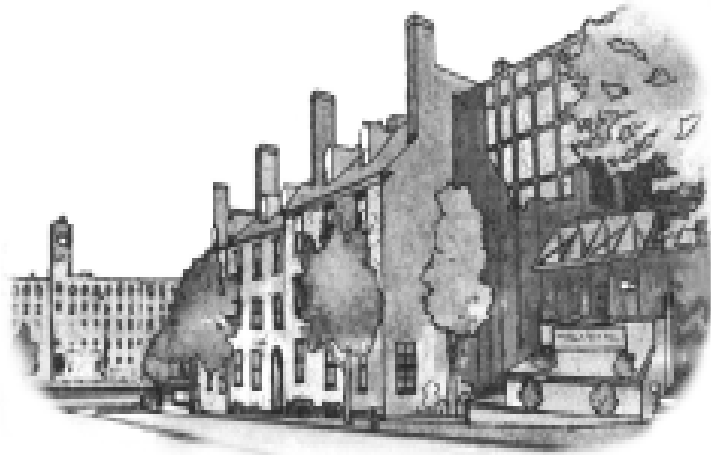


“Why I Slugged Mikey:” A Review of How the Law Responds to Bullies

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A Word of Caution

No two cases are exactly alike. This material is designed to provide Administrators with an overview of the law pertaining to certain aspects of violence prevention in the school setting. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. Overview

The purpose of this material is to assist educators in understanding the State's legal response to the problem of bullying in our public schools, and to provide tips regarding who the law considers to be a bully, what districts can do about off-campus bullying, and liability for the actions of bullies. This material does not cover every aspect of the law, and you are encouraged to seek an opinion from your district's legal counsel regarding any specific case.

II. The Pupil Safety and Violence Prevention Act

A. Legislative History

In 2000 the state legislature adopted the "Pupil Safety and Violence Prevention Act of 2000." RSA 193-F:1, et seq. The Pupil Safety and Violence Prevention Act was a direct response to incidents of school violence that had occurred throughout our nation. Educators and lawmakers alike observed a persistent theme where the perpetrator of violence had been the victim of bullying in the school setting.

In 2004, the legislature amended the Pupil Safety and Violence Prevention Act to mandate that schools provide a tangible remedy to the problem of bullying. See RSA 193-F:3.

House Bill 1523 (HB 1523), which would substantially amend the Pupil Safety and Violence Prevention Act, is currently pending before the Legislature. The bill is discussed in greater detail in the sections that follow.

B. The Purpose and Intent

1. Current Law

The purpose of the Pupil Safety and Violence Prevention Act is set forth in RSA 193-F:2:

. . . [A]ll pupils have the right to attend public schools that are safe, secure and peaceful. One of the legislature's highest priorities must be to protect our children from violence by dealing with harassment, including 'bullying,' in our public schools.

The intent of the Pupil Safety and Violence Prevention Act was also to avoid the creation of a persistently dangerous school. In 2003, the legislature adopted RSA 193-G:1, et seq., which identifies a "persistently dangerous school," for purposes of school choice under the No Child Left Behind Act.¹

¹ A persistently dangerous school is a school in which 3 of the following acts have occurred as separate incidents during the period of one school year for 3 consecutive years:

Once a school has been identified as a persistently dangerous school, the school has a duty to notify the parents of that school's status and to provide the parents or guardians of the pupil attending the school of the option to transfer the pupil from the school to another school within the same school district, consistent with local school board policy. In addition, if a student is a victim of certain enumerated crimes, the school district shall, within five days of being notified of the incident, notify the parents or guardians of the pupil of the option to transfer the pupil to another school within the same school district consistent with local school board policy. RSA 193-G:4(I)-(II).

In typical legislative fashion, homicide is included as one of the offenses allowing the victim to transfer schools. RSA 193-G:4(II); RSA 193-G:1(I)(a). Obviously a school district cannot transfer the child who has been the victim of homicide. However, the other crimes, first or second degree assault, aggravated felonious sexual assault, arson, robbery or unlawful possession or sale of a firearm or other dangerous weapon, might very well give rise to a victim and the right to transfer. RSA 193-G:4(II).

2. HB 1523²

HB 1523 would amend the purpose and intent of RSA 193-F:2, as follows:

- I. All pupils have the right to attend public schools, including chartered public schools, that are safe, secure, and peaceful environments. One of the legislature's highest priorities must be to protect our children from physical, emotional, and psychological violence by dealing with bullying, harassment, intimidation, and cyberbullying in our public schools.
- II. Bullying, harassment, or intimidation in schools has historically included actions shown to be motivated by a pupil's actual or perceived race, color, religion, mental, emotional, or learning disability, gender, gender identify and expression, obesity, or other distinguishing personal characteristics, or based on association with any person identified in any of the above categories.

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- a. Homicide under RSA 630;
 - b. First or second degree assault under RSA 631:1 and RSA 631:2;
 - c. Aggravated felonious sexual assault under RSA 632-A:2;
 - d. Arson under RSA 634:1;
 - e. Robbery as a class A felony under RSA 636:1, III; or
 - f. Unlawful possession or sale of a firearm or other dangerous weapon under RSA 159.

RSA 193-G:1(I)(a)-(f).

² The provisions of HB 1523 that are discussed in this material were taken from the version of the bill that was passed by the House Education Committee on February 16, 2010. The bill has not been before the full House of Representatives, or the Senate, and therefore, it is subject to change.

- III. It is the intent of the legislature to protect our children from physical, emotional, and psychological violence by dealing with bullying, harassment, intimidation, and cyberbullying of any kind in our public schools, for all of the historical reasons set forth in this section, and to prevent the creation of a hostile educational environment.
- IV. The sole purpose of this chapter is to protect all children from bullying, harassment, intimidation, and cyberbullying, and no other legislative purpose is intended, nor should any other intent be construed from the enactment of this chapter.

C. Adoption of a Pupil Safety and Violence Prevention Policy

1. Policy Requirements

The local school board must adopt a Pupil Safety and Violence Prevention Policy which addresses pupil harassment also known as “bullying,” in a manner consistent with the provisions of the Pupil Safety and Violence Prevention Act. The policy must include language which details the action that will be taken by a local school board to resolve and remediate occurrences of pupil harassment. RSA 193-F:3(1)(a).

At a minimum, policies should include the following:

- A statement that pupil harassment/bullying are prohibited
- A definition of pupil harassment/bullying
- A statement that training will be provided to students and teachers
- Examples of interventions that will be used to resolve and remediate bullying

The school board’s actions to resolve and remediate occurrences of pupil harassment need not be limited to traditional disciplinary action, but could include the following:

- The transfer of the bullying student to another setting;
- Honoring the request of a parent to transfer their victimized child to another setting;
- Creating and implementing a safety plan for the victimized child;
- Referral for special education and related services;
- The development and implementation of a positive behavioral intervention plan;
- The removal of privileges as a consequence of bullying behavior; and
- Mandated counseling

The State Board of Education must develop and distribute a technical assistance advisory for the purpose of providing guidance to school districts on the implementation of pupil safety and violence prevention policies. RSA 186:11(XXXVI).

a. HB 1523

Under HB 1523, districts would still be required to adopt a written policy prohibiting bullying, harassment, intimidation, and cyberbullying. School boards would be required to “involve, to the greatest extent practicable, pupils, parents, administrators, school staff, school volunteers, community representatives, and local law enforcement agencies in the process of developing the policy.”

