Sexual Harassment and Bullying:
Similar, but Not the Same
2018 Update

Ellery M. Miller, Jr. M.A.
Eric S. Mondschein, Ed.D.

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Education Law Association’s 64th Annual Conference
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ABOUT RICK AND RICK

Ellery M. ‘Rick’ Miller Jr., M.A.
Ellery M. ‘Rick’ Miller, Jr. is an author and education consultant. He served as the Executive Director of the Professional Development and Training Center, Inc. from 1982 to 2015. Rick has taught at the high school, undergraduate, and graduate levels, and is certified in Organization Development and Team Spirit. He has written, edited, and collaborated on numerous articles, publications, and curriculum resource guides. A consultant to various government agencies, as well as for-profit and non-profit organizations, he has served on the boards of non-profits. He has received numerous awards and was the 1994 American Bar Association’s Isidore Starr Award recipient for exemplary achievement in law-related education.

Rick has provided sexual harassment and bullying prevention training to local, state, and federal government agencies, school districts, non-profit and for-profit organizations in the United States and Canada. He has consulted on policy development and implementation, and conducted prevention training for administrators, teachers, and school staff. Rick has also designed and implemented training of trainers for sexual harassment for school systems, state agencies, and universities. He has developed and conducted training on investigative procedures and protocols and worked with school systems conducting training as a result of lawsuit settlements or court orders.


Eric S. ‘Rick’ Mondschein, Ed.D.
Dr. Eric ‘Rick’ Mondschein is an author and education consultant. He has taught law and education at the undergraduate and graduate levels of education. Having worked for the U.S. government in several capacities, he has published and edited numerous articles and books in various areas of law and education and has written and managed numerous grants from the private and public sectors. Rick has also consulted on policy development and implementation, and conducted training for administrators, teachers, and school staff. He directed an award-winning, law-related education program for the New York State Bar Association and State Education Department from 1980 through 1994. In 1993, he was the recipient of the American
Bar Association’s Isidore Starr Award for exemplary achievement in law-related education. From 1995 to 2006, Rick advised the governing board of an international, non-governmental organization in Haifa, Israel, in the area of external affairs, including government relations and security. He provided analysis of human rights situations in select countries throughout the world in general, and in Iran and the Middle East in particular. He also served as the citizen representative of The Post Star Editorial Board, which won the 2009 Pulitzer Prize for editorial writing.

Rick is the author of *Life at 12 College Road*, published by Something or Other Publishing, which is a collection of short stories about growing up in America in the 1950s and 1960s. He is the co-author with Ellery M. ‘Rick’ Miller Jr. of *Sexual Harassment and Bullying: Similar, But Not The Same*, and an accompanying Teaching Supplement published by the Education Law Association in 2015; and *Sexual Harassment and Bullying: Similar, but Not the Same – What School Officials Need to Know*, *The Clearing House: A Journal of Educational Strategies, Issues and Ideas*, published by the Routledge Taylor & Francis Group in October, 2017.

Rick and Rick are available on a fee for service basis to design, conduct and evaluate training and other programs tailored to meet your needs including the following:

- Sexual Harassment & Bullying Prevention
- Mediation and Conflict Management
- Violence Prevention Interventions
- Organization Diagnosis and Development
- Strategic Management

To contact, call “Rick” Miller at 410-952-2604 or e-mail at bluemax57@live.com.

To contact, call “Rick” Mondschein at 518-935-3950 or email at ericmondschein@hotmail.com
Sexual Harassment and Bullying: Similar, but Not the Same
2018 Update
Executive Summary

Ellery M. Miller, Jr. M.A.
Eric S. Mondschein, Ed.D.

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If you were bullied in school, you never forget. We all remember the class bully. Either we watched in fear as others were bullied, or we were the targets. These experiences are etched in our memories, a permanent scar of defeat, humiliation, shame, or embarrassment. Often, we were told to “get over it,” “just ignore it,” or “turn the other cheek.” We were told “boys will be boys” or that is the way “mean girls” are. For many it has been part of the school experience, but in the great majority of incidents the results were not life threatening and the physical injuries, though painful, were usually minor. Conversely, we might look back and consider with some chagrin and regret when we were the bully, picking on someone smaller, less popular or had less status in the group. Incidents of bullying occurred, but in most schools, they were the exception rather than the rule.

Today bullying is occurring much more often and with our new technologies, students are being bullied at school, on the bus and in their homes. V-mail, email, twitter, Instagram, Snapchat and Facebook have become weapons used to humiliate and bully. Bullying has received major attention in the national media as horrific stories of the results of on-going bullying have surfaced. Some of these incidents have resulted in the deaths of young people. School systems are scrambling to develop appropriate policies and procedures. A number of states have passed bullying laws that either criminalize bullying incidents or provide prescriptions for school system

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1 This document provides a brief glimpse and update into the published monograph and accompanying teaching supplement, Sexual Harassment and Bullying: Similar, But Not the same, E. Miller, Jr., E. Mondschein, Educ. Law Assn. 2015.
enforcement.\textsuperscript{2} Sexual harassment can be a form of bullying when it is used to intimidate but it is also a form of discrimination protected by federal and state laws.

Since the 1980’s schools have been required to address issues of sexual harassment of students, yet as the focus on bullying has grown attention to incidents of and concern about, sexual harassment has diminished. Effective implementation and enforcement of bullying and sexual harassment policies can only occur when administration and staff are knowledgeable about each policy and can differentiate between the two and use appropriate discretion in applying the correct policy. Nan D. Stein, an education professor and sexual-harassment researcher at Wellesley College in Massachusetts, has found that, "As the bullying crescendo rose, schools have been replacing their sexual-harassment policies with bullying policies, and they're not the same thing.”

Further complicating implementation and enforcement of these policies is the critical need to provide “due process” to both the complainant and the alleged perpetrator.\textsuperscript{3}

The paper:
1. Reviews the major laws, regulations and case law that cover sexual harassment;
2. Assesses the current status of bullying legislation, policy development and case law;
3. Notes the similarities and differences between bullying and sexual harassment;
4. Explores key considerations for policy implementation;
5. Considers parent and community perspectives;
6. Provides suggestions and options for conducting effective training in bullying and sexual harassment prevention.

Title IX of the Education Amendments of 1972 (Title IX)\textsuperscript{4} protects persons from discrimination based on sex in education programs and activities that receive federal financial assistance.\textsuperscript{5}


\textsuperscript{3} See \textit{When Bullied Kids Defend Themselves, Why Do Schools Punish Them?} By P. Kotz in Heroes, classroom creepiness, Friday, March 18, 2011. \url{http://www.truecrimereport.com/2011/03/when_bullied_kids_defend_thems.php}. See also, Dr. Jane’s Notebook: \textit{No Tolerance Often Punishes the Innocent}, Rosen-Grandon, J.R. 2001. (\url{www.dr-jane.com/chapters/Jane194.htm}). It should also be noted that during a recent training session in Maryland, we learned that a student who been harassed continually, and had informed school authorities, believed that nothing was being done, struck out at her assailant only to have the school suspend both for fighting.

\textsuperscript{4} (20 U.S.C. §§1681-1688).

\textsuperscript{5} The monograph does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. 20 U.S.C. 1681 et seq.; 34 CFR part 106, subpart E. If employees file Title IX sexual harassment complaints with the Office for Civil Rights (OCR), the complaints will be processed pursuant to the Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance. 28 CFR 42.604. Employees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act.
Examples of the types of discrimination that are covered under Title IX include sexual harassment, the failure to provide equal opportunity in athletics, access to course offerings, textbooks, comparable facilities, counseling, and discrimination based on pregnancy. Sexual harassment is a form of sex discrimination. Sexual harassment in schools is unwanted and unwelcome behavior of a sexual nature that interferes with the right to receive an equal educational opportunity. Sexual harassment creates an offensive, intimidating, or hostile learning or living environment. There are two recognized forms of sexual harassment: *Quid Pro Quo* sexual harassment: which means "this for that" and *Hostile Environment* sexual harassment which is verbal, physical or visual forms of harassment. In 1992, the Supreme Court held that a high school student who was allegedly subjected to sexual harassment and abuse could seek monetary damages under Title IX for alleged intentional gender-based discrimination. In a major sex discrimination in employment decision the Supreme Court held that same sex harassment is actionable under Title VII. Title IX was not the only means of correcting unconstitutional gender discrimination and claims under the Civil Rights Act of 1871 may be brought against individuals or state agencies. The right to seek compensatory and punitive damages for sex discrimination under Title IX and the Civil Rights Act of 1871 has now been clearly established, but the bar for being successful has been set quite high. The ability of students to collect damages was limited in *Gebser v. Lago Vista Independent School District*.

