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Bullies In the Schoolyard and Beyond: Avoiding and Defending Federal Bullying Claims Against Schools and School Leaders

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Bullies are everywhere. Anyone reading this page who survived childhood can surely attest to this. And any parent or guardian reading this page who has or cares for school-aged children certainly knows that the bullies have not gone away. In "Preventing Bullying" factsheet for 2020, the Center for Disease Control and Prevention ("CDC") states that bullying is "a form of youth violence and an adverse childhood experience" and defines bullying as "any unwanted aggressive behavior(s) by another youth or group of youths, who are not siblings or current dating partners, that involves an observed or perceived power imbalance, and is repeated multiple times or is highly likely to be repeated." And the CDC notes that bullying "may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm."

Bullying in school today is not quite what we remember from our own childhoods, however. Sure, the mean comments, pushing and shoving, stealing of personal belongings and occasional fights in the hallways and school yard still occur as they always have (for me, Ralphie from "A Christmas Story" and his daily run-ins with bullies Scut Farkus and Grover Dill always come to mind). Yet, with the ubiquity of social media and how it pervades almost every aspect of our children's lives, the opportunity is there for bullies to target their peers 24/7, both in and out of school, in person and online. Indeed, the CDC recognizes that in addition to the common types of bullying we know (physical, verbal, social/emotional and damage to personal property), "[b]ullying can also occur through technology, which is called electronic bullying or cyberbullying."

In reviewing data from the prior year, the CDC stated in its 2020 factsheet that about 1 in 5 high school students reported being bullied on school property, and more than 1 in 6 high school students reported being subjected to cyberbullying. Also according to the CDC, nearly 14% of public schools reported that bullying is a discipline problem occurring daily, or at least once a week. Reports of bullying are highest in middle schools (28%), followed by high schools (16%), combined schools (12%), and primary schools (9%). And reports of cyberbullying are highest in middle schools (33%) followed by high schools (30%), combined schools (20%), and primary schools (5%).

Because bullying remains a troubling reality for our children, schools and school personnel are, for the most part, particularly attuned to bullies, and in responding to reports about bullying. Many schools today have formal anti-bullying policies and complaint reporting procedures in place, and school personnel are being trained on how to respond to and investigate bullying complaints, as well as how to counsel both the victim and the bully. Yet, students and their caregivers often feel that their schools are not sufficiently responsive to their complaints, or that schools are not doing enough to prevent bullying altogether. This in many cases leads to federal litigation against the school entities and their administrators and personnel, and this litigation customarily takes several forms.

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The Civil Rights Bullying Complaint Under 42 U.S.C. §1983

Quite often when bullying-related lawsuits are filed at the federal level, they are brought through §1983, typically as Procedural Due Process, Substantive Due Process and/or Equal Protection claims under the 14th Amendment. Section 1983 is a preferred and attractive mechanism for plaintiffs because in addition to being able to sue the school entity itself, plaintiffs also are able to sue school officials and employees in their official and individual capacities for money damages. Of course, §1983 allows for fee-shifting to the prevailing party, which is enticing to attorneys as well.

These cases often involve a similar fact pattern: the parents or guardians claim their child was regularly bullied and harassed by other students; that the school and its personnel knew or should have known about the bullying and harassment but failed to take appropriate action; and that the school's failure to adequately address the bullying and harassment of students, according to its formal policy or otherwise, resulted in harm to the student that was tantamount to a violation of the student's 14th Amendment rights.

Monell-style claims against the school entity itself often accompany the Due Process and Equal Protection claims as well. It is common to see in these suits an allegation or separate count that a school's policy, practice, or custom was the "moving force" behind the Constitutional violation, or that a school administrator with supervisory authority and personal involvement in the bullying investigation failed to employ a specific supervisory practice or procedure to correct a known unreasonable risk of Constitutional harm, i.e., to prevent bullying.

These cases usually turn on whether the plaintiff can show the school and its personnel were "deliberately indifferent" to the student's rights, or, in the context of a Substantive Due Process claim, whether the school's action, or failure to act, "shocks the conscience." And, in addition to any substantive defenses to the claims that might be available, individual school officials and employees may enjoy qualified immunity if they can show that the performance of their discretionary functions (e.g., the manner by which they conducted a bullying investigation) does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known.

