Two Years Later: Lessons Learned in Applying the Pupil Safety and Violence Prevention Act

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an overview of New Hampshire's Bullying law, RSA 193-F:1, et seq. 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

Since January 1, 2011, school districts have been subject to the comprehensive amendments set forth in the "Pupil Safety and Violence Prevention Act." Also known as the "Anti-Bullying/Anti-Cyberbullying Legislation," NH RSA 193-F prescribes a comprehensive policy-driven response to bullying and cyberbullying. This material draws on the practical experience of numerous districts in implementing the law and provides additional tips, pointers and advice as to best practices in implementing NH RSA 193-F.

II. Reports of Bullying

A. Our Legal Obligation

The law requires that our policy identify all persons to whom a pupil or another person may report bullying or cyberbullying. See NH RSA 193-F:4, II(f). In addition, the district is required to have a "procedure outlining the internal reporting requirements within the school or school district. . ." See NH RSA 193-F:4, II(g).

B. Identifying a Report

Over the past two years, two areas have presented challenges to school districts as they take receipt of initial reports. The first challenge is presented by the incoming report which does not use the word "bullying," or "cyber-bullying," but which contains factual components which include some elements of the definition of bullying. The second challenge is presented by the reporter who uses the word "bullying," or "cyber-bullying," as a talismanic term, but the facts do not contain any elements of the statutory definition of "bullying." See NH RSA 193-F:3, I(a)-(b).

From the perspective of the individual tasked with taking receipt of reports, i.e., the principal, it is tempting to engage in a prescreening process where a determination is made as to whether or not the report itself meets the criteria for a report of bullying. While this practice may be acceptable when the report does not contain any elements of bullying and where the reporter does not use the term, it is a potentially dangerous practice when the reporter has alleged facts containing any component of the definition of "bullying."

The best practice is to treat any report which may potentially rise to the definition as a report of "bullying." On occasions, both students and parents have inartfully reported an incident, only for the principal to discover at a later date, that the facts reported by the parent or student rose to the statutory definition of either bullying or cyberbullying.

C. High Incidence/Low Incidence Events

Over the course of the past two years, it has been evident that there are certain types of reports which occur with a high degree of frequency and as a result, can be addressed through a routine investigative process. However, certain low incidence events require a unique approach to investigation. For example, reports that may constitute sexual harassment, disability-based harassment and/or a safe school zones violation, may require a creative team approach to the investigation.

D. Cyberbullying Issues

"Cyberbullying," is defined by the law as "[c]onduct defined in paragraph 1 of this section [the definition of bullying] undertaken through the use of electronic devices." See NH RSA 193-F:3, II. Electronic devices "include, but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging and web sites." See NH RSA 193-F:3, III.

Cyberbullying is an area in which a school district is more likely to receive a report that, on its face, appears deficient. At first blush, texting and instant messaging after hours, may not meet the criteria for an "action or communication" defined as bullying, in that there may be little or no indication that the after school hours off campus activity has "interfered with a pupil's educational opportunities," or "substantially disrupted" the orderly operation of the school.

Unfortunately, the nature of digital communication is such that messages generated after hours, off campus, usually migrate onto campus. For example, the after-hours text message, e-mail, and instant messaging, is all located on the perpetrator or victim's smart phone when they enter the school. Therefore, the best practice is to treat all reports of inappropriate digital communication as a potential incident of cyberbullying.

E. Abuse of Reporting

There have been few circumstances where children have engaged in false reporting. In fact, educators need to be extremely careful that, when they identify a false report, that it is not an indicator of something else adverse occurring in that child's life. For example, the child who engages in false reporting with regard to sexual misconduct by another child, may be subconsciously self-referring as to incidents of potential sexual abuse by third parties.

Parents, on the other hand, have been observed to engage in false reporting. The majority of this false reporting occurs from a misunderstanding of what constitutes bullying. Some parents have operated under the assumption that if they use the term "bullying," or "cyberbullying," that it will enlist the district as an ally in their out-of-district conflict with other parents.

