

Bullying in K-12 Public Schools: Searching for Solutions

Kathleen Conn

About the author: Kathleen Conn, Ph.D., J.D., LL.M., is the Principal of East Lansdowne Basics School, William Penn School District, East Lansdowne, Pennsylvania. An attorney as well as an educator, she is also the author of *Bullying and Harassment: A Legal Guide for Educators* (2004) and *The Internet and the Law: What Educators Need to Know* (2002).

Descriptive Context

Although the international educational community began to wrestle with the problem of bullying in schools soon after the publication of Dan Olweus' pioneering research in the 1970s, Americans did not begin to treat school bullying seriously until after the Columbine High School shootings in April 1999. Even after Columbine, the American legal community steadfastly refused to acknowledge bullying as a cause of action.

The legal landscape has changed drastically in recent months, with increasing numbers of lawsuits alleging educator and school district liability for school bullying. In addition to the number of bullying lawsuits, the variety of fact patterns has burgeoned, with students and parents alleging bullying-related deprivations of civil rights, infringements of personal speech rights, privacy violations, custody violations, gender orientation discrimination, and violations of various federal and state statutes.

Defining "Bullying"

Definitions of bullying abound in the educational, psychological, sociological, and medical literature. Most definitions, however, emphasize that bullying is intentionally aggressive behavior, perpetrated by the bully on the victim to induce fear through threat of further aggression. The elements of bullying include (1) an imbalance of power, where the bully is bigger, stronger or more favorably situated than the victim; (2) a purposeful intent to harm, either physically or emotionally; (3) a threat and likelihood of future aggression; and, (4) unremitting fear and emotional agitation in the victim.

Bullying is not "simple teasing." Teasing usually occurs between peers of approximately the same size or closely matched in physical ability and power. Teasing is designed to provoke, not subjugate. Teasing stops when one of the peers expresses displeasure. Teasing may, however, escalate into aggression and bullying.

Likewise, the terms "bullying" and "harassment" are not necessarily interchangeable. The term "bullying" is not found in Black's Law Dictionary, but "harassment" is. Perhaps not surprisingly, the definition of harassment as "words, conduct, or action (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial distress in that person" with no legitimate justification, also describes behaviors bullies direct toward their victims. However, statutes prohibiting harassment may not apply in cases of school bullying.

The Extent of the Bullying Problem

The problem of bullying in K-12 schools is worldwide. A February 2005 Education Week article outlined the measures that schools in Australia, Great Britain, Israel, Japan, Norway, Scotland, and Sweden are taking with respect to bullying in schools, and alleged that "[b]ullying is a problem in every school in the world." A 2005 United Kingdom report identifies that over 40% of children with disabilities are victims of bullies, with students with communicative or learning disabilities, not physical disabilities, the most frequently targeted groups. In the United States, between 8-80% of K-12 students, depending on the definition of bullying supplied in the survey, self-report being involved with bullying in schools, either as perpetrator, victim, or bystander.

Students are bullied in schools for many reasons. A new Harris Interactive survey, [From Teasing to Torment](#), reports that 39% of teens report bullying on account of personal physical characteristics such as their looks or body size. Bullying on account of real or perceived gender orientation is second in prevalence, with 33% reporting frequent bullying because they are, or are perceived as, gay, lesbian, or bisexual. In litigation, bullying on account of gender or gender orientation is usually identified as harassment.

Bullying is especially prevalent in elementary and middle schools. A study of over 3,500 elementary school students in 27 urban American schools found that bullying was linked to lowered academic achievement. A more extensive middle school study, conducted in 25 countries and involving over 113,000 students, found that the effects of involvement in bullying were consistent across cultures, correlating with poorer psychosocial adjustment, poorer relationships with peers, increased alcohol use, and increased weapon carrying in all countries surveyed.

Bullying in K-12 schools is especially significant and damaging because of the ages of the student bullies and victims, and because neither bullies nor victims “get over it.” Research indicates that over half of all children identified as bullies in middle school have at least one criminal conviction by adulthood, and many have multiple convictions for violent crimes. Both bullies and victims show higher rates of weapon carrying in schools, fighting, and being injured in school fights than their peers. The American Medical Association in 2002 identified bullying in schools as having long-term mental health consequences. Regrettably, some parents find out that their child was the victim of a bully only after the child commits suicide. Child suicide as a means of escaping from, “getting even with,” or retaliating against bullies has occurred with sufficient frequency that it has a special name, “bullycide.” Students who are bullied because of gender orientation are more likely to commit suicide than students bullied for other reasons.