The bill contains specific requirements for the policies, including, but not limited to, the following:

- The inclusion of the following definitions:
 - Bullying, harassment, or intimidation: a single incident or pattern of significant severity involving a written, verbal, or physical act, or any electronic communication which is intended to:
 - Physically harm a pupil or damage the pupil’s property; or
 - Cause substantial emotional distress to a pupil; or
 - Substantially interfere with a pupil’s educational opportunities; or
 - Be severe, persistent, or pervasive so as to create an intimidating or threatening educational environment; or
 - Substantially disrupt the orderly operation of the school.
 - Bullying, harassment, or intimidation also include actions shown to be motivated by an imbalance of power, based on a pupil’s actual or perceived characteristics, behaviors, or beliefs, or motivated by the pupil’s association with another person and based on the other person’s characteristics, behaviors, or beliefs.
 - Cyberbullying: bullying, harassment, or intimidation undertaken through the use of electronic devices
 - Electronic devices, which include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.

- School property: all real property and all physical plant and equipment used for school purposes, including public or private school buses or vans.
- Statements prohibiting bullying, retaliation or false accusations against a victim, witness, or anyone who in good faith provides information about an act of bullying, harassment, intimidation, or cyberbullying.
- Disciplinary consequences and/or interventions for pupils who commit, or falsely accuse another of an act of bullying, harassment, intimidation, or cyberbullying
- A notice provision, with recommended methods of communication, including, but not limited to, handbooks, websites, newsletters, and workshops
- A procedure for reporting incidents of bullying, harassment, intimidation, or cyberbullying, that:
 - Identifies all persons to whom an act of bullying, harassment, intimidation, or cyberbullying may be reported;
 - Outlines the internal reporting requirements within the school or school district;
 - Provides for notification, within 48 hours of the report, to the parents or guardians of the victim and perpetrator;
 - Allows the superintendent or his/her designee to grant a written waiver from the notification requirement if he/she seems the waiver to be in the best interest of the victim or perpetrator;
 - Includes a procedure for investigation of the report, which must be initiated within 5 school days of the reported incident;
 - Includes a written procedure for communication (within 10 school days of completion of the investigation) with parents/guardians of the victims and perpetrators regarding the remedies and assistance; and,
 - Identification, by job title, of the officials responsible for ensuring that the policy is implemented.

HB 1523 authorizes the Department of Education to develop a model policy for use by school districts.

2. Notification and Reporting Requirements

At the beginning of each school year, school districts are required to provide parents, legal guardians or “other persons responsible for the welfare of the pupil” with written notice of the district’s Pupil Safety and Violence Prevention Policy and the process whereby disciplinary decisions and other actions taken by the school board to resolve and remediate pupil harassment can be appealed at the local and state level. RSA 193-F:3(I)(b).

Any:

- School employee; or
- Employee of a company under contract with a school or school district

who has witnessed or has reliable information that a pupil has been subjected to insults, taunts, or challenges, whether verbal or physical in nature which are likely to intimidate or provoke a violent or disorderly response that violates the school bullying policy shall report such incident to:

- The principal; or
- Designee

who shall in turn report the incident to the Superintendent and the school board. RSA 193-F:3(II)(a) (emphasis added).

The principal or designee shall by telephone and in writing by first-class mail, report the occurrence of any incident of bullying or pupil harassment to the parent or legal guardian of all pupils involved within 48 hours of the occurrence of the incident. The notice shall advise the individuals involved of their due process rights, including the right to appeal to the State Board of Education. RSA 193-F:3(II)(b) (emphasis added).

If the underlying act involves an act of theft, destruction, or violence in a safe school zone, then the public school employee may also have a duty to make a report in accord with RSA 193-D.

a. HB 1523

School boards would be required to include the following provisions in their policies: notification procedures, procedures for reporting acts of bullying, harassment, intimidation, or cyberbullying, a procedure outlining the internal reporting requirements within the school or school district, and procedures for investigating acts of bullying, harassment, intimidation, or cyberbullying. However, HB 1523 removes many of the

specific reporting and notice requirements, and instead leaves it up to the school boards, in conjunction with employees and community members, to outline the specific procedures in their policies.

HB 1523 would not impact RSA 193-D; thus, if applicable to a particular incident, the requirement to report acts of theft, destruction, or violence in a safe school zone would still apply.

3. Waiver of the Notification Requirement

The Superintendent may within 48 hours of the event grant the principal a waiver from the notification requirement if the Superintendent deems such waiver to be in the best interest of the child. Any waiver granted shall be in writing. RSA 193-F:3(II)(b).

This provision has been retained in HB 1523.

4. The Local School Board's Duty to Remediate and Resolve Bullying

The school board is required to define within its policy the remedies available to respond to bullying. In addition, the school board is required to take specific action when it has been advised of an occurrence of pupil harassment. The board is also required to notify "all parties involved," of its decision. RSA 193-F:3(III).

If the local appeal process has been exhausted or the school board has exhausted its remedies under its local policy, the "aggrieved party," (which could be the victim or the bully) has the right to appeal the decision to the State Board of Education. The State Board of Education is required to notify all parties in writing of its decision. Id.

a. HB 1523

As with the current version of RSA 193-F, HB 1523 would also require that schools develop a response to remediate any substantiated incident of bullying, harassment, intimidation, or cyberbullying, and that they include disciplinary consequences and/or interventions for pupils who commit an act of bullying, harassment, intimidation, or cyberbullying.

HB 1523 removes the right to appeal to the State Board of Education. However, districts would be obligated to report substantiated incidents of bullying, harassment, intimidation, or cyberbullying to the Department of Education; the Department would then be required to prepare an annual report, summarizing all substantiated incidents of bullying, harassment, intimidation, or cyberbullying.

5. Training

The local school board is authorized to provide opportunities for educators to have the knowledge and skills necessary to prevent and respond to acts covered under the subject of bullying or pupil harassment. RSA 193-F:3(III).

RSA 193-F:4 specifically states that there is no required curriculum or material with regard to the prevention of pupil harassment and that the failure to use a particular curriculum is not considered a violation of the Act.

a. HB 1523

HB 1523 would require districts to “provide only evidence based educational programs in support of [their] efforts to reduce and prevent bullying, harassment, intimidation, or cyberbullying.” These programs would include:

- Training within 6 months of the effective date of the revisions to RSA 193-F, and annually thereafter, for district employees, regular school volunteers, parents, legal guardians, relative caretakers, or employees of a company under contract with the school, district or chartered public school who have significant contact with pupils in preventing, identifying, responding to, and reporting incidents of bullying, harassment, intimidation, or cyberbullying.
- An educational program for pupils and parents in preventing, identifying, responding to, and reporting incidents of bullying, harassment, intimidation, or cyberbullying.

