

How to Evaluate a School Bullying Case

By Adele Kimmel and Adrian Alvarez

More and more children are coming forward and confirming what we already know: bullying is a serious problem in our nation's schools. But not every instance of what we may think of as bullying is actionable in court. Knowing what set of facts gives rise to a viable cause of action may spare a student from needless disappointment. Many students who have experienced prolonged harassment at school by their peers feel victimized by a system they perceive as broken. When cases are dismissed because the facts alleged in a complaint fail to state a viable claim, students and parents may experience a second wave of disappointment and feel as if both the educational and legal systems have failed them.

We hope this article helps educate plaintiffs' attorneys about how to screen and evaluate cases against a school district and/or school officials for student-on-student or "peer" bullying. Though we briefly discuss the causes of actions commonly asserted in school bullying cases, that subject is discussed in greater depth in ADELE KIMMEL AND ADRIAN ALVAREZ, *LITIGATING BULLYING CASES: HOLDING SCHOOL DISTRICTS AND OFFICIALS ACCOUNTABLE*, which you can find on Public Justice's website and in AAJ's School Bullying Litigation Packet.¹

What is bullying?

The first step in evaluating a school bullying case is to learn how to identify bullying. One thing that makes this area of the law challenging is that there is no uniformly accepted legal definition of bullying. This is partly because there is no federal law that either prohibits or defines bullying. And the 49 states with anti-bullying laws all define "bullying" somewhat differently. Here's the definition generally accepted among psychologists and other experts in the field—which is also used by the U.S. Department of Health & Human Services: "Bullying is unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time."² This definition establishes a helpful framework for evaluating bullying cases. In essence, bullying involves the following four components: (1) a student is subjected to aggressive abuse by other students that, (2) is repeated over time, (3) involves a real or perceived power imbalance, and (4) humiliates, scares, or isolates the student.³ There are three main types of bullying: verbal; social or "relational;" and physical.⁴

1. Verbal bullying may include the following:
 - Teasing
 - Name-calling
 - Inappropriate sexual comments
 - Taunting
 - Threatening to cause harm

2. Social or "relational" bullying may include the following:
 - Excluding someone on purpose
 - Telling other children not to be friends with someone
 - Spreading rumors about someone
 - Embarrassing someone in public

3. Physical bullying may include the following:
 - Hitting, kicking and pinching
 - Spitting
 - Tripping and pushing
 - Taking or breaking someone's things
 - Making mean or rude hand gestures⁵

State Anti-Bullying Statutes

A thorough evaluation of potential claims to address peer bullying *must* include an examination of your state's anti-bullying laws and policies, as well as the local school district's anti-bullying policies. State anti-bullying laws and model policies address and define bullying in many different ways. In addition, though some state laws define bullying, others leave the definition of bullying to local school boards. Thus, it is important to review your state's anti-bullying laws and policies, as well as your local school district's anti-bullying policies, when evaluating a potential bullying case. For a quick and easy way to find your state's anti-bullying laws and policies, take a look at www.stopbullying.gov, a website operated by the U.S. Department of Health & Human Services. In addition, most schools and districts post their anti-bullying policies on their websites.

Causes of Action

When evaluating a potential peer bullying case, it is important to know that a school's responsibilities to address bullying are not limited to the responsibilities described in the school's (or the state's) anti-bullying policies. In fact, state anti-bullying statutes do not have a private right of action. You should consider possible causes of action under federal anti-discrimination statutes, the U.S. Constitution, and state law.

Federal Law

If you have evidence that the bullying was based on race, color, national origin, sex, and/or disability, you should consider asserting claims under the following federal anti-discrimination statutes: Title VI of the Civil Rights Act of 1964 (Title VI),⁶ which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX),⁷ which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973 (Section 504),⁸ which prohibits discrimination on the basis of disability; and Title II of the Americans with Disability Act of 1990 (Title II),⁹ which also prohibits discrimination on the basis of disability.¹⁰ School districts may violate these civil rights statutes and the U.S. Department of Education's implementing regulations¹¹ when peer bullying based on race, color, national origin, sex, or disability "is sufficiently serious that it creates a hostile environment and such harassment is encouraged, not adequately addressed, or ignored by school employees."¹²