F. Consequences for False Reporting

There are no consequences for false reports by third parties. The reality is that districts do not have the luxury to prescreen reports, but instead, will have to investigate third party reports which at times will result in a determination that they are unsubstantiated. This however is a natural price districts must pay in order to effectively respond to bullying.

G. Artificially Created Bullying

In order for a single significant incident or a pattern of incidents to result in bullying, one of five criteria must be found to have been met. Three of those five criteria involve a significant exercise of subjective judgment on the part of the investigator. They are as follows: "(2) Causes emotional distress to a pupil; (3) interferes with a pupil's educational opportunity; (4) creates a hostile educational environment. . ." See NH RSA 193-F:3, I(a).

While the vast majority of the cases involve evidence of a clear causal link, certain school districts have encountered circumstances where it is unclear whether the emotional distress, interference with a pupil's educational opportunities, or the hostile educational environment genuinely exists or is a consequence of the parental reaction to the circumstances. For example, over the past two years, a number of parents have unilaterally withheld their child from school attendance demanding that the district mete out consequences to the alleged perpetrator before their child is returned to the school. In similar fashion, parents have alleged anxiety- related disorders and emotional responses to events which may, or may not have a valid causal nexus to the alleged incident of bullying. The district needs to exercise care not to accept certain representations by parents at face value, but instead should submit the requisite medical and mental health authorizations in order to verify that the interference with educational opportunities results from the bullying incident rather than a parental response.

III. Notice to Parents

A. Content Questions

The initial report to parents should be nothing more than confirmation that the district has received a report of an incident of bullying. The decision whether or not to provide any additional content to the report will be effected by whether or not the incident is also a Safe School Zones Act violation. If the district has encountered a Safe School Zones Act violation, then it will also have a collateral duty to promptly inform the parent of the nature of the violation.

IV. Investigation Process

NH RSA 193-F:4, II(j) requires that the district have a written investigation procedure.

A. Parent "Participation"

One issue principals have encountered is whether they should permit parental participation in the subsequent interviews. As a general rule, if the bullying incident is likely to result in student discipline, the parent should be given an opportunity to accompany their child to the investigative interview. While this may not be a requirement of the law with regard to high school age children, parents should be allowed to accompany their minor child to any investigative interview; particularly, if there is a risk of disciplinary consequences.

B. Identifying Collateral Issues

An initial report of bullying will frequently require that the principal identify collateral issues. It is important to note that the Safe School Zones Act, the district sexual harassment policy, anti-discrimination policies, including disability harassment policies, all may be implicated during the course of an investigation. In addition, the investigation itself may give rise to collateral reporting duties.

In addition, bullying which reflects a pattern of incidents involving the same perpetrator may very well give rise to a duty to refer the perpetrator for evaluation under the IDEA.

C. Scope of the Investigation

If principals were to conduct comprehensive in depth investigations, they would find themselves no longer serving as principals and instead serve as detectives. As a general rule, the scope of an investigation is driven by the number of participants and the severity of the complaint. In conducting their investigation, the principal should use a civil standard of review, asking the question "Do I have sufficient evidence to form a conclusion? Have I identified the probative evidence?"

D. Documentation

The documentation of an investigation is required by state law and local policy. More importantly, the caliber and quality of the documentation may also have a bearing on the subsequent appeal. This is discussed further in Section IX.

E. Investigations of Cyber-bullying

There is an open legal question with regard to the authority of a school administrator to search a student's cell phone. The case of Klump v. Nazareth Area School District, 425 F.Supp. 2d 622 (E.D. Pa 2006) is instructive on this issue. In Klump, the school district prohibited cell phone usage and display, but did not prohibit the presence of a phone on campus. The phone slid out of the student's pocket and came to rest on his leg. His teacher enforced the anti-display policy by confiscating the

phone. She and the principal then began making calls with his phone to see if other students were violating the cell phone policy. They accessed the student's phone number directory to do such. They examined his text messages and listened to his voicemail messages. They also held an online conversation with the student's brother without identifying themselves. The conduct by the educators resulted in a multiple count law suit alleging violation of the Fourth Amendment, invasion of privacy, two violations of the wiretap laws, violation of the state constitution and negligence. The court declined to dismiss the Fourth Amendment, invasion of privacy, and one of two wiretap claims. Significantly, they allowed these claims to proceed against the individual defendant teacher and principal.