As with the current version of the statute, HB 1523 would not require the inclusion of a specific curriculum, textbook, presentation, or other material designed to prevent bullying, harassment, intimidation, or cyberbullying. As with RSA 193-F:4, HB 1523 states that there is no required curriculum or material with regard to the prevention of pupil harassment and that the failure to use a particular curriculum is not considered a violation of the Act.

6. Immunity and Liability Protection

Any school employee or employee of a company under contract with the school or school district who, in good faith, reports violations to the principal or designee, “shall be immune from any cause of action which may arise from the failure to remedy the reported incident.” RSA 193-F:3(IV); RSA 193-F:5 (emphasis added).

a. HB 1523

HB 1523 would provide immunity for SAU employees, school employees, public academy employees, regular school volunteers, pupils, parents, legal guardians,

relative caretakers, employees of a company under contract to a school, school districts, SAUs, public academies, and charter public schools, for “good faith conduct arising from, or pertaining to, the investigation, findings, reporting, recommended response, or implementation of a recommended response under” RSA 193-F.

III. Who Does the Law Consider to be a Bully?

Currently, RSA 193-F and the State Education Regulations, Ed 300 et seq., do not define the term “bully” or “bullying.” See RSA 193-F:1, et seq., Ed 306.04(a)(8) (requiring adoption of a policy and procedures pertaining to harassment, including bullying). Instead, it has been left up to the school board to define those terms in their bullying policies.

In contrast, HB 1523 would define the terms “bullying, harassment, intimidation” as follows:

- Bullying, harassment, or intimidation: a single incident or pattern of significant severity involving a written, verbal, or physical act, or any electronic communication which is intended to:
 - Physically harm a pupil or damage the pupil’s property; or
 - Cause substantial emotional distress to a pupil; or
 - Substantially interfere with a pupil’s educational opportunities; or
 - Be severe, persistent, or pervasive so as to create an intimidating or threatening educational environment; or
 - Substantially disrupt the orderly operation of the school.
- Bullying, harassment, or intimidation also include actions shown to be motivated by an imbalance of power, based on a pupil’s actual or perceived characteristics, behaviors, or beliefs, or motivated by the pupil’s association with another person and based on the other person’s characteristics, behaviors, or beliefs.

In addition, HB 1523 specifies that bullying, harassment, intimidation and cyberbullying occur when an action defined above “occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property” or “occurs off of school property outside of a school-sponsored activity or event, if the conduct substantially disrupts the orderly operations of the school or school-sponsored activity or event.”

A. Cyberbullying

Currently, RSA 193-F and the State Education Regulations, Ed 300 et seq., do not contain references to “cyberbullying.” However, some school districts are beginning to include “cyberbullying” in the bullying policies that are adopted in accord with RSA 193-F and Ed 306.04.

HB 1523 defines cyberbullying as follows:

- Cyberbullying: bullying, harassment, or intimidation undertaken through the use of electronic devices
- Electronic devices, which include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.

Several other states have enacted laws pertaining to cyberbullying in schools. See e.g. N.J. Statutes Annotated 18A:37-14 (including “electronic communication” in the definition of “harassment, intimidation or bullying” in school bullying policies); see also National Conference of State Legislatures, <http://www.ncsl.org/default.aspx?tabid=12903> (accessed Feb. 22, 2010) (listing states that have passed cyberbullying laws).

In addition to the various state laws, the “Megan Meier Cyberbullying Prevention Act” was recently introduced in the House of Representatives. See H.R. 1966 (111th Congress, 1st Session, April 2, 2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966>: (accessed Feb. 22, 2010). The bill, which has been referred to the House Committee on the Judiciary, states:

Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.

Id. The term defines “electronic means” as “any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text messages.” Id.

Certain criminal statutes extend protection into the cyber world. For example, a person may be guilty of harassment based on his or her electronic communications. RSA 644:4 states that:

A person is guilty of a misdemeanor . . . if the person: . . .

- Makes repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another; or
- Insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or
- Knowingly communicates any matter of a character tending to incite murder, assault, or arson; or

- With the purpose to annoy or alarm another, communicates any matter containing any threat to kidnap any person to commit a violation of RSA 633:4 [interference with custody]; or a threat to the life or safety of another.

RSA 644:4, I(b)-(e). The term “communicates,” means “to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service, or electronic transmission, including electronic transmissions generated or communicated via a computer.” RSA 644:4, II (emphasis added). Computer is further defined as “a programmable, electronic device capable of accepting and processing data.” Id.

In addition, a person is guilty of a class B felony if he knowingly:

- Compiles, enters into, or transmits by means of computer;
- Makes, prints, publishes, or reproduces by other computerized means;
- Causes or allows to be entered into or transmitted by means of computer; or
- Buys, sells, receives, exchanges, or disseminates by means of computer

“any notice, statement, or advertisement, or any minor’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any child, or the visual depiction of such conduct.” RSA 649-B:3. For purposes of this statute, a child is “any person under the age of 16 years.” RSA 649-B:2.

Individuals are also prohibited from knowingly using a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed to be a child, to commit any of the following:

- Any offense under RSA 632-A, relative to sexual assault and related offenses
- Indecent exposure and lewdness under RSA 645:1
- Endangering a child as defined in RSA 639:3, III.

RSA 649-B:4, I. If a person who violates RSA 649-B:4 believes that the child is under the age of 13, then he or she is guilty of a class A felony; otherwise, the person is guilty of a class B felony. RSA 649-B:4, II.

Absent an applicable statute, however, it is difficult to hold individuals responsible for their cyber-related activities, such as cyberbullying.

The case of U.S. v. Drew, 2009 WL 2872855 (C.D. Cal. Aug. 28, 2009), illustrates the difficulty that courts have with holding individuals liable for cyberbullying.

Facts: Lori Drew was indicted and charged with one count of conspiracy and three counts of violating a felony portion of the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. 1030. The CFAA prohibits accessing a computer without authorization or in excess of authorization and obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act.

The indictment alleged that Drew entered into a conspiracy in which its members agreed to intentionally access a computer used in interstate commerce without (and/or in excess of) authorization in order to obtain information for the purpose of intentionally inflicting emotional distress upon Megan M., a 13 year old girl who was a classmate of Drew’s daughter. Drew registered and set up a profile for a fictitious 16 year old male on Myspace.com, and posted a photograph of a boy, without that boy’s knowledge or consent. Such conduct violated Myspace’s terms of service.³ Drew contacted Megan through that profile and began to flirt with her over a number of days. Ultimately, she (acting through the profile) told Megan that she was moving away, that she no longer liked her, and that “the world would be a better place without her in it.” Megan committed suicide on the day that those comments were posted; that same day, after learning of the suicide, Drew deleted the Myspace account.

Drew was tried by a jury, and was acquitted of the felony CFAA counts. The jury did not reach a verdict on the conspiracy charge, and found Drew guilty of lesser included misdemeanor violations of the CFAA, based on the violation of Myspace’s terms of service. In particular, the jury found that the violation of the terms of service constituted an intentional access without authorization, or in excess of authorization, of a computer, in violation of the CFAA.

Following the verdict, Drew filed a motion for a judgment of acquittal, seeking to set aside the jury’s verdict, arguing that the intentional breach of an Internet website’s terms of service, without more, is sufficient to constitute a misdemeanor violation of the CFAA. If so, then, Drew argued that the statute was unconstitutionally vague and the verdict should be set aside.