Investigations conducted after school shootings reveal a link between bullying and violence in schools. The FBI Critical Response Group of the National Center for Analysis of Violent Crime identified that schools where bullying is part of the school culture are more likely to be targets of school shooters. Katharine S. Newman and her colleagues from Radcliffe Institute of Advanced Study found that bullying is part of the perceived marginalization that is characteristic of school shooters. Shooters may express rage at their bullies, but they also may have engaged in bullying.

Bullying Behaviors

Bullying behavior can begin in pre-school. The pediatric literature suggests that the child who aggressively takes toys from peers, the aggressive hitter and biter, or the child who must be included in every game may be exhibiting early bullying behavior. A recent retrospective examination of children's early home environment indicates that children who watched television significantly more than the mean viewing time of 3.5 hours per day had a 25% increase in the probability of being described as a bully by the child's mother at ages 6-11 years old. Children who received emotional support from their parents in early years were 33% less likely to be described as bullies in later years.

Although the prevalence of bullying may be greater in elementary school, the severity of bullying behaviors escalates in middle school. Boys, mostly boys of physically larger stature, typically engage in physical acts of bullying, including body-checking, pushing, shoving, extortion, and robbery. Girls typically use indirect or relational strategies, such as gossiping, shunning, or starting rumors. However, both sexes use both forms of bullying.

A recent addition to the bullies' repertoire is “cyberbullying,” the use of technology as a bullying weapon. Cyberbullying can occur via Internet postings on Web pages, in chat rooms, or in e-mails and other technology-mediated messaging systems. Instant messaging is a popular tool, as are text messages on cellular telephones. The cyberbullying consists of insults, “trash talk,” threats, gossip, the starting of sexual or gender orientation rumors, or compromising photographs taken with camera phones, all directed at the victim. For middle school students in particular, the desire to be part of the “in” group prompts victims to access and accept postings and messages even when they have reasonable notice

that the messages are targeting them. Since cyberbullying often originates outside of school, protected by the anonymity of the Internet or of cell phones, cyberbullying is hard to monitor or eradicate. It is “always there.”

Identifying Bullies and Their Victims

Identifying a bully is not an easy task. Bullies often present an engaging and appealing demeanor to adults, effectively diverting adult suspicion, at least initially. Psychologists, psychiatrists, medical doctors, and educational personnel agree that there is no typical bully. Bullies come in all sizes and shapes. However, the most prevalent characteristics of bullies include the following: (1) they control others through verbal threats and force; (2) they are quicker to anger and resort to force sooner than others; (3) they tend to have little empathy for the problems of others; (4) they inappropriately perceive hostile intent in the actions of others; (5) they see aggression as the only way to preserve their self-image; (6) they have inconsistent discipline at home, or parents who often do not know their whereabouts; (7) they may suffer physical and emotional abuse at home; and (8) they exhibit obsessive or rigid actions.

Victims are also often hard to identify; they try to “blend into the background,” often believing, sometimes correctly, that no one can or will help them. Researchers identify two kinds of victims: passive victims and provocative victims. About 80-90% of victims are considered to be passive victims; they are the children who are weak, withdrawn, easy prey for bullies. The remaining 10-20% of victims are considered to be provocative victims. Many teachers think these provocative victims, impulsive children, often with Attention Deficit/Hyperactivity Disorder (AD/HD) or anti-social personalities, “get what they deserve.”

Psychologists conclude that a child becomes a victim as a result of the interplay of personal, peer-relational, and family influences. Among other characteristics, victims typically (1) have ineffective social skills and poor interpersonal skills, (2) have a poor self-image and blame themselves for their problems, (3) feel socially isolated, (4) are afraid of going to school, (5) feel external factors have more of an impact on them than internal control, (6) have family members who are overly involved in their decisions and activities, and (7) perform self-destructive activities.

External signs that a student is being bullied are difficult to distinguish from normal behaviors in school. Signs include frequent stomach aches and repeated visits to the nurse, urination “accidents,” bathroom avoidance, irritability and inattention to schoolwork, unexplained absences from school, drug and alcohol abuse, self-mutilation, and even suicide.

In addition, besides simple classifications of bully and victim, psychologists identify a hybrid, a combination bully-victim who alternately bullies and is bullied. The genesis of this cyclic behavior may lie in the child’s being bullied or abused at home, teaching him both that bullying is allowed and that bullying is how to get his way. The child is victim at home, and in turn becomes bully in school. Provocative victims may also alternate bullying and victimization behaviors.