Although these federal civil rights statutes do not prohibit discrimination based on sexual orientation or religion, in some circumstances such bullying may be covered by Title IX or Title VI, respectively. If the bullying of a student who is gay or perceived to be gay can properly be characterized as a form of gender-based stereotyping, then Title IX would apply.¹³ Similarly, if a Jewish, Muslim, or Sikh student is bullied on the basis of actual or perceived shared ancestry or ethnic characteristics, rather than solely on their religious practices, Title VI would apply.¹⁴

Bullying based on race, color, national origin, sex, disability, or religion may also give rise to a claim under 42 U.S.C. § 1983¹⁵ for violations of a student's constitutional right to equal treatment under the Fourteenth Amendment's Equal Protection Clause or the student's right to substantive due process under the Amendment's Due Process Clause.¹⁶ In addition to the traits covered by the federal anti-discrimination statutes, the Constitution also directly covers discrimination based on religion.

State Law

When evaluating a potential bullying case, it is important to consider both common-law tort claims and civil rights claims under your state's laws. There are several potential advantages to asserting state law claims for failing to respond appropriately to bullying. For starters, unlike the federal claims discussed above, bullying victims can assert tort claims regardless of whether they are a member of a "protected" or "identifiable" class. This means that, even if the bullying is not based on the victim's race, sex or disability, he or she may have remedies under state tort law.¹⁷ In addition, state civil rights statutes often cover a wider range of discrimination than federal civil rights statutes. For example, unlike their federal counterparts, some states' civil rights statutes prohibit discrimination based on sexual orientation.¹⁸ Notwithstanding these advantages, as explained in more detail below, there are also some significant obstacles to asserting state law claims related to bullying, including sovereign immunity.

Evaluating a Claim

Evaluating a potential bullying claim requires an investigation into several key areas:

1. The Nature and History of the Bullying: Was the bullying verbal in nature only? Was it longstanding?
2. Where the Bullying Happened: Was the bullying on school grounds? Was it at a school function elsewhere? Was it via cell phone or other personal device?
3. Effects of the Bullying: Is the student experiencing Post-Traumatic Stress Disorder ("PTSD")? Depression? Anxiety? Panic attacks?
4. School Knowledge of the Bullying: Were any of the incidents reported to a school official? If so, did those officials with authority to take corrective action?
5. Administrative Exhaustion: Is there time to meet all the conditions precedent to litigation?
6. Client's Emotional State: Are the student and parents emotionally ready for litigation?

These considerations are discussed in greater detail below.

Nature of Bullying

Whether evaluating potential state or federal claims in school bullying cases, it is important to get as detailed a description as possible of the nature and history of the bullying incidents. The cases most likely to succeed typically involve a student who has been subjected to harassment with a physical component, for a significant period of time. This isn't to say that verbal and social harassment play no role in stating a claim. These forms of harassment can strengthen a claim, especially if the verbal and social harassment are severe and longstanding. But in many jurisdictions, a plaintiff cannot recover in tort for purely emotional harm.

For federal statutory causes of action, the United States Supreme Court has explained that a federal funding recipient (such as a public school district) may be liable in monetary damages for deliberate indifference to known instances of student-on-student harassment based on a federally protected class, but only for "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the

victim's access to an educational opportunity or benefit.”¹⁹ In most instances, this “severe, pervasive, and objectively offensive” prong requires physical harm.

Where Bullying Happens

School districts may be liable for harassment of a student that occurs on school grounds or when the student is in a school's custody. This covers harassment that occurs:

- In school buildings
- During extracurricular activities
- On a school bus
- On athletic fields
- And, in some instances, on the Internet (*i.e.* cyberbullying)²⁰

In other words, a school typically only owes its students a duty of protection from third-party harm in situations when it knows it can control the third party's conduct.²¹ Thus, a school district may be liable for failing to address cyberbullying initiated on school computers and laptops, and even on personally-owned devices (*e.g.* cell phones) if the harassment occurs on school grounds. A school district may also be liable for cyberbullying that occurs off school grounds, however, if it causes substantial disruption in the school environment.²²

Effects of Bullying

A fundamental legal principle is that only a plaintiff who has suffered damages may recover at law. The same is true in school bullying litigation. When you evaluate potential claims, you should consider the effects that bullying has had on the student. Key effects to consider are:

- Physical injuries
- Falling grades
- Withdrawal from the school or school district
- Depression, anxiety, other psychological harm (including suicidal thoughts)

Reports on Bullying to School Officials

Perhaps the biggest obstacle to overcome in a potential bullying case against a school district is the notice or knowledge requirement. No matter how severe and pervasive the bullying may have been, a school district may only be liable for failing to address the bullying where it had actual or constructive notice.

