



Liability 101

How NOT to be *successfully* sued

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WHAT IS A SAFE SCHOOL?



Picture an iceberg.

30% of an iceberg is visible above the waterline....the real danger is the 70% that is not so obvious.

The 30% of our iceberg is what people traditionally think of when they think of things that make a school unsafe: theft, personal attack, serious violent crime, school shootings. So, people think that the *absence* of theft, personal attack, serious violent crime, school shootings equates to a safe school.

SAFE SCHOOL???



The part of our iceberg that we cannot see – the really dangerous part – is bullying, intimidation, verbal threats, the language of hate.

In a word, *incivility*.

Kevin Jennings

OVERVIEW



Terminology

~~Theories of Liability~~

Ways to Get into Legal Hot Water

Hazing

Cyberbullying

Sexting

GLBTQA Bullying

Student Free Speech

Proactivity

TERMINOLOGY



Words Matter

“A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.”

U.S. Supreme Court Justice Oliver Wendell Holmes

Terminology...



Bullying* is aggressive, repeated behavior that is intentional and involves a real or perceived imbalance of power and strength.

*Bullying and harassment are used synonymously herein.

Terminology...



Bullying is NOT:

- a reactive instance of an angry word, a shove, or even a punch
- generalized disruptive behavior that is not directed at a specific student or group of students

Terminology...



- **Hazing** is a subset of bullying. It is the intentional infliction of harm or humiliation on a student as a condition of membership in a club or other group of students, or even a grade level in school.
- Hazing occurs – and in some states is a crime – regardless of the target’s willingness to participate in the activities.

Terminology...



Sexting includes:

- Sending photos or messages meant to harass recipient
- Sending photos or messages meant to humiliate subject
- Sending obscene materials to minors, even if consensual

Terminology...



- ~~Victim~~
- **Target**
- Words matter. A student may not have control over whether s/he is the target of misconduct. A student does have control over whether being targeted will “victimize” the student.

Terminology...



GLBTQA

- Gay
- Lesbian
- Bisexual
- Transgendered
- Questioning
 - Allied

LEGAL LIABILITY



Am I violating local policy provisions, state law,
Title VI, Title VII, Title IX, Section 1983,
Constitutional rights under the 1st Amendment,
14th Amendment????

LEGAL LIABILITY



Forget the theories of legal liability

Let's discuss "how not to get into trouble under any theory"

The Basics



- **The Legal Standard is (probably) deliberate indifference**

If a school employee knows of harassment and does *nothing*, this is deliberate indifference.

If a school employee *should have known* of harassment and does *nothing*, this is deliberate indifference.

- To avoid liability, take steps that are reasonably calculated to alleviate or to prevent harassment. Even if the steps are not successful, you may be protected. “Protected” does not mean you will not be sued; it means you will not be sued *successfully*.

Gebser v. Lago Vista Sch Dist.



In 1998, the U.S. Supreme Court first gave students a private right of action (as opposed to agency regulation only) for monetary damages for harassment by a school employee if the student proved the following:

That the school had actual notice of the harassment;
and

That the school was deliberately indifferent to the harassment.

Gebser v. Lago Vista School District, 524 U.S. 274, 118 S.Ct 1989 (1998)

Gebser v. Lago Vista Sch Dist.



Facts: Male h.s. teacher began sexually harassing female student when she was in 8th grade. By end of her freshman year, the relationship was a physical one.

The target reported this to no one.

School District prevailed because it had no notice of the harassment, and thus, no opportunity to remedy it.

Davis v. Monroe County Bd. of Ed.



This is still *the* case regarding district liability for peer harassment.

Facts:

- A 5th grade girl was subject to repeated sexual harassment by a boy in her class
- Most of the harassment was verbal, but there were also many instances of unwanted physical contact
- The Davis child was not the only target of the perpetrator; a group of girls complained to their teacher and asked her to intervene with the principal.
- The teacher declined to intervene and declined to let the students talk to the principal.
- The Davis parents did talk to the principal, but it took three months of complaining before the district so much as moved the desks of the perpetrator and the Davis child so that they would not sit directly adjacent to each other in class.

Davis v. Monroe County Bd. of Ed.



- The Supreme Court did not award damages to the Davis family. It merely reversed the lower court's granting of a motion for summary judgment, thereby holding that the Davis family could go to trial to try to prove its case against the district.
- The importance of the case is that the Supreme Court gave some guidance as to what plaintiffs must prove in such cases.
 - The harassment was so severe, pervasive, and objectively offensive, that it effectively denied the target equal access to the school's benefits and opportunities.
 - The school (board, officials) will be held liable if it is shown to have been **deliberately indifferent**

Davis v. Monroe County Bd. of Ed.



- Deliberate indifference
 - A school official must have known (or should have known) of the harassment
 - The school response was “clearly unreasonable”
 - No response at all
 - A reasonable person would believe the response to be ineffective

Davis v. Monroe County Bd. of Ed.



Other lessons from *Davis*:

- Schools are not responsible for the actions of a student; they are responsible for their own actions/inaction.
 - Teasing or name-calling alone is not actionable.
 - The school administration is not required to completely rid its schools of peer harassment.
 - School administrators have full discretion as to what disciplinary actions they take against perpetrators – courts are not to second guess any particular disciplinary decisions of the district.
-
- *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661 (1999).

SCHOOL'S DUTY TO STUDENT



Generally, schools owe students the duty of reasonable care.

Did the school do (or refrain from doing) anything to enhance the student's risk of injury?

SCHOOL'S DUTY TO STUDENT



- Compulsory attendance laws do not create any special duty of school officials to protect students.
- School officials sometimes unwittingly create a higher duty.
 - “I guarantee...”
 - “I’ll take care of it...”

Student-to-Student Harassment PROOF OF DAMAGES



A school district was liable in the amount of \$22,000 to an 11 year old student who was subjected to sexual assault and lewdly harassing notes from another student, and was deprived of the opportunity to attend middle school for almost two months, plus \$5,000 for the emotional injury the student experienced due to the district's unreasonable response to multiple notices of sexual harassment by the other student. The sexual harassment took the form of unwelcome physical contact, much of it occurring in the middle school bathroom, and the passing of notes in which the harasser requested sexual favors. The court found that the district had actual knowledge of the harassment, that its responses were unreasonable (indicating deliberate indifference), and the victim was deprived of access to educational opportunities and benefits.

Dawn L. v. Greater Johnstown School District, 586 F.Supp.2d 332 (W.D. Pa. 2008)

STUPID RESPONSE, ULTIMATELY HARMLESS



The trial court's granting of a motion for summary judgment in favor of the district was affirmed where the school district showed that all allegations of improper sexual conduct on the part of other students were swiftly and appropriately dealt with by the district. The one item to note is that the elementary principal did her school no favors when replying to the first complaint that a boy was drawing obscene pictures on the school bus that, "Boys will be boys." Stupid, yes; actionable, no.

Bosley v. Kearney R-1 School District, 140 F.3d 776 (8th Cir. 1998).

