

Bullying and Harassment: What Every School Employee Should Know

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What's Happened?

- In June 2009, the North Carolina General Assembly adopted the **School Violence Prevention Act**.
- The act is in effect for the 2009-2010 school year.
- School boards must adopt a policy that complies with this act by **Dec. 31, 2009**.



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June 2009 – GA – School Violence Prevention Act

In effect **this school** year.

Requires school boards to **adopt a policy** that complies with this act by Dec. 31, 2009.

Before looking at the requirement of the law, look at some **school violence statistics**

Percentage of Students Affected by Violence in Schools 2007

- Assaults 1.2%
- Serious Violent Crime .4%
- Theft 3%
- Bullying **32.2%**

Source: *Indicators of School Crime and Safety: 2007*, US DOJ



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Latest statistic available on school crime from the US DOJ are from **2007**. Number of students nationwide ages **12-18** who reported being a victim of **crime or violence on school grounds** during the previous **6 months**.

What do you think the most common form of violence was? Most people think of fights...1.2 % assaults; .4% serious violent crime; 3% theft (more common than fights) Overshadowed by Bullying – **32.2%**

- Roughly same number of male and female victims.
- 80% occurred inside school; 20% on school grounds; 8% on bus
- Highest percentage at 6th grade; roughly half as many incidents reported by 12th graders. **BUT YOUNGER KIDS NOT SURVEYED.**

Forms of Bullying

- Direct/Physical



- Indirect/Emotional



- Cyberbullying



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3 Types of Bullying

Of students reporting:

Direct: (More common with boys)

11% Pushed, shoved, tripped or spit on

6% Threatened with harm

4% Tried to make do things did not want to do

4 %Property destroyed on purpose

Indirect: (More commonly used by girls)

21% Made fun of, called names, or insulted

18% Subject of rumors

5% Excluded from activities on purpose

Cyberbullying:

3.7% (twice as many girls as boys reported this)

Included hurtful information in the Internet and unwanted contact.

Incidence PEAKS IN HIGH SCHOOL



Megan Meier



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What is the effect of bullying on students? It can be quite extreme.

This is Megan Meier. You may be familiar with her case.

She had befriended a boy named Josh Evans on a social networking website, myspace.com. She never met him in person.

Eventually Josh's messages became insulting. Some of Megan's peers were linked the website and joined in the harassment by sending her nasty messages.

One day "Josh" sent her a message saying the world would be a better place without her. Shortly thereafter Megan hanged herself in her bedroom.

Six weeks later it was discovered that Josh Evans was actually 47 year old Lori Drew. Ms. Drew was a neighbor and had a daughter who had been friends with Megan.

Apparently the two had a falling out and Ms. Drew created the false myspace.com page to gain Megan's confidence and learn personal details about her for the purpose of humiliating her.

Criminal charges were filed against Ms. Drew and a jury found her guilty on three misdemeanor charges, but the judge overruled the jury and threw out the guilty verdict. Ms. Drew walked free..



Eric Mohat



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This is Eric Mohat, age 17

He was subjected to months of verbal harassment from classmates at his high school.

Eric stood 6 feet 1 inch tall and weighed 112 pounds. He was made fun of due to his lanky physique.

His tormentors also referred to him as “fag,” “queer,” and “homo.”

In the spring of 2007 one of Eric’s bullies told him to “go home and shoot yourself” and that “no one will miss you.”

Eric did exactly that with a handgun owned by his father.

Much of the bullying took place in front of Eric’s teacher,

The family has filed suit against the school.



Abigayle Kempton



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Abigayle Kempton, age 14, was bullied by several girls throughout the school year. She took her own life.



Jeremiah Lasater



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Jeremiah Lasater, 14, took his own life by shooting himself in the head in one of his high school's bathrooms.

He endured daily verbal assaults from some of his peers. Jeremiah was developmentally challenged and his robust stature made him the target of considerable teasing (he was 6 feet, 6 inches tall and weighed nearly 300 pounds)

Jeremiah got into many fights as a result of this treatment and his teachers were ineffective in curbing the bullying.



Carl Joseph Walker-Hoover



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Carl Joseph Walker-Hoover was 11 when he hung himself after enduring daily bullying and taunts about being gay.

Carl did not identify himself as being gay, but, this did not stop his tormentors.