The court held that a school district would only be found liable for damages if the following elements of a cause of action in a sexual harassment case were established:

1. The plaintiff was subjected to gender-oriented conduct that was “severe, pervasive, and objectively offensive.”
2. The sexual harassment denied the student an equal educational opportunity or benefit.
3. The district had “actual knowledge” of the sexual harassment.
4. The district was “deliberately indifferent” to the sexual harassment.
5. The district’s conduct of indifference caused the students damages.

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of 1964. For information about Title VII and sexual harassment, see the Equal Employment Opportunity Commission’s (EEOC’s) Guidelines on Sexual Harassment, 29 CFR 1604.11.

6 34 CFR Part 106. See also, 20 USC §1681. [PL 92-318 901][§901]. Although not specifically addressed in the regulations sexual harassment has been found by the Supreme Court to be included. It should be noted that Title IX, like Title VI, recognizes three general types of prohibited discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. Any effective and meaningful administrative enforcement program under Title IX must be prepared to address all three. It is important to note, however, that Title VII case law does not apply with equal symmetry in the area of harassment claims. Furthermore, to enforce Title IX, the U.S. Department of Education maintains an Office for Civil Rights (OCR), with headquarters in Washington, DC and twelve regional offices located across the United States. See www.ed.gov/about/offices/list/ocr. Many state education agencies may also be approached with complaints of alleged sexual harassment. See, e.g. Maryland State Education Department, Education Department of the State of New York, Massachusetts Department of Education, Iowa Department of Education, Delaware Department of Education, Texas Education Agency, and the California Department of Education.


8 Id.


10 Id. at 285-93. See also, Vance v. Spencer Cnty. Pub. Sch. dist., 231 F.3d 253, 260-61 (6th Cir. 2000) (“... where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable
Courts are continuing to address the ever-present problem of sexual harassment in schools.

The actions we refer to as “Bullying” have always been recognized. Columbine was the first of many high-profile incidents that shocked the nation as more and more cases of violent bullying were recorded. Recently this behavior has appeared repeatedly in the headlines and TV reports, documenting the tragic stories of young people who were bullied and who felt so victimized that they took their own lives. Reports of suicides attributed to bullying continue. While policies and prevention programs are being developed, there are those who question the whole concern about bullying. Gaining insight into the degree and extensiveness of bullying is difficult as statistics vary widely depending on the definition of bullying being used and the continuum of behaviors being included from insults and taunts to actual physical assault. While we know bullying and cyberbullying are serious issues that occur with greater frequency than many believe, how can we best define them? The U.S. Department of Education’s Office for Civil Rights shared the following definition of bullying at the U.S. Department of Justice Bullying Summit in August of 2010.11 “Bullying is a form of youth violence; it is aggressive behavior that is intentional and involves an imbalance of power or strength. Bullying usually includes attack or intimidation with the intention to cause fear, distress or harm… bullying can occur in person or through the use of technology, called “electronic aggression” or more commonly – cyber-bullying.”

Lesbian, gay, bisexual and transgender youth (LGBT) often find themselves the targets of various forms of bullying and harassment. There is a growing body of research detailing the negative impacts of bullying on the victims, the bullies, and bystanders.

Studies of victims of bullying have indicated that they:

- Show increased levels of anxiety, psychosomatic symptoms and experienced higher rates of aggressive-impulsive behavior and eating disorders.12
- Are at greater risk for depression, lower self-esteem, suicidal ideations and suicide attempts.13

- Have higher rates of truancy, absenteeism, disciplinary problems and lower academic achievement.\textsuperscript{14}

The degree of and the high visibility of bullying incidents and the growing litigation over these incidents, has forced school systems, the federal government, state legislators and the courts to begin addressing the issues of responsibility and liability. They have responded by developing policies, legislation and regulations to provide guidance and clarity to school personnel, students and parents.

The Federal response has come primarily through the US Department of Education’s Office for Civil Rights (OCR). The primary statutes that OCR enforces include:

- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;
- Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color or national origin; and,
- Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA), which prohibits discrimination based on disability.

The above statutes bar harassment or severe bullying. Where sex discrimination in general and sexual harassment in particular, have delineated boundaries due to federal and state legislation and regulation, bullying policies, legislation and regulations are in many ways in their infancy with stakeholders attempting to find the appropriate response to protect victims and enable schools to engage in learning without disruption. In October 2010, OCR issued a “Dear Colleague” letter (DCL) that provides comprehensive guidance. This letter outlined that school districts and Institutions of Higher Education (IHE’s) can violate civil rights laws when peer-to-peer harassment reaches the level of a hostile environment and is not properly addressed by school officials.\textsuperscript{15} OCR noted that often the misconduct is in plain sight, widespread, well known to student and staff and rises to the level of a hostile environment if it is “sufficiently serious, severe,
pervasive or persistent so that it interferes with or limits a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. The liability for schools increases when the harassment is encouraged, tolerated, not adequately addressed or ignored. Most importantly, OCR DCL gave clarity to how schools should respond to incidents. While Title IX does not “naturally” cover bullying under “sexual harassment language” the court has declared that when bullying is based on sex or gender and is pervasive or severe it can be a violation of Title IX.  

The OCR letter of October 26, 2010 reinforces how acts of bullying can violate Title IX if they are predicated on sex or gender. It applies a similar standard in suggesting that severe, pervasive and offensive bullying could violate Title VI if it was based on race, color or national origin. In the same way bullying that is severe, pervasive and offensive may violate Section 504 and Title II if the bullying behavior was based on the student’s disability and limited the student’s ability to benefit fully from the school’s education programs. There is no specific federal law addressing bullying. Secretary of Education Arne Duncan’s December 16, 2010 “Dear Colleague letter” reiterated the growing concern and devastating effects bullying can have. That bullying has become a national problem is reinforced by the rapid expansion of state statutes to specifically address the issue. In 1999 there were no specific statutes concerning bullying, but by July 2014 forty-nine states had enacted laws addressing the problem.

Federal and state courts have responded in a multitude of ways to the growing body of litigation that has resulted from victims, their parents and alleged bullies and their parents and in a few incidents, adults accused of bullying or harassing minors. Many of these cases allege that the

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16 See, e.g., Franklin v. Gwinnet County Public Schools, 502 U.S. 60, 112S.Ct. 1028 (1992) and Gebser v. Lago Vista Independent School District, 524 U.S. 274, 118 S. Ct. 1989 (1998). In addition, On April 29, 2014, the Department of Education’s Office for Civil Rights (OCR) issued a “significant guidance document” to assist institutions of higher education in meeting compliance obligations under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally assisted education programs and activities. This new document expands upon previous OCR guidance issued in a 2001 document titled, “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” and in a “Dear Colleague Letter” dated April 4, 2011. Although not about harassment, it should also be noted that the White House published the first report of the White House Task Force To Protect Students from Sexual Assault titled, Not Alone in April 2014. See also, April 24, 2015, Department of Education’s Office for Civil Rights (OCR) “Dear Colleague Letter” regarding efforts to comply with and carry out Title IX of the Education Amendments of 1972 (Title IX).

17 October 26, 2010 “Dear Colleague Letter” on Guidance on Federal Responsibility for Bullying and Harassment, U.S. Department of Education. The letter presents a hypothetical situation where a series of anti-Semitic incidents including graffiti, swastikas were scrawled on bathroom stalls. Two boys attempted to shake down other boys using anti-Semitic terms even though the victims were not Jewish. Jewish students began avoiding the library and computer lab because they had to transit the hallway where the 9th grade harassers had their lockers. The OCR letter notes that Title VI does not cover such harassment / discrimination based solely on religion but explains that groups that face discrimination on the basis of shared ancestry or ethnic characteristics are protected. See Also, Zeno v. Plain Central Sch., 702 F.3d 655 (2nd Cir. 2012).

school and/or school administrators were negligent in protecting students’ in their care from ongoing bullying. Cases that allege negligence on the part of school officials are making headlines across the country.\textsuperscript{19}

While we can unequivocally note that sexual harassment and bullying are issues that students, parents, teachers and administrators face on an ongoing basis are similar, they are not the same. Definitions of what constitutes bullying vary widely in legislation and research. In \textit{Comparing the Impact of Bullying and Sexual Harassment Victimization on the Mental and Physical Health of Adolescents},\textsuperscript{20} Gruber and Fineran compared the impact of bullying and sexual harassment. Both bullying and sexual harassment studies have identified negative impacts on student’s health and well-being. It has been noted that bullying was more frequent than sexual harassment; LGBT students experienced higher degrees of both bullying and sexual harassment; bullying and sexual harassment led to negative health outcomes for students; sexual harassment, while less frequent, plays a greater role in poor health outcomes than the more pervasive bullying. It makes a strong case that we should focus on sexual harassment prevention as we address bullying. School Board policy on sexual harassment and bullying should be considered in the context of an overall approach to school safety and discipline, with the goal of providing a positive school environment that maximizes student learning. Strategies to address sexual harassment, bullying, including cyberbullying, may be incorporated into a comprehensive safety plan. A well-written and accessible school policy must clearly communicate that sexual harassment is unacceptable and regarding bullying there must be a statement of the position of the school or district regarding bullying behaviors and the school or districts’ definition of bullying as well a statement relating to the responsibilities and the rights of students, staff, and others who are associated.