Held: Drew’s motion was granted. “[A]n intentional breach of the [terms of services] can potentially constitute accessing the MySpace computer/server without

³ The terms of service prohibited the posting of a range of content, including the following:

- Material that harasses or advocates harassment of another person
- Provides information that you know is false or misleading or promotes illegal activities or conduct that is abusive, threatening, obscene, defamatory, or libelous;
- Includes a photograph of a person that you have posted without that person’s consent.

See U.S. v. Drew, 2009 WL 2872855.

authorization and/or in excess of authorization under the [CFAA].” However, the provision was unconstitutionally vague as applied to a violation of the terms of service. The court found that “if any conscious breach of a website’s terms of service is held to be sufficient by itself to constitute intentionally accessing a computer without authorization or in excess of authorization, the result will be that [the provision of the CFAA] becomes a law ‘that affords too much discretion to the police and too little notice to citizens who wish to use the [Internet].’” U.S. v. Drew, 2009 WL 2872855 (citation omitted).

IV. Responding to a Bully and His/Her Victim

A. Liability Exposure for Inappropriate Responses to Bullying

1. Teacher-Student Harassment, Marquay v. Eno

The New Hampshire Supreme Court has not yet had occasion to interpret RSA 193-F. However, the Court has heard cases involving teacher-on-student abuse. Marquay v. Eno, 139 N.H. 708 (1995), provides some guidance as to liability for inappropriate responses to bullying.

Facts: Plaintiffs, three women who were students in the Mascoma Valley Regional School District, brought suit alleging that they were “exploited, harassed, assaulted, and sexually abused by one or more employees of the school district.” The plaintiffs also alleged that school employees were either aware, or should have been aware, of the sexual abuse. Plaintiffs sought damages from the abusing employees, the non-abusing employees, the district, and the administration, alleging in part that the defendants were civilly liable for violating RSA 169-C:29 (child abuse reporting statute) by failing to report that they were being sexually abused by their teachers.

Held: Districts and/or administrative units have a duty not to hire or retain employees that it knows or should know have a propensity for sexually abusing students. If the plaintiff can establish that the school knew, or reasonably should have known of such a propensity, then the school will be liable for the foreseeable sexual abuse of students by that employee. Failure to report abuse, in accordance with RSA 169-C:29, can give rise to civil liability, provided the plaintiff can show that reporting would have prevented the subsequent abuse.

Individual employees with a supervisory relationship over students who have actual knowledge of abuse or are aware of facts which would lead a reasonable person to conclude a student is being abused, are subject to liability if their level of supervision is unreasonable and is a proximate cause of the student’s injury. Superintendents and principals owe a duty of supervision to each student; that duty is “not satisfied” by entrusting a student to the care of an employee who the superintendent or principal knows, or should know, poses a threat to a student.

Impact: RSA 193-F creates an affirmative duty to report violations of the school bullying policy. All employees who know, or should reasonably know, that the policy has been violated are subject to this duty. This duty is similar to the affirmative duty to report suspected incidents of child abuse. See RSA 169-C:29. Thus, failure to report violations of the bullying policy may result in liability, at least for employees with a supervisory relationship over the students involved. Districts may also be liable for foreseeable incidents of bullying, in violation of their bullying policies.

2. Peer-on-Peer Harassment

The United States Court of Appeals for the First Circuit recently decided a case involving peer-on-peer sexual harassment, Fitzgerald v. Barnstable School Committee, 504 F.3d 165 (1st Cir. 2007), reversed on other grounds by 129 S.Ct. 788 (U.S. 2009).

Facts: A kindergarten student informed her parents that when she wore a dress to school, a third-grade student on her school bus would bully her into lifting up her skirt. Parents immediately contacted the school principal to report the allegations, and the principal instructed the district's "prevention specialist" (Title IX Coordinator) to investigate. The prevention specialist interviewed the third-grader, who denied the allegations, as well as the bus driver, and a majority of the students who rode on the bus. However, she was unable to corroborate the kindergartener's version of the events.

Shortly thereafter, the parents informed the district that the kindergarten student had provided them with additional details about the incidents that had occurred on the bus. The district resumed its investigation, conducted another interview of the third-grader, and followed up on the interviews that had previously been conducted.

In the meantime, the police department had begun an investigation, ultimately finding that there was insufficient evidence to proceed criminally against the third-grade student. Relying on the results of the police investigation, and its own investigation, the district concluded that there was insufficient evidence to discipline the third-grade student. The district offered to place the kindergarten student on another bus, or to leave rows of empty seats between the kindergarten students and the older pupils on the bus. The parents rejected both of those suggestions, and requested that the district place a monitor on the bus or transfer the third-grader to another bus. The district declined both of those requests.

Parents sued the school district, alleging that the district violated Title IX and 42 USC 1983. The parties agreed that the district was subject to the Title IX requirements, that the allegations, if true, constituted harassment, and that the district was aware of the allegations. The district court dismissed the parents' claims; with respect to the Title IX claim, the court held that the district "could not be found deliberately indifferent as long as the plaintiff was not subjected to any acts of severe, pervasive, and objectively offensive harassment *after* the defendant first acquired actual knowledge of the offending conduct." Id at 172 (citation omitted). Parents appealed.

Held: The district's response to the alleged harassment, when evaluated in light of the known circumstances, was not "so deficient as to be clearly unreasonable."

Impact: Investigations and responses to allegations of peer-on-peer harassment will be judged on a reasonableness standard: was the district's "response, evaluated in light of the known circumstances, . . . so deficient as to be clearly unreasonable?"

i. Case Law from Other Jurisdictions

Davis v. Monroe Cty. Bd. Of Ed., 526 U.S. 629 (1999)

Facts: A student who was the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates brought suit alleging violation of Title IX (gender discrimination). The student had reported each incident to her mother and her classroom teacher, and her mother reported them to other school officials who assured her that the principal was aware of the incidents. No disciplinary action was taken in response to the student's reports.

Held: A district's failure to respond to student-on-student harassment in its schools can give rise to a private suit for money damages if the district is deliberately indifferent to known acts of harassment. At a minimum, deliberate indifference must "cause students to undergo harassment or make them liable or vulnerable to it." Liability is limited to circumstances where the district exercises substantial control over the harasser and the context in which the known harassment occurs, such as during school hours and on school grounds.

Impact: Deliberate indifference to bullying, occurring on school grounds and during school hours, may lead to liability for money damages.

S.S. v. Eastern Kentucky University, 50 IDELR 91, 532 F.3d 445 (6th Cir. 2008)

Facts: A student identified under Section 504 filed suit against his middle school, which was operated by Eastern Kentucky University, alleging (in part) that the school discriminated against him in violation of the ADA, Section 504 and Section 1983 by failing to adequately respond to and stop peer-on-peer harassment. The student asserted that the school failed to respond to and investigate his complaints of disability discrimination and harassment, and that the peer-to-peer harassment he experienced created a hostile learning environment, which the school failed to adequately protect him from.