Carl's mother had contacted the school about the bullying, but, they were unable to stop the abuse



Holly Grogan



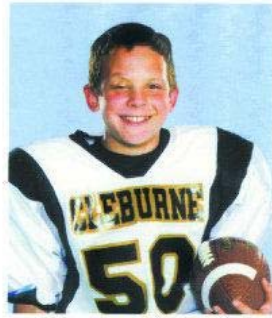
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Holly Grogan, was a victim of internet bullying..

While at school, Holly had been subjected to vicious verbal attacks.

The abuse was escalated when her bullies took their harassment online and began posting abusive message on the teen's facebook.com page

At age 15, she jumped off of a busy highway overpass to her death.



Hunter Layland



Hunter Layland, shot himself before school.

Friends and family say that Hunter took his life due to constant bullying.

Hunter was 15.



Jaheem Herrera



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Jaheem Herrera hung himself in his bedroom closet as a result of bullying at the hands of his classmates.

Jaheem had complained numerous times to school officials about his mistreatment.

Shortly after his death, **other** parents came forward and reported that their children had been the victims of bullying and that school officials failed to address their concerns.

Jaheem was 11 years old.



Michael Brewer



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This October (2009), we learned the horrifying story of Michael Brewer, who was surrounded by five boys, drenched in rubbing alcohol, and set on fire with a lighter. He suffered burns over 65% of his body.

One of the boys called him a “snitch” before setting him afire. He was apparently referring to the fact that Michael reported to the police that one of the boys attempted to steal a bicycle belonging to Michael’s father.

Michael is 15 years old and expected to spend years undergoing skin grafts and surgeries.



Hope Witsell



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Most recently, we learned about Hope Witsell.

At the end of her 7th grade year, Hope sent a nude picture of herself to a boy she liked via text message. A third party intercepted the photo and sent it around the school.

Hope's photo eventually reached neighboring schools and was spread throughout the community.

Hope was then subjected to intense harassment within and outside school for several months.

Hope hung herself from the canopy of her bed. Her mother found her when she came in to give Hope a kiss goodnight.

Hope was 13 years old.



As defined by NC law . . .

- “Bullying or harassing behavior” is any pattern of gestures or written, electronic, or verbal communications, OR any physical act OR any threatening communication that takes place on school property, at any school-sponsored function, or on a school bus, AND that:



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It was against a backdrop of stories like this, that the general assembly passed the School Violence Prevention Act.

The State Board already required schools to have policies on H& B, but the bill sponsor said schools aren't stopping this, especially based on sexual orientation.

The law is aimed squarely at stopping bullying and harassing behavior at school and school activities.

It begins by defining what the GA means by bullying and harassing behavior:

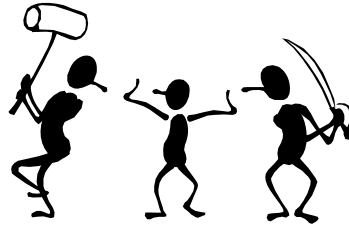
(1) Any single physical act or threatening communication

OR

(2) A pattern of gestures or communications in whatever form

AND

(3) That takes place on school property or at a school-sponsored function or on a school bus THAT...



- Places a student or school employee in actual and reasonable fear of harm to his or her person OR damage to his or her property; OR
- Creates or is certain to create a hostile environment by substantially interfering with or impairing a student's educational performance, opportunities or benefits.



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- (1) Places a student or school employee in **actual and reasonable fear** of harm to person or property OR
- (2) **Creates or is certain to create a hostile environment by substantially interfering with the student's education.**

Harm:

Actual fear of harm = student feels it

Reasonable fear of harm = not defined but presumably means others in the same situation would feel similarly threatened.)

- For purposes of this section, “*hostile environment*” means that the victim subjectively views the conduct as bullying or harassing behavior AND
- the conduct is objectively severe or pervasive enough that a reasonable person would agree that it is bullying or harassing behavior.



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Hostile environment defined similarly:

Victim views it as bully or harassing AND

A reasonable person would agree

- Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived differentiating characteristics such as
 - race,
 - color,
 - religion,
 - ancestry,
 - national origin,
 - gender,
 - socioeconomic status,



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Bullying and harassing behavior specifically includes **acts reasonably perceived as being motivated by actual or perceived differentiating characteristics**

Some of which you might expect, and some of which might be new to you....

Race

Color

Religion

Ancestry

National Origin

Gender

Socioeconomic status



- academic status,
- gender identity,
- physical appearance,
- sexual orientation,
- mental, physical, developmental, or sensory disability, or
- an association with a person who has or is perceived to have one or more of these characteristics.



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But also these.

The law could have just forbid harassing and bullying behavior and stopped there, but the general assembly was very **deliberate** in deciding to spell out these characteristics.