Student-to-Student Harassment

REASONABLE RESPONSE



Leonard was a kindergarten student who alleged that a classmate named Tyler touched his genitalia in the boys' restroom. In response, the principal talked to both students and their parents, and instructed teachers and aides not to allow the boys to use the bathroom at the same time. The classroom teacher was also instructed to monitor the boys closely. Two days later, during lunch recess, there was a second incident; Tyler confirmed that he had tried to "hump" Leonard. After discussing the second incident with both parents, the principal agreed to the request of Leonard's parents to transfer Leonard to another school. Leonard's parents also sued, but this lawsuit was dismissed. The court found there was no way to foresee that a second incident would occur based on the murky facts surrounding the first allegation. Essentially, the response of the principal, although it did not prevent a second incident, did not amount to deliberate indifference because the principal had not increased the danger to Leonard or provided an opportunity that otherwise would not have existed for Tyler's conduct.

Student-to-Student Harassment

REASONABLE RESPONSE



While two first graders were left unsupervised during lunch, the male student exposed his bottom and penis to the female student and improperly touched her buttocks. Several days previously, the male student had “seductively” kissed her on the lips. For the kissing incident, he was suspended from school for 10 days and not allowed to return until his parents submitted a written statement from a mental health professional stating that he was not a threat to other children. The court granted summary judgment for the school, concluding that there was no evidence that the school acted with deliberate indifference toward the girl, and that she was not effectively barred access to an educational benefit. (She had presented no evidence that her grades suffered or that her learning was otherwise compromised.)

Doe v. Lennox School Dist. No. 41-4, 329 F.Supp.2d 1063 (D.S.D. 2003)

Student-to-Student Harassment

REASONABLE RESPONSE



High school female cheerleader sued school district, claiming it was deliberately indifferent to harassment by another female cheerleader.

Plaintiff's Mom

Boyfriends, ex-boyfriends

Name-calling ('ho)

Rumors (hickeys, pregnancy)

Student-to-Student Harassment REASONABLE RESPONSE



Court ruled in favor of district.

School investigated all allegations and removed the perpetrator from the plaintiff's classes and from cheerleading tryouts.

Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)

Student-to-Student Harassment

REASONABLE RESPONSE



Federal court in Delaware also sided with the school where a student alleged that the school failed to protect her from her boyfriend. All abusive incidents occurred off-campus, but when school was told of them, it assigned the two to different lockers to limit their interaction.

The boy sent a threatening text message to the girl and was charged with criminal harassment. Two months later, he slapped the girl at school, which was first incident at school.

Student-to-Student Harassment

REASONABLE RESPONSE



He was arrested again and pled guilty to harassment.

School suspended him from class for 3 days and removed him from school baseball team.

School offered to allow the female student to complete the remaining one month of school at home with no loss of credit. This was rejected by the family, but found to be reasonable by the court.

P.K. v. Caesar Rodney High Sch. (D.Del. 2011)

Student-to-Student Harassment

FORESEEABILITY



A kindergarten student was sexually assaulted by a classmate in the school bathroom. The parents filed a negligence lawsuit against the school based on the school's failure to warn the *substitute teacher* of the other child's sexually aggressive behavior and of the school's bathroom-pass procedure which limited use of the bathroom to one child at a time. The jury found in favor of the injured child.

Miami-Dade County School Board v. A.N., 905 S.2d 203 (Fla. App. 3 Dist. 2005)

Student-to-Student Harassment UNREASONABLE RESPONSE



In another case involving a substitute teacher, a 5th grader sustained a fractured nose and lost a tooth when he was assaulted by a classmate during a social studies class. There was evidence that the substitute teacher left the room while the students were engaged in verbal conflict. This created enough of a fact question about whether the school's conduct caused the injuries to the student to allow the case to proceed to trial for a jury to determine.

Wood v. Watervliet City School District, 815 N.Y.S.2d 360 (A.D.N.Y. 2006)

Student-to-Student Harassment FORESEEABILITY



A school was not liable under a negligent supervision theory for injuries sustained by a high school student when he was assaulted by another student while eating lunch in the school cafeteria because the school did not have sufficiently specific knowledge or notice of the conduct. Therefore, the school could not have reasonably anticipated the eventual injury.

Filiberto v. City of New Rochelle, 2006 WL 3734643 (N.Y.A.D. 2 Dept. 2006)

Student-to-Student Harassment FORESEEABILITY



Another district school was successful in a lawsuit brought by the family of a student who was sexually assaulted by a classmate on school premises but outside of regular school hours. The school had no reason to know that the classmate was capable of committing a sexual assault on another student, and nothing the school did increased the likelihood of injury to the assaulted student.

Wilson ex rel. Adams v. Cahokia School Dist. #187, 2007 WL 172227 (S.D. Ill. 1/19/07)

Student-to-Student Harassment FORESEEABILITY



Where parent alleged that the district was or should have been aware that groups of Hispanic students subjected others to beatings on their birthdays (“birthday beatings”), parent’s claims for constitutional violations remain, as the parent adequately alleged that the district had a custom or policy of posting students’ names and birthdays in the hallway – coupled with an awareness that birthday beatings occurred.

Funez v. Guzman, 54 IDELR 153 (D. Ore. 2010)

Student-to-Student Harassment

FORESEEABILITY



An 8th grade student was sexually assaulted by some teammates on his football team in the school locker room. The case will proceed to trial on the question whether the school district provided adequate supervision in the locker room. (There is evidence from depositions of witnesses that there was “virtually no supervision of the locker room over a 20 to 30 minute period and that the football players were engaged in reckless and aggressive horseplay during that period.”) The court said that the district would *not* be held liable for the student’s injuries if the injuries occurred as a result of “sudden, spontaneous acts.”

But the student will have an opportunity at trial to present evidence that the district had notice of prior similar conduct.

Student-to-Student Harassment KNOWLEDGE



A kindergarten student was molested by a classmate in the bathroom of the school during regular school hours. Case will proceed to trial on the issue of whether the school counselor's failure to act on information that an incident of inappropriate touching involving the same students had contributed to this incident.

Hertzel v. Palmyra School District, 733 N.W.2d 578 (Neb.App. 2007)

Student-to-Student Harassment KNOWLEDGE



Lawsuit will proceed because issues of material fact exist re whether basketball coach knew of incidents occurring in locker room.

After practices, coach was “rarely present” in locker room. 7th and 8th grade boys would turn off lights and engage in humping and blind sit-ups.

Doe v. Derby Board of Education



A 13-year-old female middle school student (Sally) was sexually assaulted by a male high school student (Christopher) from the same school district. The assault occurred off school grounds in July of 2002 when school was not in session. The middle school and high school are in the same building; both students returned to school that fall. Sally's father complained to school officials after learning from his daughter that Christopher was still in the same building that she attended. After a meeting between Sally's father and a school administrator, Christopher was given an out-of-school suspension for 10 days. Following his return, Sally complained that *Christopher's friends* continued to harass her *outside of school*, but that the experience of almost daily seeing Christopher at school "was very upsetting" and made the "school year very hard." At the end of 8th grade, Sally transferred to another school system. Sally's father filed a lawsuit against the school for failing to shield Sally from the upsetting event of seeing Christopher at school. This case is awaiting trial.