The ability for schools to prevent bullying (or defend against bullying claims) occasionally can be even more daunting, particularly in cases when a creative lawyer advocates for the 1st Amendment rights of the bully. For example, in *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020), a high school suspended a sophomore student plaintiff because she anonymously posted a sticky note on a mirror in girls' bathroom that stated "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS." The note did not identify the alleged rapist or victim by name. School personnel investigated the note after another student brought it to them. School personnel believed they determined who the intended target of the note was and concluded the note constituted bullying under the school's policies, which warranted a three-day suspension of the student. The student and her parents filed suit and sought preliminary injunctive relief, arguing in part that the school's intent to suspend the student violated her 1st Amendment free speech rights. The trial court granted the student preliminary injunctive relief, concluding in part that the note was tantamount to political speech as it was a criticism of how the school handled sexual assault. On appeal, the First Circuit affirmed, albeit on slightly different grounds, reasoning the "sticky note communicated its message in written words and so it plainly constitutes 'pure speech,' which 'is entitled to comprehensive protection under the First Amendment." *Id.* at 24. In relying upon a litany of United States Supreme Court 1st Amendment cases, the First Circuit also reasoned that the school was unlikely to succeed on the merits of the case, because the "sticky note contained no speech that could be viewed as 'offensively lewd' or indecent'… nor did it reference any drug use… [and] a sticky note posted by a student in a student bathroom is not reasonably viewed as school sponsored." *Ibid.*

The ability for schools to monitor and discipline a student for online activity (cyberbullying or otherwise) can be very challenging, particularly when the activity occurs off school premises, not during school hours, and while using a personally-owned device, and consequently disciplinary overreach by school personnel, even with good intentions, occasionally leads to 1st Amendment claims under §1983 as well. By way of illustration, in *B.L. v. Mahanoy Area Sch. Dist.*, 964 F. 3d 170 (3rd Cir. 2020), a disgruntled cheerleader who failed to make the varsity squad as a sophomore vented her frustrations by posting a rude photo and comments about the team to her Snapchat account one Saturday while visiting a local store. Unsurprisingly, this post quickly made its rounds through school and was reported to the cheerleading coaching staff, who swiftly removed the student from the JV squad for the year for violating team rules.

The student and her parents appealed to school district administrators and the school board to overturn the decision, but to no avail. So, they turned to §1983, and filed suit claiming her suspension from the team violated her 1st Amendment rights; that the school and team rules she was said to have broken were overbroad and viewpoint discriminatory; and that those rules were unconstitutionally vague. The trial court and later the Third Circuit agreed, concluding that the student's snap and commentary, however vulgar, were protected speech. Specifically, the Third Circuit found that the snap was "off campus" speech that fell outside of the school context, reasoning the speech did not take place in a school-sponsored forum, or in a context that "bears the imprimatur of the school," nor was it a case in which the school operated the online forum. "Instead, B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school." *B.L.* 964 F. 3d at 180. Consequently, the Third Circuit concluded the school could not discipline the student for her snap.

Still, the result of *B.L.* may have been different if the student's snap and comments involved bullying, threats of violence, or harassment toward another student: "Nor are we confronted here with off-campus student speech threatening violence or harassing particular students or teachers. A future case … involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law." *B.L.*, 964 F. 3d at 190. "[O]ur opinion takes no position on schools' bottom-line power to discipline speech in that category. After all, student speech falling into one of the well-recognized exceptions to the First Amendment is not protected." *Ibid.*

The Title IX Bullying Complaint

Claims under Title IX of the Education Amendments of 1972 ("Title IX") find their way into federal bullying lawsuits as well, and they often go hand-in-hand with §1983 claims. This is not surprising. Sex-based bullying is prevalent. In 2020, the CDC reported that about 30% of female high school students, and 19% of male high school students, experienced bullying at school or electronically in the prior year. No child is immune from bullying, regardless of sex.

Title IX expressly states that "[n]o person . . . 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(a). In any Title IX case, a plaintiff must prove that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program (i.e., a public school); that the program receives federal assistance (most public schools do); and that the exclusion was on the basis of sex. And in the context of a bullying case in particular, a plaintiff must prove that the sexual harassment was severe, pervasive, and objectively offensive; and that the school district had actual knowledge of the sexual harassment.