Perhaps that is because studies show that the most frequent **targets** for bullying and harassment are children who look “different,” including **disabled children,**

and children who are or who are perceived to be **gay or lesbian.**

This pretty much runs the gamut of things children use to tease and taunt each other about. So **when does teasing or taunting become harassment?**

When it **reasonably puts a student in fear** or creates an **objectively hostile environment** that interferes with the student’s education.

Other Provisions

- No student or school employee shall be subjected to bullying or harassing behavior by school employees or students.
- No person shall engage in any act of reprisal or retaliation against a victim, witness, or a person with reliable information about an act of bullying or harassing behavior.



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Now that we know what the GA means by bullying and harassment, what direction does it give to schools?

5 Things: Forbids 2 and requires 3 :

Forbids

- (1) bullying and harassing of students and school employees.
- (2) Reprisals and retaliation against the victim for reporting bullying or harassment and against witnesses to the misconduct.

Employees MUST Report



- A school employee who has witnessed or has reliable information that a student or school employee has been subject to any act of bullying or harassing behavior **shall** report the incident to the appropriate school official.



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First Requirement:

REQUIRES school employees to report bullying or harassing behavior

Whether it is a student or employee who is being bullied.

Employees have an **absolute duty** to report reliable info.

Others SHOULD Report

- A student or volunteer who has witnessed or has reliable information that a student or school employee has been subject to any act of bullying or harassing behavior should report the incident to the appropriate school official.



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It encourages students and volunteers to report – they “should” report but stops short of requiring them to report.

Policy Required

- By December 31, 2009 each local school system must adopt a policy prohibiting bullying/harassing behavior.
- The policy must contain the following components.
 - A statement prohibiting bullying and harassing behavior.



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The 2nd Requirement:

REQUIRES school systems to **adopt a policy** prohibiting bullying and harassing behavior.

The policy must be in place by the end of this **calendar** year.

Refer to **policies (2) 1710/4021/7230, which prohibits discrimination, harassment and bullying and 1720/4015/7225, which is the complaint procedure.** Since we already had a **sexual harassment policy and complaint procedure**, we **built on those to add** the requirements of the new law. It should look **familiar**.

This is one of those places where **General Assembly tells us exactly** what must be in the policy:

(1) A statement that bullying and harassing is prohibited.

In model policy this is found in para A.1 “The board expressly prohibits unlawful discrimination, harassment and bullying.”



- A definition of bullying/harassing behavior no less inclusive than provided in North Carolina law.
- A description of the type of behavior expected for each student and school employee.
- Consequences and appropriate remedial action for a person who commits an act of bullying or harassment.



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(2) Policy must contain the definition of H&B used in the School Violence Prevention Act or one that is broader.

E.g., cannot eliminate sexual orientation from the definition, but

Could add, e.g., participation or non-participation on sports teams if bullying of students who are athletes – or more likely - not athletes is a problem in your school.

Model policy definition is on pages 2-3 at section C.2 (appears to be missing the “on school property” language...see Section B – application of policy. We add “at school bus stop” to make clear that bullying at the bus stop is not acceptable..

(3) Must also have: A description of the **behavior expected** for each student and school employee.

AND

4) Spell out **the consequences** if bullying or harassment occurs.

Model policy sec. A.1. (Students are expected to comply with the behavior standards...Employees are expected to comply....Volunteers and visitors also are expected to comply....)

Next para...students will be disciplined...next para...employees will be subject to disciplinary action, (consequences)

– A procedure for reporting an act of bullying/harassment, including a provision for anonymous reporting. (This provision should not be construed to permit formal disciplinary action solely on the basis of an anonymous report.)



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(5) Need a procedure **for reporting**.

Must provide for **anonymous** reporting, although can't take "formal" disciplinary action based solely on an anonymous report.

What is formal disciplinary action?

??? Maybe ok to talk to the perpetrator, but can't suspend, or if employee, impose job-related disciplinary consequences such as suspending the employee or terminating, based solely on an anonymous report..

*Model policy – mentioned in section **D** of policy 1710/4021/7230, but spelled out a little more in policy 1720/4015/7225, the **complaint procedure**. See section **B.3** on page 2.*

- A procedure for prompt investigation of reports of serious violations and complaints of any act of bullying or harassment, identifying either the principal or the principal’s designee as the person responsible for the investigation.



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(6) Need procedure **for investigating** reports of “serious violations” and complaints of B&H.

And

the principal or principal’s designee must be responsible for the investigation.