Doe ex rel. Doe v. Derby Board of Education, 451 F.Supp.2d 438 (D. Conn. 2006)

Doe v. Derby Board of Education



Typical problems illustrated by the case:

The only school-related issue here was that Sally was upset by seeing Christopher in the hallways at school. She does not allege that he harassed her, and she stated in her deposition that the harassment by his friends did not occur at school. In the absence of a no contact order, the school had no grounds to find another educational setting for Christopher.

The school had no business even suspending Christopher for ten days. Were he in extracurricular events, Christopher could have been punished under a good conduct policy. But there was no school-related conduct here on which to base a suspension.

By disciplining Christopher for non-school-related conduct, the district has now set itself up as the insurer of Sally's safety for incidents that arise outside of school.

Doe v. Derby Board of Education



What to do in similar situations:

- Urge the target's family to seek a no contact order (NCO).
 - If they are successful and if the NCO includes school, make sure to get a copy of the order and comply with it.
 - If they are unsuccessful, this means that a court determined that there is no immediate danger to the target posed by being in school with the perpetrator, BUT this does not mean that the school is less vigilant.
- Be open to meeting with the family, but do not promise anything other than that the school will take reasonable steps to keep the target safe from further trauma.
- What constitutes the reasonable steps will vary from case-to-case. Obviously, keeping the students from being assigned to the same course is one such step. Communicating with all staff about the need to be vigilant is another. (There are no confidentiality issues here...all staff have a legitimate "need to know" that an assault occurred, who was involved, etc.)

Patterson v. Hudson Area Schools



A male student suffered extraordinary bullying, threats, verbal and physical abuse throughout much of middle school and through his freshman year of high school. He was teased, called named, pushed and shoved by other students, taunted by a teacher, and slapped. His locker was repeatedly vandalized.

His clothes were urinated upon and his shoes thrown in the toilet. After he was sexually assaulted in a locker room (a naked male classmate rubbed against him) incident in 9th grade, he left school and his parents sued the school.

Patterson v. Hudson Area Schools



The school took the following steps:

- It established policies prohibiting harassment and for the supervision of hallways, lunchrooms, and locker rooms.
- It trained personnel to implement the policies.
- It informed students on acceptable student conduct through the Health class curriculum.
 - It expelled the student who had sexually assaulted the targeted student.
- It assigned a staff person as mentor for the targeted student.

Patterson v. Hudson Area Schools



Trial court dismissed.

“While [the school’s] actions may not be exactly what the [student and his family] desired and while their actions may not have yielded the results hoped for, applicable law provides that the Plaintiffs do not have a right to dictate the actions Defendants take. The standard is whether the school officials acted clearly unreasonably in light of known circumstances.”

Patterson v. Hudson Area Schools



The United States Court of Appeals for the Sixth Circuit reversed that decision, saying the family had demonstrated that there was enough of a question of whether the district's response was adequate to go forward with the trial. It's not enough to stop a student from bullying another. There needs to be a concerted effort to stop systemic bullying, too. For example, the school could have done more anti-bullying education, instituted more monitors or other measures to stop the pattern.

Patterson v. Hudson Area Schools



On remand: A federal jury found the school district liable to the tune of \$800,000 for failing do enough to protect a student from years of the sexually tinged bullying.

The district moved for judgment as a matter of law. Motion was granted. Case dismissed.

Staff-to-Student Harassment

SCHOOL'S DUTY TO STUDENT



A former student of the teacher involved – sued the teacher for their “consensual” sexual relationship. The teacher had been discharged from his former school district for the same kind of misconduct that got him in trouble here. That district impleaded the former school district for not telling it about his prior bad acts. At the time of this lawsuit, it was not a crime for the teacher to engage in this relationship.

Result: no crime = no duty to protect the student and others like her from this predatory teacher. The result would not be the same today in Iowa because this conduct is now criminal sexual abuse.

Stotts v. Eveleth, 688 N.W.2d 803 (Iowa 2004)

Staff-to-Student Harassment NOTICE



Elementary school student had been sexually fondled by his teacher in the classroom, used drugs and alcohol with the teacher after school hours, and eventually engaged in sex acts with the teacher. The student sued the school board and various school officials.

The court decided that the issue of whether the school principal was deliberately indifferent to the risk of the teacher sexually abusing his students should proceed to trial. The principal had prior knowledge that the teacher had been seen in the school hot tub with male students, at least one of whom was nude. The teacher had also been convicted of providing alcohol to male students on a trip in his car, and had allegedly sexually abused them.

Arbaugh v. Bd. Of Educ., County of Pendleton, 329 F.Supp.2d 762 (N.D.W.Va. 2004)

Staff-to-Student Harassment NOTICE



Nonpublic school had been sexually abused by a teacher while the student was in the teacher's 1st grade class; the abuse continued while the student was in 2nd and 3rd grades. The court held that the fact that the teacher removed the student from his 2nd and 3rd grade classes on a weekly basis without explanation (and with the other teachers' consent) was sufficient to raise an issue as to whether those teachers breached a duty of ordinary care toward the child. The school itself was granted summary judgment on the negligent hiring claim, as there was not a sufficient showing that the school was or should have been aware of the proclivities of the teacher.

Doe v. Whitney, 779 N.Y.S.2d 570 (N.Y.A.D. 2 Dept. 2004)

Staff-to-Student Harassment

REASONABLE RESPONSE



Male high school student had a “consensual” sexual relationship with a married female teacher. This was not a crime under state law. The teacher provided the student with. Anonymous reports of their relationship reached school administrators, who investigated thoroughly. Their investigation was met with denials from both student and teacher. (In fact, the student used the investigation to extort more materials goods - prescription drugs and pain pills, payment of his speeding tickets, clothes, a cell phone, and money – to “buy” his silence.) Once the school was able to make a connection between the student and teacher, it fired the teacher. When the boy’s parents sued, the court determined that the school was not liable because its officials had acted properly.

Sauls v. Pierce County School District, No. 03-16267 (11th Cir. 2/9/05)

Staff-to-Student Harassment REASONABLE RESPONSE?



A high school principal was absolved from legal responsibility for the principal's alleged failure to investigate allegations that the girls' basketball coach was involved in a sexual relationship with a student. The facts did not support a finding that the principal had actual notice of the coach's sexual abuse. The principal was aware – because of parent complaints – that the coach was sending players inappropriate text messages and making inappropriate comments. The principal reprimanded him and instructed him to make no further comments. At the same time, rumors cropped up that the coach was having a sexual relationship with one of his players. Although the principal investigated each rumor, she failed to turn up any evidence. The relationship was finally uncovered after students confirmed the rumor. The coach was suspended and charged with sexual assault, to which he pled guilty. The court dismissed the player's claim against the principal, finding that various inappropriate text messaging and reports of vague rumors each were insufficient to provide the principal with actual knowledge of sexual abuse.

Doe v. Flaherty, No. 09-2535 (8th Cir. 10/19/10)

Staff-to-Student Harassment

UNREASONABLE RESPONSE



Teacher is alleged to have encouraged and facilitated a sexual relationship between two students – and then videotaping the students having sex. The teacher made his home, car, and office available to the students. The school resource officer knew of the teacher’s actions but did not inform school officials and did nothing to put a stop to the abuse. In denying the motion to dismiss filed by the school employees, the court stated that the employees were not entitled to statutory immunity because their actions were beyond the scope of their public duties. The case will proceed to trial.

