BULLYING IN THE WAKE OF PHOEBE PRINCE: NEW STRATEGIES FOR COMBATING PEER BULLYING IN SCHOOLS

By Julia Beien

“Phoebe definitely didn’t want to fight with the girls in the school. She just wanted to keep to herself and keep things the way they were. She wanted people to stop picking on her, to stop being bullied. She wanted people to leave her alone. She wanted people to stop spreading rumors and stop the girls from talking about her.”

THESIS

This paper will argue that neither anti-bullying legislation nor criminal consequences for acts of bullying are sufficient to protect students from peer harassment in schools. While solutions that rely on action by public institutions are important, parents must have the power to advocate for their children directly to schools. Victims of bullying may suffer so dramatically at the hands of their peers that they develop severe emotional problems. Therefore, these children should be able to use the same laws that guarantee special education students the right to a free and appropriate education and thus require schools to protect them from harm. While using special education laws is an extreme solution, it is necessary to prevent schools from hiding behind poorly implemented or ineffective bullying policies and to ensure that victims of bullying do not have to rely on the criminal justice system for relief.

INTRODUCTION

It is a sad political truth that it often takes a tragedy to create a willingness to change. In January of 2010, such a tragedy occurred, and turned the national spotlight to the issue of bullying in schools. On January 14, Phoebe Prince, a 15-year-old high school student who had

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1 Commonwealth’s Memorandum of Law In Support of Its Motion For Joinder of Youthful Offender Indictment and Delinquency Complaints Pursuant to Mass.R.Crim.P 9(a) and G.L.C. 119 54, 5, Commonwealth v. Flannery Mullins, No. YO10H002-3 (Juvenile Court Dept. of the Trial Court April 8, 2010).
recently moved to the Boston area, took her own life.\textsuperscript{2} Reports quickly surfaced that Phoebe killed herself because of relentless bullying at the hands of several of her classmates.\textsuperscript{3}

In the aftermath of this event, parents and community officials attempted to find out how this happened and what could be done to prevent it from happening again. School officials rushed to create an anti-bullying policy.\textsuperscript{4} And, the district attorney stepped in, bringing criminal charges against nine of the students who bullied Phoebe.\textsuperscript{5}

\textbf{ANTI-BULLYING LEGISLATION}

Another public responses to the suicide was to push for the passage of statewide anti-bullying legislation. At the time, New Jersey, for example, was one of only seven states that did not have some kind of anti-bullying legislation in place.\textsuperscript{6} The resultant New Jersey law is one of the nation’s toughest, prohibiting actions that could cause emotional or physical harm, including messages sent via cellular phone or the Internet.\textsuperscript{7} The law also requires schools to report significant cases of student harassment to criminal authorities.\textsuperscript{8}

Bullying policies have been shown to be extremely successful, but they require buy-in from the entire community.\textsuperscript{9} The power of these policies comes from changing the school

\begin{itemize}
\item \textsuperscript{2} Commonwealth’s Memorandum of Law In Support of Its Motion For Joinder of Youthful Offender Indictment and Delinquency Complaints Pursuant to Mass.R.Crim.P.9(a) and G.L.C. 119 54, 4, Commonwealth v. Ashley Longe, No. YO10H001 (Juvenile Court Dept. of the Trial Court April 8, 2010).
\item \textsuperscript{3} Id. at 5.
\item \textsuperscript{7} Id.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Rod Limper, Cooperation Between Parents, Teachers and School Boards to Prevent Bullying in Education: An overview of Work Done in the Netherlands, 26 Aggressive Behavior 125, 129-130 (2000).
\end{itemize}
culture; teaching students about the danger of bullying and the importance of respecting one another.\textsuperscript{10} However, even when implemented effectively, anti-bullying programs are a long-term solution that will not result in immediate changes.\textsuperscript{11} Furthermore, the effectiveness of these programs is tied to the fidelity with which the program is adopted.\textsuperscript{12} Schools cannot pick and choose the elements they use, nor can they use them sporadically.\textsuperscript{13} Because these programs are time intensive to implement, there is a high likelihood that they will be pushed aside in favor of subjects that will increase standardized test scores. This will limit the programs’ effectiveness while also potentially sending a message to students that bullying is not as important as the subjects that merit testing.