One challenge is that many bullied students are not comfortable enough to report the harassment. This is especially true for students who have experienced some kind of bias-based harassment, such as harassment based on the student's actual or perceived sexual orientation.

Although actual or constructive notice is not an element of a negligence claim, school officials and school districts may be immune from these claims.²³ Even when a school district had a duty to protect a student from bullying and failed to exercise reasonable care in carrying out the duty, a common law or statutory immunity may protect the school from facing civil liability. Because of these immunities, you may only be able to assert claims for willful and wanton misconduct or gross negligence—both of which either explicitly or implicitly require the school district to have some kind of notice of the bullying.²⁴

Actual notice is required for federal causes of action seeking money damages. The Supreme Court in *Davis* has made very clear that private damages actions for peer harassment under Title IX (and other similar statutes enacted pursuant to Congress's Spending Clause powers, such as Title VI) are available only where the school district had *actual notice* of the harassment.²⁵

The standard is not as burdensome for federal injunctive relief. The United States Department of Education has taken the position that a plaintiff seeking injunctive relief can hold a school district liable for failing to address instances of bias-based harassment about which it knows or *reasonably should have known*.²⁶ In other words, a plaintiff only has to prove constructive knowledge for injunctive relief claims under federal civil rights statutes.

The notice requirements vary under state tort law, but are often similar to the federal requirements for suits seeking injunctive relief.

Another potential obstacle to liability involves the issue of who must have notice of the harassment. In a federal lawsuit for money damages, a school district may be liable only if an official with authority to address the alleged harassment and institute corrective measures had actual knowledge of the harassment.²⁷ This can be a very high burden to meet.²⁸ Depending on the way that a school district is structured under state laws, this might require actual knowledge of the harassment by a principal, superintendent, or even a school board member. For federal injunctive relief, the standard is more relaxed: a student need only inform a "responsible employee," which could be any one of the following:

- An employee with authority to take action to redress the harassment;
- An employee with the duty to report to appropriate school officials harassment or misconduct by students or employees;
- An individual who a student could reasonably believe has this authority or responsibility.²⁹

Administrative Exhaustion

When evaluating a bullying claim, you should consider if there is sufficient time to meet administrative exhaustion requirements. There is no exhaustion requirement for filing a federal claim under the Constitution or any of the anti-discrimination statutes, but many states require a plaintiff to file a notice of claim with a government entity within as little as six months from the date of accrual.³⁰ Although there may be exceptions when the plaintiff is a minor, each jurisdiction varies, and failure to fulfill notice of claim requirements can be fatal to a case.

Client's Emotional State

As we all know, a lawsuit is highly stressful for plaintiffs. And it can be much more stressful for a child who may be experiencing PTSD or other mental health issues. Therefore, you and the bullying victim's parents should carefully assess whether the child is emotionally able to participate as a plaintiff in a lawsuit.

Be mindful as well that bullying can cause parents and guardians to experience tremendous anxiety and frustration. Educating parents and students about what is and isn't a viable bullying claim can help focus a client's attention on developing strategies for dealing with bullying that are separate from any issues involving potential litigation.

There are many resources on the internet that can help parents understand the nature of bullying and cope when litigation isn't a viable option. These include the federal government's anti-bullying website (www.stopbullying.gov) and documentary filmmaker Lee Hirsh's website (www.thebullyproject.com), among others. Moreover, books such as Emily Bazelon's *STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY* (2013), can help parents and attorneys alike understand the nature of bullying, how it plays out at school, and how schools can do a better job of addressing bullying and creating a positive environment conducive to learning.

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NOTES

¹ See http://publicjustice.net/sites/default/files/downloads/Bullying-Litigation-Primer-April-2013_1.pdf. The primer is part of AAJ's School Bullying Litigation Packet, available through the AAJ Exchange.