Like the §1983 cases, Title IX cases very often turn on the "deliberate indifference" standard. For example, when schools take little to no action, or ineffective action, in response to a bullying complaint and as a consequence fail to

prevent the harassment, Title IX plaintiffs can prevail. Also, in cases when schools have policies or take action that allow students of one sex to be particularly more vulnerable to harassment or bullying (e.g., only punishing the conduct when the bully is caught in the act), courts will find the school was "deliberately indifferent" to bullying and peer harassment. Deliberate indifference is a lofty standard, however, and schools and school personnel may avoid Title IX liability even if the harm to the harassed student ultimately is not averted, as long as they responded reasonably to the perceived risk. As the Sixth Circuit in *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) explained, schools are "not required to 'remedy' sexual harassment nor ensure that students conform their conduct to certain rules." Rather, the school "must merely respond to known peer harassment in a manner that is not clearly unreasonable.'" *Ibid.*

The Due Process Complaints Under IDEA and §504

Bullying claims can manifest as well in administrative due process complaints brought on behalf of an eligible child with a disability under the Individuals with Disabilities Education Act ("IDEA") and/or §504 of the Rehabilitation Act of 1973 ("§504"). These cases, particularly on appeal on federal court, also may include related claims under the Americans with Disabilities Act ("ADA"). In very broad terms, Hearing Officers, Administrative Law Judges and federal courts (on appeal) hearing these cases frequently are tasked with determining whether a school has denied a student the right to a Free Appropriate Public Education ("FAPE").

In its August 20, 2013 "Dear Colleague" Letter, the U.S. Department of Education's Office of Special Education and Rehabilitative Services made clear that "any 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." Likewise, in its October 21, 2014 "Dear Colleague" Letter, the U.S. Department of Education's Office for Civil Rights ("OCR") stated that the "bullying on any basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied." OCR also explained in its 2014 Letter that when it is tasked with investigating bullying claims, and whether the conduct resulted in the denial of a FAPE, it will consider whether (1) a student was bullied based on a disability; (2) the bullying was sufficiently serious to create a hostile environment; (3) school officials knew or should have known about the bullying; and (4) the school did not respond appropriately. Hearing officers and courts may consider these factors too. Thus, in evaluating whether a school responded appropriately to bullying of a student with special needs, the tribunal will consider whether, and to what extent, the bullying adversely affected the student's ability to access a FAPE or, stated otherwise, whether the student was denied a FAPE as a consequence of bullying.

There must be direct link between bullying and a child's receipt of FAPE in order successfully prove bullying as an IDEA/§504/ADA claim in this context. The fact that the student was bullied does not necessarily constitute a violation unless the bullying prevented the student from deriving a meaningful benefit from his or her education. In *Shore Reg'l Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004), for example, the Third Circuit explained that a child's "legitimate and real fear" of an educational placement caused by bullying can render that placement inappropriate. Evidence used to establish this "legitimate and real fear" may include documentation of persistent abuse, documentation of psychological diagnoses that are directly attributable to that abuse, and expert testimony directly linking the child's mental state to the provision of a FAPE.

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Tips for Avoiding Bullying Litigation

- Schools and school leaders should develop and implement a thorough and comprehensive anti-bullying/ cyberbullying policy and complaint reporting policy that satisfy federal and state standards.

- Schools and school leaders should train their personnel on how to identify students who may be the victim of bullying, and how to respond to and investigate complaints of bullying.

- When school personnel are notified of a bullying complaint (either through a formal reporting process, or even less formally), they must conduct a prompt, thorough and complete investigation. At a minimum, school personnel must interview the victim, the bully, and any key witnesses, and review surveillance video and social media activity (when appropriate).

- School personnel should offer and provide counseling and other services to the victim, and any other students who in some way may have been adversely affected by the bullying.

- School personnel should administer discipline when appropriate and take reasonable steps to prevent the bullying from recurring (e.g., separating the bully and victim in school and school-sponsored activities).

- In the case of an eligible student who receives services through an Individualized Education Plan ("IEP") or §504 Service Plan, the school should reconvene the student's IEP/§504 team and determine whether the bullying has adversely affected the student and the student's access to education, and evaluate whether the Plan should be revised or updated to address the student's needs.

Litigation as a result of bullying is sometimes unavoidable, no matter how proactive and responsive a school and its personnel may be in responding to a bullying complaint. Right or wrong, some students and parents will be dissatisfied with the school's response to the complaint, no matter the outcome. Still, if the school is proactive and responsive, and follows the tips recommended above, they and their personnel will be in a much better position to mount a successful defense to bullying claims.

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