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**STUDENT-ON-STUDENT HARASSMENT 2006: POLICY IMPLICATIONS****Overview**

Past commentaries in this series have contained discussions of potential liability for student injury. Over the past four years several commentaries have treated such related topics as tort liability for student injury, bullying, student discipline, student safety and security, search and seizure, the role of school resource officers, and others. Suffice it to say, as the 2006-2007 school year begins, and students gather at school bus stops, ride school buses, make their way to class down crowded school hallways, attend football games, school dances, and other after school activities, this subject area of education law is very appropriate, especially as it involves potential liability issues that spring to life from incidents where student-on-student harassment is alleged. The purpose of this commentary is threefold. First, the beginning sections are intended to define and draw a distinction between student behavior that is the result of mere childishness and immaturity, and student behavior that is abusive and harmful. Second, potential legal and policy issues related to student-on-student harassment will be explored. Finally, suggestions for possible inclusion in local school anti-harassment policies will be enumerated.

**Student Behavior**

As a general rule, student behavior is very hard to predict. Kids do behave “like kids” and, more often than not, kids do not consider the consequences of their behavior. What is clear, however, is that school officials, administrators, and classroom teachers are responsible maintaining a safe, secure, educational environment so that teachers can teach and students can learn. Moreover, educators are not powerless to act when student behavior disrupts the learning environment and/or represents a threat to staff and to other students. A basic tenet of education law holds that school officials possess considerable discretion in controlling student behavior. Vacca and Bosher (2003)

*Immature Behavior.* The United States Supreme Court itself has acknowledged that “[s]chool children regularly interact in a dizzying array of immature behaviors that would not be acceptable among adults.” As such, “[d]amages under Title IX are not available for simple acts of teasing, shoving and pushing, insulting and upsetting gender-specific conduct.” Davis v Monroe City Board of Education (1999) As one writer has

summarized, "...Davis can be viewed as the Supreme Court's attempt at protecting students from peer sexual harassment while simultaneously protecting school districts from liability for less serious infringements." Ford (2005)

As stated above, immature (silly, childish) behavior is not actionable under Title IX, 20 U.S.C 1681 (1972) To refresh the reader regarding Title IX, the federal statute states in relevant part that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." The Supreme Court's interpretation of Title IX liability does not negate a need for diligent school administrators and staff to pose the following questions: When does a student-initiated act move beyond the bounds of mere "child's play?" When does a student-initiated act motivated by "silliness" transform itself into *bullying* (repeated negative behaviors) or *hazing*? When does a student-initiated act become an *assault* or a *battery*, or a *threat of harm* and criminal behavior becomes an issue? When do the acts of one student (or group of students) pose a significant risk to the physical and/or emotional health and wellbeing of another student (or group of students)? When does the behavior of one student (or group of students) subject another student (or group of students) to discrimination? When does the behavior of one student (or group of students) actually keep another student (or students) from access to and enjoying the benefits of the school's educational program (academic courses, extracurricular activities, social [peer] interactions)?

*Abusive Behavior: What is it?* "Abusive behavior" and "childish, immature (kids will be kids) behavior" are not the same. Two types or categories of *abusive behavior* exist; the most recognized involves *physical abuse*, *i.e.*, one person physically interacting with another person resulting in harm to that person. *Assault* and *battery* are examples of such abusive acts. The second type involves the *non-physical* actions of one person that cause harm to another person. Often characterized as *assaultive speech*, the second form of abusive behavior involves *abusive language*, *i.e.*, expressive language (spoken, written, gestures, pictures) that cause actual harm or place a person in imminent fear of harm. Vacca and Boshier (2003) This latter form of abusive behavior more often than not creates a "hostile environment" and manifests itself in student-on-student situations as *harassment* (both sexual and non-sexual). In recent years *student-on-student (peer) harassment* has been a serious problem at all levels of education.

### **Potential Liability: The Deliberate Indifference Standard**

More than a decade ago, the United States Court of Appeals for the Fifth Circuit opined that school officials may be held liable if nothing is done to prevent or correct a situation where dangerously aggressive and disruptive behavior exist. Doe v Taylor (5<sup>th</sup> Cir. 1994) Three years later, the Fifth Circuit held that liability will attach "[w]here a school official knows, or willfully avoids knowing about the possibility of serious harm to a student, fails to take appropriate action, and the student is harmed." Walton v Alexander (5<sup>th</sup> Cir. 1997) That same year, a federal district court in New Hampshire held, that school officials may be held liable for student (peer) sexual harassment "if (1) school officials knew or should have known of the matter but failed to correct the problem, (2) a special relationship existed to protect students from harm, and (3) the harassment was severe and pervasive." Doe v Oyster River (D.N.H. 1997)

In 1999, the United States Supreme Court articulated the judicial standard to apply in deciding whether or not liability for student-on-student harassment can be brought home to school officials. In an opinion written by Justice O'Connor and referencing Restatement of Torts (Second), the high court held that school officials may be liable for student (peer) harassment where they are "deliberately indifferent to known acts of student-on-student sexual harassment," and where "the student harasser is under the school's disciplinary authority...."

