



How to Evaluate a School Bullying Case

By Adele Kimmel

Introduction

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.

This paper provides an overview of how to screen and evaluate potential cases against a school district and/or school officials for student-on-student or "peer" bullying. Although this paper briefly discusses the causes of actions commonly asserted in school bullying cases, the causes of action are discussed in greater depth in Adele Kimmel, *Litigating Bullying Cases: Holding School Districts and Officials Accountable* (Fall 2017 edition), available at <https://www.publicjustice.net/wp-content/uploads/2016/02/Bullying-Litigation-Primer-Fall-2017-Update-FINAL.pdf>.

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 law challenging is 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 even though all 50 states have anti-bullying laws, they all define "bullying" somewhat differently.¹ 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 In essence, bullying involves the following four components: (1) a student is subjected to physical and/or verbal abuse by other students that, (2) is repeated over time, (3) involves a

¹ The U.S. Department of Health and Human Services has a website, <https://www.stopbullying.gov/index.html>, which provides a wealth of information on bullying, including every state's anti-bullying laws and policies.

² See Stopbullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Apr. 30, 2019).

real or perceived power imbalance, and (4) humiliates, scares, or isolates the student.³ There are three main three 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, you can take a look at <https://www.stopbullying.gov/> and/or <http://bullypolice.org/>. In addition, most schools and districts post their anti-bullying policies on their websites.

³ See, e.g., Stopbullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Apr. 30, 2019); 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 See Stopbullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/index.html> (last visited Apr. 30, 2019).

⁵ *Id.*

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 include a private right of action. Thus, 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/or 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

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).

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

¹² Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlyn Ali*, U.S Dep't Educ., at 1 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (hereinafter "Bullying DCL").

¹³ *Id.* at 7-8.

¹⁴ *Id.* at 5-6.

Bullying based on race, color, national origin, sex, disability, or religion may also give rise to a claim under 42 U.S.C. § 1983 for violations of the 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.¹⁵ 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 was not based on the victim’s race, sex, ethnicity, or disability, he or she may have remedies under state tort law.¹⁶ 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 and/or gender identity.¹⁷ 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.

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

It’s worth noting that substantive due process claims in bullying cases typically fail and that equal protection claims fare far better in the courts. So attorneys should think long and hard before asserting a substantive due process claim in a school bullying case. *See* Adele Kimmel, *Litigating Bullying Cases: Holding School Districts and Officials Accountable*, 21-25 (Fall 2017 edition), available at <https://www.publicjustice.net/wp-content/uploads/2016/02/Bullying-Litigation-Primer-Fall-2017-Update-FINAL.pdf> (last visited Apr. 30, 2019).

¹⁶ *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); *Jerkins ex rel. Jerkins v. Anderson*, 922 A.2d 1279, 1286 (N.J. 2007) (school districts and officials have duty to exercise reasonable care in supervising students during school day).

¹⁷ *See, e.g.,* N.Y. Civ. Rights Law § 40-d (prohibiting discrimination on the basis of “race, creed, color, national origin, sex, marital status, sexual orientation or disability”); D.C. Code § 2-1402.41(1) (prohibiting discrimination on the basis of “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.”); N.J. Stat. Ann. § 10:5-4 (prohibiting discrimination on the basis of “race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, gender identity or expression.”).

Evaluating a Claim

Evaluating a potential bullying claim requires an investigation into many different areas:

1. Nature and History of the Bullying: Was the bullying verbal in nature only? Was there a physical component? Was it longstanding, a one-time incident, or something in between?
2. Where the Bullying Happened: Was the bullying on school grounds? Was it via cell phone or other personal device? Was it at a school function off campus?
3. Effects of the Bullying: Is the student experiencing post traumatic stress disorder, depressions or anxiety? Does the student have suicidal thoughts? Did the student's grades drop? Did the student have to leave the school to feel safe?
4. School Knowledge of the Bullying: Were any of the incidents reported to a school official? Did the student report the bullying to school officials with authority to take corrective action? Did school officials take any action on the reports?
5. Administrative Exhaustion: Is there time to meet all the conditions precedent to litigation?
6. Client's Emotional State: Is the student too traumatized to handle litigation?

These considerations are discussed in greater detail below.¹⁸

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 frequent harassment with a physical component. 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 pure 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.