Smith v. Jackson County Bd. of Educ., 608 S.E.2d 399 (N.C. App. 2005)

Staff-to-A-Student Harassment

VERBAL ABUSE



Teacher was accused of yelling and screaming at his elementary-level students, using foul language, telling students that their handwriting "sucks," telling students that "if you had one eye and half a brain, you could do this," calling students "stupid," and referring to students as "bimbos," "fatso," and the "welfare bunch."

The federal Court of Appeals held that the use of patently offensive language did not violate students' constitutional rights.

Doe v. Gooden, 214 F.3d 952 (8th Cir. 2000)

Staff-to-Student Harassment PHYSICAL ABUSE



Teacher alleged to have:

Grabbed a student around the neck in order to bring the student to the school office

Kicked a desk across the classroom while a student was sitting in the desk

Thrown a clenched fist toward a student's face but did not hit the student

Grabbed a student by the shoulders and turned the student around in the student's desk

Thrown a book at a student on two different occasions

Grabbed a student and pushed the student against the wall of the building

The court found that school administrators had notice only of half of the above, and that the instances were not sufficient to constitute notice of a pattern of unconstitutional acts.

NOTE: The court stated only that the plaintiffs failed to show constitutional violations.

Doe v. Gooden, 214 F.3d 952 (8th Cir. 2000)

Staff-to-Student Harassment VOLUNTEERS



A student alleged sexual harassment by a school volunteer. There were a few previous complaints about this volunteer – a 70+ year old man – but none had been substantiated upon investigation. That is, there was no reason for the school district to remove him as a volunteer when its investigation was done in a reasonably thorough manner and did not disclose any problems. Therefore, the district's motion for summary judgment was granted.

Gordon ex rel. Gordon v. Ottumwa Community School District, 115 F.Supp.2d 1077 (S.D. Iowa 2000)

Staff-to-Student Harassment SUBSTITUTE TEACHERS



Parents alleged that a school acted with gross negligence in failing to protect their child from the known danger of a substitute teacher's inappropriate interest in young girls. Specifically, the parents alleged that the school had prior complaints and warnings regarding the substitute teacher's inappropriate interest in young girls. The substitute teacher was charged and convicted of criminal sexual conduct with a minor as a result of this inappropriate relationship. The state supreme court ruled that the lawsuit filed against a school by the parents could proceed to trial.

Doe v. Greenville County School District, 2007 WL 2415751 (S.C. 8/27/07)

HAZING



Hazing is a subset of bullying/harassment.

Very simply stated, it is the intentional infliction of harm or humiliation on a student as a condition of membership in a club or other group of students (even a grade level in school) or as an attempt to get a student to quit a club or team.

HAZING



Hazing is a crime in 44 states.

In many states, it does not matter whether the target is “willing” to participate in the activities.

HAZING



The 1st anti-hazing law dates back to 1874.

It was passed by Congress to stop “plebe bedevilment” at the US Naval Academy.

HAZING



Categories of hazing:

- Physical abuse
 - Beatings, paddlings
 - Sleep deprivation
 - Extreme exertion
- Confinement
 - Tied up
 - Locked in lockers, trunks, closets, cars
 - Lashed to goal posts, railings

HAZING



Categories of hazing:

- Disgusting substances
 - Covered with feces, urine, syrup, motor oil
 - Having the same thrown at the target
- Ingestion/consumption
 - Alcohol
 - Illegal drugs
 - Excessive amounts of anything, including water
- Inappropriate clothing
 - Underwear
 - No clothes

HAZING



Categories of hazing:

- Commission of illegal acts
 - Shoplifting
 - Gang-related activities
- Sexual acts
 - Simulation of sex acts
 - Use of sex toys
 - Sexual assaults of students

HAZING



The **formula** that courts use to determine legal issues is as follows:

Knowledge by a school official of hazing activities

+

Power to control students' involvement in the activities

+

A sufficient *connection* between the activities and the school

= A *duty* on the part of the school to take reasonable steps to protect students from the hazing activities.

HAZING



The “powder puff football game” incident at Glenbrook, Illinois occurred off-campus on a Sunday morning in early May, 2003. None of the targeted students – junior girls – sued the school for damages, even though several girls were injured as senior girls punched, slapped, and dumped paint, feces and trash on them. The only lawsuit involving the school was filed by two of the senior girls who were suspended from school. The seniors alleged that the powder puff events had occurred for years, that school officials were aware of them, and that school officials did nothing to prevent them or to punish the participants. The court denied relief to the suspended students. However, if one of the injured girls had sued, these are the types of allegations that would get a school and school officials in legal trouble.

Gendleman v. Glenbrook North High School, 2003 WL 21209880 (N.D. Ill. 5/21/03)

HAZING



A school district was held liable for a hazing injury that took place off-campus because the high school had known that hazing was an ongoing tradition in one of its school clubs, the Key Club. The faculty advisor for the club had not attended the ceremony, but had helped plan the event and had attended previous ceremonies for the club. In short, he knew what was going to occur and did nothing to stop the activities.

So what happened? Swimming pool, blindfolded students...

Chappel v. Franklin Pierce School Dist. No. 402, 426 P.2d 471 (Wash. 1967)

HAZING



A school was held liable where a high school student was permanently paralyzed in an off-campus hazing incident. The school had sponsored the club and assigned an advisor. This advisor failed to attend the meeting where the plan to haze was discussed. He later learned about the plan, but took no action to stop it and failed to attend the initiation meeting where the hazing took place.

Rupp v. Bryant, 417 So.2d 658 (Fla. 1982)

HAZING



Claims brought by private school student get to proceed to jury. Student alleged that he was bullied by peers, included being physically assaulted, causing him to become so depressed that he threatened self-harm. Per complaint, school officials not only ignored the student's reports of peer harassment, but also told him that it was their policy to look the other way when upperclassmen punished or hazed younger students.

M.Y. v. Grand River Academy, 54 IDELR 255 (N.D. Ohio 2010)

HAZING



Hazing activities at a football camp jointly coordinated by two high schools resulted in a successful lawsuit against the school districts. A suit was filed because of the alleged lack of supervision exercised by the coaches who ran the camp, resulting in one player being assaulted by insertion of an air pump into his rectum, an assault in the shower, and a “pillow fight” that included the coaches involving pillows stuffed with baby powder, football equipment, and heavy objects.

Roe ex rel. Callahan v. Gustine Unified School, 678 F.Supp.2d 1008 (E.D. Cal. 2009)

HAZING



NY court ruled that a gang of high school students was an “organization” under NY’s hazing law

Same case, held that the fact that a student subjected himself to being hit and kicked was not a valid defense

In re Khalil H. (NYAD 2 Dept), 2010 WL 4540458)

HAZING



Other cases where courts have found hazing.

New track team members at a California high school were forcibly held down while upperclassmen shaved their heads and pubic areas.

