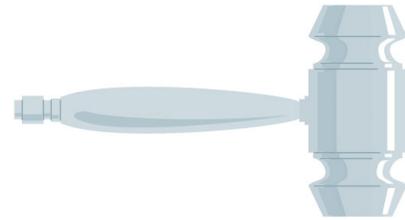


# Legal Corner



By Michael I. Levin, Esq., PAESSP General Counsel

## Responding to School Bullying



### I. Introduction

As long as schools have existed, there have been bullies. We remember our days in school and the troublemakers. As prevalent as bullying may have been in years past, the problem of bullying has escalated and has perhaps taken on a more pernicious cast with the advent of the Internet. In this age of technology, students

must not only cope with the old-fashioned bullying that takes place on school premises, but also, with cyber-bullying. It is an unfortunate state of affairs that today's youth are subjected online to vicious personal attacks that are often made anonymously and have long-lasting effects.

School administrators, teachers and other staff must deal with the problem of bullying on a daily basis. They must protect students from being victimized by bullies either directly on the school premises or through cyberspace. In the past year, there have been reports of several students who committed suicide after enduring pervasive bullying. School administrators, teachers and staff must grapple with the emotional toll that bullying takes on their students and do what is necessary to prevent other students from falling victim to the same tragic fates.

From a legal perspective, not only must school administrators strive to prevent bullying and to create a safe environment for all of their students, school administrators must also prevent their schools from being subjected to liability. First, this article describes the statute governing anti-bullying policies for schools. Second, this article provides different theories of law under which schools can be held liable for school bullying and what schools can do to shield themselves from liability. Finally, this article provides steps

that schools can take to not only shield themselves from liability but also to prevent the prevalence of school bullying and cyber-bullying.

### II. Anti-Bullying Policies

Pennsylvania law requires schools to address bullying head on. Under section 1303.1-A (a)<sup>1</sup> of the School Code, schools are required to adopt a policy or amend an existing policy relating to bullying and to incorporate it into their school's Code of Student Conduct. The statute defines "bullying" as:

intentional *electronic*, written, verbal or physical act or a series of acts:

- (1) directed at another student or students;
- (2) which occurs in a school setting;
- (3) that is severe, persistent or pervasive; and
- (4) that has the effect of doing any of the following:
  - (i) substantially interfering with a student's education;
  - (ii) creating a threatening environment; or
  - (iii) substantially disrupting the orderly operation of the school; and

"school setting" shall mean in the school, on school grounds, in school vehicles, at a designated bus stop or at any activity sponsored, supervised or sanctioned by the school.<sup>2</sup>

Thus, not only does the statute apply to face-to-face bullying, but it also applies to certain forms of cyber-bullying that take place on a school setting, including sending threatening or vicious emails or posting

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harmful messages using the Internet, such as on Facebook.<sup>3</sup> If the school's current policy does not cover cyber-bullying, the school should amend its anti-bullying policy to incorporate this newer form of harassment. Because the State Board regulations require that school boards adopt a Code of Student Conduct, 22 Pa.Code §12.3(c), the rules prohibiting bullying must be incorporated in the Code of Student Conduct.

The anti-bullying policy is to be made available in every classroom and on the school's publicly accessible Internet web site.<sup>4</sup> Furthermore, a school must post the policy in a conspicuous location, and "[e]ach school entity shall ensure that the policy and procedures for reporting bullying incidents are reviewed with students within 90 days after their adoption and thereafter at least once each school year."<sup>5</sup> Thus, students need to be made aware of the school's policy towards bullying.