The policies on sexual harassment and anti-bullying and grievance procedures should be published in district and student handbooks, on a website, or in some format that is easily

\textsuperscript{19} See, e.g., This Honorable Court: Court Cases brought by Bullied Students. http://www.ravendays.org/court.html. The following are headlines of articles that allege negligence or failure to protect on the part of school officials:

- \textit{Family Sues Hamilton Southeastern School District over Suicide} -- Nov. 28, 2011. -- Fishers, Indiana, USA. -- 14-year-old Jamarcus Bell killed himself Oct. 20, 2010, after being bullied. Now, a year later, his parents are suing his school system for failing to protect him from his bullies. Article by Daniel Miller for WISH.
- \textit{Broward County School District Faces Bullying Lawsuit from Florida Mother} -- Nov. 24, 2011. -- Broward County, Florida, USA. -- 13-year-old Brianne Vanderheyden tried to kill herself after being repeatedly bullied by schoolmates. Article web-published by the \textit{Huffington Post}. See also, Nov. 24th’s \textit{Broward School District Faces Bullying Lawsuit}, by Donna Rapado for NBC. \textit{Jewish Family Sues Green Schools...} -- Nov. 12, 2011. -- Green, Ohio, USA. -- The parents of a 14-year-old are suing her school system for failing to protect her from bullying. Article by John Higgins for the \textit{Akron Beacon Journal}. \textit{Family Sues School District Over Bullying} -- Sept. 27, 2011. -- Saranac Lake, New York, USA. -- Amy and Hiram Oliveras are suing their daughter’s school system for failing to prevent her from being bullied. Article by Kim Smith Dedham for the \textit{Press-Republican}. See also, Sept. 24th’s \textit{Schools Sued over Racial Bullying} by Chris Knight for the \textit{Adirondack Daily Enterprise}. \textit{Lawsuit Blames Bullying on District} -- Sept. 4, 2011. -- Harrisburg, Oregon, USA. -- The mother of a middle school student with Tourette’s Syndrome is suing her son’s school system for failing to protect him from bullies. Article by Karen McCowan for the \textit{Register-Guard}.

accessible to all persons who may be affected by the policy.\textsuperscript{21} When developing a policy on sexual harassment and/or bullying, the goal is to create an educational environment that allows each student to feel safe and secure. The entire school community will benefit most from stopping harassment of any kind from happening at all. While developing a strong program often begins with establishing and enforcing written policies and procedures, all of a school district's programs and activities should enhance its anti-harassment efforts. The school's stated philosophy, instructional program, extracurricular activities, professional development efforts, and parent involvement initiatives are key to establishing a safe environment in which respect for others can flourish. Successful prevention strategies depend on the coordinated efforts of not just administrators, but all teachers, staff, the student body, and the community. All employees who have contact with students should receive training to ensure that policies are understood, that incidents are reported and investigations, if necessary, are effective.

The monograph reviews the major laws, regulations and case law concerning the sexual harassment of students in elementary and secondary schools. It finds that Title IX of the Education Amendments of 1972 protects persons from discrimination based on sex in education programs and activities that receive federal financial assistance. The implementing regulations inform us that sexual harassment is a form of sex discrimination and is covered under Title IX. In general, sexual harassment in schools is unwanted and unwelcome behavior of a sexual nature that interferes with the right to receive an equal educational opportunity.

The monograph also explores bullying and assesses the current status of legislation, case law, and policy development being implemented to confront it. It was found that bullying is occurring much more often and with new technology, students are being bullied at school, on the bus and in their homes. V-mail, email, twitter and Facebook for example, have become weapons used to humiliate and bully. Although many are still trying to determine what bullying is, the US Department of Education stated that bullying is a form of youth violence; it is aggressive behavior that is intentional and involves an imbalance of power or strength. In developing a policy on bullying and sexual harassment, school boards should consider seeking the input from the entire school community including parents, and that legal counsel should be consulted, particularly regarding issues of sex discrimination, student discipline and first amendment issues.

\textsuperscript{21} See U.S. Department of Education, Office for Civil Rights (2001). \textit{Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties} (“Sexual Harassment Guidance”); See also, 65 Fed. Reg. 52867 at § .135(b) [Recipients of federal funds must adopt and publish internal grievance procedures to promptly and equitably resolve complaints alleging discrimination on the basis of sex in its education programs or activities]. Although not required by the federal government as of the time the monograph was written, it is recommended that bullying policies also be published and made available to the school community. It may however be required by state law or regulations.
It is important to remember that when developing these policies, the goal is to create an educational environment that allows each student to feel safe and secure. With due diligence and respect for due process and the rights of all involved, investigations must be conducted in a timely and thorough manner.

It is important to note that the OCR made it clear that on its face bullying and sexual harassment may be similar, but they are not the same and the distinction becomes most critical in the areas of prevention, investigation, enforcement and remediation. Peer harassment that is severe and pervasive and is based on sex, race, color, national origin or disability violates civil rights laws that are enforced by OCR. Furthermore, when peer-to-peer harassment reaches the level of a hostile environment and school administrators fail to properly address it, they may face heightened legal liability.

Successful prevention strategies depend on the training and coordinated efforts of not just administrators, but all teachers, staff, and the student body. It is not enough to merely provide information on what constitutes bullying and/or sexual harassment—the school community must understand that bullying and sexual harassment will not be tolerated. Policies and procedures must be in place and known by all members of the school community. Schools should consider developing action plans both at the district level and at individual school sites, again involving all members of the school community, that specify the steps of each segment that community will take to implement a comprehensive anti-harassment program.

Schools are first and foremost places for learning. We must always remember that the goal is to create an educational environment that allows each student to feel safe and secure. As previously stated, for real learning to occur, students must not only feel safe and protected—they must, in fact, be safe and protected.

The companion teaching supplement to the monograph provides activities and resources to enhance understanding of the issues and problems inherent in sexual harassment and bullying. The following chart provides the optimum parameters for effective training regarding policy implementation, reporting of complaints and adequate investigation:22

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22 Over the years we have trained over 30,000 educators and related personnel on sexual harassment prevention. Recently, we have expanded that training to include bullying prevention. We strongly believe that training of staff is critical to effective implementation of policy, effective reporting of allegations, appropriate investigations and provision of due process to the alleged bully/harasser and the victim. While we have modified training content, length of training and size of training groups to fit client needs the aforementioned model and chart contain what we consider to be the “best practices” for maximum application.
<table>
<thead>
<tr>
<th>Personnel Trained</th>
<th>Focus of training</th>
<th>Length</th>
<th>Format</th>
<th>Outcomes</th>
<th>Optimum Group Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support staff including bus drivers, cafeteria, hall monitors and clerical.</td>
<td>Understanding of local policies and federal civil rights laws. Understanding acceptable and unacceptable behavior. Recognizing and reporting harassment/bullying. Understanding their role in maintaining school safety and security.</td>
<td>90 -120 minutes</td>
<td>Pre-Post Test Interactive Presentation w. Q. &amp; A. One application activity to identify and discuss the severity of different types of behavior.</td>
<td>Participants are provided the opportunity to know what constitutes harassment and bullying, how to assess and avoid individual problems and when and how to identify h/b in students and the reporting procedures.</td>
<td>30</td>
</tr>
<tr>
<td>Administrators, Teachers, Guidance Counselors, Media Specialists, Coaches and Teacher’s Aides</td>
<td>All of the above + case studies and hypothetical’s to increase their understanding of how policies need to be applied and methods for early intervention and interacting with alleged harassers, bullies and potential victims.</td>
<td>6-8 hours</td>
<td>Above activities plus hypothetical’s, case studies and forced choice activities to ensure group and individual understanding culminating in an applications activity. Information is provided on intervention strategies.</td>
<td>Participants are provided the opportunity to understand sexual harassment and bullying prevention.</td>
<td>30-50</td>
</tr>
<tr>
<td>Administrators and those charged w/ investigating complaints of sexual harassment and bullying.</td>
<td>Above + Investigative Procedures and Processes. Understanding how to ensure due process.</td>
<td>Above w/ +3-4 hours.</td>
<td>Overview of procedures and questioning techniques. Simulations and practice sessions.</td>
<td>Participants are provided the opportunity to understand how to investigate and resolve sexual harassment &amp; bullying complaints.</td>
<td>20-25</td>
</tr>
</tbody>
</table>
Update 2018

Sexual Harassment and Bullying Cases

Sexual Harassment Cases


M.D., a female eighth-grader, was sexually assaulted by a male student, R.M., an eleventh-grader who was a fellow member of her cheerleading team, while on the bus returning from a school event. When the matter was reported to school authorities, R.M., who had no prior record of disciplinary incidents, was promptly moved to an alternative high school. He remained there for the balance of that school year despite repeated recommendations from the staff of the school that he be allowed to return to the regular high school. R.M. was allowed to return to the high school approximately one month into his twelfth-grade year. School administrators warned him that any contact with M.D. would result in his immediate return to the alternative school. When it was brought to their attention that he was assigned to the same lunch period as she was and had also been assigned to take yearbook photos at sporting events where she was cheerleading, the administration arranged for him to eat his lunch in a location outside the cafeteria and to be given a different assignment on the yearbook. He graduated at the end of the year without further incident.