In a New York case, new members of the girls' softball team were required to shoplift five specific items each as part of an initiation scavenger hunt set up by team captains.

Female softball players in Mississippi were driven five miles into the country at 2 a.m., forced to strip to their underwear and left to walk back to the home at which the girls were having a team overnight. One girl was severely injured when she became entangled in a barbed wire fence in the dark.

CYBER-BULLYING



Another subset of bullying/harassment has evolved whereby students use communication technologies to harass or threaten peers or educators. This type of harassment brings unique challenges.

It can be anonymous

It can be impractical to take reasonable steps to alleviate it

Targets don't complain about it

One click of the mouse can send it literally around the globe

STUDENT FREE SPEECH



Neither freedom of speech
nor freedom of religion creates
a license to engage in bullying
behavior.

STUDENT FREE SPEECH



Absent either impingement on the rights of others or the likelihood of a substantial and material disruption at school, school officials may not regulate student speech at school.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969)

STUDENT FREE SPEECH



Lewd, indecent, objectively offensive speech by students may be regulated by school officials.

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986)

STUDENT FREE SPEECH



School officials may regulate content of articles in school newspaper as school-sponsored expressive activity.

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988)

STUDENT FREE SPEECH



School officials may regulate speech that appears to promote illegal or harmful activity.

Morse v. Frederick, 127 S.Ct. 2618 (2007)

STUDENT FREE SPEECH



“Cohen’s jacket”

While the case of is not a school case (indeed, it is a criminal appeal), it has given rise to the oft-used expression that students have the right to “wear Tinker’s armband, but not Cohen’s jacket.”

Cohen, while walking through the halls of the Los Angeles County Courthouse, wore a jacket bearing the plainly visible words “F--- the Draft.” He removed it when he walked into the courtroom and his conviction for disturbing the peace was overturned by the U.S. Supreme Court.

This also presents a good example of “fighting words,” that is, speech (including symbolic speech) designed to provoke and disturb others to an extreme.

Cohen v. California, 403 U.S. 15 (1971)

STUDENT FREE SPEECH



A cheerleader was removed from the cheer squad for refusing to cheer for a member of the boys basketball team whom she had accused of sexually assaulting her at a party.

The boy had been arrested but the grand jury did not indict him for the sexual assault.

STUDENT FREE SPEECH



When the cheerleader refused to join with the rest of the squad in cheering for the boy during a basketball game, she was removed from the squad. She sued.

The courts found in favor of the school officials. The school had no duty to allow her “to cheer or not cheer, as she saw fit.” She had voluntarily undertaken a duty to cheer, so her refusal to cheer constituted substantial interference with the work of the school and could be regulated under the *Tinker* case.

Doe v. Silsbee Indep. Sch. Dist., No. 09-41075 (5th Cir. 9/16/10)

STUDENT FREE SPEECH



High school student sued district, alleging her suspension from school for creating a group on a social networking website to express dislike for a teacher violated her right to free speech.

On her own time and from her own computer, she created a Facebook page titled “Ms. [Teacher’s Name] is the worst teacher I’ve ever met” as an electronic “place” for students to express their feelings about the teacher. Some postings were supportive of the teacher; no postings were threatening. The teacher never saw the page, and it did not disrupt school activities. The student removed the posting after two days. After she removed it, the teacher found out about the page. The student prevailed; the court overturned her suspension for “disruptive behavior.”

Evans v. Bayer, 684 F.Supp.2d 1365 (S.D. Fla. 2010)

STUDENT FREE SPEECH



Free speech vs. harassment

Recall that one exception in *Tinker* whereby school officials may regulate student speech is if the student speech impinges upon the rights of other students. Therein lies the tension at the heart of the T-shirt cases.

Following are two cases that demonstrate that balancing rights of free speech of students with protecting other students from offensive comments is tricky business. There are no “one size fits all” solutions.

STUDENT FREE SPEECH



IN THIS CASE, a school district may ban T-shirts which communicate negative messages toward homosexuality. The front of one shirt read, "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED." The front of the second shirt read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED." The backs of both shirts read, "HOMOSEXUALITY IS SHAMEFUL, Romans 1:27."

Harper v. Poway Unified School Dist., No. 04-1103 (S.D. Cal. 2/11/08)

STUDENT FREE SPEECH



In contrast, another court ruled that a school district cannot forbid a high school student from wearing a T-shirt bearing the message

“Be Happy, Not Gay.”

Nuxoll v. Indian Prairie School Dist. #204, No. 08-1050 (7th Cir. 4/23/08)

CYBER-BULLYING



Much like the legal analysis for hazing, there must be a close connection to school for school officials to be able to regulate cyberbullying. But *in addition*, because cyberbullying involves student speech, the school must demonstrate legitimate pedagogical concerns before courts will allow schools to take action.

CYBER-BULLYING



A high school student created a web site (“raymondsucks.org”) about his band teacher. As a result of the ten day suspension from the school, the student failed band and received lowered grades in other classes. The court ruled in favor of the student when the student asked for a temporary restraining order to prevent the suspension from taking place. The district eventually settled by paying \$30,000 to the student, expunged the suspension from his record, and issued a letter of apology to the student.

O’Brien v. Westlake City Schools, 98 CV 647 (E.D. Ohio 1998)

CYBER-BULLYING



Another high school student created a web site that used crude and vulgar language in criticizing the school administration. He did not use school resources to create the site, but the site included a hyperlink to the school's official homepage, and the student invited readers of his web site to contact the school to communicate their observations about the high school. The school imposed a ten day suspension, which was overturned by the court because the principal testified that he suspended the student because the principal did not like the *content* of the student's web site. Had the principal testified about the site causing a substantial disruption of educational time at school, there might have been a different outcome.

Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998)

CYBER-BULLYING



A student included mock obituaries of his friends in a web site he created and named “Unofficial Kentlake High Home Page.” The student – an honors student with no disciplinary history – included a disclaimer on his web site that noted that the site had no connection to the school and was for entertainment purposes only. Readers of the web site were invited to vote on “who should die.” When local media picked up on this, one TV station characterized the site as having a “hit list.” Mortified, the student removed his site the day after this news item ran on television. There was no evidence that any of the students whose obits were featured felt threatened, no evidence that the creator of the web site intended to do any harm, and no evidence of any disruption to the educational environment. The court found in favor of the student.

Emmett v. Kent School District No. 415, 92 F.Supp.2d 1088 (W.D. Wash. 2000)

CYBER-BULLYING



In this case one student wrote an e-mail about the school's A.D. that was very unflattering about his weight (very large) and genital size (not so very large). The student sent the email from his home computer to friends on their home computers, but one recipient brought several copies of the e-mail to school. In ruling in favor of the student, the court stated that the mere desire on the part of school officials to avoid discomfort or unpleasantness did not justify a restriction of private student speech. However, because this student had previously written "poison pen" e-mails about school employees on school computers, the court left the door open for a school to prevail if the school can demonstrate a "well-founded expectation of disruption."

