



When Bullying is Legally Actionable

Part One of a Three Part Series

By Mary Jo McGrath, Attorney at Law

In 2002, Trial Magazine interviewed me for an article on trends in bullying litigation. Several years and many settlements and verdicts later, it is clear that lawsuits over school bullying are not going away any time soon. School administrators must be prepared to minimize the risk of harm to students and liability to the school district.

The Legal Status of Bullying

It is helpful to clarify where bullying falls in terms of its "legal status." Unless a state has adopted legislation regarding bullying, bullying in itself is not a legally recognized harm for which a legal action may be brought in civil court. School districts typically take action against bullying using their administrative law powers to enforce the student code of conduct and board policies. If necessary, they may involve law enforcement to pursue the matter under the criminal code.

A judge or jury may find that illegal harassment or bullying took place at the school site, yet find in the school district's favor regarding its liability for the conduct. Juries do not find against school districts because the behavior happened. They find against school districts if they did not take appropriate action when they knew (or in some cases, should have known) that the behavior was occurring.

A \$440,000 Settlement

It is particularly important to recognize that taunts that have been around for a long time may now be recognized as behavior that interferes with a student's educational opportunities and causes great harm. A highly illustrative case is out of Tonganoxie, Kansas. In December 2005, 18-year-old Dylan Theno received a \$440,000 settlement from his former school district after a federal district court jury found in his favor. Theno sued the school district in federal court under Title IX in May 2004, claiming that he was bullied and illegally harassed when other students taunted him for being gay, even though he testified that he is not. He said that the harassment started when he was in seventh grade, and continued until he quit school in eleventh grade.

Although bullying has traditionally been considered from a socio-emotional perspective, in today's world it must also be looked at through a legal lens. This is not a bad thing. The judicial system has played an integral part in moving many social issues forward, such as integration and gender equality. Looking at behavior through a legal lens gives us objectivity and clarity on how to proceed and effect change.

To assist educators in determining what makes student misconduct legally actionable under state and federal harassment and discrimination law, the McGrath Criterion has been developed.

The McGrath Criterion – Illegal Harassment and Bullying

Illegal Harassment

1. Is the behavior related to one of the following protected classifications? (Intent is not an issue – impact is the issue)

- sexual in nature
- gender
- age
- race
- religion
- national origin
- disability
- sexual orientation (in some locales)

2. Is it unwelcome or unwanted?

3. Is it severe or persistent or pervasive?

4. Does the behavior substantially interfere with work or study?

5. Does the behavior meet the subjective/objective tests or standards related to its level of interference with work or study?

Bullying

1. Is there intent to harm?

2. Is it unwelcome or unwanted?

3. Is it severe or persistent or pervasive?

4. Does the behavior substantially interfere with work or study?

5. Does the behavior meet the subjective/objective tests or standards related to its level of interference with work or study?

The key distinction between bullying and illegal harassment is the intent to harm. The intent to harm is not a requirement of illegal harassment. It is the defining characteristic of bullying. In our next McGrath E-newsletter we will discuss this concept in depth.

NEXT ISSUE: Understanding The McGrath Criterion – Point by Point

This article is an excerpt from *School Bullying: Tools for Avoiding Harm and Liability* By Mary Jo McGrath, Attorney at Law – Corwin Press, August 2007

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Beginning in September 2004, we will be issuing a new edition twice per month. If you would like Mary Jo McGrath to address a particular issue related to one of our legally-based training topics (bullying, sexual harassment, cultural and racial diversity, employee supervision and evaluation, organizational leadership, or vulnerable employees liability), please email your request to info@mcgrathinc.com .

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