Schools should not be able to point to their program when a child is being bullied and argue that the school is doing all that it can or needs to do. Bullying programs may become a \textit{de facto} safe-harbor for schools that implement them. Even where bullying issues improve dramatically, there should still be recourse for the few who suffer.

Finally, bullying polices in public schools can be handcuffed by the First Amendment. More and more, bullying has become a cyber phenomenon. Bullies torment their victims by harassing them on \textit{Facebook} and \textit{Youtube}, and through cell phone text-messages. However, public schools cannot prohibit student speech that occurs outside of its walls unless it is likely to create a substantial disruption within the school.\textsuperscript{14} Furthermore, recent court cases have held that schools cannot discipline students for cruel things they do and say using these media.\textsuperscript{15} As a

\textsuperscript{10} Id. at 127.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{15} See, Snyder v. Blue Mt. Sch. Dist. 593 F.3d 286 (2010).
result, polices that rely on prohibitions of student speech in these contexts may be found to be unconstitutional.

**CRIMINAL CHARGES AGAINST BULLIES**

Likewise, criminal charges, by themselves, are not the solution. Bullying actions are often so that subtle teachers are not aware of them. As a result they may not rise to the level of harassment or stalking. Furthermore, the State has discretion to choose whether to prosecute offenders. Additionally, scientific evidence shows, and the Supreme Court has recognized, that the undeveloped nature of the adolescent brain is less capable of understanding consequences than the adult mind. As a result, even when the government chooses to bring charges, the lack of certainty that the bully will be prosecuted inhibits the effectiveness of criminal charges as a deterrent to bullies.

Finally, criminal charges result in criminal trials where the bully has the right to a defense, which may force the victim to suffer further. For example, in the Phoebe Prince case, one of the defendants, charged with statutory rape, is seeking Phoebe’s medical and psychological records and information about an investigation of the Prince family by the Department of Children and Family Services. It would be quite reasonable for parents to forgo criminal charges to spare their children these inquiries.

**CLAIMS DIRECTLY AGAINST SCHOOLS**

While mandatory bullying policies and the potential for criminal charges are good tools, they are not sufficient to protect students from bullying. Instead, power must remain in the

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17 See, Proper v. Simmons, 543 U.S. 551, 570 (2005) (Acknowledging research that shows that juveniles lack the reasoning skills of adults).
hands of parents to advocate for their children, and schools must be held liable for bullying that occurs within their walls. This can be achieved by giving parents the power to bring suit against their children’s schools. When successful, courts force the school to either take steps to ensure that the student is not bullied or to place the student in another school where they can be protected. However, the effectiveness of this strategy hinges on whether the parents can bring a claim against the school.

**TORT CLAIMS**

Students who suffer from bullying in public schools have had a very difficult time bringing claims against schools. Suits against public schools are usually unsuccessful because the schools are immune from tort liability. This immunity can protect school officials even if their actions are found to be grossly negligent. Furthermore, even if parents are able to overcome the governmental immunity provision, courts have found that schools generally do not have a duty to protect students from the tortuous actions of other children that occur while the students are at school, unless the school has specific knowledge of the danger and control over the situation.