M.D. brought claims against the school district under Title IX. The district court dismissed the complaint granting summary judgment to the school district, which was also affirmed by the circuit court. The elements of a Title IX claim for student-on-student harassment are that the harassment was so severe as to deprive the claimant of access to educational opportunities, that the school had actual knowledge of that harassment, and that it was deliberately indifferent to it. M.D. failed to meet the “deliberate indifference” test. The school took immediate action on learning of the act of harassment, allowed R.M. to return to the regular high school only after multiple recommendations by the staff of the alternative school, and took effective steps to separate him from M.D. In addressing the situation, they had to balance the interests of both students, and courts will not second guess disciplinary decisions made in good faith by school administrators. The court found it was not unreasonable, given that the harassment was not ongoing, and the measures taken to separate the two students were successful, to make arrangements that would facilitate R.M.'s rehabilitation.
M.D.’s claim that the coaches retaliated against her because she reported the assault was not included in her original complaint, but was raised for the first time in her opposition to the school district’s summary judgment motion. It was therefore denied because of the unfair surprise created by her failure to raise it before.


Matthew, a ninth-grade special needs student at Chelmsford High School in Massachusetts, alleged that he was sexually assaulted with a broomstick, beaten, and otherwise harassed by several members of the school’s football team while attending the annual pre-season football camp. Matthew further claimed that no regular adult supervision was present during the three-day camp and when he reported some of the abusive events, the coaches took little if any action. His parents also claimed to have experienced a similarly dismissive attitude during meetings with the athletic director and school officials, who also appeared to be more concerned about keeping the incident hushed up than about the allegedly abusive climate that encouraged bullying and harassment to make the players tougher.

News of the sexual assault against Matthew spread throughout school and students started calling Matthew “broomstick.” Lewd, obscene, vulgar, and threatening statements appeared on social media, and when reported, school officials took little action stop it. However, after the first media report appeared, the superintendent and school committee issued press releases filled with declarations regarding student safety. In all, twenty-four separate reports of abuse and harassment were reported to school officials in the 2013-2014 school year. Ultimately, Matthew enrolled at a different high school and had to repeat his sophomore year. His parents initiated a suit against the town, school committee, and various school officials claiming civil rights violation, defamation, and various other torts. The defendants moved to dismiss.

The court dismissed the plaintiffs’ substantive due process claim, finding no special relationship or state-created danger exception and that the actions of school officials did not shock the conscience. The court also dismissed the ‘stigma-plus’ due process claims stating that reputational harm is not enough to satisfy the requisite standard, and the equal protection claim also failed because the plaintiffs could not provide a ‘similarly situated comparator.’ Although the court awarded qualified immunity to school officials, the court ruled, however, that the parents successfully pleaded a claim for First Amendment retaliation against several teachers whose derogatory remarks were considered to be an adverse reaction toward Matthew for reporting the abuse and harassment. The court also refused to dismiss a claim against the town and school
committee, based upon allegations that policymaking officials had actual knowledge of widespread bullying yet did not take reasonable steps to end the custom or practice. Finally, the court denied the defendants’ motion to dismiss the Title IX claim, as the alleged sexual taunting came in different forms from different students over an extended period of time, making the sexually charged hostile environment more repeated and pervasive. The plaintiffs adequately state a Title IX claim.

Bullying Cases


Christina Scott (“Scott”) and her son B.P., allege that B.P was the victim of bullying at Kerr Middle School (“KMS”) by a student and then was further victimized by a teacher who yelled, cursed, and intimidated B.P. in front of the other students. The plaintiffs further alleged that in a separate incident B.P. was confronted by the teacher, who followed him into the bathroom where B.P. was changing clothes to get ready for baseball practice. They alleged that the teacher forced open the bathroom stall, causing injuries and then berated the student with personal insults. They also alleged that school officials, while aware of the incident, had failed to take reasonable steps to train or supervise the teacher, or to protect the student. The plaintiff filed suit against the teacher, claiming substantive due process violations, intentional infliction of emotional distress, assault and battery, invasion of privacy and false imprisonment. Also named as defendants were the school board, superintendent, principal, and assistant principal for their alleged failure to train, supervise, or protect. The court dismissed the substantive due process claim against the school officials in their individual capacities, finding no danger-creation exception, and dismissed the substantive due process claims against the district, finding no widespread practice of unconstitutional conduct or deliberate indifference on behalf of school officials. The Court cited the Oklahoma Government Torts Claim Act, which insulated the school officials from liability for negligence as they were acting within the scope of their employment.

The court, based on the alleged facts, inferred that the teacher acted out of malice and in retaliation for being reported and that the actions of the teacher rose to the level of being conscience-shocking. Accordingly, the teacher’s motion to dismiss the substantive due process and intentional infliction of emotional distress claims were denied. The allegations of assault and battery, invasion of privacy, and false imprisonment by the teacher remained active.
ST was a freshman at Father Ryan High School, a nonpublic school. The plaintiff alleged that he was bullied by classmates, who called him “gay,” a “fag,” and “suffered other sexually oriented and derogatory verbal abuse.” The alleged harassers hit him with belts and suggested that he kill himself. After ST committed suicide, his mother sued the school in state court, alleging under state law that it had been negligent in failing to enforce its anti-bullying policy, and that the bullying constituted student-on-student harassment under Title IX. The school filed a motion to move the case to federal court and the motion was granted. In regard to the Title IX claim the court found that the plaintiff failed to make a plausible claim of student-on-student harassment because no evidence was presented to show that ST had been subject to harassment on account of his sex. The negligence claim was also dismissed, as the facts alleged did not support a reasonable inference that ST’s suicide was foreseeable and that the school’s failure to act was a proximate cause of the student’s suicide. For these reasons punitive damages were not appropriate. Finally, the court did not grant leave to amend the complaint, as the plaintiff failed to provide sufficient information pertaining to the substance of proposed amendment.


The paternal grandparent and guardian of D.V., a student with a learning disability and autism, filed a lawsuit with multiple claims. Further the plaintiffs claimed retaliation, based on their advocacy for D.V., by the school district. They alleged bullying related to his sexual orientation, in violation of Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act (ADA), and 42 U.S.C §1983; sex discrimination and retaliation under the New Jersey Law Against Discrimination (NJLAD); and discrimination under Title IX. The family of D.V. made four complaints to the school about bullying that D.V. was subjected to between January and May 2012, including one complaint related to his perceived sexual orientation. The court found that the district performed timely Harassment/Intimidation/Bullying (“HIB”) investigations and the assessments concluded there was no indication of HIB behavior from D.V.’s teachers, assistant principal or students interviewed. The court noted that a plaintiff’s claim is only actionable if the District’s failure to reasonably address the harassment has the effect of denying to the student any of the school’s accommodations, advantages, facilities or privileges. The court found that the facts did not support the plaintiffs’ claims. The retaliation claims, which resulted from representatives of the district contacting the Department of Youth and Family Services (DYFS) to report suspected child abuse by D.V.’s uncle suspected of child abuse. The court found no causal connection, required for a retaliation claim, between the family’s advocacy on behalf of
D.V. and the district’s calls to the DYFS. The court also noted the required reporting procedures in cases of suspected child abuse and granted the district’s motion for summary judgment.


The family of Jacobe Taras filed suit against the South Glens Falls School District alleging the South Glens Falls School District was negligent and responsible for the wrongful death of their son, who committed suicide after persistent and ongoing bullying. The family contended that Jacobe had been bullied, starting in the 4th grade and continuing persistently and continually until the 7th grade when he took his life and left a note stating that he could not take it anymore and so ended his life. The family alleged that several teachers and a counselor knew of the bullying and took no action to end the bullying. The jury ruled that the school district was guilty of negligence, but they could not determine a direct causation between the district’s negligence and Jacobe’s death.