¹⁸ To help attorneys evaluate the potential financial value of school bullying and harassment cases, Public Justice tracks verdicts and settlements in these cases across the country and updates its list approximately three times per year. The current list is available at <https://www.publicjustice.net/wp-content/uploads/2019/04/2019.04.22-Spring-2019-Edition-Bullying-Verdicts-and-Settlements-Final-1.pdf>.

¹⁹ *Davis ex rel. 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 Amendments 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); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008) (Title II and Section 504).

Where the Bullying Happened

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, via computers, smart phones, or other devices (*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 perhaps 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)

School's Knowledge of Bullying

One of the main obstacles in many school bullying cases is the notice or knowledge requirement. No matter how severe and pervasive the bullying may have been, schools frequently avoid liability by arguing that they did not have actual or constructive notice of the bullying.

The fact is that many bullied students are not comfortable enough to report the bullying. This is especially true for students who have experienced some kind of bias-based harassment, such as when a student is sexually assaulted or is harassed based on sexual orientation or gender identity.

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 Cnty. Schs.*, 652 F.3d 565, 573-74 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

Although actual or constructive notice is not an element in negligence cases, schools and their employees may be immune from negligence claims. Some states grant school districts and boards absolute immunity for its employees' torts. For example, Virginia school boards, acting in their governmental capacity, enjoy absolute immunity, even when school officials are grossly negligent.²³ Most states, however, do not grant school boards and school officials sued in their individual capacities absolute immunity for their torts.²⁴ They typically grant "qualified" immunity that applies only to "discretionary" acts or acts performed negligently, rather than with gross negligence or recklessness.²⁵ 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 harassment.²⁶

Actual notice is even more important for federal causes of action for monetary damages. The Supreme Court in *Davis* has made very clear that private damages actions for peer harassment under Title IX (and other similar anti-discrimination statutes, such as Title VI) are available only where the school district had *actual notice* of the harassment.²⁷

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*.²⁸ In other words, a plaintiff only has to prove constructive knowledge for injunctive relief claims under federal civil rights statutes.²⁹

Another potential obstacle to liability involves the issue of who must have notice of the harassment. In a federal lawsuit for monetary 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

²³ See, e.g., *Kellam v. Sch. Bd. of City of Norfolk*, 117 S.E.2d 96, 97-98 (Va. 1960); *Croghan v. Fairfax Cnty. Sch. Bd.*, No. 202460, 2002 WL 1941177, at *1-2 (Va. Cir. Ct. May 22, 2002).

²⁴ See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 11 Temple L. Rev. 641, 684 (2004).

²⁵ See *id.* Some states, however, permit ordinary negligence claims against school districts or officials. For example, California, holds school districts liable under traditional negligence standards. See, e.g., *M.W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 521, 525 (Cal. Ct. App. 2003) (judgment entered on negligent failure to supervise claim because school district owed student duty of care to protect from classmate's sexual assault).

²⁶ 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).

²⁷ *Davis*, 526 U.S. at 633, 650.

²⁸ See *Bullying DCL*, *supra* n.12, at 2.

²⁹ The notice requirements vary under state tort law, but typically are similar to the federal requirements for suits seeking injunctive relief.

harassment.³⁰ This can be a very high burden to meet.³¹ 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. There, a student need only inform a “responsible employee,” who 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.³²

Administrative Exhaustion

Another component for evaluating a claim is making sure 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 some 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.³³ 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.

Client’s Needs

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 post-traumatic stress disorder or thoughts of suicide. Therefore, you and the bullying victim’s parents should carefully assess whether the child is psychologically and 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 may not include 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 (<https://www.stopbullying.gov/index.html>) and documentary filmmaker Lee Hirsh’s website (<http://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 what schools can do to make structural changes that create a positive environment conducive to learning.

³⁰ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

³¹ *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).

³² Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. Dep’t of Educ., at 34 n.74 (Jan. 19, 2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.html>.

³³ *See, e.g.,* Cal. Gov. Code § 911.4.

Conclusion

We cannot eliminate bullying among school-aged children, but we can make schools respond appropriately to it—and help stop and deter a great deal of it—through effective litigation. Litigation is a critical tool in our arsenal. It can help compensate bullying victims for the injuries they have suffered and help change the culture of schools and districts, so they take appropriate steps to prevent and respond to bullying.