These restrictions create a bleak picture for parents who attempt to hold a school responsible for bullying that occurs on its premise. A single act of violence is insufficient, regardless of whether it was carried out in a way that was foreseen by the school or by a student whom the school knew was dangerous. As a result, parents are in the unenviable position of

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23 Lawson v. City of Chicago, 662 N.E. 2d 1377 (Ill. App. Ct. 1996) (Holding that even when a school knew that there was a danger of gun violence and had purchased a metal detector, the school would not be liable for the wrongful death of a student who was shot by another student on a day when the metal detector was not used);
watching their children be subjected to continuous, and often escalating, bullying. They must also follow school procedures, which rarely resolve the problem, before they can gather enough evidence to show that the school was responsible for the bullying. 24

**FEDERAL CLAIMS**

In addition to tort claims, some bullying victims have attempted to bring Federal claims alleging that the school's actions deprived the student of his or her rights to personal integrity and security under the Fourteenth Amendment to the United States Constitution. 25 Plaintiffs base their claims on the special custodial relationship created by compulsory school attendance laws. 26 However, courts have rejected these claims, citing *DeShaney v. Winnebago County Dept. of Social Services*, in which the Supreme Court held that the government's failure to protect individuals from privately inflicted wrongs generally cannot violate the Due Process Clause. 27

However in some cases, specific federal statutes can provide relief. The most successful bullying cases have been brought under either Title IX of the Education Amendments of 1972 or the Individuals with Disabilities Education Act (IDEA). 28 These statutes spell out the specific circumstances in which a claim can be brought against a school.

Students who have been the victim of bullying in the form of sexual harassment or discrimination have been successful in holding schools liable under Title IX. 29 The Supreme Court held that schools may be liable for subjecting their students to discrimination where the

24 See infra BULLYING AS CAUSE FOR DISABLED STATUS for discussion
26 Id. at 643.
27 DeShaney v. Winnebago County Dept. of Social Svcs (1989) (Holding that it was not a deprivation of due process where the a state agency failed to intervene when the had reason to know that a child who had been under their care was attacked by his father).
28 Title IX of the Education Amendments of 1972, 20 USC § 1681 et seq.,
school is deliberately indifferent to known acts of student-on-student sexual harassment. However, the court specified that acts of teasing and name-calling are insufficient to subject a school district to Title IX liability.

Similar to the way that Title IX provides relief to students who are bullied on account of their gender, the Individuals with Disabilities Education Act (IDEA) can be used to protect students from bullying that arises from their disability. In order to make a claim under IDEA, a bullied student must show that the school refused to provide him with a Free and Appropriated Public Education (FAPE) due to some discriminatory intent. This is a high standard for parents to meet, but a pivotal one. Students who qualify for special education services can receive relief in the form of alternative school placements if the school cannot provide them with an appropriate placement.

BULLYING AS THE CAUSE OF DISABLED STATUS

While this strategy may be successful for students with diagnosed disabilities, it is not available to all victims of bullying. Many students who experience bullying are picked-on for reasons having nothing to do with a protected characteristic. However, when the bullying itself is so severe that it causes a student to suffer a disability, the student can become qualified for special education services. This route could prove to be particularly successful because the school must provide protection for the student from bullying in order to provide him with FAPE.

Evidence that this strategy may be successful can be found in several recent bullying cases. In Patterson v. Hudson Area Schools, the student-plaintiff was bullied from the time he

31 Id.
33 Scrugg, 2007 WL 2318851 at 17.
was in seventh grade until he left the school to complete his GED through classes at a community college.\textsuperscript{36} In seventh grade, the student endured significant bullying. He was mocked with name-calling and was assaulted by another student.\textsuperscript{37} The school assessed the student for special education services and found him to be emotionally impaired under the IDEA.\textsuperscript{38} The bullying continued, culminating in his being attacked in the locker room after a ninth grade basketball game.\textsuperscript{39} The student brought suit under IX sexual harassment, however it is possible that he could have brought a suit under IDEA because the student was found to be suffering from emotional impairment.\textsuperscript{40}