Killion v. Franklin Regional School District, 136 F.Supp.2d 446 (W.D. Pa. 2001)

CYBER-BULLYING



The court upheld the expulsion of a student based upon a web site (TeacherSux) the student created at home that contained *threatening* comments against a teacher and a principal. The student attempted to shield himself from school discipline or regulation by putting a disclaimer on his site (which was not password-protected) that viewers promised not to tell any school officials or employees about the site. This attempt proved futile. His site had *many* visitors, so the word got back to the teacher who was threatened that he was actually soliciting donations from site visitors to hire a hitman to take out the teacher.

J.S. ex rel. H.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002)

CYBER-BULLYING



Comments typed in class and printed off in class alleging that a teacher and principal were having sex were proper grounds to suspend the student who typed and printed the comments. This student was an honor student who went to court to try to get the suspension off her student record. The court denied her request.

Matos ex rel. Matos v. Clinton School District, 367 F.3d 68 (1st Cir. 2004)

CYBER-BULLYING



The suspension of a middle school student who created an instant messaging (IM) icon depicting his English teacher being shot was upheld by a federal court. The student created the icon at home and sent it to 15 other students, one of whom showed it to the teacher. The teacher was distressed enough that he was allowed to stop teaching this student's class. The court concluded that "it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot," thus deciding that the material and substantial disruption of the work of the school was met.

Wisniewski v. Weedsport Cent. School District, 494 F. 3d 34 (2nd Cir. 2007)

CYBER-BULLYING



High school student sued district, alleging his suspension from school for balance of school year violated his right to free speech. Student had sent IMs to a classmate from home computer; IMs were “true threats;” IMs caused a substantial disruption for the school. Suspension upheld. Student said he was going to get a gun and kill certain classmates. Student also arrested.

Mardis v. Hannibal Public School District, 684 F.Supp.2d 1114 (E.D. Mo. 2010)

CYBER-BULLYING



A senior with no disciplinary history and who was academically successful decided just before the Christmas recess to create a “parody profile” of one of the high school principals on MySpace.com. The profile was juvenile in its conception, vulgar in parts, and crude. It did not provide a flattering profile of the principal. The student did not use school equipment or school time to develop the profile. The court determined that the student’s off-campus speech did not result in a substantial disruption of school operations; therefore, it granted summary judgment to the student. This case is on appeal to the Third Circuit Court of Appeals.

Layshock v. Hermitage School District, 496 F.Supp.2d 587 (W.D. Pa. 2007)

CYBER-BULLYING



A year later, another federal trial court in the same state reached the opposite conclusion, ruling that school officials did not violate a student's free speech rights by disciplining her for creating a parody online profile of her principal, and granting *the school's* motion for summary judgment. As in *Layshock*, the student here created a fake MySpace profile and used a photo of the principal from the district's Web site. The personal profile section depicted the principal as a pedophile and sex addict. The court here found that *Fraser's* regulation of lewd and vulgar speech applied.

J.S. v. Blue Mountain School District, No. 07-585 (MD. Pa. 9/11/08)

CYBER-BULLYING



On April 10, 2010, the U.S. Court of Appeals for the Third Circuit (PA, NJ, DE, VI) granted the motions for rehearing *en banc* in *J.S.* and *Layshock*. Both cases were argued before the *en banc* court on June 3, 2010. An *en banc* hearing means that all active judges of the Third Circuit heard the arguments from the parties.

CYBER-BULLYING



The 3rd Circuit ruled in favor of the STUDENTS in BOTH cases.

The US Supreme Court refused to hear the appeal that was filed by the schools.

CYBER-BULLYING



QUEEN OF CHARM

Kara apparently did not like Shay, a fellow female student, so Kara created a discussion group webpage with photos of Shay and lewd, defamatory statements about Shay.

Shay filed harassment complaint with principal, who investigated and suspended Kara from school for 10 days (later reduced to 5), and suspended her from extracurricular activities for 90 days. She could not crown her successor as “Queen of Charm.”

CYBER-BULLYING



Kara filed federal lawsuit claiming her free speech had been abridged by the school, that peers were socially isolating her, and teachers were giving her the cold shoulder.

In a very strong case for schools, the 4th Circuit said “had the school not intervened, the potential for continuing and more serious harassment of Shay...was real.”

MIS-ADVENTURES IN CYBERSPACE



A teacher created a *MySpace* account (“Mr. Spiderman”), ostensibly so he could answer questions about homework and to learn more about his students so he could better relate to them. Several students complained to the school’s counselor about the content of the teacher’s *MySpace* account. When the counselor looked at the web site, he saw pictures of naked men and inappropriate conversations that the teacher had conducted with students. The teacher closed down this account, but soon activated another account under the name “Apollo68.” This account again generated student complaints. Eventually, the teacher was terminated and his termination was upheld by the courts.

Spanierman v. Hughes, et al., 576 F.Supp.2d 292 (D. Conn 2008)

MIS-ADVENTURES IN CYBERSPACE



Veteran teacher created a publicly- available blog on the teacher's own time and using her own equipment. She was also a mentor to a beginning teacher under the state mentoring program. The teacher blogged quite recklessly about her colleagues (didn't use their real names, but identities were so thinly disguised that everyone knew who she was talking about) and about her opinion (very low) of the district and its administration. The court characterized her comments as "highly personal and vituperative." Her mentee asked for another mentor. Not only did the district grant the mentee's request, it reassigned the veteran teacher to a non-teaching position. This adverse employment action was upheld by the court.

Richerson v. Beckon, 337 Fed.Appx. 637 (9th Cir. 2009)

MIS-ADVENTURES IN CYBERSPACE



A principal received an email from her vice principal, detailing the complaints of a parent of one of the students at the school. The principal wrote back, Tell her she can eat sh--. And then hit “send” before noticing that the parent was on the “cc” line. The principal had hit “reply all.”

MIS-ADVENTURES IN CYBERSPACE



An athletic director in a large Catholic high school sent an email to all coaches of his school regarding mundane, but appropriate, housekeeping items. Unfortunately, he neglected to delete the string of non-related messages solely between him and his brother (an A.D. at another Catholic high school) at the bottom of his email. Among the included messages was an unflattering description of a local priest, who happened to serve the parish in which the A.D.'s high school was located. One of the coaches who received the email had recently had a spat with the A.D., and was only too happy to share the email with the press and the school's president. In that order.

MIS-ADVENTURES IN CYBERSPACE



A district suspended one of its teachers over a *Facebook* photo of her with a male stripper at a bachelorette party. She had not posted the pictures. She was fully clothed. The ACLU investigated on behalf of the teacher. Settlement was recently reached.

MIS-ADVENTURES IN CYBERSPACE



An elementary teacher who referred to her 1st grade students as “future criminals” on a Facebook post has lost her job, and the court sided with the school.

District’s need to efficiently operate its schools outweighed teacher’s right to free speech. “Thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.”

MIS-ADVENTURES IN CYBERSPACE



A cheerleader is suing her high school and coach for allegedly forcing her to give her *Facebook* login to her coach so that the coach could monitor illegal activities of the cheer squad. This would be OK if the school were to sponsor a social medium site, but only for the medium sponsored by and made available to students by the school. Failing that, you can't force a "Cheerio" to give up her/his login information.

