Legal Issues Related to Bullying in the Public Schools

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Sources of Legal relief

- Common Law
  - Assault and Battery
  - Intentional Infliction of Emotional Distress
  - Defamation
  - But these focus on the perpetrator, not the school officials
- Negligence (but sovereign immunity)
- Statutory Law (state and federal)
- Federal agency enforcement (DOE)
Federal Statutes

- Title IX (sex)
- Title VI (race, color, national origin)
- ADA (disability)
- §504 (Rehabilitation Act)
- §1983
  - 14th Amendment Due Process
  - 14th Amendment Equal Protection
Bullying

• Bullying has several names, including harassment, intimidation, assault
• Students perceive much more verbal than physical bullying
• Key case for educator liability is *Davis v. Monroe County Board of Education*, 526 U.S. 629(1999)
• Supreme Court set out standards for when school employees can be held liable
DOE Expands \textit{Davis}

- “Dear Colleague” letter
- October 2010
- Threatens federal enforcement action
- The standards expressed in the letter go significantly further than the Supreme Court did in \textit{Davis} in holding schools liable for what students do
- Biggest issue is what school officials “\textit{actually knew}” versus what someone decides they “\textit{should have known}”
State Laws

• 48 of the 50 states have some specific statute addressing bullying

• They generally:
  – Define bullying
  – Include “cyberbullying” somehow
  – Require schools to take preventive measures
  – Require anti-bullying policies
  – Require reporting of incidents of bullying
Bullying

• The responsibility of protecting students includes preventing bullying
• The federal courts apply a general legal standard for liability of “deliberate indifference” to each of the statutory claims
• You must make some affirmative effort to intervene, but you cannot be held liable for a bad outcome if you have made some reasonable effort
Five-Part Test for Liability

- The student falls within a statutorily protected category
- The student was harassed because of the protected trait
- The harassment was severe and pervasive, and deprived the student of access to educational benefits
- The school officials knew of the harassment
- The school officials were deliberately indifferent to the harassment
1. The student is a member of a protected class

- Race/Color/National Origin
- Gender (Sex)
- Sexual Preference (courts are split)
  - Sexual stereotypes is getting attention
- Disability
2. Harassed “because of” protected trait

- Students called “gay,” “fag,” “queer,” and “man-boobs” by his peers
- Court said he was overweight, not homosexual
- “While the harasser’s comments were unbelievably cruel, stupid and hurtful to Plaintiff, there was no evidence presented that the harasser acted out of sexual desire for Plaintiff or had a general hostility towards males.”
Wolfe v. Fayetteville Sch. Dist.

- Arkansas case – 8th Circuit – 8/9/11
- Male student alleged that from 6th to 10th grades he was harassed on a weekly basis
- Pushing, shoving, name-calling
- “faggot”, “queer bait” and “homo” among others
- Quit school and pursued GED at home
Wolfe

- School officials did not deny incidents occurred
- Argued not sex-based harassment, because the other students did not perceive him to be actually gay
- Court held that mere name-calling and rumors with sexual connotations are not enough to make a Title IX claim – must be able to show that the harassment was “sex based”
But not all courts are the same

- Female student called “bitch,” “whore,” “prude,” and “slut” (explain to me how you can be a “prude” and a “slut”, but logic apparently does not apply to harassment)

- Court said “a female student, subjected to pejorative, female homosexual names by other female students, can bring a claim of sexual harassment.”
3. Harassment so severe, pervasive and offensive that it deprives the student access to educational benefits

- Student called homophobic names ("gay" and "faggot")
- Kicked by other students in a game of dodgeball
- Received death threats
- Student changed schools in the district, but the bullying continued
Must be “pervasive”

- Plaintiff female alleged two instances of sexual harassment by 4th grade boys
- First was that boy touched her vagina through her skirt
- Second was six months later – boy slapped her on her buttocks
- While “strikingly offensive acts”, they are not sufficiently pervasive to establish liability
Deprived of educational benefits

- Female student harassed during instruction, free periods and lunch
- She could not obtain school counseling because her harasser would threaten her during counseling sessions
- Sufficient
Kansas case

- Female suffered physical side effects as a result of harassment
- Harassment lasted for years, and student left school
- Sufficient
PA case

