexuality is shameful 'Romans 1:27'" on the back because the court said the message "collided with the rights of other students." *Harper v. Poway Unified School District* (2006).

However, a district court in the Ninth Circuit said a California school district could not discipline a student who posted, outside of school, a YouTube video that called another student a "slut" and other insults. In that case, the court said that, because the conduct was off-campus and there was no substantial disruption at school, it did "not wish to see school administrators become censors of students' speech at all times, in all places, and under all circumstances." *J.C. v. Beverly Hills Unified School District* (2010).

Guidelines for school leaders

With conflicting court opinions, plus very strong guidance from the OCR, how should

a school address bullying while at the same time avoid suit from the alleged bully? I offer the following general guidelines, with the caveats that each situation will be unique and it is always a good idea for districts to involve their legal counsel.

1. Follow the OCR guidance.

- Even though it is overly broad, the guidance provides a useful template for investigating and addressing harassing or bullying conduct.

- As a reminder of the benefit of this approach, a federal district court recently ruled that a school district denied a student a free appropriate public education under the Individuals with Disabilities Education Act for failure to remedy disability-based peer bullying and harassment. The court rested a portion of its analysis on the OCR guidance. (See Standard of Liability.)

2. Focus your policies on those classes of individuals protected under federal and state anti-discrimination laws.

- The *Saxe* case from the Third Circuit acknowledged that a school district must comply with the law, but when an anti-bullying policy extends beyond the already existing legal protections, then there may be a First Amendment problem.

3. When determining whether to discipline a student, ascertain whether there is an actual or reasonable forecast of substantial disruption. If not, look for solutions that do not involve discipline.

- It is usually better to discipline disruptive conduct and speech than to discipline merely on the content of the speech.

- Also remember that on-campus student speech that is lewd, vulgar, obscene, drug-promoting, and/or threatening may generally be disciplined.

4. When a bullying complaint is made, don't do nothing, don't do too much.

- Districts tend to run into problems in the courtroom because the administration did very little to address or follow up on alleged bullying, or because the district overreacted and imposed excessive discipline on the student.

5. Have respected anti-bullying programs in place.

- There is no one "best" program, but having an anti-bullying program in place helps ensure that students and staff understand what is prohibited, as well as how to report and address prohibited conduct.

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