Bystanders: Witnesses to the Bullying

Children who escape being either the bully or the victim in schools may still be involved in bullying by virtue of being forced to witness the victimization of their peers. While many students may feel sorry for the victims of bullying, researchers document that fewer than 11% actually intervene. Potential interveners may fear retaliation by the bully or they may be afraid the bully will make them the next victim. Many simply do not know how to intervene effectively. Research indicates that children who repeatedly witness bullying can become desensitized to violence. They can also develop a sense of powerlessness similar to that experienced by the victim, thereby becoming an indirect victim of the bully.

The Role of School Culture in Bullying

Most bullying occurs in schools, rather than on the way to and from schools. The frequency and severity of bullying is inversely related to the degree of supervision present; that is, more, and more severe, bullying occurs where supervision is least. Playgrounds and schoolyards are areas preferred by bullies. Bullying also occurs in the cafeteria, on lines, in bathrooms, and in classrooms, even when teachers are present.

Although studies have not quantified the relationship between school culture and bullying, research shows that the attitudes of teachers and administrators toward bullying matter. Schools in which the teachers and administrators talk about bullying and monitor its occurrence have fewer bullying incidents. Schools organized as communities, with a common set of goals and norms, have stronger peer relationships and fewer bullying incidents. Students in these communal schools feel a greater bond to the school, to teachers, and to each other, making bullying less likely.

Differing Perspectives

Bullying *per se* is not illegal unless a state has adopted a specific anti-bullying statute. To date, fewer than half the states have. Moreover, in those states that have adopted anti-bullying statutes, the definition of what constitutes bullying is often left to local School Boards. No current state anti-bullying statute specifically provides a private cause of action. Where enforcement mechanisms are provided, they are usually left to the discretion of local Boards. The bottom line is that enforcement mechanisms are either largely inadequate or absent.

Many state anti-bullying "laws" are merely guidelines or, as in the case of Pennsylvania, mandates to adopt "character education" programs. The 2005 Session of the Virginia General Assembly passed an anti-bullying measure, HB 2266. Effective July 1, 2005, the law requires School Boards to include "bullying" in policies on student conduct, provide anti-bullying instruction in their character education programs, and report certain incidents of stalking. The non-profit watchdog organization Bully Police currently rates the Virginia anti-bullying law as "B+/A-," but rates Pennsylvania's law "F."

Although many states and the federal No Child Left Behind law mandate reporting of bullying and violence in schools, meaningful sanctions for schools where a culture of bullying exists are not in place at this time.

Bullying versus Harassment

Courts have in the past not generally recognized bullying as a viable cause of action. However, harassment is actionable if the harassment is based on race, ethnicity, religion, disability, or gender. Many students and parents, therefore, attempt to redress harms suffered by students at the hands of peer bullies by bringing suits alleging harassment.

In suits alleging harassment, the initial burden is on the plaintiff to establish deprivation of an established right. Where a plaintiff alleges peer-peer sexual harassment in schools, the cause of action typically lies either in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, the federal statute securing equality of educational opportunity to both sexes, or in Section 1983, 42 U.S.C. § 1983, alleging deprivation of a Constitutionally guaranteed right by an individual acting under color of state law.

To succeed in a cause of action for peer-peer sexual harassment under Title IX, the standard enunciated in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), requires the plaintiff show that (1) an official with authority in the district had actual knowledge of the harassment; (2) the district was deliberately indifferent to the harassment; and (3) the harassment was "so severe, pervasive, and objectively offensive" as to effectively deprive the plaintiff of access to an education. The burden is high, and it proves insurmountable in many fact patterns. If the school or school district takes any *not clearly unreasonable* action to deter the harassment, even if unsuccessful, the school district will likely

prevail. Suits alleging harassment due to gender orientation or perceived gender orientation may also be brought under Title IX. Courts typically recognize such suits when the plaintiff suffered gender orientation harassment based on stereotypical beliefs about gender behavior.

Special Relationships and State-Created Dangers

In formulating a claim for relief under Section 1983, harassed students have alleged that school officials have effectively deprived them of their liberty or property interests or of the equal protection guaranteed by the Fourteenth Amendment. These claims invariably fail under the two-pronged arguments that the schools do not have a special or custodial relationship with the students, nor have they created the danger experienced by the students. The lack of a special relationship theory was enunciated in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), where the Supreme Court ruled that an affirmative duty to protect students from the actions of third parties arises only if the state so limited students' freedom that they were unable to care for themselves and were totally reliant on the state for care. Although school attendance is compulsory in all states, public school students nevertheless are free to leave school daily and to return to the care and protection of their parents.