Held: There was no discrimination because the school was not deliberately indifferent to the student's complaints. The school responded to all incidents involving the student, as soon as it learned about the incidents. It conducted individual and group interviews with the student's classmates, instructed his classmates not to tease the student, arranged for outside speakers to talk to the students about name-calling,

identified topics for discussions at school assemblies and in small groups, monitored the student, separated the student from other students involved in the altercations, conducted a mediation with the complaining student and another student, disciplined students who were at fault, called the police, and called parents of students.

Impact: This case illustrates the intersection between Section 504 and harassment claims. Children with disabilities who are victims of bullying or harassment may have separate damage discrimination or retaliation claims under Section 504 or the ADA. In addition, the response to a bullying claim may give rise to a duty to convene a manifestation meeting, to determine whether the bullying behavior is a manifestation of the bullying child's disability.

Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009), cert denied, Hudson Area Schools v. Patterson, 130 S.Ct. 299, 2009 WL 2390235 (U.S. Oct. 5, 2009)

Facts: During the plaintiff's sixth and seventh grade years, he was teased, pushed, and shoved by students on a daily basis. The plaintiff reported several of these incidents to school staff, and who initially responded by indicating that "kids will be kids, it's middle school." As time progressed, students were given verbal reprimands; once a student received a verbal reprimand, the plaintiff did not raise any subsequent complaints about that student. However, the plaintiff was teased so frequently that he eventually began eating lunch by himself in the band room to avoid the harassing students.

During the summer between the student's seventh and eighth grade year, he was referred for special education services. The team determined that the student had an emotional impairment and the student was assigned to a resource room for one period of the day. The resource room teacher assisted the plaintiff in coping with his peers. As a result, the plaintiff's 8th grade year was successful and he made progress.

When the student entered 9th grade, the District refused to place the student in a resource room. That year, the harassment began again, and the student was teased, pushed and shoved on a daily basis. As with the 6th and 7th grade years, students were given verbal reprimands, and the plaintiff did not raise any subsequent complaints about a student who received a verbal reprimand.

However, the harassment worsened during the second half of the school year – in March, students broke into the plaintiff's gym locker, removed his clothes and urinated on them, and threw his sneakers in the toilet; later that spring, the student's regular locker was vandalized and numerous derogatory and sexual phrases were written on the locker with permanent marker; in May, the student was sexually assaulted by one of his baseball teammates in the locker room. The individual who assaulted the student was permitted to attend school while the district investigated; he was ultimately suspended for 8 days (the remainder of the school year), but was permitted to attend

the sports banquet, one week after the assault. During the summer, the student who committed the assault was expelled.

During his 10th grade year, the plaintiff began receiving instruction at a preschool through sixth grade elementary school. Plaintiff's teachers would visit periodically to discuss his assignments. For his 11th grade year, the District allowed the student to enroll in courses at a local college. Initially, the District agreed that one semester of college would equal one semester of high school. However, after receiving a tuition bill, the District determined that one semester of college would equal one year of high school. The student graduated at the end of this 11th grade year. Plaintiff filed suit alleging, among other things, violations of Title IX.

Held: For the student. There was a genuine issue of material fact with regard to whether the District acted with deliberate indifference towards the student. The District was aware of what didn't work (verbal reprimands) and what did work (resource room support), but it discontinued the resource room support when the student entered high school, and began responding by verbally reprimanding alleged harassers. Since the District knew that those methods were ineffective, but did not change them, a jury could conclude that the District's response to the harassment was "clearly unreasonable."

Although the verbal reprimands stopped individual harassers from continuing, it did not prevent the overall and continuing harassment of the student, and the District was aware that the harassment remained ongoing. In addition, the harassment did not stop despite the District's school-wide programming dealing with harassment and bullying.

Seamons v. Snow, 206 F.3d 1021 (10th Cir. 2000)

Facts: Plaintiff, who was subject to hazing by members of his football team, reported the incident to school authorities. The football coach refused to remove any of the players from the team and refused to allow plaintiff to play in a game unless he apologized for reporting the incident to the members of the team. Plaintiff refused and was removed from the team. Immediately thereafter, the rest of the season was cancelled. Plaintiff brought suit against the district, the principal, and the coach, alleging, among other things, that his First Amendment right to free speech was violated when the coach dismissed him from the team.

Held: The plaintiff established genuine issues of fact and may proceed to trial with his claims against the coach. The plaintiff's claims against the district were also upheld based on the delegation of authority to the coach, who was the only individual authorized to make decisions regarding membership on the football team. The claims against the principal were dismissed as there was no indication that he was involved in plaintiff's dismissal from the team, or that he had any authority over team membership.

Impact: Avoid the risk of conduct in response to reports which will be deemed retaliatory.

Note: Pursuant to RSA 631:7(II)(b)(1)-(3), educational institutions, including high schools, or organizations operating at or in conjunction with an educational institution are guilty of a misdemeanor if they:

- Knowingly permit or condone student hazing;
- Knowingly or negligently fail to take reasonable measures within the scope of their authority; or
- Fail to report to law enforcement authorities any hazing reported to it by others or of which it otherwise has knowledge.

Hazing is defined as “any act directed toward a student, or any coercion or intimidation of a student to act or to participate in or submit to any act, when:

- Such act is likely or would be perceived by a reasonable person as likely to cause physical or psychological injury to any person; and
- Such act is a condition of initiation into, admission into, continued membership in or association with any organization.”

RSA 631:7(I)(d)(1)-(2).

Brodsky v. Trumbull Bd. of Educ., ___ F.Supp.2d. ___, 2009 WL 230708 (D. Conn. Jan. 30, 2009)

Facts: On October 12, 2005, a male student called plaintiff S.B. a lesbian. The comment was overheard by a teacher and reported to the administration. The male student was asked to apologize and told that there would be consequences if he repeated the behavior.

On December 15, 2005, another male student stuck a pencil under S.B.’s bottom while she was sitting and called her “an ugly skank.” A teacher witnessed the incident and reported it to the administration. The student received a two-day detention and was asked to apologize to S.B.

Beginning in January 2006, a female student who had previously been friends with S.B. began calling her “whore,” “prude,” and “bitch.” In February 2006, S.B.’s mother reported to the administration that the female student had been making mean comments to S.B. during online conversations. The administration warned the student that they would be watching for similar behavior at school, and notified the student’s mother. That same month, the student received a detention after she called S.B. names during a school assembly. In March 2006, S.B.’s mother reported that at dismissal time, the student had given S.B. the middle finger and had slid her index finger across her (the female student’s) throat. The female student was directed to read the bullying policy and was told that she would be disciplined for verified acts of bullying. In addition, the girls’ teachers were informed about the incidents.

During March 2006, S.B. and her mother continued to report various incidents, including name calling, throwing a straw into S.B.'s hair, and additional online threats. The administration removed the female student from S.B.'s homeroom and increased monitoring in the hallways between classes and at dismissal time. In addition, after meeting with the Superintendent, the female was given an assignment on bullying, and S.B. was to receive counseling and an escort at dismissal time.

In May 2006, plaintiffs alleged that they reported that the female student "touched S.B.'s breasts and/or buttocks and called her a 'prude bitch.'" The District denied receiving such report. That was the last reported incident during that school year. The plaintiff subsequently filed suit, alleging a violation of Title IX.