The search of cell phones is an emerging area of the law and the jurisprudence addressing the issue is scant. However, all indicators are that the seminal case of New Jersey v. TLO, 469 U.S. 325 (1985) sets the legal standard for the search of a cell phone. TLO stands for the premise that students are protected by the Fourth Amendment, but that the probable cause requirement does not apply to students in the school setting. Instead, the Supreme Court held that a student search must satisfy the reasonableness requirement of the Fourth Amendment. In the context of school, this means that the search must be justified at its inception and reasonable in scope. For a search to be justified at its inception there must be reasonable grounds for believing that the search will turn up evidence that the student has violated, or is violating either the law or the rules of the school. See TLO, 469 U.S. at 341-342.

These legal principles are instructive with regard to the investigation of cyberbullying. As a general rule, principals should seek permission from the victim/student and their parents before looking at that child's cell phone. The search of a perpetrator's phone should only occur if the administrator has a reasonable basis for concluding that either the law or a rule of the school has been violated.

1. The Intersection Between Discipline and Speech

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 Facebook.com, 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). 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 Sh[__] 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."

F. Bethany T. v. Raymond School District

The recent case of Bethany T. v. Raymond Sch. Dist., 2013 DNH 74, 2013 U.S. Dist. LEXIS 67012, 2013 WL 1933756 (D.N.H. May 10, 2013), illustrates the importance of investigating allegations of bullying.

Facts: On nearly a dozen occasions during the 2010-11 school year, student, a "half African-American, half Caucasian male," was a freshman at Raymond High School ("RHS"). During the school year, he was subjected to racial slurs from other RHS

students. One student also threatened to burn a cross in student's front yard while wearing a white hood. Another student taunted student with a book about the KKK. The incidents occurred throughout the entire school year and each incident was reported to the district. The school disciplined some but not all of student's harassers. Parent alleged that no additional steps were taken to prevent the harassment from continuing to occur.

Parent alleged that the harassment became so severe that student "found himself sick with the idea of going to school and was absent for at least (20) days. In response, . . . [the district] sent him truancy letters threatening police action and court costs and fines if he continued to miss school."

Parent filed suit against the District, alleging, among other things, violations of Title VI, Section 1983, state law, and negligence. The District moved for summary judgment.

Held: For the parents. The court noted that to establish a violation of Title VI (racial discrimination), the parent needed to establish that the District was deliberately indifferent to the alleged student-on-student harassment. Deliberate indifference is shown where the district's response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances. Deliberate indifference usually presents a jury question.

The school district here asserted that this is an appropriate case for summary judgment because the basic facts about their response to the harassment are not in serious dispute. However, what is reasonable must be a fact that is undisputed in order for summary judgment to occur. In this case, what the school district did is not in dispute, but whether that action was reasonable was in dispute, and summary judgment was denied. The court also denied summary judgment on the plaintiffs' negligence claim for the same reasons.

With regard to the Section 1983 claim, the court noted that "the issue of whether a municipality had a custom or policy that caused a violation of a plaintiff's right is a jury question," unless "no reasonable jury could conclude that the municipality had such a policy or custom." The court found that a jury could conclude that such a policy existed, noting that "school principals and superintendents may be 'policymakers' for purposes of school discipline," and that the "actions or inactions of policymakers may evidence a custom or practice of the municipality."

V. Decisions

A. Interpreting the Definition of "Bullying"

Over the past two years, some districts have been at risk for interpreting the definition overbroadly resulting in the non-sequitur conclusion that any incident of misconduct is an incident of bullying. Also problematic has been the increased

incidence of parent-induced "interference with a pupil's educational opportunity." In short, parents are withholding their child from school, expressing dissatisfaction with the result of the investigation. This creates a circular problem where it is the parent's response to the incident rather than the child's response that creates the interference with a pupil's educational opportunity.

