



*In the first article of this series, we discussed the legal status of bullying and the importance of looking at the issue through a legal lens. I outlined the McGrath Criterion and its five points for determining whether behavior constitutes legally actionable Bullying or Illegal Harassment.*

*Today's newsletter describes the first two of the five points in further depth. (For a copy of Part One, email: [info@mcgrathinc.com](mailto:info@mcgrathinc.com).)*

## **When Bullying is Legally Actionable – Part 2 of 3 Understanding The McGrath Criterion Points 1–2**

**By Mary Jo McGrath, Attorney at Law**

Peer bullying and harassment behaviors may be classified into four categories:

- (1) under the school administrative law and policies prohibiting bullying, and justifying action under the student code of conduct and board policy;
- (2) under a protected classification (e.g., protection against discrimination based on race, gender, etc.) and justifying a civil rights action;
- (3) under criminal law (e.g., hate crimes); and
- (4) under state statutes relating to anti-bullying provisions or even negligence.

The very same behavior may violate all four areas of law at the same time.

In determining whether bullying behavior constitutes discrimination and a civil rights violation under state and federal law, five separate findings (or points) must be found. The first two points follow:

### **Point 1: Is a Protected Classification Involved and/or Is There Intent to Harm?**

The Analysis: If bullying behavior is directed at a member of a protected class of people, it must be addressed as potential illegal harassment and discrimination. An example of behavior related to a protected classification would be when a child is taunting another child about her race, ethnicity, or disability. Similarly, if the behavior is s'xual in nature – for example, if a student is groped or s'xually explicit remarks are made, as in the Theno case (described in Part One) – the bullying behavior may fall into the category of illegal harassment and discrimination, and be pursued under Title IX as s'xual harassment.

### **With Bullying, Intent Is the Key Factor**

When analyzing bullying statutes, the major differentiating factor between bullying and illegal harassment and discrimination is the intent of the perpetrator to harm. The key question with bullying is: Did the perpetrator intend to cause harm to the victim? With illegal harassment, the perpetrator's intent or lack of intent to harm the victim is irrelevant. The hallmark of illegal harassment is the emphasis on the impact of the behavior on the victim, rather than the perpetrator's intent.

Establishing the intent to harm can be tricky. Often intent has to be inferred from the actions of the

alleged perpetrator. Rarely does a person say, "Yeah, I meant to bully and hurt that weasel and given the chance, I'd do it again!"

There are places to look to get a window into the mind of the alleged perpetrator where intent resides. First, ask the student why he or she did what was done:

- When you were doing that, what were you trying to do?
- What did you mean to cause?

Second, any documentation you have of the student's history or prior allegations may point to the student's state of mind. It may show a persistent pattern of causing injury to others.

Once you have established which of these two arenas the behavior falls into – illegal harassment (protected classification) or bullying (intent to harm) – the other four points of the McGrath Criterion are identical in their legal requirements between the two categories. Remember, the behavior may fall into both categories at the same time.

### **Point 2: Is the Behavior Unwelcome or Unwanted?**

Two boys are exchanging insults about their respective mothers' s'xuality, socking each other on the shoulder and sharing a bag of french fries. Is that bullying or illegal harassment? The defining question is: Is the conduct welcome by the recipient? In the example here of the two french fry-eating boys, to all appearances they are having a mutually agreeable, good time together.

What is welcome differs with gender and with culture. For example, we have seen cases of African American children who call each other the "n word," and among them it is not unwelcome. Yet this word would be completely unwelcome from a student or teacher of another race or even from another student who is of the same race but outside their group.

Even if someone consents to the behavior, it does not mean that the behavior is welcome. With bullying you have an imbalance of power. The target may be consenting, yet that consent may be a defensive reaction. This is especially common with s'xualized behavior. A person may not feel like he or she can say "no," so he or she goes along. But going along does not mean the behavior was welcome. Furthermore, there are people who cannot legally consent to s'xual activity, including minors, people with certain disabilities, and those who are intoxicated.

### **NEXT ISSUE: Understanding The McGrath Criterion Points 3–5**

*Author's Note: Abbreviations such as s'xuality and s'xual are used to avoid adult content filters in schools.*

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By Mary Jo McGrath, Attorney at Law – Corwin Press, Copyright 2007

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