Similarly, in \textit{Shore Regional High School Board of Education v. P.S.}, a student who was bullied in a situation factually similar to the one in \textit{Patterson} was successful in bringing a suit against the school based on IDEA. There, the student was called names like “faggot,” “homo,” and “transsexual,” and was assaulted by his classmates.\textsuperscript{41} Although he had previously been classified as eligible for special education due to a perceptual impairment, his diagnosis was later changed to emotional disturbance due to the constant bullying.\textsuperscript{42} His parents sought to enroll him in a different school, where they believed he would not be bullied but the school maintained it was not a necessary placement and instead planned to send him to the local high school.\textsuperscript{43} The school believed that if it granted the student’s request, it would set a precedent requiring it to allow any non-disabled student to attend the other school if they wished.\textsuperscript{44} The court found that the school was required to provide the student with an education that was sufficiently free from

\footnotesize{\textsuperscript{36} Patterson v. Hudson Area Schs., 2007 WL 4201137 at 1.  
\textsuperscript{37} Id.  
\textsuperscript{38} Id. at 2.  
\textsuperscript{39} Id.  
\textsuperscript{40} 20 U.S.C. § 1432(1)  
\textsuperscript{41} Shore, 381 F.3d at 195.  
\textsuperscript{42} Id. at 196.  
\textsuperscript{43} Id.  
\textsuperscript{44} Id.}
the threat of harassment to constitute FAPE. In this case, the court found that the student would not receive FAPE at his local high school and his school district was required to pay for him to attend the out-of-area high school.

The situation in Shore Regional High School and Patterson suggest a new strategy that parents could employ to require schools to provide their children with an environment that is free from bullying. In both cases, the court found that the schools had shown they were incapable of protecting the students at issue from being bullied by other students. Although, as discussed previously, schools do not generally have a duty to protect students from the torts of third parties, the situation changes when those tortuous actions are causing the student to be denied FAPE.

In order for a student to qualify for special education services the student must be diagnosed with a disability that was caused by the bullying he or she experienced in school. In both Shore and Patterson, the students were diagnosed with emotional disturbance or impairment. This is not surprising, as research has consistently shown the harmful effects of bullying.

Once the child qualifies for special education services, the school will be required to provide him with FAPE. Since the disability is caused by bullying, the school would need to provide the student with an environment that is free from bullying. When the court has stepped in to determine what constitutes a bullying-free environment, they have set the bar quite high. The court has found that it is not enough for the school to stop an individual perpetrator, if other

45 Id. at 199.
46 Id.
47 See supra CLAIMS DIRECTLY AGAINST THE SCHOOL
48 Shore at 196; Patterson, 551 F.3d at 441
49 Shore at 196; Patterson, 551 F.3d at 441.
51 20 U.S.C §1901(9)
52 See Theno, 377 F.Supp. at 592; Patterson, 551 F.3d at 438
students continue where the initial bully left off.\textsuperscript{53} If the student can show that the bullying continues despite the school implementing some changes in policies, the court is willing to look past form and into the substance of whether the abuse has stopped. \textsuperscript{54} This will prevent the simple implementation of an anti-bullying policy from becoming a safe-harbor for schools, when faced with specific bullying issues.

If the school is unable to provide the student with a bullying-free environment within its walls, the court has shown a willingness to require that the school provide an alternative placement.\textsuperscript{55} In \textit{Patterson}, the school paid the student’s tuition at a local college so that he could complete his high school course work.\textsuperscript{56} In \textit{Shore}, the school paid for the student to attend an out-of-district high school.\textsuperscript{57} Although neither of the bullying victims was placed in private schools in these cases, such placements are not precluded.\textsuperscript{58} Courts have been willing to place students in private schools when they find it necessary for FAPE.\textsuperscript{59} Additionally, in both of these cases, the student was sent to the placement that the family requested, this suggesting that if the student can demonstrate that the most appropriate placement is a private school, the public school would be required to provide it.\textsuperscript{60}

While there is evidence that these steps would be successful in requiring public schools to provide a student who suffers from extreme bullying with a bullying-free environment, it is far from an ideal solution. Before either of the students discussed above were diagnosed with emotional disturbance, they had already been subject to significant bullying at the hands of their