Courts, however, have held that in certain specific instances school districts voluntarily assume a special duty to protect a student that gives rise to district liability if the student is injured. In Greene v. City of New York, 170 A.D.2d 321 (N.Y. Sup. App. Div. 1991), the court ruled that the school district had assumed a duty to protect plaintiff's son, a junior high school student, from a neighborhood bully who had threatened the student. The principal and a security guard had specifically promised to protect the student in school. The bully fatally shot the student in the schoolyard. The court awarded the mother monetary damages for medical expenses and pain and suffering.

In order to prevail when alleging a state-created danger, a harassed student must show that the state has affirmatively created or enhanced the danger, or that the state's action in the factual situation did not merely make injury more likely, but was so egregious that it "shocked the conscience." Plaintiffs have rarely borne their burden of proving state created danger.

One fact pattern to which courts seem more sympathetic is that which alleges that persistent school bullying prompted the victim to commit suicide, or in which the bully actually killed the student victim. Here several courts have allowed a foreseeable or "identifiable victim" theory to establish school district liability.

Snapshots of Research and Court Decisions

A review of education-related court decisions reveals numerous lawsuits alleging peer-peer harassment based on real or perceived student differences: racial, ethnic, religious, gender-based, or disability-based. Many of these complaints detail inappropriate behaviors that constitute bullying, but they are brought as harassment suits because the legal community has traditionally recognized harassment, but not bullying, as a viable cause of action under several independent theories of liability.

An Early Court Decision

Complaints alleging school liability for peer-peer bullying on account of student differences are a relatively recent phenomena. One of the earliest suits alleging school liability for a school's inability to control bullies who robbed, assaulted, and repeatedly harassed a middle school student, Alex Stevenson, was Stevenson v. Martin County Board of Education, 93 F. Supp.2d 644 (E.D.N.C. 1999). After the District Court granted the school district's motion to dismiss, Alex's parents appealed to the United States Fourth Circuit Court of Appeals (3 Fed. Appx. 25 (4th Cir. 2001)). The Court of Appeals affirmed the lower court's decision, and the United States Supreme Court ultimately declined to grant *certiorari* (534 U.S. 821 (2001)).

Alex's situation was especially poignant because the record showed that bullies robbed and brutally assaulted Alex in the lunch yard and in school hallways, ultimately inflicting severe contusions and eye damage. One teacher to whom Alex appealed for help told the student she could not do anything, and that he, Alex, "probably deserved what he got." The consistent refusal of several courts to acknowledge school liability for Alex's injuries under Section 1983, as well as the Sixth Circuit's determination that no private right of action exists under the Safe and Drug Free Schools and Communities Act, became a depressing precedent.

Escalation of Bullying Behavior

A contemporaneous decision from the Eastern District of Texas served as a reminder to educators and parents that bullying can escalate to an even more serious negative behavior which can seriously harm the victim. Unfortunately it also served as a reminder that allegations, even allegations of most egregious conduct, may not survive summary judgment in court.

The plaintiff in Wilson v. Beaumont Independent School District, 144 F. Supp.2d 690 (E.D. Tex. 2001), was identified by the pseudonym Ken Wilson. He was a mildly retarded middle school student at the time of litigation, and the "primary victim" of an aggressive same-sex bully John Doe, also mildly retarded, who repeatedly stole his lunch money and constantly picked on him. The teacher changed Wilson's seat in class and his seat on the school bus was changed to separate him from Doe, but the boys remained in the same class. The bullying finally climaxed in Doe's anal rape of Ken Wilson.

Despite taking judicial notice of the unremitting bullying by Doe, sufficiently obvious to school officials to merit changed seats in the classroom and on the bus, the court granted summary judgment to the school district because "a single incident" of sexual harassment was insufficient basis to conclude that school violated Title IX.

Bullying can be seriously harmful even without such extreme escalation. However, although the number of suits alleging causes of action for bullying is on the rise, courts still do not necessarily acknowledge complaints alleging bullying.

Bullying Based on Victim's Personal Characteristics

In Smith v. Guilford Board of Education, 2005 WL 3211449 (D. Conn. Nov.30, 2005), the parents of Jeremy Smith, a high school student, sued the Guilford Board of Education and its members individually in their official capacities for the high school's failure to intervene to stop the bullying and harassment suffered by their son because of his small stature and low body weight. Although a freshman in high school, Jeremy was approximately four feet, seven inches in height and weighed only 75 pounds.