What is a “serious violation”? Our model policy makes every violation a “serious” violation.

See 1710/4021/7230 section A.1, third para down: Any violation of this policy is serious...

The procedure for investigating is in policy 1720/4015/7225.

Investigator is determined pursuant to section **D.1.** of the policy- **pages 3-4.**

You will see that the policy addresses situations where the principal is the alleged perpetrator, and situations where the alleged perpetrator is not under the control of a building principal, such as when he or she is the superintendent or a member of the board.




– A statement that prohibits reprisal or retaliation against someone who reports an act of bullying/harassment and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation.

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(7) Must **prohibit reprisal and retaliation** against someone who reports bullying or harassment, and **specify the consequences** for someone who engages in retaliation or reprisal.

Model policy – Section A2., beginning at top of page 2.

The statement of remedial action for retaliation is purposely vague, as there are a number of other considerations that will come into play. For example, the consequence for a tenured teacher might play out differently than the consequence for an at will employee. A student protected under the Individuals with Disabilities Act may receive a different consequence than a student not covered under that law if the retaliation is determined to be a manifestation of the student's disability. Etc.



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- A statement of how the policy is to be disseminated and publicized, including notice that the policy applies to participation in school-sponsored events.
- Notice of the policy must appear in any school publications or handbooks that set forth comprehensive conduct rules for students and employees

(8) Finally, the policy must also explain how the school system will **disseminate and publicize** the policy

Including **notice that it applies to participation in school-sponsored events.**

[That **concludes** list of what must be **IN** the policy. But the statute has **more requirements...**]

Notice of the policy must appear, e.g., in the **student code of conduct** and **student and employee handbooks** or other publications that set forth **comprehensive conduct rules and procedures** for students and employees.

Model policy: Section F is the notice provision, pg. 5.

*Provides for posting **of the policy on website**, copies in **P's office and media center**, and **superintendent's office**.*

*Also provides for **notice in student and employee handbooks and publications** in accordance with the statutory requirement.*

- Information about the policy must be incorporated into school employee’s training program.
- “To the extent funds are provided” (*no funds were provided*) the school system must provide training on the policy to school employees and volunteers who have significant contact with students by 3/1/2010.



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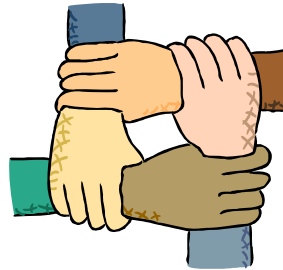
Employees must be given **information on** the policy during training. Information must be included as an **established** part of your employee training program.

However, it appears that **actual training** on the policy is not required unless funds are provided, and no funds have been provided at this point.

However, there are **VERY GOOD** reasons to train employees, whether or not you are required to by law.

Prevention Efforts Required

- Schools shall develop and implement methods and strategies for promoting school environments that are free of bullying and harassing behavior.



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The Third Requirement:

This is a big one...schools are required to put **prevention strategies in place** to promote a school environment that is free of bullying and harassing. (Section E of policy)

There are lots of resources available to help schools do this. What works? What doesn't work?

Studies generally agree that these things **don't work**:

1. **Asking the target to solve the problem**, e.g., training victims to be assertive, blend in, ignore bullying, pretend they're not bothered by the bullying (sticks and stones) (Chances are kid has already tried that before reporting it to adults)
2. **Broad-brush educational efforts alone** (sensitivity training, empathy training and the like) (studies that have watched bullies in an educational discussion reveal that bullies react in two ways – boredom (this is stupid) or outrage directed at others, with no recognition that that presentation is about them ("I can't believe bullies do that.) Won't change bullies' behavior or attitudes unless it is part of a comprehensive intervention.

What works:

An **integrated approach** based on **clear expectations and consistent consequences**, followed by **counseling** for perpetrators, **support** for victims and **education** of the silent majority within a comprehensive approach. Consistency seems to be key

Your system is free under the statute to decide what methods or strategies to use. Besides being required by the statute, having a good prevention program in place is your **first line of defense** should you get sued by a student who has suffered harassment or bullying at school. It tends you show the school is not fostering an environment of deliberate indifference.

Construction of this legislation

- This law shall not be construed to permit students to be punished for expression or speech based on an “undifferentiated fear or apprehension of disturbance or out of a desire to avoid the discomfort and unpleasantness that always accompany an unpopular point of view.”



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The law is not intended to suppress lawful speech.

Mary Beth Tinker Tinker v. Des Moines

Rule that school officials cannot prohibit student speech unless doing so is necessary to avoid **material interference or substantial disruption** to the school or invasion of the rights of others.