A Common Pleas judge has ordered the School District of Philadelphia to pay $500,000 to the family of a former student who alleged that the school district failed to prevent severe bullying over her gender orientation at four city schools. The judge ruled the school district’s conduct violated the Pennsylvania Human Relations Act, which prohibits sex discrimination. Wible alleged the bullying began in 2003 while attending Pollock Elementary School and continued throughout her attendance at four schools within the district. She alleged “severe and persistent taunting, teasing, bullying and harassment,” as well as “sexualized name calling” that was “indicative of contempt for her gender presentation” and her “failure to conform to societal expectations for girls in terms of appearance and dress.” Wible alleged several incidents when she was physically assaulted, once by a larger male student and then later by a group of 10 students who “teased her with sexualized taunts.” The suit detailed that because of the bullying and harassment Wible suffered “physical and psychological harm,” depression and anxiety. “The suit noted that she also engaged in self-harm, had suicidal ideation” and has since developed “‘Complex Type’ post-traumatic stress disorder”.
The judge concluded that the “School District had no procedure to remedy the discrimination and bullying suffered by Amanda at Pollock.” He wrote that at one of the schools the staff blamed Wible for the bullying that was perpetrated on her. The PHRA — the state’s flagship anti-discrimination statute is typically applied in cases involving employment issues — and this is the first time it has been utilized to hold a school district accountable for student-on-student bullying. The suit detailed that Wible suffered “physical and psychological harm,” depression and anxiety and developed “Complex Type” post-traumatic stress disorder.

The plaintiff’s attorney said. “Once school districts understand that they can be held financially accountable for this type of behavior, they’re more likely to take the bullying seriously.”

Claire Sasko, JUDGE Orders Philadelphia School District to Pay $500,000 in Bullying Case, Philadelphia Magazine, June 5, 2018, 3:46 p.m.

**Update 2017**

**Sexual Harassment and Bullying Cases**

**Sexual Harassment Cases**

*Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681 (5th Cir. 2017)

A student, Doe, claimed he was sexually assaulted in the school bathroom, appealed the dismissal of claims under due process, equal protection, Title IX, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act by the federal district court. The due process claim was dismissed because the Due Process Clause does not protect an individual against private violence. A student allegedly committed the assault while Doe was in the second grade. As Doe asked his mother not to reveal the assault to school authorities until after he graduated, those authorities were not aware of the assault; therefore the Title IX claim failed. The court dismissed the Section 504 and ADA claims for the same reason. The Fifth Circuit Court of Appeals affirmed.


Noelle, a student who endured four years of peer-on-peer harassment, and her mother, filed suit against the city of Attleboro and multiple school officials asserting violations of Title IX, 42 U.S.C. § 1983, and negligence. In middle school, Noelle was subjected to verbal abuse from
several boys, including being called a “bitch, slut, whore, and fat ass.” This behavior continued despite multiple complaints from Noelle and her mother. Noelle also was physically assaulted by Thomas C., the main abuser, suffering a sprained ankle and fractured wrist.

The records of the harassment and abuse that took place during middle school were not transferred to the high school, “as a matter of policy,” and Noelle and Thomas C. ended up in the same classroom. The conduct harassment and abuse continued. One of the assistant principals did verbally reprimand Thomas, but the harassment increased, with new perpetrators getting involved. Noelle suffered severe depression and anxiety and was withdrawn from school and enrolled in a crisis intervention counseling center. The court found that the complaint pleaded facts sufficient to state a plausible Title IX claim, noting that Noelle was subjected to severe, pervasive, and objectively offensive peer-on-peer harassment that deprived her of educational opportunities. In addition, the defendants demonstrated deliberate indifference, as their limited response was completely unreasonable.

The Section 1983 equal protection claim was dismissed because Noelle was unable to show that she was subjected to discriminatory treatment on the basis of her membership in a protected class. Her claims of negligence by school officials were also dismissed, as she failed to comply with Massachusetts’s presentment requirements. The methods used by school officials investigating allegations of school bullying were viewed as discretionary functions, thus placing her claim outside the scope of permissible negligence suits under the Massachusetts Tort Claims Act. The court found that neither the public employer nor its agents were the original cause of the injuries sustained by Noelle. The court also dismissed a claim under the Massachusetts Equal Rights Act, as Noelle was unable to show an underlying contractual relationship with the Attleboro School District.


S.K. was a ninth-grade student who entered North Allegheny Intermediate School in 2009. The evening before school began, S.K. received a threatening text message and Facebook posting. Her older sister responded to the test, which led to a threatening and profane response and multiple harassing posts on S.K.’s Facebook page. The next and first day of school, S.K. reported the incident to the principal, and he called her to his office via the loudspeaker system. S.K. later alleged that this method of calling her had the effect of identifying her as a complainant. As the school year progressed harassment escalated, including a variety of verbal and physical confrontations. Further the harassment became overtly sexual in nature and boys began joining in
the harassment. S.K. alleged that faculty members witnessed the harassment but did not intervene. S.K. was physically assaulted on multiple occasions. She was pushed, shoved, and inappropriately touched by male students in the hallways. S.K. and her parents sought an intervention, but they saw no punishment or consequences for the students involved.

The harassment was so pervasive that S.K. tried to take her own life.

As the harassment intensified, her parents took their concerns to the school board. They met with the superintendent, who assured them that the situation would be remedied. The principal and guidance counselor suggested that S.K. transfer to another school, for which they paid tuition and provided her with a new laptop. After completing ninth grade at another school, she returned to North Allegheny for tenth grade, but the harassment and bullying began again, this time perpetrated by her grade-level peers. S.K. returned to the transfer school and filed her suit.

S.K. alleged that she was the victim of student-to-student sexual harassment that constituted a violation of Title IX. Further, she alleged retaliation for having reported the harassment and for exercising of her First Amendment protected expression; as well as violation of equal protection under the Fourteenth Amendment, because the district practiced “selective enforcement” and sexual discrimination.

The court agreed that S.K. had been a victim of sexual harassment, which constituted a violation of Title IX. However, all her other complaints were dismissed, due to no showing of “deliberate indifference”.

*Morgan v. Town of Lexington*, 823 F.3d 737 (1st Cir. 2016)

The mother of a middle school boy brought an action against the school district, alleging that the school had violated her son’s civil rights by inadequately reacting to bullying incidents directed at him. The federal district court granted a motion to dismiss, and the mother appealed. Addressing a Section 1983 due process claim, the court held that the mother had failed to allege facts to support the claim under a state-created danger theory. In addition, as to a Title IX claim alleging sexual harassment, where others had pulled the boy’s pants down on one occasion, the court held that the bullying was not sufficiently severe or pervasive to support a sexual harassment claim.


T.W., was a student at Justin F. Kimball (Kimball) High School in the Dallas Independent School
District (DISD). She suffered from cerebral palsy and encephalopathy, which left her severely impaired. In 2013, T.W. began ninth grade, where her special education program included a class V.A., was a 20-year-old male special needs student was also a classmate. Shortly after the semester began, V.A. began inappropriately touching T.W. including grabbing her buttocks and genital area. She reported the behavior to her teacher, Mr. Jones, but the school took no action.

Throughout the fall semester, school officials received numerous complaints about V.A.’s behavior. His harassment of T.W. continued through the semester and, on several occasions, he attempted to pull T.W. into the classroom’s bathroom. She and her classmates who witnessed the behavior made reports to the teachers, administrators, and T.W.’s case manager. School officials responded by conducting two meetings in December 2013, where V.A. admitted to some of the accusations. The case manager was not permitted to attend the meetings, but did tell T.W. of the reports she received. As a result of these meetings, administrators relocated V.A.’s seat to the back of the FLS classroom. Despite this relocation, V.A. continued the harassment. The teacher rejected T.W.’s requests to use another bathroom, because a school rule required FLS students to use the one in the classroom. After the school’s holiday break, V.A. raped T.W. in the bathroom, and threatened her, if she told. She did not report the rape for a few weeks.

T.W.’s mother, Doe, upon learning of the rape, reported the rape to police. In response, school officials held another meeting with T.W. and her family. The principal and assistant principal assured T.W.’s parents that they would investigate. Over the next few weeks, school officials and Child Protective Services questioned T.W. extensively, without her parents’ knowledge or permission, about the rape. Kimball did not suspend V.A. or take any steps to ensure that he did not contact T.W., leading Doe to keep T.W. at home and requesting that her daughter be transferred to another school.

T.W. eventually changed schools, but by that time, she fell behind in her studies, causing her grades to suffer. Doe asserted causes of action under Title IX for (1) violating T.W.’s right to educational opportunities and benefits, and interfering with Doe’s right to direct T.W.’s upbringing; (2) violating Doe’s and T.W.’s rights to familial association; (3) violating T.W.’s right to bodily integrity; (4) failing to protect T.W. from V.A.’s sexual assault; and (5) retaliating against T.W. for exercising her First Amendment right to free speech. Doe also asserts state law claims of intentional infliction of emotional distress, negligence, and gross negligence.