- Middle school girl subjected to constant harassment and teasing
- Immediate decline in grades
- Sufficient because of the connection in time
Dear Colleague letter

• DOE would expand this concept
• Not just “deprivation” but “limitation” of educational benefits
• Much easier for a plaintiff to show some “limitation” (some adverse effect) than to show an actual “deprivation” (a complete adverse outcome)
• Words matter in court, so NSBA and others have opposed DOE’s position
4. Actual knowledge

• An “appropriate person” must have had actual knowledge of the harassment
• That means someone who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf
• DOE says “knew or should have known”
• Constructive knowledge
5. Deliberate indifference

- “Public schools are obligated to educate all students, whether they are well-behaved or not.”
- “It should surprise no one that the schools that are the primary focus of most children’s social development are rife with inappropriate behavior by children who are just learning to interact with their peers.” *Davis*
High standard

“Male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource – an athletic field or a computer lab. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students.”
Specific theories – Title IX

• Damages are not available for simple acts of teasing or name-calling
• Even when those names are based on gender differences
• Only where the behavior is “so severe, pervasive and objectively offensive that it denies the victims equal access to education” that Title IX protects
• *Davis*
Gender Stereotypes

- *Theno v. Tonganoxie Unified Sch. Dist.* (Kansas, 2005)
- Male student claimed harassment for several years in middle and high school because his appearance and behavior did not conform to gender stereotypes
- “administrator turned a blind eye...by ignoring, tolerating or trivializing the harassment....”
- $520K judgment, then settled for $440K
Title VI

• Question has been whether there had to be an actual act of race discrimination, or whether simply permitting an atmosphere of racial harassment and intolerance could support liability.

• Two federal courts have said the latter: “When administrators who have a duty to provide a nondiscriminatory educational environment...sit by and do nothing, they can be held liable.”
Disability (ADA/IDEA/§504)

• Student who was teased and harassed for his disability committed suicide
• Court held for school district, even though it found they mishandled the case and were not proactive enough early on
• Provided services and intervened constructively at certain times
• Represents the views courts often take
OCR Guidelines

A school district “should take immediate and appropriate steps to investigate and otherwise determine what occurred and take steps reasonably calculated to end any harassment, to eliminate a hostile environment, and prevent harassment from occurring again.”
So what should you do?

• First, accept and process all complaints and reports of bullying or hazing
• Second, document the reports and the investigative steps that were taken in response
• Third, if the report is substantiated, *do something about it.*
• Finally, when you take action, make sure you aren’t penalizing the victim (easiest response may be to move the victim to another bus, classroom, school, but never do it unless it is voluntary and with consent of the victim and her family)
Tinker and the Schoolhouse Door

- Schools may regulate student expression that would otherwise be protected by the First Amendment only if the speech (1) causes, or is reasonably likely to cause, a material and substantial disruption or (2) interferes with the rights of others.
Speech schools can curtail

- Substantially disruptive
- Obscene and vulgar
- Defamatory
- Drug promoting
- Fighting words and true threats
- School-sponsored speech
School-sponsored speech

- Student newspapers
- School assemblies
- Competitive environments
- School-sponsored outings (field trips)
- Restrictions must simply be “reasonable”
Off-campus speech

• Off-campus speech that constitutes a true threat may be subject to discipline if the facts demonstrate substantial disruption or a reasonable forecast of same

• Cyberbullying becomes “on-campus” as soon as the student brings the device onto school grounds, or the effects are manifest on school grounds
Kowalski v. Berkeley County Schools

- Discipline of student for website created at home was proper where the result of the website was a substantial disruption at school
- Female student created website called “Students Against Sluts Herpes” or “S.A.S.H.”
- Named individual students
• One girl in particular stopped coming to school for awhile because of embarrassment/teasing
• Offender given 5 day suspension plus kicked off cheerleading squad for remainder of the school year
• Student argued school had no authority to sanction off-campus conduct: court disagreed because of nexus
Practical test for administrators

• If the administrator has a *reasonable suspicion* that online actions will have an immediate and more-than-minimal effect on kids at school, you can discipline.

• If students are *threatening* each other online, that disturbs their ability to obtain the benefits of education, so you can discipline.
Questions?