Remember, under **Bethel v. Frazier**, schools can prohibit speech that is **lewd, vulgar, indecent or plainly offensive, i.e., the words used to express the thought.**

So while a student probably couldn't be stopped from wearing a t-shirt that says “**be happy, not gay**” or “**straight pride,**”

But, a student could be stopped from repeatedly calling a particular student **gay** if it created a hostile environment that interfered with the student's education. (invades student's right to be free of harassment and bullying)

- This legislation shall not be interpreted to prevent the victim of bullying or harassing behavior from seeking redress under any other available law, either civil or criminal.



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The law doesn't prevent student victims from **suing** the school system **under other laws**, and doesn't prevent the victim from filing **criminal charges** in appropriate cases.

School attorneys think this probably creates a new cause of action under the statute, so that schools can be sued for not following the statute's requirements, i.e., allowing bullying/harassment to go on unchecked.

Construction of the Legislation

- Nothing in this legislation shall be construed to require an exhaustion of the administrative complaint process before civil or criminal law remedies may be pursued regarding bullying or harassing behavior. [*Problematic]
- The provisions of this statute shall be liberally construed...



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Finally, the General Assembly threw this in...

Simply put, this means the student victim **can advance directly to “go”**, that is, to court.

They don't have to bring the harassment or bullying to your attention first.

It may be harder for them to win their case if they don't (we'll see why that may be true in a moment) but they won't be turned away at the courthouse if they go straight there instead of to the superintendent or to the board.

Last phrase:

Construction = how the meaning of an ambiguous statute is determined.

Liberally – give it the widest possible meaning

Strict – give it the most narrow reading

Birthday. Strict construction = on the day of their birth. Liberal construction = on the day they celebrate their birth.



What happens if a school fails to take action to prevent bullying and harassing behavior?



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Potential for Legal Liability

- Legal grounds that have been used in the past to hold a school system or school employee liable for bullying/harassment:
 - Negligent supervision (state tort law)
 - Violations of U.S. Constitutional rights (federal law)
 - Discrimination claims under federal law based on the fact that victims were members of a “protected class” because of their race, ethnic group, sex or disability.



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3 ways schools and school employees have been held liable: for bullying and harassment.

For failure to supervise adequately, so that a bully has an opportunity to get at the victim.

For failure to respond to known bullying in a reasonable manner, so that a student is deprived of a constitutional right, such as the right to equal protection under the law.

For discrimination based on their membership in a class that is protected by law, e.g., discrimination based on sex, which is prohibited by Title IX, or discrimination based on race, color or national origin, which is prohibited by Title VI, or disability protected by the ADA/504..



- Note that in each of these types of lawsuits, the school system or the employee is not liable for the acts done to the victim but rather held responsible for failure of the school system or its employees to take adequate measures to “deal with” the bullying/harassment situation.



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In these cases, liability is not based on what was done to the victim, i.e., schools are not held to **ensuring** the student’s **freedom from bullying and harassing**.

Instead, it is the school’s **response** to known bullying that is being **tested**.

Negligent Supervision

- *Cavello v. Sherburne-Earlville CSD*, 110 A.D.2d 253 (3rd Dept. NY 1985).
- A brother and sister were constantly bullied, sometimes physically, mostly verbally, while attending a high school.
- The school's response was ineffectual and the bullies received little or no punishment.



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Turning first to claims of Negligent Supervision, here is an example:

A brother and sister in New York moved to a new school system and enrolled in high school. The sister, in particular, quickly became the **target of a female student** who badgered her with **verbal abuse, foul language, death threats, and also brandished a knife**. This went on for a **year**.

The brother was subjected to similar harassment, although to a lesser degree.

Students/parents **repeatedly told the guidance counselor**, dean of students and the superintendent about the harassment by the female student and her friends.

In response, school officials had the victim **study in the guidance office**, then arranged for her to be **tutored at home**. At one point, the guidance counselor **placed the victim and perpetrator in a room alone, told the perpetrator to lock the door from the inside, and to “settle your differences.”** Later in the year the school system advised the parents that it was **too dangerous** for their children to attend school and arranged for them to take a **correspondence course**. **Nothing was done to the perpetrators.**

The students sued, alleging that the school system's negligent supervision allowed the harassment to continue and resulted in emotional harm to the students. The school tried to have the case dismissed, saying it was a claim for educational malpractice, which was not recognized in NY.