\textsuperscript{53} \textit{See} Theno, 377 F.Supp. at 592; Patterson, 551 F.3d at 438.
\textsuperscript{54} Patterson, 551 F.3d at 438
\textsuperscript{55} \textit{Id.} at 443.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} at 197.
\textsuperscript{58} \textit{See}, Justin G. v. Board of Educ. of Montgomery Co., 148 F. Supp. 2d 576 (D.Md. 2001) (Holding that where the school is unable to provide FAPE, they may be responsible for private school tuition).
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 196; Patterson, 551 F.3d at 441.
peers.\textsuperscript{61} In \textit{Shore}, the student was classified as emotionally impaired in March of his eighth grade year, after he had been bullied since fifth grade and had attempted suicide.\textsuperscript{62} In \textit{Patterson}, the student was classified as emotionally disturbed at the end of his seventh grade year, when the abuse had begun two years prior, at the beginning of sixth grade.\textsuperscript{63}

It is quite unrealistic to suggest that a solution that requires a child to suffer two or more years of extreme bullying before the school is required to intervene is sufficient. Typically, a period of time elapses between when the bullying begins and the student is diagnosed with emotional disability.\textsuperscript{64} Then the school does not become obligated to protect the student until he or she becomes eligible for special education services.\textsuperscript{65} Once those services are in place, the school has a period of time to attempt to rectify the bullying.\textsuperscript{66} If the student is still subject to bullying after the school has attempted to rectify the situation, or if the parent and school disagree about whether the student has an appropriate placement, the parent must exhaust all administrative remedies before going to court.\textsuperscript{67} Even in the best-case scenario, this could take a year or more, during which time the child suffers at the hands of bullies.

This strategy is also likely to have significant public policy implications. Special education services are very expensive and already make up a significant portion of every school district’s spending.\textsuperscript{68} Adding a new, and potentially very large, group of students could wreak havoc on already tight budgets.

\textsuperscript{61} \textit{Shore}, 381 F.3d at 197; \textit{Patterson}, 551 F.3d at 439-41.
\textsuperscript{62} \textit{Shore}, 381 F.3d at 197.
\textsuperscript{63} \textit{Patterson}, 551 F.3d at 439-41.
\textsuperscript{65} \textit{Id}.
\textsuperscript{66} \textit{Id}.
\textsuperscript{67} \textit{Pollowiz}, at 90 Fed. Appx. at 438; B.A., 2000 WL 760734.
\textsuperscript{68} Gregory F. Corbett, note, Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act violate a general Education Student’s Fundamental Right to Education? 40 B.C.L.Rev. 633, 634 (1999).
It might be this economic aspect that would force schools to get serious about comprehensive bullying policies. Under the current funding regime a bullying policy is not as important to the school’s bottom line as their test scores. Therefore, bullying programs are likely to fall by the wayside. But, when the school has an equally strong financial incentive to prevent bullying, it is far more likely that schools will invest the necessary time and energy to implement these programs and ensure they are achieving the desired results.

CONCLUSION

In the end, the only long-term sustainable solution is for all the stake-holders in the education process to work together to eradicate bullying in schools. This process will be complex and multi-faceted. The steps taken by the community after Phoebe Prince’s death may represent an important turning point in public awareness on the issue of bullying. But legislative anti-bullying measures and criminal charges cannot stop bullying, and school bullying programs are only effective when then are implemented consistently.

Using special education laws to qualify victims of bullying for services is costly, in terms of time, emotional energy, and money. Nevertheless, it could play a critical role in changing the economic incentive structure for schools when dealing with bullying. When preventing bullying is as important to a school’s budget as achieving passing test scores, then it will be a real priority for school districts to achieve results. Furthermore, it is when schools instill in students from the moment they walk in the door that bullying is not acceptable and that all students must respect one another that a great paradigm shift will occur. It is this shift which will result in an end to bullying.

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