The federal district court dismissed all of Doe’s claims finding that: (1) Doe failed to exhaust her administrative remedies under the Individuals with Disabilities Education Act (IDEA); (2) Doe
failed to state a claim for violation of her parental rights under the Due Process Clause; (3) Doe failed to state a claim under § 1983 for failure to train; (4) the district did not create special relationship with student, for due process purposes; and, (5) Doe failed to state a claim of subject matter jurisdiction.


A female high school special needs student claimed to have been sexually assaulted by another student after a substitute teacher allowed the two of them to return to a classroom, unsupervised, to retrieve personal effects. Her legal guardians alleged violations of Title IX, 42 U.S.C. §1983 (First Amendment, Fourteenth Amendment Due Process, failure to train and/or properly supervise its students and staff in sexual harassment and failing to have and enforce a policy to prevent student-on-student sexual harassment), negligence, and intentional infliction of emotional distress. Defendants moved to dismiss for failure to state a claim, which was granted in part and denied in part.

Two years before the sexual assault at issue, the plaintiff brought forth allegations of another sexual assault, which was investigated and determined to be a consensual act. The court, however, took notice of a psychological evaluation completed two months before the second alleged sexual assault, where the plaintiff reported numerous episodes of unwanted sexual touching from her peers, and concluded that there was a great likelihood for continued sexual abuse. In the view of the court, this report, coupled with campus levels of violence and vandalism, put defendants on notice that there was a heightened risk for sexual assaults and that they failed to take effective supervision or security measures that were available.

The Court granted Defendants' motion to dismiss with respect to all claims except for the Plaintiff's claim under Title IX against Willingboro Board of Education, and one count of negligence. The court found that although unlikely, it was plausible that the Plaintiff could prove a cause of action against the Board for deliberate indifference to a pattern of student-on-student sexual assault on the school premises under Title IX. As to negligence, the court held that it is plausible that Plaintiff can prove that Defendants breached their duty of care to her as a student with intellectual impairments who was especially vulnerable to sexual assault. That the Defendants owed a heightened duty to protect a vulnerable teenaged girl with learning and communication disabilities is also plain.
Bullying Cases

**Grossman v. Rockaway Public School District** (Recently filed - Superior Court of N.J. Morris County Civil Docket #L-001173-18 June 19, 2018)

The family of Mallory Grossman filed suit against the Rockaway Public School District accusing the school district of "gross negligence" and "deliberate indifference" for not stopping bullying on social media. Mallory was cyberbullied via Snapchat, Instagram and text messages sent by other students at Copeland Middle School in Rockaway. The messages, sent by four girls, stated that she had no friends, was a loser and included 'why don't you kill yourself?'

Her mother had complained to the school district for over a year about the ongoing bullying, with her last complaint being made in person the morning her daughter committed suicide.


Two families filed suit against Clark County Public School District that alleging their sons were bullied in band class at Greenspun Junior High, including assault and sexual harassment. District Court Judge Nancy Allf ruled that school official’s action was deliberately indifferent to numerous complaints made by the parents. This continued deliberate indifference placed the two students in a dangerous environment, which exposed them to more bullying. The court determined that the school must pay each of the boys families $200,000.00 in damages.

**Donald Richardson v. Huber Heights City Schs.,** 651 Fed. App’x 362 (6th Cir. 2016)

Plaintiff Donald Richardson, on his own behalf and that of his minor son, K.R., filed an action under 42 U.S.C. § 1983 against the Huber Heights City Schools Board of Education (the “Board”). Richardson claims that K.R. was sexually assaulted by fellow students with the tacit permission of an assistant baseball coach, and maintains that the Board violated K.R.’s constitutional rights by creating, and being deliberately indifferent to, a culture of sexualized violence at Wayne High School.

K.R. was a freshman at Wayne High School in Huber Heights, Ohio, and a prospective member of the baseball team. An argument involving K.R. and another member of the team drew the attention of Assistant Coach Jonathan Soukup. The plaintiff alleged that several days after the incident, Soukup approached B.C, a junior and a member of the baseball team, and inquired about K.R. Soukup purportedly told B.C. to “take care of it.” Soukup denies making this statement.
The assault on K.R. took place in November 2010 as he was getting a drink of water in the hallway. Three members of the team accosted him, held him down and B.C. inserted his finger into K.R.’s anus. K.R. and his parents reported the incident to the assistant principal and following an investigation, the students who assaulted K.R. were disciplined. During this time, evidence showed that some of the coaches were aware of ongoing student-on-student hazing.

The A.D. and coaches denied any knowledge.

The U.S. District Court for the Southern District of Ohio granted summary judgment for the board, predicated upon the plaintiff’s inability to show that the board was “deliberately indifferent”. The parent appealed. The Court of Appeals for the Sixth Circuit found that Richardson had failed to establish municipal liability under Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), and therefore affirmed the district court summary judgment.


N.H., a student who endured four years of peer-on-peer harassment, and her mother, filed suit against the city of Attleboro and multiple school officials asserting violations of Title IX, 42 U.S.C. § 1983, and negligence. Attending Brennan Middle School, N.H. was subjected to verbal abuse from several boys led by Thomas C., including being called a “bitch, slut, whore, and fat ass.” N.H. also was physically assaulted by the main instigator, Thomas C., suffering bruising, a sprained ankle and fractured wrist. This behavior continued despite multiple complaints from N.H. and her mother.

The records of the harassment and abuse that took place at Brennan MS were not transferred to the high school, and N.H. and Thomas C. ended up in the same classroom. Unfortunately, the harassment continued and intensified with new perpetrators joining in. One of the assistant principals did verbally reprimand Thomas. As the harassment grew in in scope and severity N.H. suffered severe depression and anxiety and was withdrawn from school. She enrolled in a crisis intervention counseling center.

The court concluded that the complaint pleaded facts sufficient to state a plausible Title IX claim, noting that N.H. was subjected to severe, pervasive, and objectively offensive peer-on-peer harassment that deprived her of educational opportunities; additionally, the defendants were deliberately indifferent in that their limited response was completely unreasonable, given the known circumstances.
N.H.’s Section 1983 equal protection claim was dismissed because she was unable to show that she was subjected to discriminatory treatment based on her membership in a protected class. The state law claims for negligence were also dismissed, due to a failure to comply with presentment requirements; the methods employed by school officials when investigating allegations of school bullying were discretionary functions, placing her claim outside the scope of permissible negligence suits under the Massachusetts Tort Claims Act. The court determined that neither the public employer nor its agents were the original cause of the injuries sustained by N.H. The court also dismissed a claim under the Massachusetts Equal Rights Act because the plaintiff was unable to identify an underlying contractual right or opportunity, which was lost or interfered due to the Attleboro School District.

**Smith v. Leake County. Sch. Dist.,** 195 So. 3d 771 (Miss. 2016)

After a year of bullying and intimidation by a small group of students, YS was beaten and severely injured while riding the school bus home. Having reported the prior bullying numerous times the school finally suspended the primary antagonist for five days. However, they permitted the suspended student to ride home on YS’s bus. They had YS sit in the front seat next to the bus driver. Nonetheless, the primary antagonist and her friends attack YS, breaking her wrist and puncturing her scalp. Y.S. and her parents sued Leake Central in September 2015. She alleged claims of common-law negligence and claims of negligence per se under Sections 37-9-69, 37-11-67, and 37-11-69 of the Mississippi Code.

The circuit court granted the school district’s motion for summary judgment under the premise of discretionary function immunity. The Supreme Court of Mississippi reversed and remanded this finding, noting that the trial court erred in finding the school district was entitled to discretionary-function immunity. According to Section 37-9-69, [i]t shall be the duty of each superintendent, principal and teacher in the public schools of this state ... to observe and enforce the statutes, rules and regulations prescribed for the operation of schools.


Plaintiff is currently a senior at Nelson County High School and has attended schools within the Nelson County School District from age five to the present. In 2007, Plaintiff was identified as a child with a disability eligible to receive special educational services. Plaintiff continues to be identified as an individual with a qualifying disability under the IDEA, including a mild mental disability which manifests in some learning issues and social adaptive issues. In August of 2008,
Plaintiff's parents filed a "due process request" on behalf of their son. (T.C. Dep. at 9-11.) Issues concerning Plaintiff's elementary school educational experience, including allegations of bullying by peers, were raised through an administrative hearing request under the IDEA, et. seq. These issues were resolved by a settlement agreement executed in 2009.

Based on continued "harassment, bullying, teasing, and hazing" that occurred after the settlement agreement from 2009 forward, the Plaintiff filed in the Nelson Circuit Court, asserting claims against Defendants for deprivation of Plaintiff's constitutional rights under 42 U.S.C. § 1983, violation of § 504 of the Rehabilitation Act violation of related state law, and negligence. The plaintiff alleged that he and his family repeatedly complained to school officials that other students were bullying him. Further the plaintiff claimed that he was repeatedly assaulted and multiple school officials failed to recognize and reasonably respond to these incidents. The defendant school district led a motion for summary judgment on the plaintiff’s claims, and the court granted summary judgment in favor of the school district.