- The court held that the two students asserted a valid claim for emotional suffering caused by continuing bullying that the school failed to address in a reasonable manner.
- “While a school is not an insurer of student safety, it will be held liable in damages for a foreseeable injury proximately related to the absence of supervision.”



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The court held that the students had a valid claim for emotional distress caused by the schools failure to address the continuing bullying.

The court acknowledged that the school is not an insurer of student safety, but it allowed the case to proceed to trial, **Schools have a duty to provide reasonable supervision over their students to prevent “foreseeable” harm.**

If the school is on notice that a student is a target of a bully, it can be found **negligent for failure to provide adequate supervision to prevent foreseeable harm to the target.** What is “adequate” will depend on what is reasonable in the circumstance.

Was it reasonable to lock the victim alone in a room with the bully? Of course not.

This is not to say that other steps that the school did take were not reasonable. That is one of the issues the jury would have to decide.

This case was just about whether the school **COULD** be held liable for the student’s emotional distress caused by the bullies. The jury would decide whether the school **SHOULD** be held liable.

Lesson: If you know a kid is a bully then you have a duty to provide reasonable supervision to prevent him/her from hurting others. Also duty to reasonably supervise a known victim.

Violation of Constitutional Rights

- *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (9th Cir. 2003).
- Several former students of the school district sued school administrators/employees and school board members alleging that the district's response and lack of response to complaints of student-on-student anti-homosexual harassment denied them equal protection under the law.



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Under 42 U.S.C. § 1983 Motion for summary judgment.

Another way in which schools can be held liable is for violations of a student's **constitutional rights**. When a school system responds in a **clearly unreasonable manner to known bullying, it exposes itself to a variety of constitutional claims**.

Example: *Flores* from California

In that case, Ms. Flores and several other students alleged that they suffered anti-gay harassment by their classmates for 7 years.


All of the plaintiffs were, or were perceived to be lesbian, gay, or bisexual.

Among the incidents alleged were:

- pornography was left in the student's locker,
- notes with anti-gay remarks such as "die dyke bitch" were scrawled on the outside of her locker,
- one of the students was beaten by a group of students who said "Faggot, you don't belong here."
- students shouted anti-gay slurs at two of the female victims and threw things at them in the school parking lot, . There was more, but you get the idea.

The students alleged that the district's response/lack of response to their complaints of **anti-homosexual harassment** denied them equal protection under the law, since other types of harassment in the school was not tolerated. In other words, the school failed to enforce its anti-harassment and anti-discrimination policies to prevent the harm to the students and this was **intentional and done with discriminatory intent** (because the student's were complaining of anti-homosexual harassment, in particular). "You don't tolerate other types of harassment, but you allow this type to continue against me."

- The court ruled in favor of the students finding that there was sufficient evidence for a reasonable jury to find that the defendants acted with **deliberate indifference** to harassment based on sexual orientation in violation of the Equal Protection Clause.
- Deliberate indifference is found if the school district's response to harassment is clearly unreasonable.



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To establish a violation of the equal protection clause of the 14th Amend, the students had to prove

- (1) that the school officials discriminated against them **as members of an identifiable class** (in this case the class was alleged to be based on sexual orientation) and
- (2) that the discrimination was **intentional and without a rational basis**.

The standard applied in these kinds of cases as a **proxy** for “intentional discrimination” is **deliberate indifference**. That is, if school officials turn their head and ignore the discrimination, that is giving **tacit approval** and is considered **intentional** discrimination. Deliberate indifference occurs when the school district’s response is **CLEARLY UNREASONABLE**.

The court found there **WAS** sufficient evidence for a jury to find that defendants acted with **DELIBERATE INDIFFERENCE** to the harassment based on sexual orientation

So how did the school respond here? ...

- Pornography in the locker incidents, and the student’s request to change lockers: AP told her “don’t bring me this trash any more. This is disgusting. Are you gay? If not, why are you crying, then?” Nothing was done when the student continued to receive notes and pornography in her locker.
- Only one of the six students who beat the other student to the point he required hospitalization was disciplined. Instead the **victim** was transferred to another school.
- The students who had things thrown at them in the parking lot were told by the AP to whom they reported the incident to talk to the campus police officer. The **AP didn’t follow-up** in any way.
- Complaints of harassment made to a campus monitor went unaddressed. The monitor would not take action to stop the harassment even when it **happened repeatedly in her presence**. On one occasion the monitor **initiated a rumor** among the students that two of the female victims were having sex in the bathroom.
- The gym teacher suggested that one of the students **change her clothes away from the locker room** so that her classmates would not feel uncomfortable. This was after the student complained to the teacher about the students harassing her, calling her **dyke and queer** and making comments such as “oh, I don’t want her to touch me, I don’t want her to look at me. I don’t want to be her weight training partner.” The teacher took no action against the harassers.