MIS-ADVENTURES IN CYBERSPACE



A district, fed up with inappropriate use of cell phone during school time, planned to jam cell phone signals inside school buildings. The district discovered that its plan is illegal under Federal Communications Commission (FCC) rules.

SEXTING



In September 2009, the Iowa Supreme Court issued a sobering reminder to young people to be careful about what they send electronically to each other. Long story short, when the young man, Jorge, was in high school he complied with a request from a female friend who was a minor to send her a picture of his penis. The young lady was not offended by this; she testified that “all my friends are doing this...it’s just a joke.” BUT – her mother saw the picture and was not amused. Jorge ended up being convicted of dissemination of obscene material to a minor. He is on Iowa’s sex offender registry until June of 2016.

State v. Canal, 773 N.W.2d 528 (Iowa 2009)

SEXTING



Three middle schoolers in Washington have been charged with felonies after they used their cell phones to spread nude pictures of a classmate.

SEXTING/STUDENT SUICIDES



Jessica L.

When 18 and on spring break, took nude pictures of herself and sent to her then-boyfriend. Soon went viral. Jessica began skipping school, allegedly because of the escalating harassment, but completed her studies and graduated on time. Her parents allege that Jessica went to school officials numerous times seeking to stop the harassment, but nothing was done. SRO encouraged Jessica to go on a local television show (“anonymously”) to talk about the effects on her of this sexting incident. Allegedly, this same SRO told Jessica that the school could do nothing because she was 18, an adult. About a month after graduation, she attended the visitation of a friend who committed suicide, and hanged herself in her bedroom that night.

Foreseeable?

Nexus present?

SEXTING/STUDENT SUICIDES



Hope W.

13 year old who sent nude photos of herself to boys she knew, including one on whom she'd had a crush. Forwarded by the girlfriend of one of the boys to several classmates. Friends surrounded her and escorted her from class to class. School officials found out about the photos two weeks after school let out for the year; suspended Hope for one week (to be served that coming fall). Over the summer, she was goaded into repeating her earlier mistake.

SEXTING/STUDENT SUICIDES



Hope W.

When she returned to school after serving the suspension, the harassment continued.

Hope hung herself in her bedroom on September 12, 2009.

Foreseeable?

Nexus present?

STUDENT SUICIDES



The law generally imposes no duty upon an individual to protect another person from self-inflicted harm in the absence of a "special relationship," usually custodial in nature. But being put on notice that a student is at enhanced risk of self-harm creates the special relationship. The question the courts will ask is, "Could this death have been foreseen and prevented by school authorities?"

STUDENT SUICIDES



A 13 year old student was seen at lunch but failed to attend her afternoon classes. She had cleaned out her locker and left the building without signing out. The next day she was found in a car in a secluded parking area with a man who lived with her family; both had ingested poison and were dead. The court held that the district could not be liable when it had no knowledge that the man posed a danger to the student and could not reasonably foresee that the student would leave the school and ingest poison while in the man's company. Absent evidence that the incident should reasonably have been anticipated, the district did not breach a duty to supervise the student.

Chalen v. Glen Cove Sch. Dist., 814 N.Y.S.2d 254 (A.D.N.Y. 2006)

STUDENT SUICIDES



As part of a high school English class assignment, a junior student wrote of contemplating suicide and how he resolved several personal issues from the past. His essay ended on a positive note, stating, “I can now enjoy life and all its little pleasures without any guilt.” The teacher wrote a note on the essay encouraging the student to talk to him if suicidal thoughts returned, but said nothing to the student’s parents or to school officials. That summer, the student’s family moved to another state where the student began his senior year of high school. In early November, the student shot and killed himself.

The mother’s told law enforcement that she had no reason to suspect that her son was depressed or suicidal, but she sued the teacher and his employer school district under a state law imposing a duty upon teachers and school districts to warn of “suicidal tendencies” of a student. The issue for the court was whether the term “suicidal tendencies” was broad enough to include the student’s statement in his essay. The court held that the term means a present aim or trend toward taking one’s own life. When applied to the essay, which spoke in the past tense about such thoughts, the essay did not create a duty to warn. Judgment for the teacher and district.

Carrier v. Lake Pend Oreille School Dist. No. 84, 134 P.3d 1059 (Idaho 2006)

STUDENT SUICIDES



A 7th grade girl, Timijane, killed herself at home after she was suspended for possessing a cigarette at school. Although Timijane was reassured by the assistant principal who issued the three-day suspension that “she was a good kid and was not in a lot of trouble” for the tobacco possession, Timijane left school at the end of the day “crying pretty hard.” She was composed enough to ask questions about how she could obtain her homework assignments. School officials tried to reach her parents without success, but did leave a message on the home answering machine to alert Timijane’s parents about the suspension. (The school officials knew that Timijane was going home to an empty house, but it was the end of the school day, so she was free to leave.) It appears that as soon as Timijane arrived home she went to the basement and hung herself. Finding that the school did nothing to increase the risk of harm to Timijane, the court affirmed judgment for the school district.

Martin v. Shawano-Gresham School District, 295 F.3d 704 (7th Cir. 2002)

STUDENT SUICIDES



A jury question was generated in a case where Phil, a 16-year-old special education student, committed suicide after he was suspended from school. Phil had had an IEP for seven years at the same district that identified him as being impulsive and suffering from depression and having low self-esteem. One day Phil was insubordinate to a teacher; he was immediately suspended by the school principal because she considered him at risk for committing violence. Phil's counselor drove him home in the middle of the day. Neither the principal nor the counselor notified Phil's parents about the suspension or about the removal from school to home. Both officials knew that Phil had previously threatened to kill himself, that he had access to firearms at home, that he would be alone, AND BOTH KNEW THAT IT WAS CONTRARY TO WRITTEN SCHOOL POLICY TO ALLOW HIM TO BE AT HOME WITHOUT A PARENT PRESENT. The boy's parents came home to find him dead of a self-inflicted gunshot wound. The question before the jury will be whether sending Phil home to an empty house knowing that firearms were there increased the danger that he would harm himself.

Armijo v. Wagon Mound Public Schools, 159 F.3d 1253 (10th Cir. 1998)

STUDENT SUICIDES



Shawn, a 13-year-old boy, killed himself at home after twice attempting suicide at school in the few days before his death.

There was evidence that school officials knew of both previous attempts and did not contact either Shawn's mother or his guardian. There was also evidence that the mother of another student who witnessed Shawn's first attempt called the school and was told by the Dean of Students that he would take care of it (the implication being that this woman would have called Shawn's mother or guardian but for the school administrator's statement to her). The jury handed down a six-figure judgment against the school district, which was upheld on appeal.

Wyke v. Polk County School Board, 129 F.3d 560 (11th Cir. 1997)

STUDENT SUICIDES



At least one court has ruled that the failure of school officials to take steps to prevent a student's attempted suicide after attempts by seven other students was not actionable, nor could the school be compelled by the courts to introduce a suicide prevention program. This student, Jamie, was a known rape survivor and had been reprimanded for being unruly by a physical education teacher in front of her classmates just prior to her suicide attempt. She was sent from the school's softball field to the locker room where she tried to hang herself. Because Jamie had not threatened to kill herself then or at any previous time known to any school official, the school was not liable for any damages.

