



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 certain behaviors would constitute legally actionable Bullying or Illegal Harassment. In the second article, I described the first two of the five points in further depth.

Today's newsletter describes points three through five and Quid Pro Quo Harassment. (For a copy of Parts One and Two, email: info@mcgrathinc.com.)

When Bullying is Legally Actionable – Part 3 of 3 Understanding The McGrath Criterion, Points Three thru Five

By Mary Jo McGrath, Attorney at Law

Point 3: Is the Behavior Severe or Persistent or Pervasive?

To be bullying or illegal harassment, behavior only has to fit one of these three criteria: Is it severe? Is it persistent? Is it pervasive? It may, in fact, fit all three.

Severe behavior can be established with a single action. Actions that would typically be considered severe include physical assault resulting in injury or severe bodily harm, the threat of severe bodily harm, or the threat of severe bodily harm to one's family. The more severe the conduct, the less you need a pattern of behavior to establish bullying or illegal harassment.

Persistent behavior, as the term implies, happens repeatedly. As a drip of water on the top of a hill eventually erodes the hill, a small action done persistently has a compounded impact and can cause harm cumulatively. Intent to harm can be inferred from a pattern of persistent behavior in which a child has been warned by the target, "This hurts me," and then repeats the behavior.

Pervasive means the unwelcome behavior is everywhere one goes within the school environment. (Like Theresa in the case study in Chapter 1 of *School Bullying: Tools for Avoiding Harm and Liability*), there is no respite for the victim. There are many schools in which the climate and culture allow pervasive harassment or bullying to take place. There is a tolerance for vicious behavior among students that has been cultivated and prevails.

Point 4: Does the Behavior Substantially Interfere With the Student's Education?

The legal standard for illegal harassment and discrimination claims requires that it be proved that the behavior unreasonably interferes with the student's ability to get an education. In a civil lawsuit for the recovery of damages, the intent to harm or even gross negligence won't carry the day without actual harm to the ability to get an education being proved.

Point 5: Does the Behavior Meet Both Subjective and Objective Tests Related to Its Level of Interference With Student Education?

Unreasonable interference with education is assessed through a two-pronged test: subjective and objective. Subjectively, did the alleged victim experience unreasonable interference? Objectively, would a reasonable person similarly situated to the alleged victim be unreasonably interfered with, given the totality of these circumstances?

For example, Sally comes to you saying, "The way Tommy looks at me makes me feel uncomfortable. He's s'xually harassing me, and it's hard for me to pay attention in class." Sally is experiencing what she considers to be interference with her schoolwork. That is the subjective test.

You make some informal inquiries and find out that Tommy has cerebral palsy. He has trouble controlling his head and neck and often appears to be blankly staring to his right or left. There is no evidence that any behavior on Tommy's part is s'xual in nature, nor does any intent to harm exist. No other students have a problem with Tommy and they enthusiastically support and include him in class activities. This is the objective test. It is clear that Susan is not reacting as a reasonable girl of her age and background would react under the totality of these circumstances.

Again, even though this is not a legal matter, there is still action to take. Those actions may include educating Susan about cerebral palsy and helping her to adjust to the inclusion of students with disabilities. This is not a case of illegal harassment or bullying, but one that calls for education.

Quid Pro Quo S'xual Harassment: An Exception to the Five-Point Criterion

For quid pro quo s'xual harassment cases, only points 1 and 2—the behavior is s'xual in nature, and the conduct is unwelcome—need be answered affirmatively for liability to attach. An example of quid pro quo s'xual harassment (and s'xual abuse) is trading s'x for favorable treatment in class or grades. Usually quid pro quo s'xual harassment occurs adult to student.

In Review

The McGrath Criterion and its five points determine whether certain bullying behaviors are legally actionable harassment or discrimination. The criterion for illegal harassment and the criterion for bullying are identical except for the first point. The first point for illegal harassment or discrimination is that the conduct must be against a protected classification of people. For bullying that is not also illegal harassment or discrimination, the first point is that there is intent on the perpetrator's part to cause harm.

The Five-Point Criterion may also be helpful for determining whether bullying behavior may be legally actionable in a negligence suit or actionable under the state's anti-bullying legislation

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

This article is an excerpt from

[School Bullying: Tools for Avoiding Harm and Liability](#)

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

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