² <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Feb. 11, 2015).

³ See, e.g., Stopbullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Feb. 24, 2014); Emily Bazelon, "Defining Bullying Down," *The New York Times* (Mar. 11, 2013), available at <http://www.nytimes.com/2013/03/12/opinion/defining-bullying-down.html>.

⁴ Stopbullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Feb. 11, 2015).

⁵ *Id.*

⁶ 42 U.S.C. § 2000d *et seq.*

⁷ 20 U.S.C. § 1681 *et seq.*

⁸ 29 U.S.C. § 794

⁹ 42 U.S.C. § 12131 *et seq.*

¹⁰ For disabled students who are bullied, you should also consider asserting claims under the Individuals with Disabilities Education Act (IDEA) based on a school district's failure to provide a "free appropriate public education." See 20 U.S.C. § 1412(a). Potential claims under the IDEA are discussed in Section III. C. 2., *infra*.

¹¹ The Department's regulations implementing these statutes are in 34 C.F.R. Parts 100, 104, and 106.

¹² U.S. Department of Education, Office for Civil Rights (OCR), Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

¹³ *Id.* at pp. 7-8.

¹⁴ *Id.* at pp. 5-6.

¹⁵ 42 U.S.C. § 1983 provides that:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

¹⁶ School bullying claims under the Equal Protection Clause fare far better in the courts than claims under the Substantive Due Process Clause, and we recommend thinking long and hard before asserting the latter claim (which generally fails).

¹⁷ See, e.g., *Smith v. Poughkeepsie City Sch. Dist.*, 41 A.D.3d 579, 580-81 (N.Y. App. Div. 2007) (negligent supervision claim against school district for failing to prevent student's assault).

¹⁸ See, e.g., N.Y. Civ. Rights Law § 40-d ("No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil rights, or to any harassment . . . in the exercise thereof, by any other person or by any firm, corporation or institution, or by the

state or any agency or subdivision of the state.”); D.C. Code § 2-1402.41(1) (“It is unlawful discrimination for an educational institution to discriminate based on actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, political affiliation, source of income, or disability.”)

¹⁹ See *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (federal funding recipient can be liable under Title IX of the Education Amendment of 1972 for deliberate indifference to sex-based peer-on-peer harassment). Other courts have applied the holding in *Davis* to other federal anti-discrimination statutes. See, e.g., *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012) (Title VI of the Civil Rights Act of 1964); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008) (Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act).

²⁰ For a discussion on cyberbullying, see SEMEER HINDUJA & JUSTIN W. PATCHIN, OVERVIEW OF CYBERBULLYING (March 10, 2011) available at

http://www.uwec.edu/patchinj/cyberbullying/white_house_conference_materials_Hinduja&Patchin.pdf.

²¹ See RESTATEMENT (SECOND) OF TORTS § 320(a).

²² See, e.g., *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

²³ See, e.g., *Burns v. Gagnon*, 727 S.E.2d 634, 645-46 (Va. 2012) (teachers have statutory immunity for negligence and principal has common law immunity for negligence).

²⁴ See, e.g., *Vilardo v. Barrington Cmty. Sch. Dist.*, 941 N.E.2d 257, 267 (Ill. App. 2010) (actual or constructive notice needed to state a claim for willful and wanton conduct); *Etheredge v. Richland Sch. Dist. One*, 534 S.E.2d 275, 277 (S.C. 2000) (school district not grossly negligent for failing to protect against bullying where it “had no direct knowledge or notice of the animosity” between the students).

²⁵ *Davis*, 526 U.S. at 633, 650.

²⁶ See U.S. Dep’t of Ed., Office of Civil Rights (“OCR”), *Dear Colleague Letter: Harassment and Bullying 2* (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

²⁷ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

²⁸ See, e.g., *Doe v. Univ. of Pac.*, 467 F. App’x 685, 688 (9th Cir. 2012) (university vice president of student affairs was not an official with authority to address the alleged discrimination and to institute corrective measures).

²⁹ OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 34 n. 74 (Jan. 19, 2001) (“Sexual Harassment Guidance”) available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

³⁰ See, e.g., CAL. GOV. CODE § 911.4.