The parents of two sisters sued a school district and other defendants for breach of contract and willful and wanton conduct based upon ongoing bullying. The parents claimed their daughters had been harassed, physically assaulted, and injured by their basketball teammates. To support their breach of contract claim, the parents alleged the defendants had failed to enforce anti-bullying policies in parent and student handbooks. As for their other claim, parents alleged that the district employees knew of or acted with indifference and reckless disregard to the bullying behavior.

An Illinois trial court dismissed the case and the appellate court affirmed. It reasoned that the defendants were immune to the tort claim of willful and wanton conduct. The defendants were implementing the bullying policy, which is a discretionary task permitting absolutely immunity under state law. Additionally, the parents’ breach of contract claim was unfounded because bullying provisions in school handbooks do not create a legally binding contract nor do they promise any specific action. The court affirmed the dismissal of the breach of contract claims because the plaintiffs failed to demonstrate the existence of a valid contract based on the exchange of an offer, acceptance, and consideration.

From 2011 to 2014, J.T. who was African-American attended seventh, eighth, and ninth grades at South High School. Plaintiffs allege that J.T. was systematically bullied during this time. The parents requested help from the school’s counselor, and complained to the principal, and assistant principal to address the situation. As the bullying continued, JT got into fights with the alleged bullies and was suspended numerous times. After repeated and unsuccessful complaints to the principal, JT’s parents met with the school superintendent who told them the suspensions were unwarranted.

J.T.’s parents sued the district, its board, and various individuals, claiming retaliation against their son for their numerous complaints, deprivation of education, negligence, and selective discipline against African American students. The court split on the district’s motions for summary judgment. The court found that J.T. was not deprived of education, the district’s response was not racially discriminatory, nor was its disciplinary practice racially discriminatory. The district’s motion for summary judgment failed, though, on the issues of material fact concerning the plaintiffs’ First Amendment retaliation and negligent supervision claims, due to the assignment of excessive suspensions and by allowing the bullying to continue even after becoming aware of its occurring.


B.D. was attending a high school within the Greater Egg Harbor Regional High School District. The school suspended him for out-of-school YouTube video and Twitter postings regarding other students that the school determined to be in violation of the state's anti-bullying statute and the school's anti-bullying policies. B.D. sued, claiming that his suspensions violated his rights under the constitutions of New Jersey and the United States. School officials claimed Dunkley’s speech came under the harassment, intimidation and bullying (HIB) definition of New Jersey’s Anti-Bullying Bill of Rights Act. The district maintained the suspensions were required under law.

B.D. argued that his case was analogous to Layshock v. Hermitage, 650 F.3d 205 (3d Cir. 2011), in which the Third Circuit Court of Appeals concluded school officials could not sanction a high school student for the off-campus production of a fake MySpace in which he parodied the school principal. The court disagreed, finding the instant case analogous to Kowalski v. Berkeley Cnty. School, 652 F.3d 565 (4th Cir. 2011), in which the Fourth Circuit Court of Appeals found no
violation of a student’s rights when school officials sanctioned a student for off-campus speech that cyberbullied a classmate. Based on the aforementioned reason, the court granted the district’s motion for summary judgment.

**Morgan v. Town of Lexington, No. 15-2174 (1st Cir. 2016)**

R.M., a 12-year-old middle school student in Lexington, was dragged to the ground by some students who beat him, and repeatedly kicked and punched him in the head and stomach. The beating was caught on video. The Principal discussed the incident with R.M.’s mother, Morgan. He indicated that R.M. had agreed to the beating as part of an initiation into a group and had "delay[ed] the investigation," so that R.M. would not be allowed to participate in an upcoming track meet. Later, R.M. was "pushed, tripped, punched or verbally assaulted while walking in school hallways." R.M. had his pants pulled down in front of other students and was pushed into a locker. Morgan emailed the Principal that R.M. did not feel safe at school and was scared to report bullying for fear of retaliation. R.M. missed a significant amount of school due to anxiety attacks. Morgan filed suit, alleging a violation of R.M.’s federal substantive due process rights, relying upon a theory once suggested by the Supreme Court that when the state creates a danger to an individual, an affirmative duty to protect might arise. The First Circuit affirmed dismissal, further agreeing that the conduct did not fall within the scope of Title IX, which is concerned with actions taken "on the basis of sex," and not undifferentiated bullying.

**Update 2016**

**Sexual Harassment and Bullying Cases**

**Sexual Harassment Cases**


The three-judge panel for the US Court of Appeals for the Ninth Circuit affirmed the district court’s summary judgment in favor of the Eugene School District 4J in an action brought by a middle school student suspended for harassment. The student challenged his suspension under the First Amendment, arguing that because the harassment occurred off-campus, in a public park, the school lacked the authority to discipline him.

The panel held that under the unique facts presented by this case, the School District had the
authority to discipline plaintiff for his off-campus, sexually harassing speech. The panel noted that the speech at issue occurred exclusively between students, in close temporal and physical proximity to the school, on property that was not obviously demarcated from the campus itself, and that a school may act to ensure students are able to leave the school safely without implicating the rights of students to speak freely in the broader community. The panel further held that the School District’s decision to suspend plaintiff for two days for sexual harassment was permissible under Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). The panel concluded that plaintiff’s suspension was permissible under the First Amendment.

Rejecting plaintiff’s due process claims, the panel held that taken in the light most favorable to plaintiff, the uncontroverted facts showed that he was provided the informal procedures that the Constitution requires for a two-day, out-of-school suspension. The panel further held that plaintiff failed to show that he has a substantive due process interest in maintaining a clean, non-stigmatizing school disciplinary record. In addition, the panel found that the School District’s characterization of this behavior as sexual harassment in its Student Handbook is reasonable. Thus, the panel deferred to the School District’s determination that C.R. participated in sexual harassment.

*Doe v. Rutherford County Bd. of Educ.*, 86 F. Supp. 3d 831 (M.D. Tenn. 2015)

A suit was filed on behalf of three sisters claiming they had been sexually harassed while on the basketball team by the daughter of the coach who “goosed” them and that because they complained they were retaliated against in violation of Title IX. A jury returned verdicts in favor of the defendant board on all but one retaliation claim. The court found that Title IX can support a claim against a federal funding recipient premised on student-on-student harassment, provided that the plaintiff demonstrates the following elements: (1) The sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (2) The funding recipient had actual knowledge of the sexual harassment; and (3) The funding recipient was deliberately indifferent to the harassment.

The plaintiffs failed to do so, and the court held the verdicts rendered were reasonable, including the juries finding that retaliation had in fact occurred and the award of nominal damages to one of the sisters.
**Swanger v. Warrior Run Sch. Dist.**, 137 F. Supp. 3d 737 (M.D. Pa. 2015)

The district court granted summary judgment to the school district and its employees on claims by plaintiff’s daughter asserting violation of Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, substantive due process rights under 42 U.S.C. § 1983, breach of fiduciary duty, and a number of tort claims. It was alleged that plaintiff’s daughter was subjected to uninvited sexual contact by another student at the school. The parent’s primary claim was that the school district failed to act appropriately to prevent the sexual contact. The district court granted the motions for summary judgment on the following grounds: (1) there was no dispute as to the school district’s lack of knowledge of the student-offender’s past sexual misconduct, (2) the ‘plaintiff’ produced no evidence of the school’s discrimination against their minor child due to her disability, (3) neither the school district nor its employees engaged in affirmative acts to place students in harm’s way, and (4) the school employees did not act willfully or with malice.

**Bullying Cases**

**Stiles ex rel. D.S. v. Grainger County Bd. of Educ.**, 819 F.3d 834 (6th Cir.2016)

The plaintiff filed suit on behalf of her son alleging that he had experienced sexual harassment and bullying by other students during his seventh and eighth grades.

The incidents included verbal and physical altercations, demands for money, pushing, shoving, name-calling, threatening, head ramming, and other actions by his classmates. D.S. and his mother repeatedly complained to school and district officials, as well as the police chief, who also served as the part-time school resource officer for the middle school. As a result, the administrators investigated and disciplined the guilty students and even placed D.S. in separate classes from his harassers. During the investigations made by administrators, several teachers and student witnesses noted that D.S. often instigated the events. Despite the efforts of school officials, D.S.’s problems continued and climaxed when he was attacked in the school bathroom; thereafter, he transferred to another school.

D.S. and his mother filed a Section 1983 action against the school board, superintendent, school principal and assistant principal, the district’s disciplinary supervisor, and the police chief, alleging they failed to adequately respond to D.S.’s harassment and, accordingly, he was deprived of his constitutional rights to equal protection and substantive due process. Further, they claimed a violation of Title IX.
The U.S. District Court for the Eastern District of Tennessee granted the defendants summary judgment, and the mother and student appealed.