B. Reasons for the Decision

Most educators are good at documenting facts, but at times have been deficient in articulating the reasons for their decision. Rationale for a decision is one of the most important components of a bullying investigation. The reasons for the decision drive the remediation and are critical to preserve the decision in a subsequent appeal.

C. Alternative Pathways

At times, educators have sought to recategorize alleged incidence of bullying as violations of the Safe School Zones Act. While there may be a legitimate factual basis for doing such in some cases, a Safe School Zones Act violation and an incident of bullying can overlap. Like all Venn diagrams, there will be fact patterns where the facts indicate both a Safe School Zones Act violation and bullying. The same can be said for sexual harassment and disability-based harassment. These are not truly alternative pathways, but instead dual pathways where the district must conduct a multi-faceted investigation.

1. Cost/benefit analysis.

NH RSA 193-F:7 provides that a school administrative unit employee, school employee. . .regular school volunteer, pupil, parent, legal guardian. . . shall be immune for civil liability for good faith conduct arising from or pertaining to the reporting, investigation, findings, recommended response or implementation of a recommended response under this chapter. The Department of Education shall be immune from civil liability for its good faith conduct in making recommendations under this chapter." (Emphasis added). This inartfully written statute not only provides insulation for the employees of the district, but literally provides immunity to pupils, parents and legal guardians for "good faith conduct arising from or pertaining to bullying statute." The implications of this grant of immunity have not been fully explored and are potentially profound. In addition, NH RSA 193-F:9 states that "Nothing in this chapter shall. . .create a private right of action for enforcement of this chapter against any school district or chartered public school or the state."

The general grant of statutory immunity warrants potentially treating a "close-call" report as an incident of bullying in order to afford the immunity to the district. Please note that the immunity granted by the Safe School Zones Act is far more narrow. It provides that, "Any public or private school employee or employee of a company under contract with a school or school district who in good faith has made a report under RSA 193-D shall not be subject to liability for making the report."

VI. Remediation and Discipline

The statutory law permits responses of the district to substantiated bullying ranging from remediation to discipline. At times, districts have sought to mediate disputes between children in a manner which included the parents. At times, that process has gone very badly and remediation has effectively been stymied.

VII. Long-Term Outcomes

The jury remains out as to whether or not school districts will see long-term beneficial outcomes from implementing this policy. However, there have been short-term benefits in the form of heightened sensitivity to incidents of bullying and increased advocacy for victims.

VIII. Post-Investigation Notice to Parents

State law and local policy require that upon completion of the investigation, the principal or his/her designee provide notice to the parents of the pupils involved in the incident.

Some policies do not specify whether the notice must be in writing. The potential problem with the oral reporting of an unsubstantiated incident is that the principal may not articulate the reason for their decision. A decision by a school district that a child has not been the victim of bullying is appealable. This issue presents an open question as to whether districts would be in a better position with regard to appeals if they were to articulate the rationale for their decision in writing to parents.

IX. Procedural Issues

Although RSA 193-F is silent about appeals, the New Hampshire State Department of Education has taken the position that it has jurisdiction over appeals by parents with regard to incidents of bullying. This creates the risk of a collateral attack to disciplinary decisions which heretofore were not appealable. A number of these procedural issues remain to be sorted out over the course of the ensuing years and may result in either further regulation by the State Department of Education or potentially litigation.

A. Being Ready for Your First Appeal

The goal of any administrator who's decision is the subject of an appeal should be to create a turn-key package for the Superintendent and ultimately the Board. From a process perspective, the principal's decision is appealable to the administrator for an independent review. The Superintendent's independent review is then appealable to the Board. If the parent remains aggrieved, they have a right to appeal to the State Board of Education.

X. Statistics

A. What Will Our Data Show?

It is too early to definitively determine what the data will show with regard to incidents of bullying. The first year for most school districts was a year of education and gaining a comfort level with regard to the reporting and investigation process set forth in their policies. The end result may be that the second year of data will show an increase in incidents of bullying stemming in part from a greater familiarity on the part of students, parents and school districts with regard to the district's anti-bulling/anti-cyberbullying policies. It is of course our hope over time that these statistics will mitigate as the school culture further improves.

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