The Smiths alleged that the school knew, but failed to intervene in any way, that peers were pushing and shoving Jeremy, restraining Jeremy from leaving classrooms, hoisting Jeremy on their shoulders or cradling him like a baby; and teasing, bullying, and tormenting him on a daily basis because of his small size. On at least one occasion, the parents alleged, peers stuffed Jeremy into a backpack and paraded through the halls to show him off.

The Smiths claimed that Jeremy's bullying and the school district's failure to deal with it violated Jeremy's rights under Sections 1983 and related statutes. The Connecticut court held that the right to education is not a fundamental right guaranteed by the Constitution, and, in addition, Jeremy voluntarily withdrew from the school. Therefore, Jeremy experienced no underlying violation of a Constitutional right, and the court dismissed all his claims that were derivative of a Constitutional violation, namely Section 1983 and related pleadings.

Jeremy's parents also raised the issue of disability harassment, because Jeremy had been identified as an individual with AD/HD. However, the court ruled that since Jeremy's classmates bullied him because of his physical stature, not his identified disability, Jeremy's parents had no cause of action under disability statutes.

Bystander Injury

In another Connecticut case, decided several months earlier than Smith, Bell et al. v. West Haven Board of Education, 2005 WL 1971264 (Conn. Super. Jul. 19, 2005), the court found in favor of defendant School Board, giving short shrift to parents' claim of educational malpractice and intentional infliction of emotional distress by virtue of the district adopting and implementing an educational model known as the "Responsive Classroom" that parents alleged led to extreme disorganization in the educational process and facilitated bullying of their children. One of the teachers described "only the usual sorts of school-based problems" under the novel teaching model.

The plaintiffs also raised a "bystander" claim, alleging that their children were injured by having to witness hurts suffered by other students as a result of the chaotic and undisciplined environment under the Responsive Classroom model. The court concluded that, even if the parents' claims were cognizable, the school district was immune from liability anyway. Of course, courts in various jurisdictions traditionally have denied educational malpractice claims. However, with the new awareness of the emotional harms of both bullying and bystander phenomena, students' emotional distress arguments, accompanied by bullying and bystander claims, may prove the arrow that pierces the invincible shield thwarting educational malpractice claims.

Disability and Gender Orientation Bullying Lawsuits

Although exceptions abound, the two instances in which courts as a whole seem to be more sympathetic to bullying complaints appear to be in suits brought under disability statutes and in suits alleging real or perceived gender orientation harassment. Plaintiffs alleging school liability for bullying based on disability may plead violations of one or more federal statutes, including the Individuals with Disabilities in Education Act (IDEA), 42 U.S.C.A. § 1400 *et seq.*, the Rehabilitation Act (RA), 29 U.S.C. § 794, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. § 12101. However, courts may summarily dismiss complaints under IDEA if plaintiffs have not exhausted administrative remedies or have not pleaded futility of attempting such exhaustion. Suits brought under RA and ADA are not required to satisfy the administrative exhaustion requirement.

In both McAdams v. Board of Education of Rocky Point Union Free School District, 216 F. Supp.2d 86 (E.D.N.Y. 2002) and Shore Regional High School Board of Education v. P.S. ex rel. P.S., (381 F.3d 194 (3d Cir. 2004) the courts ruled in favor of special education students who were harassed and threatened by bullies in their respective schools. Arley McAdams, a learning disabled special education student, suffered at the hands of school bullies from fifth grade through middle school, experiencing both name-calling and physical abuse. Bullies pulled out a chunk of his hair one day on the school bus, and on another occasion, broke bones in his back, neck, and knee. Although an independent hearing officer recommended Arley receive private placement, the district fought the recommendation. When the McAdams family sued, the district argued that they had not exhausted their administrative remedies under IDEA. Ruling that the futility exception to exhaustion of remedies applied, the court refused to grant the school district's motion to dismiss.

The P.S. decision also was a victory for the student and his parents. P.S. had endured the verbal taunts, physical assaults, and shunning of bullies throughout his elementary and middle school years. The school had ultimately classified P.S. as a special education student after the constant bullying caused him to become emotionally disturbed. His parents wanted the school district to assign P.S. to a high school in a neighboring school district so that the bullying would not follow him to high school. The district steadfastly refused, despite the opinion of the administrative law judge that if P.S. were not assigned to an alternative high school, the bullying would continue. Third Circuit Judge Samuel A. Alito, writing for the judicial panel, finally made the re-assignment possible and ordered that the school district reimburse parents for all costs incurred in the suit. In addition, in his opinion Judge Alito repeated the testimony of an independent psychologist that bullying does not go away on its own.

