



GARRETT HEMANN ROBERTSON PC

Bullying and Harassment Issues in Schools

35th Annual Oregon School Law Conference
December 3, 2015

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"The unwillingness of the administration and some community members to acknowledge the patterns of disrespect [and bullying] that go on with the kids and the adults that oversee them will enable ongoing and escalating rude and dangerous behaviors."

NBC News: 11/06/15



Bullying Defined

- "Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time."
- OCR Dear Colleague Letter (August 20, 2013)



Bullying is called different names

- Harassment.
- Hazing.
- Teasing.
- “Just joking”
- Intimidation



Bullying includes

- Overt physical behavior.
- Verbal, emotional or social behavior:
 - Excluding someone from social activities.
 - Making threats.
 - Withdrawing attention.
 - Destroying someone's reputation.
- Blatant aggression.
- Subtle and covert behaviors.
- Bullying through electronic technology (“Cyberbullying”)
 - Offensive text messages.
 - Fake online profiles.
 - Rumors posted online.



Cyberbullying: The New Tool, the Same Old Concerns

- Differs from Bullying:
 - Electronic media
 - Highly accessible, can occur anytime, off or on campus
 - Message distributed to wide audience quickly
 - Anonymous, not face-to-face, may encourage behavior
 - May not report due to fear of limited access to technology
 - Bystanders and witnesses anonymous



The Tools of Cyberbullying



Snapchat



Whisper



Ask.fm



Kik



Yik Yak



Instagram



Tumblr



Vine



Review of Laws re: Bullying

State Law

- ORS 339.351 Harassment, Intimidation, Bullying.
 - Defines terms.
 - Expansive list of acts that constitute bullying.
 - Requires District policy.
 - Requires a school employee to report.
 - Procedure for investigation.
 - Consequences for bully.

Federal Law

- Disability Discrimination
 - Section 504
 - ADA Title II
- Title VI (Civil Rights Act)
 - Race
 - Color
 - National Origin
- Title IX
 - Sexual Harassment
 - Gender-based Harassment.



ORS 339.351: Includes more than protected class

Protected class

- Distinguished or perceived by—
 - Race
 - Color
 - Religion
 - Sex
 - Sexual orientation
 - National origin
 - Marital status
 - Familial status
 - Source of income
 - Disability

Anyone else

- “May be based on, but not limited to, the protected class status of a person.”



**Definitions of Bullying and Harassment
ORS 339.351**

- **Harassment, intimidation or bullying** means any act that substantially interferes with a student's educational benefits, opportunities or performance.
- Cyberbullying is the use of any electronic device to harass, intimidate or bully.



ORS 339.351

That has the **effect** of:

- (1) physically harming student or damaging student's property,
- (2) placing student in reasonable fear of the above, or
- (3) creating a hostile educational environment.



Location

- "Takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop."



School Policy Requirements

Policy must include:

- Prohibition of activities including harassment, intimidation, bullying, or cyberbullying
- Uniform reporting procedure including **job titles** of school and district officials
- Procedure to request review by the school district of a school's report of response of an action
- Annual notice of policy in handbook and "readily" available (website)



School Policy Requirements (cont'd)

- ORS 339.362 Prohibits retaliation against victim of, witness to or person with reliable information about an act of harassment.



Increased Focus on Bullying and Harassment of Disabled Students

Office for Civil Rights

- Dear Colleague Letter of October 26, 2010.
- Dear Colleague Letter of August 20, 2013.
- Dear Colleague Letter of October 21, 2014

October 21, 2014

- "Dear Colleague, While there is broad consensus that bullying is wrong and cannot be tolerated in our schools, the sad reality is that bullying persists in our schools today, and especially so for students with disabilities."



Students with Disabilities disproportionately bullied.

Likely Targets

- Students with learning disabilities.
- Students with ADD/ADHD.
- Student on the Autism spectrum.

Target Response

- More vulnerable to bullying.
- May not understand harmful effects of bullying.
- May not be able to make the situation known to an adult.



Bullying Disabled Student can result in a Denial of FAPE.

October 14, 2014 OCR Letter

- "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 a denial of FAPE that must be remedied under Section 504."

School Response to Bullying

- "School should convene the IEP team to determine whether, as a result of the effects of bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit."



Estate of Lance v. Lewisville Indep. S.D. (5th Cir. 2014)

- 4th grade student with ADD, a speech impediment (lisp) and eventually an emotional disturbance.
- Student had multiple disciplinary events with other students, some of whom were picking on him.
- Student commits suicide by hanging himself in nurse's restroom.
- Parents sue district under Section 504 for disability discrimination.



Holding by Court

- School District was not deliberately indifferent to disability-based harassment that student suffered at the hands of his classmates.
- School psych was involved.
- Teacher intervened with target student and aggressor student.
- District policy met national standards.
- District provided training to students. ■ ■

Legal Standard for Disability Discrimination under Section 504

- Student has a disability.
- Student was harassed as result of disability.
- Harassment was sufficiently severe or pervasive that it altered the condition of student's education and created an abusive educational environment.
- School knew about harassment; and
- School was deliberately indifferent to harassment. ■ ■

Moore v. Chilton Co. Bd. Of Ed. (M.D. Ala. 2014)

- Overweight teenage girl with orthopedic impairment commits suicide after bullying.
- No IEP or 504 Plan.
- Students teased her because of her weight and awkward way of walking.
- Cheerleaders called her "fat ass."
- Friend of target student reports to teachers.
- School bus driver was aware of verbal harassment and provided assistance.
- Teachers took steps to help target student.
- Parents sue District under Section 504. ■ ■

Holding: No Deliberate Indifference to Harassment.