It should be noted that schools must not adopt an anti-bullying policy that is constitutionally overbroad.<sup>6</sup> The Supreme Court in *Tinker v. Des Moines Independent Community School District*<sup>7</sup> explained that "the prohibition of expressions of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."<sup>8</sup> Thus, in adopting a policy relating to bullying, schools should review the policy with legal counsel to ensure that it is not overbroad and does not prohibit constitutionally protected speech.<sup>9</sup>

### III. Legal Theories

Even though every school district in Pennsylvania must adopt a policy relating to bullying, having a policy alone does not rule out a school or its administrators, in which students are subjected to bullying by their classmates, from being held legally liable. Federal law provides several avenues in which students, who have been subjected to bullying, can take against school districts that have essentially enabled bullying to persist. For instance, a student may possibly bring suit against a public school under Title IX of the Civil



Rights Act for bullying if the bullying was based on gender.<sup>10</sup> Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."<sup>11</sup> If the courts use the student-on-student sexual ha-

rrassment standards for purposes of gender-based bullying, under *Davis v. Monroe County Board of Education*,<sup>12</sup> for a school district to be held liable, a plaintiff must show that the school had actual knowledge of, and was deliberately indifferent, to sexual harassment that was so severe, pervasive and objectively offensive that it deprived the victim of access to the educational opportunities or benefits provided by the school.<sup>13</sup> Thus, if there is student-on-student bullying based on sex, a school that receives federal funding can be held liable if the school had actual knowledge of the bullying and was deliberately indifferent to such bullying that was so severe, pervasive and objectively offensive that it deprived the student of access to the educational opportunities or benefits provided by the school.

As a school administrator, you may be wondering what type of student-on-student sexual harassment could rise to the level of violating Title IX. Do simple acts of teasing and name-calling among school children trigger damages under Title IX? No, not even when such teasing targets gender differences because even the Supreme Court recognizes that children are going to be children and it is understandable that there will always be a certain amount of

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teasing among children.<sup>14</sup> The Supreme Court explains that “damages are available only where the behavior is so severe, pervasive and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”<sup>15</sup> Furthermore, the court limited “private damages actions to cases having a systemic effect on educational programs or activities.”<sup>16</sup> For example, if school administrators are well aware of male students that threaten their female peers on a daily basis and prevent the female students from using a particular school resource, such as the computer lab, and the administrators deliberately ignore requests for aid from the female students, then such deliberate indifference could be subject to monetary damages.<sup>17</sup>

What about race-based bullying? Title VI of the Civil Rights Act of 1964 prohibits any program or activity receiving federal financial assistance, such as a school district, from discriminating on the basis of race, color or national origin.<sup>18</sup> The reasoning that the Supreme Court applied in *Davis* for Title IX applies to private causes of action under Title VI for student-on-student racial harassment.<sup>19</sup> Thus, private damages are available against a school that acts with deliberate indifference to known acts of racial harassment and such acts have a systemic effect on education programs and activities.<sup>20</sup>

#### IV. Schools' Responses

To not only foster a safe environment but to also shield the district from liability, school administrators must not ignore known acts of sexual or racial harassment that have a systemic effect on education programs and activities. Due to the immense popularity of e-mails, text messages and posting messages on social networks like Facebook, students not only face sexual or racial harassment in-person but

on the Internet as well. The escalating problem of school bullying prompted the Pennsylvania Department of Education to recently send out a letter to educators to advise them on how to avoid liability for bullying under federal laws.<sup>21</sup> The letter suggests that if incidents of school bullying create a hostile environment, school administrators cannot avoid liability by addressing each incident in isolation. Besides disciplining the perpetrators, school administrators should take remedial steps, such as counseling the perpetrators about the ramifications of their conduct, reaffirming the school's anti-bullying policy and publicizing the means by which students may report incidents. Furthermore, schools should provide students and employees with training on the schools' policies related to harassment.<sup>22</sup>

It should be noted that the Pennsylvania Office of the Attorney General web site provides tips on a number of ways schools can control cyber-bullying.<sup>23</sup> The tips include integrating curriculum-based anti-bullying programs into classrooms, educating teachers on the dangers of cyber-bullying and amending or creating anti-bullying policies to include harassment associated with technology. To prevent students from sending cruel, vicious or threatening e-mails to other students within in the school setting, it is suggested that schools should block district-wide access to Yahoo Mail, MSN Hotmail, AOL Instant Messenger and any other personal e-mail accounts.<sup>24</sup> In addition, schools should block district-wide access to social media sites such as MySpace and Facebook.<sup>25</sup> Finally, schools should send letters home to parents to inform parents of the dangers of cyber-bullying.<sup>26</sup> In these letters, schools can advise parents to keep computers in a common area of their homes and to prohibit their children, especially those in middle school and elementary school, from having accounts on social networks. The letters could suggest that if parents allow their child to have an account on a social network, then the parent should monitor their child's profile to see whether their child is bullying another student or being victimized by bullies.