The court also found that failure to properly **train teachers, students, and campus monitors** was further evidence of deliberate indifference, because discrimination was a highly predictable consequence of failure to train.

Finally, court said there was no rational basis for treating the student’s complaint of sexual orientation harassment differently than other types. **“The school system couldn’t explain why it had any rational basis for permitting one student to assault another based on the victim’s sexual orientation.”**

Case settled for \$1.1 Million. Lessons: 1. When on notice, must take action. Action must be reasonable in light of the circumstances. Properly train employees. 2. H & B based on actual or perceived sexual orientation (or any other characteristic) must be responded to as aggressively as any other type of harassment or bullying. Otherwise risk showing “deliberate indifference.”

Violations of Anti-Discrimination Statutes

- *Vance v. Spencer County Public School District*, 231 F.3d 253 (6th Cir. 2000).
- Over a three year period, a middle school girl suffered numerous instances in which other students taunted her with vulgar language, groped her, attempted to remove her clothing, hit and shoved her and stole her homework.



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The third broad category of claims that arise out of bullying are discrimination claims. Often the student bullied are members of a “protected class” such as a minority racial or ethnic group and the victim claims the bullying was motivated by the school’s discriminatory intent and/or that the response to the bullying was not prompt or effective because of the school systems’ discriminatory intent.

These claims come in many forms, including claims based on sex, disability, ethnicity, race national origin, and sexual orientation. They arise under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. Anytime a student who is the target of a bully is a member of a protected class, you can expect to see a claim of discrimination along with a claim of negligent supervision.

Peer-on-Peer sex based harassment is probably the most frequent claim schools see. School will be liable for peer-on-peer sexual harassment only where the school exhibits “**deliberate indifference**” to known acts of **severe and pervasive harassment** which effectively bar access to education because of the student’s sex.

An example is this case out of the 6th Circuit...

The student here, a sixth grader named Alma McGowen was new to her school. On the second day of school she began being taunted by students who referred to her as “that German gay girl that just moved here.” Over the course of the next three years, she suffered many instances of taunting with vulgar language, at one time she was pushed up against a wall, two boys held her hands while others pulled her hair and tried to remove her shirt. One boy started taking off his pants and said he was going to have sex with her, until another student intervened. She was also hit, shoved and had her homework stolen.

- The victim and her mother filed numerous complaints with teachers and school administrators. School district response consisted of “talking to” the offending students, but school officials never investigated the incidents, nor did the perpetrators receive any discipline other than “talking to.”



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In response to the numerous complaints the victim and her mother filed, the school

-Talked to the offending students and

-Gave presentations on accepting people

-There was no investigation, and none of the student perpetrators received any real discipline.

- Finally, the victim and her mother filed suit alleging that the school system had subjected her to intentional sexual discrimination as a result of peer conduct in violation of Title IX.
- The jury returned a verdict in favor of the victim and awarded her \$220,000, and the school system appealed.



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Despite the school having “talked to the student” and done a presentation on accepting people, students continued to harass the victim, ask her for sexual favors, etc. On the last day she attended school, a boy told her he and his family were KKK members and were going to burn down her house because all Germans should be burned and sent to hell.

After that the victim withdrew from school and sued the school system, alleging she had been subjected to intentional sexual discrimination in violation of Title IX.

She won a jury verdict of \$220,000, which the school system appealed.



- On appeal, the court applied this standard, established in *Davis v. Monroe County School Board*, 526, U.S. 629 (1999):


Schools may be held liable for student-on-student sexual harassment when the plaintiff can establish the following:



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On appeal the court looked to US Supreme Court precedent in the *Davis* case, in which the court had first recognized that students can recover money damages under Title IX for peer-on-peer sexual harassment.

That case held that in order to win, the plaintiff-victim must prove:



– The sexual harassment was so severe, pervasive and objectively offensive that it could be said to deprive the plaintiff access to the school’s educational opportunities or benefits. [And]

– The school system had actual knowledge of the sexual harassment. [And]

– The school system was deliberately indifferent to the harassment.

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These 3 elements:

- (1)The harassment was **so severe and pervasive** that it deprived the student **of access to educational opportunities and benefits.**
- (2)The school system had **actual knowledge of the** sexual harassment; and
- (3)The school **responded with deliberate indifference.**

So again, it’s all about how the school responds.