Hasenfus v. LaJeunesse, 175 F.3d 68 (1st Cir. 1999)

GLBTQA BULLYING



A school district was held liable – and the middle school and high school principals were held personally liable – for failure to take meaningful remedial action to protect a gay student over a four-year period of persistent verbal harassment and physical abuse that included a mock rape of him. The court felt compelled to note that “some of the [school] administrators themselves mocked Nabozny’s predicament.”

A jury awarded the student nearly \$1 million in damages.

By the way, the school district had a written policy in place that stated that school officials would protect students from harassment based on sexual orientation.

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996)

GLBTQA BULLYING



A federal court ruled that local school officials could be held personally liable for their failure to protect and take remedial action for students subjected to constant derogatory sexual comments, threats of physical violence, and actual physical violence based on their real or perceived sexual orientation. Not only did school officials fail to act, they urged as their defense that they didn't know they had a duty to protect students from peer sexual orientation harassment.

The district settled by paying the six plaintiffs \$1.1 million and agreeing to provide all staff with training in the recognition and prevention of student harassment based on sexual orientation.

Flores v. Morgan Hill Unified School Dist., 324 F.3d 1130 (9th Cir. 2003)

GLBTQA BULLYING



A student sued his school district for depriving him of the opportunity of an education due to the district's failure to stop years of harassment because the student was perceived as gay. The bullying started when the student was in 7th grade when a fellow student started false rumors that he masturbated in the school bathroom. The plaintiff dropped out in his junior year because the harassment (in the form of name-calling, teasing, and crude gestures with sexual overtones) had become unbearable.

A jury awarded the student \$250,000 in August, 2005. The district had a policy protecting students from harassment but failed to enforce it. The perpetrators had been warned about their misconduct and ordered to apologize, but the jury found that school officials should have taken stronger disciplinary actions against the students, should have given staff means by which to address school cultural issues, and should have given the high school staff a "heads up" about the issues experienced by the plaintiff when he was in junior high. District officials stated in their defense that students often casually called each other by derogatory names. This type of "defense" is **never** a smart idea.

Theno v. Tonganoxie Unified School Dist. No. 464, 377 F.Supp.2d 952 (D. Kan. 2005)

GLBTQA BULLYING



A high school and its principal got in legal trouble for disciplining a female student for PDAs (public displays of affection) with her girlfriend when it did not also discipline students for the same behavior with opposite sex partners. The punishment isn't the problem; NOT punishing the same behavior when exhibited by heterosexual students is the problem. Be consistent!

C.N.v. Wolf, No. 05-868 (N.D. Cal. 2005)

PROACTIVITY



STATE LAWS

What good are they?

What about states with no such
state law?

PROACTIVITY



- Local School Policy
 - Clear statement of expectations
 - Clear lines of communication
 - Clear statement of consequences
 - Due process rights (see next slide)
 - Consistency = effectiveness
- Training/Support
- Implementation

PROACTIVITY



Due Process Basics

Short-Term Suspension (≤ 10 days OSS)

The right to be told “what are you accusing me of?”

The right to give the student’s side of the story

PROACTIVITY



Due Process Basics

Long-Term Suspension (>10 days OSS or
expulsion)

Local School Board hearing

Call witnesses, Confront witnesses

Hire attorney to represent student before Board

Impartial Board

Written decision

PROACTIVITY



Seizing, searching cell phones

A good policy does the following:

Clearly tells students what is not acceptable:

- Use of cell phone during class for any reason

- Taking pictures in locker room

- Taking any picture of another person for the purpose of ridiculing the other person (falling asleep, chewing food with mouth open...it doesn't have to involve nudity)

- Use of cell phone or any device to cheat

- Use of cell phone or any device to harass another person

PROACTIVITY

Absence of Policy



A high school girl was subjected to “unmerciful torment [showing] an incredible example of how cruel teenagers can be to one another.” The girl had filed charges against a former boyfriend who had raped her.

The notable holding is that the failure of a school district to have a sexual harassment policy in place is mere negligence, and mere negligence is not actionable in federal court. The “something more” that is required is that the district was reckless or intentional in its discrimination against the plaintiff. This district always reacted promptly to punish known incidents of harassment. It proactively assigned the rapist to another attendance center. (Unfortunately, graffiti on school grounds attacking the girl was not seen and obliterated by the district before the girl and her parents saw it.)

Wright v. Mason City Community School District, 940 F.Supp. 1412 (N.D. Iowa 1996)

PROACTIVITY



Seizing, searching cell phones

A good policy does the following:

Clearly informs students of the consequences of unacceptable use:

Device shall be confiscated

Duration

May be turned over to law enforcement

Subject to search

Other discipline (suspension from class/from activities)

Parents shall be informed

Law enforcement shall be informed where appropriate

PROACTIVITY



Cell phone questions

1. May a school official confiscate a student's cell phone? For how long?

Yes...if the student is violating the school's policy about appropriate use. Confiscation depends on number of times the student has violated the policy. Up to 30 days has been upheld by a court for a 3rd infraction.

PROACTIVITY



Cell phone questions

2. To what extent may a school official search a confiscated cell phone?

Again, this depends on how the policy is worded. BE AWARE that at present there is no law to exempt school officials who may access pornography on a student's cell phone or laptop computer from being charged with a violation of obscenity laws.

SOLUTION: Call law enforcement to search the device.

PROACTIVITY



Protecting the Targeted Student

Below are some steps school officials should consider that are directly related to protection of targeted students:

Notify the perpetrator and perpetrator's parents of the allegation. **DO NOT IGNORE** any allegation simply because there may not be a sufficient nexus to discipline the perpetrator.

Keep an extra eye on the perpetrator...and let the perpetrator and his/her family know that you will be doing so.

PROACTIVITY



Protecting the Targeted Student

Give target's family option of notifying law enforcement

In some states, the crimes of harassment and terrorism can be committed by electronic means. So just because a school may not be able to take action, law enforcement should be contacted if the family is willing to cooperate.

If the cyber-bullying involves a threat, notify law enforcement directly and inform the families of both students that you have done so.

The school must fully cooperate with law enforcement.

Do not discourage target's family from exploring civil actions (defamation, invasion of privacy, intentional infliction of emotional distress)

PROACTIVITY



Protecting the Targeted Student

Gather evidence and investigate

Confiscate (directly or via law enforcement)

Document, document, document

Keep target and target's family posted as to progress made during investigation, but remember not to tell them what discipline is ultimately imposed against the perpetrator.

Check with the target often to make sure s/he is not suffering any retaliation from the initial perpetrator or friends of the perpetrator

If possible, offer counseling/mental health support to the target



*I've come to the frightening conclusion
that I am the decisive element in the classroom.
It's my personal approach that creates the climate.
It's my daily mood that makes the weather.
As a teacher I possess a tremendous power
to make a child's life miserable or joyous.
I can be a tool of torture or an instrument of inspiration.
I can humiliate or humor, hurt or heal.
In all situations, it is my response that decides whether
A crisis will be escalated or de-escalated,
and a child humanized or dehumanized.*

Haim Ginott, Child psychologist

Questions