Held: For the District. While S.B. suffered "numerous instances of rude and unkind treatment by various peers, the alleged behavior was not sufficiently pervasive or severe . . . so as to give rise to a claim under Title IX."

"Title IX was not intended and does not function to protect students from bullying generally (as opposed to sexual harassment or gender discrimination) or to provide them recourse for mistreatment that is not based on sex."

In addition, the District was not deliberately indifferent to the student's allegations, and instead, responded reasonably and expeditiously, and in a manner that was consistent with the District's bullying policy.

Halladay v. Wenatchee Sch. Dist., 598 F.Supp.2d 1169 (E.D. Wash. 2009)

Facts: In December 2005, during lunch recess, students threw or rubbed snowballs in plaintiff, A.H.'s face. A.H. responding by chasing the students and saying "I'll kill you" to another student, A.L. When the students returned to their classrooms after recess, A.L. reported to the teacher that A.H. had chased him around the playground and threatened to kill him. The teacher had the boys explain what happened, and the next morning, she reported the incident to the principal.

The principal had the school resource officer interview A.H., and she also emergency expelled him. One hour later, she reduced the emergency expulsion to a one-day suspension and sent A.H. home. He missed 4-5 hours of school. Rather than return A.H. to school the following day, his parents transferred him to another school. They filed suit against the district alleging, in part, that the district negligently failed to protect him from bullying and/or harassment, and that the bullying/harassment caused the student to verbally threaten to kill another student, which resulted in the plaintiff's suspension.

Held: For the district. There is a general rule that schools have a duty to protect students from reasonably foreseeable harm, and a district's duty is to "exercise such care as an ordinarily reasonable and prudent person would exercise under the same or

similar circumstances.” A “district is only liable if the wrongful activities are foreseeable, and they will be foreseeable only if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.”

In this case, the district did not breach its duty to supervise and protect A.H. from being bullied/harassed. Prior to the December 2005 incident, the District was not aware of any incidents of harassment/bullying involving A.H. In addition, the District had sufficient staff supervising the playground on the day of the incident. In order to avoid summary judgment, “plaintiff would have to come forward with some evidence that the district knew or reasonably should have [kn]own that the students would throw snow at AH and that AH, uninjured by that event, would then threaten to kill a student, resulting in AH’s emergency expulsion/suspension.”

Shante D. v. City of New York, 190 A.D.2d 356, 598 N.Y.S.2d 475 (N.Y. App. Div. 1993), aff’d Shante D. v. City of New York, 83 N.Y.2d 948, 638 N.E.2d 962 (N.Y. 1994)

Facts: Plaintiff, in violation of school safety regulations requiring students to use classroom restrooms and prohibiting more than one student from leaving the classroom unattended, was sent out of the classroom to use the restroom at a time when at least one other student was wandering the school premises unattended. When she entered the restroom, plaintiff was sexually assaulted by the other student. A restroom was available in the classroom, but the teacher did not allow the students to use it during class.

Held: For the plaintiff. It was not necessary for the plaintiff to show that the student had previously committed the same type of assault that occurred in the case. It is sufficient for the plaintiff to show that the student had previously exhibited violent tendencies which should have placed the school on notice that she would, given the opportunity, assault plaintiff in the future.

Impact: Parental complaints/reports of threats and bullying behaviors may give rise to liability for subsequent harm.

Jenison (MI) Public School District, 47 IDELR 81 (OCR 2006)

Facts: Parents filed a complaint with OCR, alleging that their child, who had ADHD and a learning disability in math, was called “retard, psycho,” and “stupid bitch” by other students during the first semester of her freshman year. Parents alleged that the harassment was reported to the student’s resource room teacher on two occasions, and to the guidance counselor. However, the student did not indicate that she was being harassed based on her disability. The guidance counselor told the student that she would refer her to the school’s social worker and refer the harassers to the vice principal. However, the complaint alleged that the vice principal never followed up on the allegations. Subsequently, in November 2005, one of the harassers falsely accused the student of writing a death threat on the bathroom wall. After an

investigation (which included a polygraph test, which the student failed), the student was suspended from school for 10 days beginning on January 3, 2006. The student's parents withdrew her from the school on January 4, 2006.

OCR interviewed the student who indicated that she had been friends with a group of students since 3rd grade, and at the beginning of their freshman year, the students began calling her names and posting statements about her on the Internet.

Held: For the district. OCR found that the student had been called names that might be construed as relating to her disability, but that she never reported that she was being harassed based on her disability, and the staff members who received the reports from the student believed that they were based on an ongoing feud between two students who had formerly been friends, not based on the student's disability. The student's interview with OCR supported the teacher's interpretations.

Racial insensitivity may rise to the level of harassment or discrimination. Thus, it is important that districts promptly respond to claims of racial insensitivity. For example, the case of Malcolm W. v. Novato Unified School District, 2002 WL 31770392 (Cal. App. 1st Dist. Dec. 11, 2002), involved a discrimination claim based in part on racially insensitive remarks made by students.

Facts: In February 1998, school A (located in the Novato School District) hosted a basketball game against school B. Plaintiffs, both African-American, were members of the School B basketball team. Prior to the game, approximately 15 students from school A arrived at the game dressed in costumes. "Though the exact description of the costumes varies, at least one student was wearing a 'black afro wig' and some had on face paint." Id. During the team warm-ups, plaintiffs overheard some of the students chanting racial slurs; they reported the chants to their coach, who instructed them to return to the locker room. The coach reported the incident to the school B vice principal, who reported the incident to the principal of school A. The principal discussed the incident with the group of students, and the chanting stopped. After the game, school A conducted interviews with students who were at the game, held an emergency staff meeting to discuss the incident, sent a letter of apology to school B, met with school B and the basketball team on two separate occasions to apologize, and issued announcements to the student body at school A regarding the importance of sportsmanship and respect. Plaintiffs filed suit, alleging (among other things) racial discrimination.

Held: For the district. Despite a history of racial hostility at school A, the district was not deliberately indifferent when it responded to the incident at the basketball game. The district took active efforts, before and after the basketball game, to develop racial sensitivity and eliminate racist behavior among students, parents, faculty, and administrators.

Racial insensitivity is an example of conduct that could constitute bullying or harassment in the policy adopted in accord with the Pupil Safety and Violence

Prevention Act. Similarly, as several of the above cases demonstrate, sexual or disability-based harassment could constitute bullying and actionable harassment under Title IX or Section 504.

B. First Amendment Protections

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Constitution, Amendment 1.

Not all speech is protected by the First Amendment. For example, “fighting words,” which have been defined as “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction” and “true threats,” defined as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” are not protected. Virginia v. Black, 538 U.S. 343, 359 (2003).