- Applying the standard established by the Supreme Court in *Davis*, the Sixth Circuit Court of Appeals concluded that the Spencer County Public School District was liable under Title IX for the severe pervasive student-on-student sexual harassment suffered by the plaintiff.



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In this case, the court found the school district was liable because, although the school system had taken a few steps to remedy the situation, their response was clearly unreasonable in light of the known circumstances. For example, on at least three occasions, the student had reported that she had been assaulted, and in each case the school responded by “speaking” to the students. It was ineffective all three times, but the school was willing to keep repeating the ineffective response.

The school isn’t expected to “remedy” sexual harassment nor ensure that students behave,

“no particular response” to known sexual harassment is required

BUT the response must

Where a school system **has knowledge that its remedial action is inadequate and ineffective**, it is required to take reasonable action in light of those circumstances to eliminate the behavior.

If it continues to use the same methods to no avail, **it has failed to act reasonably in light of the known circumstances** .

Lessons here:

You must respond to known bullying in a timely fashion

, and if the bullying continues, must try different approaches. Keep trying.

Summary

- Through the School Violence Prevention Act, the North Carolina General Assembly now requires school systems to take a number of proactive steps to prevent bullying and harassment in the schools.
- School systems may be held liable for failure to take adequate steps to deal with bullying and harassment.
- All students in North Carolina schools should be able to learn in an environment that is free from bullying and harassment.



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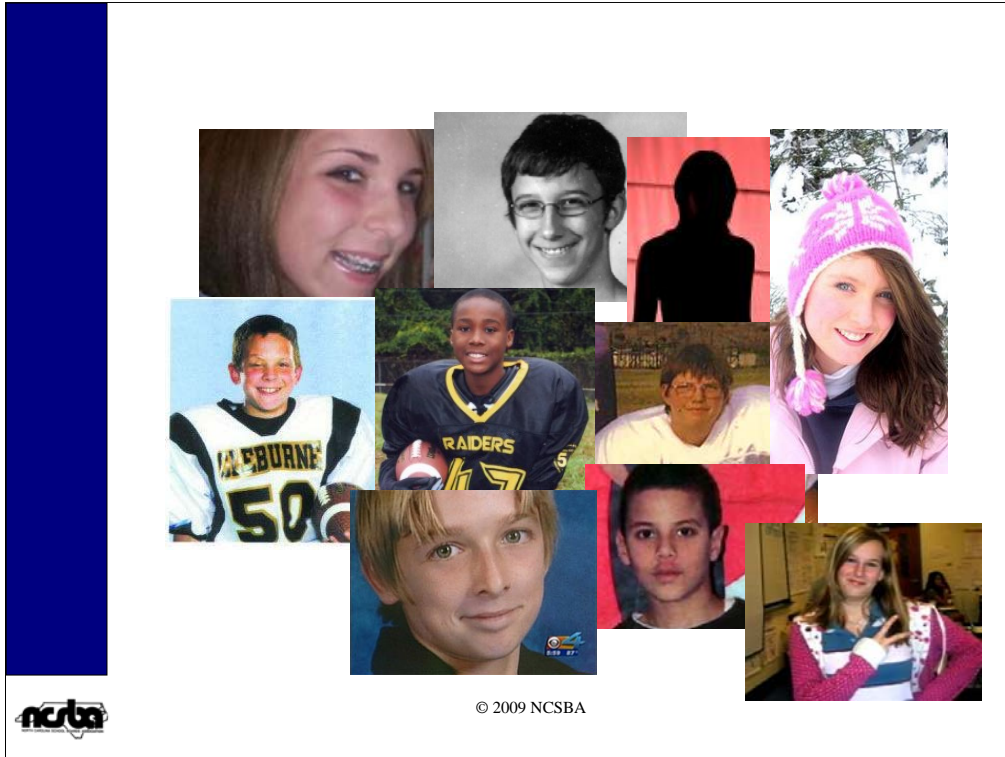
We can think that the General Assembly has done us a favor by requiring us to take a number of proactive steps to prevent bullying and harassment.

Proactive steps are evidence that the school system is not “deliberately indifferent to bullying and harassment” in general (this will not be enough to save you though if you fail to respond in a clearly reasonable manner to known bullying.)

We can be held liable for failing to take adequate steps to deal with bullying and harassment.

Our goal is that all students in this our school system should be able to learn in an environment that is free of bullying and harassment.

NEXT SLIDE



So that no child here suffers the fate of these children.

Questions?