- Court determined that the Board did not have actual notice of harassment.
- Teachers and bus driver cannot establish actual notice.
- Asst. principal took appropriate disciplinary action. ■ ■

T.K. v. New York City Dept. of Ed. (E.D.N.Y. 2014)

- L.K is student originally diagnosed with ASD.
- In May a student assaulted L.K.
- In November student stomped L.K.'s toes.
- L.K. complained to her parents that she was being bullied on a daily basis.
- L.K. regressed, gained weight and began bringing dolls to school.
- Parents obtained a private psych report recommending private placement.
- Teachers agreed T.K. was treated as a classroom pariah. ■ ■

T.K. (cont'd)

- Parents tried to discuss bullying during IEP meeting.
- IEP team responded it was not an appropriate topic for discussion.
- IEP team placed T.K. back in the same classroom where she was bullied.
- Parents rejected classroom placement and filed due process.
- Hearing Officer determined that bullying was unrelated to FAPE.
- Parents appeal.
- Parent prevails. ■ ■

Court holding:

- “A disabled student is deprived of FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts a child with learning disabilities in her educational opportunities.”



Court holding:

- The conduct does not need to be outrageous. It must be sufficiently severe, persistent, or pervasive that it creates a hostile environment.
- “Where there is a legitimate concern that bullying will restrict a disabled student’s educational opportunities, it must be considered by the student’s IEP team.”
- IEP failed to address bullying.



Does v. Prince George’s County Bd. Of Ed. (4th Cir. 4/7/15)

- Student alleged that during 4th and 5th grade years he was repeatedly sexually harassed by another student.
- District responded to each incident.
- Student reported harassment to police.
- Harasser was disciplined.
- Parents withdrew student at end of 5th grade.



Parents file Title IX Claim for sexual harassment

- Parents claim that school "should have known" of alleged sexual assault.
- "Should have known" standard = negligence standard.
- District Court ruled that proper standard is the deliberate indifference.
- Held in favor of District. District had no actual knowledge.
- 4th Circuit Court affirms District Court.



State v. Bishop (N.C. Ct. App. 2015)

- Dillon was a sophomore in high school.
- His classmates began posting negative comments and pictures of him on social media.
- Comments were vulgar and threatened violence.
- Defendant admitted to posting comments, he was arrested and charged under the North Carolina Cyberbullying statute.



Highlights of North Carolina Cyberbullying Statute

- Unlawful to use a computer or computer network to:
 - With intent, **intimidate** a minor.
 - Make any statement, whether true or false, that is likely to provoke a 3rd party to **harass** a minor.



Holding of Court

- Content of the messages was not being limited by the Cyberbullying statute.
- Intent to use comments as instrumentalities to intimidate was being limited.
- Not a limit on speech
- Is a limit on conduct



Holding of Court (cont'd)

- "A statute is not overbroad when it punishes, prohibits, or inhibits . . . conduct which is not constitutionally protected."
- "Government has substantial interest in the protection of children from the psychological and emotional harm of cyberbullying."



OCR Best Practice per 10-21-14 Letter:

- Unless from school's investigation it is clear that bullying conduct had no effect on the disabled student's receipt of FAPE, the school should:
 - Convene IEP or 504 team;
 - Determine if student's needs have changed;
 - Whether the bullying impacted FAPE;
 - Determine what additional services needed;
 - Make any needed changes promptly.



OCR then looks at FAPE

- Did the school know or should it have known the bullying conduct affected student's FAPE?
 - If no- No FAPE violation.
- If yes, did the school meet its ongoing obligation to ensure FAPE by having an IEP team determine whether needs were being met and whether IEP changes were needed?



OCR Investigation template:

- Was disabled student bullied by one or more students based upon disability?
- Was bullying sufficiently serious to create hostile environment?
- Did the school know or should it have known of conduct?
- Did the school fail to take prompt and effective steps to end conduct and eliminate hostile environment.



Now What?



Your conduct will be judged by deliberate indifference standard.

- How to avoid deliberate indifference:
 - Don't ignore student/parent complaints.
 - Prompt investigation.
 - If a SPED student is complaining of bullying follow OCR guidance– IEP Meeting.
 - Proactive response.
 - Make sure you have District policies and procedures in place to handle complaints of bullying and harassment.



What Works?

1. Develop a school based program for prevention and intervention.
2. Most effective programs are comprehensive and continuous, not situational.
3. Assess students and staff for extent of concern and attitudes.
4. Representative team, coordinated efforts, include outside professionals.
5. Staff development and training for response and program development.



What Works?

6. Review policies, disciplinary code and develop consistent rules.
7. Intervene consistently and appropriately.
8. Classroom activities and discussion, incorporate themes in curriculum.
9. Increase adult supervision in "hot spots".
10. Involvement of parents in prevention and intervention activities.
11. Use/encourage staff to increase knowledge and motivation to end bullying.



Additional Elements to address Bullying:

- Most important to decrease both bullying perpetration and victimization:
 - Parent training and meetings.
 - Discipline that provides consequences to bullies.
 - Promoting cooperation among different professionals in working with bullies and victims.



Most important to decrease bullying

- Improve playground supervision
- Classroom management techniques to detect and deal with bullying
- Training teachers
- Using classroom rules against bullying that students were expected to follow
- School anti-bullying policy
- School assemblies
- Information for parents



Less Effective Strategies

- Zero tolerance policies.
- Conflict resolution/peer mediation.
- Group treatment of bullies.
- Simple, short-term solutions.
- Meetings between bully and victim.



Contact Us

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