The US Court of Appeals for the Sixth Circuit affirmed the lower court’s decision, finding that the school administrators and police chief did not act with deliberate indifference to D.S.’s complaints of sexual harassment in violation of Title IX. The court noted that school officials thoroughly investigated all reported complaints and took appropriate disciplinary and remedial steps to prevent the harassment. Although the school’s efforts did not end all of D.S.’s problems, they did prevent repeated offenses by the perpetrators. The court noted that Title IX does not require school districts to eliminate peer harassment. Further the court upheld the summary judgment of the plaintiffs Section 1983 claim. They found that there was no disparate treatment nor was there any state action that increased his danger. In affirming the summary judgment, the court wrote that the Plaintiffs cannot show as violation of D.S.’s rights under Title IX or §1983 by either the Board or the individual Defendants.

**Smith v. Leake County School District** NO. 2015-CA-01056-SCT - Supreme Court of Mississippi (July 2016)

After several years of bullying and intimidation by a small group of students, Smith filed a complaint of bullying with Leake County School district. The Principal investigated and with corroboration of the bus driver suspended the leader of the bullying group for five days. He then permitted the suspended student to ride home on the same bus as Smith with the stipulation that the suspended girl ride in the front seat of the bus and have no contact with Smith. At some point the suspended student and her accomplices beat Smith with a belt buckle until she lost consciousness and also broke her wrist. Smith sued the Leake County School District, alleging negligence and negligence per se. The circuit court found that the school district was entitled to discretionary-function immunity and granted the school district’s motion for summary judgment.

Smith appealed. Finding that the broad governmental function of the school district here was ministerial, the Mississippi Supreme Court reversed the circuit court’s grant of summary judgment and remanded the case to the circuit court for Smith to proceed with her claims. The Court noted that Section 37-9-69 of the Mississippi Code requires that school districts had a ministerial duty to “use ordinary care and to take reasonable steps to minimize foreseeable risks to students thereby providing a safe school environment.” Further the Court dismissed Leake County District’s contention that its duty to prevent bullying was discretionary and not ministerial.
The parent of D.H. filed suit on claiming that her child was denied a free and appropriate public education, and that the school district failed to protect her son from bullying based upon his disability, religion, ethnicity, and perceived sexual orientation. The parent’s claim was based upon on provisions of the First, Fourth and Fourteenth amendments, Title IX, the Individuals with Disabilities Act, Title VI of the Civil Rights Act, and the Rehabilitation Act of 1973. The suit claimed that during his time at Georgetown Middle / High School, J.H. was “regularly emotionally, physically and verbally bullied and abused because of his small physical stature, his Jewish ethnicity and religion, his perceived sexual orientation and other symptoms caused by his developmental disorders. Further they alleged that staff members participated and encouraged the harassment with his gym teacher calling him a female and another teacher isolated J.H. from participating in group projects.

The defendant, Georgetown School District, moved for summary judgment. The court dismissed with prejudice the plaintiff’s claim that her child was denied a free and appropriate public education. In regard to the claims of negligence by the District and Individual defendants the court dismissed the claims without prejudice.

**State Bullying Laws**

All 50 states, D.C. Puerto Rico and the other territories have enacted laws as of 2018.

- 34 include “cyberbullying”
- 48 include electronic harassment
- 18 include criminal sanctions
- 45 include school sanctions
- 49 require school policy
- 14 include off campus behavior

**Liability**

**Teen who impregnated teacher awarded 6 million**

The Redlands Unified School District has agreed to pay a former high school student $6 million to settle a lawsuit brought against it after former teacher Laura Whitehurst was convicted of having sex with him and other students. A civil complaint was brought against Whitehurst, district officials and Citrus Valley High School for negligence and damages caused by a yearlong
sexual relationship that resulted in the birth of a child.

The complaint filed in Riverside County Superior Court alleged that the district and high school failed to inform the victim’s family and law enforcement of the abuse and ignored or concealed Whitehurst’s past sexual abuse of students.

The School District’s spokesperson denied any wrongdoing on the part of the district, saying the settlement is not an admission of guilt, liability or acceptance of the validity or invalidity of the allegations.


Doe v. Rutherford County Bd. of Educ., 86 F. Supp. 3d 831 (M.D. Tenn. 2015)

Plaintiff refused to accept Defendant’s offer to settle and although the plaintiff was awarded nominal damages for retaliation at trial it was less than that offered the claimant, therefore under Federal Rule 68 the plaintiff was obligated by law to pay the costs incurred by the defendant after the offer had been made.

“Rule 68 permits a party defending against a claim to make a pretrial settlement offer, and if the claimant rejects the offer but then obtains a judgment that is less favorable, the claimant ‘must pay the costs incurred after the offer was made.’ ” Fed.R.Civ.P. 68

Other

United States Department of Education’s Office for Civil Rights

Schools Punished Teenagers for Being Victims of Sexual Assault

A complaint has been filed with the United States Department of Education’s Office for Civil Rights against the New York City Education Department alleging that it has a pattern of discrediting and punishing victims of sexual assault, particularly if they are black and poor.

The complaints were filed on behalf of several black female students. One, a ‘developing delayed’ female was allegedly accosted in a hallway by seven boys taken to a stairwell and forced to perform oral sex while the others watched. Six days later she reported the incident to a guidance counselor and was interviewed by administrators and police officers. The next day the assistant principal interviewed her again in front of one of the students that witnessed the act and based on that interview concluded the sex was consensual and updated the incident report to reflect the new finding and the girl was given a six-day suspension for engaging in sexual acts on campus.
The record indicates that a month later the suspension was withdrawn, and the Education Department said it would be expunged from her record. The complaint states that the girl has suffered emotionally, her grades have suffered, and she is afraid of retaliation by her assailants and the additional fear of school officials making up charges against her again.

In another case a 13-year old female was awaiting a bus after school and was dragged into an alley way by a male student who forced to have oral and anal sex and videoed the act and disseminated among other students. She suffered the trauma of attack and the taunts and harassment from students. In response the complaint says the school principal told the girl to stay home as her presence would only “make things worse.” As a result, the student missed over a month of school before a safety transfer was approved.

In another instance it was alleged that a female student was punched in the genital region taken to the floor and the male student proceeded to simulate sex on top of her causing her school uniform to ride up exposing her. The male student was suspended for a month. As a result of the incident the girl was afraid to go to school and upon the boys return she was faced with having him in three classes—lunch, gym and music. Despite requests to transfer the girl, the district failed to expedite the transfer and instead took seven weeks. Because of the number of school days missed she may be forced to repeat the year.


**Federal Judge Issues Injunction Concerning Interpretation that the Definition of Sex Under Title IX includes Gender Identity**


On August 21, 2016 Judge Reed O’Connor granted a preliminary injunction enjoining the defendants (U.S. Departments of Education (“DOE”), Justice (“DOJ”), Labor (“DOL”), the Equal Employment Opportunity Commission (“EEOC”), and various agency officials) from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants’ interpretation that the definition of sex includes gender identity in Title IX’s prohibition against discrimination on the basis of sex. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court
of Appeals. This preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

While not directly linked to either sexual harassment or bullying this case has implications for all educators, as LGBTQ students are disproportionately the victims of bullying. This case and others like it, coupled with the sensational coverage they often generate, make it important for school officials to do all they can to ensure that all students are provided a safe school environment in general, and are protected from harassment and bullying in particular.

G.G. v. Gloucester County School Board No. 15-2056 (Fourth Cir. April 19, 2016)

Certiorari Granted by Supreme Court, October 31, 2016  Vacated and Remanded by Supreme Court, March 6, 2017

It should be noted the Supreme Court of the United States has decided not to hear the case of G.G. v. Gloucester County School Board this term. Gavin Grimm, a transgender boy, filed an action against the school board alleging it violated Title IX of the Education Amendments of 1972 by denying him use of the boy’s restroom. The Supreme Court sent the Grimm case back to the Fourth Circuit Court of Appeals following the Trump Administration's decision to rescind protective school guidance for transgender students that had been promulgated by the Obama administration. Because the Fourth Circuit's original ruling was heavily based on the Obama Administration's guidance, the Supreme Court has asked the lower court to revisit the case and rule on the underlying statutory question regarding the scope of Title IX. The federal district court dismissed Grimm’s Title IX claim because Title IX’s implementing regulations permit schools to provide separate restrooms “on the basis of sex.”

The circuit court citing the guidance from the United States Department of Education held that the Department’s interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight in this case. The court therefore reversed the district court’s contrary conclusion and its resultant dismissal of G.G.’s Title IX claim.

The United States Supreme Court agreed to hear the case and granted certiorari on October 31, 2016. But with the United State Government through its Departments of Education and Justice rescinding the guidance proffered concerning transgender students the Supreme Court Vacated and Remanded the case on March 6, 2017, to the circuit court with instructions to rule on the underlying statutory question regarding the scope of Title IX.
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