In the school setting, certain additional categories of speech may be regulated:

- Speech that is “vulgar, lewd, obscene and plainly offensive,” may be limited, restricted, or punished by school officials. Bethel School District v. Fraser, 478 U.S. 675 (1986).
- Reasonable restrictions may be placed on school - sponsored speech, such as school-sponsored publications. Hazelwood School District v. Kuhlmeier, 484 US 260 (1988).
- Student speech that does not fall in to either of those categories, may be limited, restricted, or punished provided that there are facts which may reasonably lead school authorities to believe that the speech will substantially disrupt the school environment or materially interfere with school activities. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Schools may enact policies that are both content and viewpoint neutral, even if those policies result in the suppression of speech. Douglass v. Londonderry School Board, 372 F.Supp.2d 203 (D.N.H. 2005). To withstand constitutional muster, policies pertaining to speech, including harassment and bullying policies, should be limited to speech that is unprotected by the First Amendment (i.e., a “true threat”), and speech that falls into the categories set forth by the Supreme Court in Tinker, Bethel School District, and Hazelwood.

When determining whether speech may be regulated, ask:

1. Where did the speech occur? (On-campus, off-campus, both)
2. If the speech occurred on-campus, then ask:
 - a. what type of speech is it? (Political, lewd, vulgar, offensive, etc).
 - b. what is the effect of the speech? (Was there a disruption? Could a disruption be reasonably anticipated)
 - c. where was the speech communicated? (Assembly, classroom, hallway, etc.)
 - d. is the speech part of a school sponsored activity? (Assembly, newspaper, play)
3. If the speech occurred off-campus, then ask:
 - a. did it constitute a “true threat”?
 - b. if not a “true threat”, is there a sufficient nexus between the bullying and the school to consider the speech as occurring on-campus? Did the bullying cause a substantial disruption to the school? Could a substantial disruption be reasonably anticipated?

C. Responding to Off-Campus Bullying

Recently, courts have struggled with the extent to which school administrators may regulate off-campus conduct. With the advent of instant messages, websites such as MySpace.com and Friendster, internet communications have substantially increased. Courts are generally holding that schools may discipline students for off-campus conduct, including internet speech, if there is a nexus between the conduct and the school. See Cohn v. New Paltz Central School District, 363 F.Supp.2d 421 (N.D. N.Y. 2005). As with on-campus conduct and speech, the inquiry is whether the off-campus conduct caused a serious disruption of the educational process. See Packer v. Bd. of Educ. of the Town of Thomaston, 717 A.2d 117 (Conn. 1998).

While the full extent to which school officials may regulate off-campus conduct, including speech, is unclear, the following cases do shed some light on this issue:

Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995)

Facts: On Sunday, September 18, 1994, a group of 15 students created a 9-page document entitled “The Shit List.” The document listed the names of 140

students, with each name “being followed by one or more lines of crude descriptions of character and/or behavior.” A handful of freshman, more than 30 sophomores and juniors, and more than 60 seniors “were characterized by epithets that were not merely insulting as to appearance, but suggestive, often explicitly so, of sexual capacity, proclivity, and promiscuity.”

The following Thursday, a high school senior and two other students made copies of the list and put them in a trash barrel. They were delivered to the school and discovered by a faculty member the following day. The Principal informed the school that the list was harmful and degrading and encouraged students to provide information as to the perpetrators. The following Monday, the three boys who had copied the list went to the principal’s office and denied any involvement in the matter. The next day, they returned to the principal’s office, said they photocopied the list, but denied knowing the contents of the list. They also indicated that they had photocopied the list off-campus. The principal informed them that they would likely face discipline.

In the meantime, the principal had discovered the names of the 15 students who were involved in creating the list. The principal sent a letter to those students and scheduled a meeting with them and their parents. During the meeting, the principal indicated that the list violated the school’s rules against harassment and obscenity. After the meeting, the principal met with the high school senior who instituted this case and informed him that he was indefinitely suspended. Shortly thereafter, the principal wrote to the student and his parents and informed them that he was suspended for 10 days and was to be excluded from extracurricular activities.

The student brought suit against the school, seeking injunctive relief, compensatory and punitive damages, and attorney’s fees, alleging that the District failed to follow required procedures prior to suspending him, and that the suspension violated state law which prohibited the “suspension of a student for ‘marriage, pregnancy, parenthood or for conduct which is not connected with any school-sponsored activities.’”

Held: For the district. The student’s due process rights were not violated. The court found that the student’s “admitted off-campus conduct led to the distribution of the list on school premises.”

Gendelman v Glenbrook N. High Sch., 2003 U.S. Dist. LEXIS 8508, 2003 WL 21209880 (N.D. Ill. May 21, 2003)

Facts: Plaintiffs, members of the junior and senior classes at Glenbrook N. High School, met for the annual “powder puff” football game, on a Sunday afternoon, off school grounds. All individuals in attendance were students at the High School. During the game, the juniors were “subjected to a variety of offensive and physical contacts, including violence, at the hands of the senior students,” described by the court as “hazing and harassment of an extreme sort.” The “game” was videotaped, and subsequently, several participants were charged with violations of the school handbook rules prohibiting hazing and harassment. The students, who were brought before

several administrators and given the opportunity to respond to the charges against them and were then suspended for 10 days, filed a complaint seeking an injunction ordering defendants to vacate their suspensions.

Plaintiffs alleged that the district did not have the authority to discipline the students because the event was not sponsored or sanctioned by the school, it did not take place on school property or during school hours, and the school had no interest in what had occurred. The District argued that its handbook prohibited hazing and harassment, and it did not limit that prohibition to school sponsored events.

Held: Plaintiff's request for a temporary restraining order was denied. It was unlikely that plaintiff's would succeed on the merits of their claim. "[G]iven the egregious nature of some of the conduct depicted in the videotapes, the nexus of the event to the . . . High School and the fundamental relationship that all of the participants had to the school, to hold that the school was powerless to act in these circumstances is patently absurd. When one set of students sets to prey upon another set of students in a ritualistic exercise, the consequences of which will necessarily effect the students' relationships while they are all in attendance at the s[a]me school, the ability of school officials to act in the area and discipline those who went beyond the pale of tolerable student behavior is manifest."

Impact: There is a strong public interest in keeping school environments safe and free from persons and events that will impede the learning process. To accomplish this purpose, school districts must be allowed to discipline students when discipline is warranted. The public interest is served when district's are permitted to punish students participating in incidents involving "egregious conduct."

Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. MO 1998)

Facts: Brandon B., a junior in high school, used his home computer to create a website that was critical of his high school. The website, which was not created during school hours, included crude and vulgar language and was highly critical of the administration at the school, and included a hyper-link that allowed the reader to access the school's homepage. Brandon did not create the website with the intention that it would be viewed at school; however, the site was accessed during school hours by a student who was angry at Brandon and "wanted to retaliate against" him. *Id.* at 1178. The student, Amanda, showed the site to an instructor who showed it to the principal. The principal "made the decision to discipline Beussink *immediately* upon viewing the homepage." *Id.* (emphasis in original). Beussink was suspended for ten days; as a result of the suspensions, and in accord with the district's absenteeism policy, his grades dropped 8.5 grade levels and he failed all of his classes. Brandon sued, alleging that the district violated his First Amendment rights, and requested a temporary restraining order, seeking to prohibit the district from applying the absenteeism policy.

Held: For the student. There was no evidence that the student was disciplined "based on a fear of disruption or interference with school discipline." Instead, the

student was disciplined because the principal was upset by the content of the homepage, which is “not an acceptable justification for limiting student speech under Tinker.”