Davis v Monroe City Board of Education (1999) In subsequent clarifications of the Davis deliberate indifference (callous disregard, or callous indifference, or gross negligence) standard, legal scholars have emphasized that to prevail plaintiff parties must show that school officials had *actual notice* (i.e., *actual knowledge*) of the circumstances and yet acted deliberately indifferent to the matter. Alexander and Alexander (2005)

### **Current Issues and Recent Case Law Examples**

In recent years, federal and state courts have been busy applying the “deliberate indifference” standard in a broad range of situations where peer student harassment is at the heart of the controversy. What follow are some case law examples.

Two years ago, a federal district court in New York State heard a case involving an elementary school student whose parents claimed that their son was the victim of verbal and physical abuse solely because of his Chinese ancestry. The parents were not successful in their suit because they could not show that school officials had been deliberately indifferent to the name calling and physical acts of the accused students. Yap v Oceanside Union Free School District (E.D.N.Y 2004)

In 2005 a group of high school female students and their parents went into a federal district court in Montana seeking damages against local school officials. Without their knowledge the female students had been videotaped in their school locker room and bathroom by a group of male students. Plaintiffs were unsuccessful because they could not show that school officials knew (had actual knowledge) or were willfully blind to the videotaping. To put it another way, how could school officials do something about the situation if they did not know what was going on. Harry A. v Duncan (D.Mont. 2005)

That same year, a male student in a local public school district in Kansas went into a federal district court where he alleged that school officials were deliberately indifferent to his harassment (teasing, name calling, gestures) by other students. To determine liability, said the court, it must be shown that: (1) school officials knew of but had been deliberately indifferent to the matter, (2) the harassment was severe, pervasive, and objectively hostile, and (3) the acts of the other students effectively deprived the complaining student of educational opportunities. Theno v Tonganoxie Unified School District No 464 (D.Kan. 2005)

This past year, a student in New Jersey claimed that he was the victim of student-on-student sexual harassment based on sexual orientation. More specifically he alleged in a state court that he suffered repeated verbal and physical harassment at the hands of other students because of his perceived sexual orientation. Applying New Jersey law and using a deliberate indifference analysis the court was persuaded that the school district was liable for student peer sexual harassment based on sexual orientation. L.W. v Toms River Regional Schools Board of Education (N.J. 2006)

Williams v Board of Regents (11<sup>th</sup> Cir. 2006) involved public higher education. In this Title IX case a female student at the University of Georgia alleged that she was raped in a dormitory room by male athletes. More specifically she claimed, among other things, that University officials did not adequately respond to her report of the incident, and that they failed to implement existing student sexual harassment procedures. Convinced that school officials reacted with deliberate indifference, the appellate court remanded the case back to the district court for further proceedings on the Title IX claim.

### **Policy Implications**

In today's fast paced, media/technology driven society young people are constantly exposed in a variety of ways (music, movies, television programming, advertising, the internet) to words, phrases, and actions once deemed inappropriate for kids. Ironically, many terms of common parlance among a growing number of today's students were once considered crude, rude, insulting, and derogatory. At the same time, a growing number of young people are easily offended and resort to violent means to settle disputes. Because a poor choice of words plus the potential to provoke a violent response creates a volatile formula, and student peer harassment in schools does exist, school officials and staff must be proactive in heading off trouble before it escalates.

What follow are some suggestions to consider in drafting school system policy in a effort to balance the rights of students (e.g., free expression) with the prerogatives of school administrators and staff to maintain safe, secure, and disruption-free schools. School board anti-harassment policy must make it clear that:

- Students are expected to act in a civil and respectful manner when interacting with fellow students.
- Harassment (both physical and verbal), intimidation, taunting, bullying, hazing, stalking, and other like forms of abusive behavior will not be tolerated in school, on school busses, and at school sponsored activities and events (on- and off-school grounds).
- Profanity, lewd and obscene language, hateful words and phrases, and crude gestures will not be tolerated in school, on school busses, and at school sponsored activities and events (on- and off-school grounds).
- Threats (including threats made using e-mail and other electronic means) made by students against fellow students will not be tolerated and those who make threats will be expelled from school and where appropriate threat-makers will be charged and prosecuted under the law.
- Students are encouraged to directly report all suspected incidents of student-on-student harassment and other forms of abusive behavior to their building principal.
- Building principals shall immediately and fully investigate all incidents of student harassment and other forms of abusive behavior directly reported to them.
- Building principals have complete authority to immediately suspend from school and from school sponsored activities any student who has engaged in harassment and/or other forms of abusive behavior directed toward fellow students, pending the results of an investigation into the allegations.
- Parents will be fully informed of and immediately involved in the school system's anti-harassment process.

It is important that school board policies and procedures be thoroughly explained to all administrators, staff (professional staff, coaches, and support personnel), parents, and students. Finally, all administrators and staff must be provided with up-to-date training on how to spot and deal with incidents of student peer harassment and other forms of student-on-student abusive behavior.

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Note: The views expressed in this commentary are those of the author.