Although customarily brought to the courts as allegations of gender-related harassment prohibited by Title IX, gender orientation bullying lawsuits have received arguably the most attention in the press and the most lucrative monetary settlements and jury verdicts of all bullying lawsuits. Two recent examples are the cases of Dylan Theno in Kansas and L.W. in New Jersey.

In Dylan's case, the headline in the January 4, 2006 issue of Education Week bragged "Former Kansas Student Wins Settlement in Bullying Case." However, neither Theno's court pleadings nor the court rulings actually used the term "bullying." Theno brought suit against his school district because he had been subjected to pervasive gender orientation harassment from grade seven until eleventh grade, when the severity of the name-calling and ugly rumors about his sexual preferences forced him to leave school. Ruling that the school district "had actual knowledge that its efforts to remediate [the harassment] [we]re ineffective" but continued to use those same methods "to no avail," the court allowed Theno's suit to proceed to a jury trial. A jury ultimately awarded the young man \$250,000, and in Theno's subsequent action to recover attorneys' fees and expenses, awarded an additional \$268,793.51, to be paid by the district and its insurance company. Theno v. Tonganoxie Unified School District No. 464, 377 F. Supp.2d 952, 394 F. Supp.2d 1299, 2005 WL 3434016 (D. Kan. Dec. 13, 2005).

Similarly, L.W.'s court action did not include the word "bullying." L.W. complained of sexual harassment because of perceived gender orientation under New Jersey's Law Against Discrimination statute. (L.W. v. Toms River Regional Schools, 2005 WL 3299837 (N.J. Sup. A.D. Dec. 7, 2005)) Alleging that his harassment began in fourth grade and continued into high school, with students daily calling him "faggot," "homo," and "butt boy" as well as physically picking on him, L.W. testified that when he complained to a guidance counselor, she merely told him to "toughen up" and "turn the other cheek." The school repeatedly disciplined individual harassers, but failed to take any concerted schoolwide remedial actions. The court affirmed an award of \$50,000 to L.W.

Bullicide Lawsuits

Especially poignant are the lawsuits brought by parents whose child committed suicide after prolonged suffering at the hands of school bullies. Although courts have consistently refused to acknowledge school liability for students injured or killed at the hands of peers during school shootings, they may be more sympathetic to parents' complaints alleging that the student who committed suicide was, or should have been, known to the school as an "identifiable victim."

J.D. Scruggs, a middle school learning disabled student, committed suicide after years of enduring punching, violent hair-pulling, desks slammed into him, and other bullying behaviors directed at him in school. The school had identified J.D. as emotionally troubled, but refused to effect simple changes, such as changing his seat or class assignment, to deter bullies. When J.D.'s mother sued the school district alleging violations of J.D.'s civil rights and other causes of action, Scruggs v. Meriden Board of Education, 2005 WL 2072312 (D. Conn. Aug. 26, 2005), the court refused to grant the district's motion for judgment on the pleadings, stating that J.D. was an identifiable victim, negating the school district's claim of governmental immunity.

The Scruggs case may be an anomaly, because many courts deem the identifiable or foreseeable victim theory insufficient to withstand defenses of governmental immunity. Illustrative is the case of Tempest Smith. Smith, a seventh grade student, committed suicide as she prepared for school, after a lengthy history of classmates bullying and psychologically intimidating her based on her gender and her affiliation with the religion of Wicca. The district court granted the school district summary judgment regarding her mother's claims that the district violated her daughter's civil rights, and, on appeal, in an unpublished opinion, Smith v. Lincoln Park Public Schools, 2004 WL 1124467 (Mich. App. May 20, 2004), the higher court also ruled that Smith's gross negligence claim against the district was barred by statutory immunities. Although the *per curiam* opinion recognized that the "direct cause of Tempest's psychological harm was student-on-student teasing and harassment," the court rejected Smith's claims.

The Issue in Practice

Close examination of court decisions following allegations of school liability for peer-peer bullying and harassment is critical to advising school districts how to deal with bullies.

First, and most reassuring, the decision in Yap v. Oceanside Union Free School District, 303 F. Supp.2d 284 (E.D.N.Y. 2004) makes clear that the measures schools adopt to deter bullying and harassment do not have to be totally effective to avoid institutional and personal liability.

In Yap, parents brought a Section 1983 cause of action against the principal and the school district for their alleged failure to stop the racial bullying and peer abuse of their elementary school son. The court noted that school principal Karen Siris, whose doctoral thesis addressed the issues of peer bullying in schools, had introduced and supported a "Caring Majority" program and anti-bullying curriculum in the elementary school since her arrival at the school in 1996.