Emmett v. Kent School District, 92 F.Supp.2d 1088 (W.D. Wash. 2000)

Facts: Nick Emmett, an eighteen-year-old high school senior, with no disciplinary history, created a website from his home computer and without using school resources or time. Although the website was captioned “Unofficial Kentlake High Home Page,” it included a disclaimer that warned visitors it was not sponsored by the school and was for entertainment purposes only. The site included tongue-in-cheek “mock obituaries” of two of Emmett’s friends, and allowed visitors to vote on “who would be the subject of the next mock obituary.” On the evening of February 16, the website was portrayed on the news as featuring a “hit list” of people to be killed. That night, Emmett removed the site from the Internet. The next day, the student “was summoned to the office and was placed on emergency expulsion for intimidation, harassment, disruption to the educational process, and violation of Kent School district copyright.” The expulsion was modified to a five-day suspension, which included a prohibition on sporting events. Emmett filed suit, seeking to enjoin the district from enforcing the suspension.

Held: For the student. There was no evidence that the off-campus speech was intended to threaten, had actually threatened anyone, or that the speaker manifested violent tendencies.

J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638 (Pa. 2002)

Facts: J.S., an eighth grade middle school student, created a website on his home computer entitled “Teacher Sux,” which contained derogatory, profane, offensive, and threatening comments, most of which were about his algebra teacher. One of the pages that referred to his algebra teacher was captioned “Why Should She Die?” and stated “Take a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman.” The website, which was not password protected, contained a disclaimer requiring visitors to agree that, among other things, they would not to tell District employees about the site. Nevertheless, faculty and administrators became aware of the site and reported it to the principal, who, after viewing the site, reported it to the police because he believed the threats were serious. The principal also informed the entire faculty that there was a problem at the school and told the algebra teacher that the site existed. After viewing the site, she became frightened, suffered physically and emotionally, and obtained medical leave for the remainder of the school year. In addition, “the effect of the morale of the students and staff . . . was comparable to the death of a student or staff member.”

At the end of the school year, the district sent a letter to J.S. and his parents, informing them that it was aware of the site and that it intended to suspend J.S. for three-days for violating school policies. After a hearing, the district extended the

suspension to ten days, and began proceedings to expel the student. J.S. appealed the expulsion, asserting that the District violated his First Amendment rights.

Held: For the district. Although the website did not contain “true threats,” the website substantially disrupted the school environment. In particular, the algebra teacher left school for the remainder of the year and took a medical leave of absence during the following school year. In addition, the student’s statements were viewed by other students, who also provided their own derogatory comments about various teachers and administrators on the web-site.

Layshock v. Hermitage School District, ___ F.3d ___, 2010 WL 376184 (3d Cir. Feb. 4, 2010).

Facts: Justin Layshock, a seventeen-year old high school senior, created a parody profile of the school principal on MySpace.com. The parody was created off-campus during non-school hours. Although Justin only informed a few of his close friends about the parody, word spread until most, if not all, of the student body was aware of the parody. After meeting with the principal, Justin was informed that the school intended to hold an informal hearing to consider disciplinary action, based on violations of the school disciplinary code. Following the hearing, Justin received a ten-day suspension, was removed from his advanced placement classes and placed in the Alternative Curriculum Education Program, and was prohibited from participating in school events, including graduation. Justin and his parents brought suit, alleging that the district violated his First Amendment rights.

The district court held that the school district could not establish a sufficient nexus between the speech and a substantial disruption of the school environment.

Held: For the parents. The district did not challenge the trial court’s finding that the profile did not cause a substantial disruption at the school. Instead, it argued that there was a sufficient nexus between the creation and distribution of the vulgar and defamatory profile of the principal to permit the district to regulate the conduct. The court held that the district could not punish the student for creating the profile unless it resulted in a foreseeable and substantial disruption in the school.

Wisniewski v. Board of Education of the Weedsport Central School District, 494 F.3d 34, (2d Cir. 2007), cert. denied, 128 S.Ct. 1741 (U.S. March 31, 2008).

Facts: Aaron W., a fifteen-year old eighth grader, created, and attached to the instant messaging feature of his family computer, an icon depicting a gun pointing to a head, a bullet leaving the gun, and blood splattering from the head. It bore the words “Kill Mr. VanderMolen,” (Aaron’s English teacher). The icon circulated from Aaron’s home computer for approximately three weeks, until it was reported to school officials. School officials and a Lieutenant from the Sheriff’s Department met with Aaron and his parents; Aaron was suspended for five days for making “threatening icons and language directed towards a teacher over a home computer and sent it to several students.” A

subsequent disciplinary hearing resulted in a finding that the icon was a “true threat” and that the District’s reaction was reasonable, led to Aaron being suspended for one semester.

Following the meeting, the Sheriff’s department determined that Aaron did not constitute a realistic threat to Mr. VanderMolen or any other school official and closed their investigation. In addition, a psychologist concluded that the student did not pose a threat to the teacher or other school officials.

Parents filed suit against the district, seeking damages under § 1983. The district court dismissed their suit on the basis that the icon was a true threat, and therefore, was not protected speech under the First Amendment.

Held: For the district. It was reasonably foreseeable that the student’s communication would cause a disruption within the school environment. The fact that the icon was created and transmitted off of school property did not insulate the student from discipline because it was reasonably foreseeable that the icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. “The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of [the plaintiff’s] classmates, during a three-week circulation period, made this risk at least foreseeable to a reasonable person, if not inevitable. And there can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment.” Thus, the school was permitted to discipline the student, regardless whether he intended the icon to be communicated to school authorities.

Key Points:

- Authority over off-campus conduct is “much more” limited than authority over on-campus expression; however, students may be punished for their off-campus speech if the speech substantially disrupts or materially interferes with the educational environment.
- In order to discipline a student for off-campus internet speech, there must be a reasonable belief that the speech will substantially disrupt or interfere with the educational environment.
- Speech that originated off-campus may be considered “on-campus speech” when “the speech is aimed at a specific school and/or its personnel [and it] is brought onto the school campus or accessed at school by its originator”
- Speech that constitutes a “true threat” requires an immediate response from school officials. Allowing a student to attend class and extracurricular activities, and failing to commence disciplinary proceedings

It is important to keep in mind that the above cases have all involved internet speech that originated off-campus. School officials may regulate on-campus internet usage and they may prohibit students from accessing websites such as MySpace.com while they are on-campus. Each district should have an Internet-use policy that sets forth the on-campus internet policy and gives students and parents notice of the consequences of violating the policy.

V. Conclusion

As a general rule, when courts are confronted with allegations pertaining to peer-to-peer bullying/harassment, the district will be judged based on the reasonableness of its actions. Thus, to prevent bullying, and when responding to bullying/harassment, you should consider the following:

- Are the district's bullying policies reasonable?
- Once you (the district) have received a report that bullying has occurred, did you respond in an appropriate timeframe?
 - Were the steps that you took reasonably likely to prevent future bullying?

Asking these questions, and taking steps to ensure that students are protected from bullying/harassment, should assist in reducing exposure for the district.