In conclusion, to the extent that bullying is inevitable and is perhaps becoming more pernicious in the form of cyber-bullying, we must be ever more vigilant to protect victims and potential victims. It is not only the right thing to do — it is the legally required thing to do.

**Editor's Note:** This article is written by Julie Levin who recently joined the Levin Legal Group, P.C. Ms. Levin graduated from Brooklyn Law School in 2009; and the Villanova University School of Law in 2010. She is the daughter of Michael Levin, Esq.



### Endnotes

- <sup>1</sup> 24 P.S. § 13-1303.1-A (a) (2008).
- <sup>2</sup> 24 P.S. § 13-1303.1-A(e) (emphasis added).
- <sup>3</sup> *Id.*
- <sup>4</sup> 24 P.S. § 13-1303.1-A(b).
- <sup>5</sup> It is recommended that districts invest in enclosed and locked bulletin boards where all legally required posters and notices are posted. Further, a photograph of each such bulletin board should be made periodically, or whenever new posters or notices are added to the bulletin board or otherwise changed. It has sometimes been an issue in litigation whether the posters or notices were posted and having a locked bulletin board with appropriate protocols in place to be able to prove compliance with the law is important.
- <sup>6</sup> See *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001).
- <sup>7</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
- <sup>8</sup> *Id.* at 511.
- <sup>9</sup> See *Saxe*, 240 F.3d at 216-17.
- <sup>10</sup> See *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); see also, 240 F.3d at 205.
- <sup>11</sup> 20 U.S.C.A. § 1681(a) (2006).
- <sup>12</sup> 526 U.S. 629 (1999).
- <sup>13</sup> See *id.* at 650.
- <sup>14</sup> *Id.* at 651-52.
- <sup>15</sup> *Id.* at 652.
- <sup>16</sup> *Id.* at 653.
- <sup>17</sup> *Id.* at 650-51.
- <sup>18</sup> 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).
- <sup>19</sup> See *Saxe*, 240 F.3d at 206 n.5.
- <sup>20</sup> *Id.* at 206 and 206 n. 5 (citing *Davis*, 526 U.S. at 653).
- <sup>21</sup> See Dep’t of Education, *Dear Colleague Letter* (Oct. 26, 2010).
- <sup>22</sup> *Id.*
- <sup>23</sup> See Pennsylvania Office of the Attorney General, *Cyber Bullying – Tips for Schools and Teachers* (Sept. 11, 2006), available at <http://www.attorneygeneral.gov/kidsparents.aspx?id=1572>.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.*

## Organizational Resilience

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children. Parents often times feel left out of the process, as if their child’s education is something that takes place completely outside of their control and they get 3-4 updates annually on their child’s progress via a progress report or occasional conference. The reality is, for better or worse, parents are their child’s first teachers.

Parents have valuable insights they can offer about their child’s interests and learning style. If the public school systems are to follow Hamel’s ideas and rules for business success, then they need to establish a more positive relationship with parents and students in their charge. A child’s education should be a partnership that includes all of the people who are involved with the child; they should all be learning with and from each other to develop the best possible educational opportunities for children.

Dr. Hamel’s concepts for organizational resilience and his dynamic approach to an ever-changing and pliable business model have afforded many compa-

nies great success. Educational reform moves at a glacial pace. Little over a decade after the creation of Google, it is a household term and known worldwide. More than a century after the cre-

ation of the first system, the education of our children looks much the same as it did then. A new model that embraces new challenges and searches for new principles and exemplars for the educational system is far overdue. For more information, contact the author at [clupo@wsdweb.org](mailto:clupo@wsdweb.org).



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