After repeated racial attacks on Edward Yap in fifth grade, Principal Siris met with the entire fifth grade and discussed the dangers of racial name-calling, stereotyping, and teasing, re-emphasizing the importance of tolerance. After subsequent incidents, Siris met with each of the students named as bullies, investigated the allegations, and took actions such as documenting the incidents and admonishing the perpetrators. Some were denied lunch or recess privileges; others were denied school bus privileges. The parents wanted Edward accelerated and moved up a grade, or transferred to a different school to avoid the bullies. After repeated complaints from the parents, the district offered to provide differentiated instruction for Edward, or to transfer him to another school in the district. The parents then changed their minds, refused the school district's offers, and removed Edward to a private school.

In deciding to accord summary judgment to the school district on all counts in the Yaps' complaint, the court noted that the record showed that the school district "doggedly but unsuccessfully" attempted to address the Yaps' allegations of bullying and harassment. The majority stated that the court "must avoid second-guessing the disciplinary decisions made by school administrators." The court also refused to fault the district for refusing parents' request for acceleration or the district's initial refusal to transfer Edward, stating that the district's refusal to break "long-standing policies regarding transfers and class acceleration" was reasonable. The Yap ruling not only affirms the right of districts to adhere to their own guidelines and practices, but also recognizes that the options for school action in bullying and harassment situations are limited in scope. The principal could not eliminate the bullying Edward suffered. However, her actions in implementing a schoolwide anti-bullying program, meeting with the entire fifth grade class to discuss the problem, investigating incidents, and disciplining individual bullies were sufficient to carry her burden of taking reasonable steps to address the school bullying and harassment.

A Sixth Circuit decision from 2001, not specifically mentioning bullying but issued in the context of peer-peer sexual harassment, signals that school districts may also face litigation at the hands of parents whose children are disciplined because of bullying behaviors, and gives advice for appropriate school district responses. In Wayne v. Shadowen, 15 Fed. Appx. 271 (6th Cir. 2001), parents alleged Section 1983 violations consisting of deprivations of equal protection and due process, because of their middle school student's four-month assignment to a special correctional classroom as a consequence of his repeated sexual harassment of a female student.

Although this suit arises out of a student's behaviors characterized as sexual harassment, the court record makes clear that the harassing student had engaged in behaviors that could also be characterized as bullying. The boy's teachers had "chronicled a pattern of classroom misbehavior, and preying upon weaker students by verbal taunts and physical assaults." The court record also clearly established that, because of his inappropriate behaviors, the student Nick Wayne had been subjected to progressively escalating disciplinary measures. Because of his repeated negative behaviors, he was not similarly situated to other students in the school. Moreover, during his detention in the special classroom,

Nick continued to receive “the fundamentals of a ‘proper and adequate’ public education.” The court granted summary judgment to the school administrator defendants, stating that neither the student’s equal protection nor due process rights had been violated.

The court decision, although not selected for publication in the Federal Reporter, is instructive for school districts whose disciplinary measures for bullies may be challenged. First, documentation of the bullying student’s inappropriate behaviors is critical, along with a record of disciplinary measures demonstrating that school officials attempted to deal individually with each of the behaviors as they occurred. School officials should document escalating levels of disciplinary action. References to the school district code of conduct are legally significant. Secondly, school officials must observe the student’s due process rights, including providing notice and an opportunity for a hearing. Including parents in these proceedings at an early point is advisable. Finally, the disciplinary measures must not deprive the student of access to the school’s educational program. In cases of prolonged imposition of disciplinary measures, the student must continue to receive the education he would receive absent the disciplinary measures adopted.

A recent case, K.M. v. Hyde Park Central School District, 381 F. Supp.2d 343 (S.D.N.Y. 2005), offers further specific guidance to schools, suggesting what *not* to do to help the victim of a bully. D.G. was a disabled child subjected to repeated abuse at the hands of his middle school peers. Other students called him names and taunted him, threw him to the ground, body-slammed him, threw his books and tossed him bodily into the cafeteria trash cans, and physically beat him on multiple occasions. D.G.’s special education teacher was sympathetic and invited him to have lunch with her in the resource room, which he began to do as a matter of course, apparently happy to be in the quieter setting, away from his tormentors. The court record noted that D.G.’s mother objected to the practice, although the school denied that she had objected to the practice at the time. However, the majority labeled D.G.’s eating with his teacher apart from the general student body as “social isolation,” a form of actionable discrimination, quoting Olmstead v. L.C., 527 U.S. 581 (1999). The court denied the school district’s motion for summary judgment. No good turn may go unpunished in cases of school bullying.

Related Issues

A series of recent bullying-related lawsuits suggests the complexity of issues that schools may face in the current wave of bullying litigation.

In Albers v. Breen, 346 Ill. App.3d 799 (Ill. App. 2004), parents sued the school social worker, principal, and the school district because the social worker revealed to the principal the names of students who were bullying their seventh grade son. When the principal revealed the son’s name and complaint to the bullies, the son suffered emotional distress and his parents removed him to another school. The Illinois appellate court dismissed the parents’ complaint on the basis of protections for school personnel afforded by the state Confidentiality Act and the Tort Immunity Act. The decision affirmed the right of a school principal to balance competing interests and make discretionary policy decisions in dealing with bullying issues in the school, stating that “Certainly the way that a principal handles an instance of bullying in his school falls within the definition [of a discretionary act]; any student who has been sent to the principal’s office could attest that he has broad discretion in how to handle such situations.”

In Crowley v. McKinney, 400 F.3d 965 (7th Cir. 2005), a noncustodial divorced parent, Daniel Crowley, sued the school principal and district, alleging a Section 1983 violation for denial of his right to participate in his children’s education. Crowley alleged that the denial was due to the administrator’s personal animosity toward Crowley after he complained about bullying of his children in school and his failure to receive school-related information about his children. The court denied the Section 1983 claim as to denial of Crowley’s right to participate in his children’s education, but certified Crowley as a “class of one” and allowed his suit to proceed on First Amendment grounds, affirming Crowley’s right to openly criticize school district policies.

In another situation involving competing interests of divorced parents, P.J.S. v. J.S., 2002 WL 31998734 (Del. Fam. Ct. Aug. 22, 2002) a mother wanted to home school her fourth grade son because he suffered at the hands of school bullies who repeatedly “picked on him” with impunity. The noncustodial father objected, and the Delaware Family Court ultimately ruled that the boy should return to public school to “overcome his fears.”

The issue of bullying has also surfaced in employment suits. In Georgia Department of Education v. Niemeier, 616 S.E.2d 861 (Ga. App. 2005), a teacher was dismissed after two incidents in which he used force to control students. One of the incidents involved the teacher’s intervention to stop a student’s “bullying antics.” The court upheld the teacher’s reinstatement. In Dockery v. Unified School District No. 231, (D. Kan. 2005), Reginald Dockery, an African-American school custodian, sued the school district and the district’s Director of Human Resources alleging, in part, that he was fired in retaliation for complaining to the school district about race-based bullying and harassment of his children in school. The court dismissed Dockery’s claim with respect to his bullying complaints because he did not establish that the district had a policy or custom of retaliatory discharge for such comments that caused his injury.

Finally, Meade v. City of Hartford, 2005 WL 1023151 (Conn. Super. Mar. 24, 2005) raises the specter of the difficulty of assigning liability in cases where poorly performing schools have been taken over by state boards of control. During a state takeover of a school district, not only is it difficult for parents to ascertain who were the individuals at the helm of the district at the time of the alleged unchecked bullying, but it is also difficult to effect legal service of process on the appropriate individuals or administrative offices.

CEPI Summary

Bullying is a pervasive phenomenon in American K-12 public school education. Courts at all levels are experiencing a rise in lawsuits from both parents and students alleging school district liability for a variety of harms as a result of school bullying. While the often-invoked lack of a special relationship between a student and her school or the difficulty of proving a state-created danger currently prevents most plaintiffs from prevailing in bullying lawsuits, novel theories of recovery and statutory causes of action are on the horizon. School officials must be alert to court rulings in this area. How future court decisions will impact the management of bullying in schools remains a question.

Legislative History

The nonprofit watchdog organization Bully Police (<http://www.bullypolice.org>) tracks the progress of state adoption of anti-bullying statutes and rates the legislation according to a stated set of effectiveness criteria. But, beware, the Web site is not always up to date. For example, as of January 6, 2006, the site was reporting that Virginia’s anti-bullying statute awaited the Governor’s signature. The Governor signed the VA bill, HB 2266, on March 30, 2005, and the statute went into effect July 1, 2005. However, the site is a good source for initial information.

The Web site of the Education Commission of the States (ECS), <http://www.ecs.org>, is also a good source of information about state anti-bullying statutes. ECS is a nonprofit organization that seeks to assist state leader in shaping education policy.

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