VICTIMS WITH NO ACCESS TO THE COURTS: WHY LIABILITY SHOULD BE IMPOSED ON SCHOOL DISTRICTS FOR BULLYING

By: Katelyn Deady

I. The Bullying Epidemic

In a “Dear Colleague” letter1, issued on October 26, 2010 from the Department of Education, the government heeds a warning that school officials may be liable for civil rights violations for acts of bullying and cyberbullying.2 School districts may violate Civil Rights Statutes, including Title VI and Title IX of the Civil Rights Act of 1964 and Title II of the Americans with Disabilities Act of 1990, when harassment encompassed by those statutes is tolerated, ignored, or inadequately address by school officials.3 In a position statement on inter-student violence,4 Francisco Negron, Chief Counsel for the National School Boards Association, responded by cautioning against this lowered threshold for school district liability for bullying.5 Francisco Negron argued that classifying bullying and cyber-bullying, as a civil right violation will only invite large amounts of litigation that will syphon funds from already limited school resources.6 To date, it is unclear which side the courts have taken. What is clear is that without imposition of liability on school districts, administration, teachers, and staff, victims of bullying have no clear means of recourse. Like all tort cases, liability should follow when

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2 “Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating.”
3 See supra note 1.
4 Position Statement of the National School Boards Association, Commission on Civil Rights Briefing on Inter-Student Violence, Francisco M. Negron, Jr., General Counsel, May 13, 2011.
5 See supra note 4.
6 See supra note 4.
there is a foreseeable risk of harm and when action could have been taken to prevent the harm. In this case, liability should fall on the hands of school districts and administration that knew or should have known of the foreseeable risk of harm associated with bullying and who are the only people in a position to take steps to intervene, address, and prevent future bullying.

There are few absolutes in the area of constitutional law and the classroom. But there are two things that have proven to be true. It is well settled that a students’ first amendment rights do not vanish at the schoolhouse doors.7 It is also well settled that there is no fundamental right to an education.8 Does this too mean there is no fundamental right to safety in school? These two basic principles of constitutional law have merged to create a victim with no clear legal remedy, the victim of bullying.

Bullying has existed since the creation of the one room schoolhouse. But it has evolved over time. Bullying is any "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time."9 Today, students can no longer return to the confines of their homes to escape from the torment of their bullies until the next day. In the age of technology, bullying is more pervasive than ever.10 With cyber-bullying,11

9 stopbullying.gov
10 U.S. Department of Education, National Center for Education Statistics, Indicators or School Crime and Safety: 2006, Indicator 11: Bullying at School (2007), at http://nces.ed.gov/programs/crimeindicators/ind_11.asp ("In 2005, about 28 percent of students reported having been bullied at school during the last 6 months. Nineteen percent of students said that they had experienced bullying that consisted of being made fun of; 15 percent reported being the subject of rumors; and 9 percent said that they were pushed, shoved, tripped, or spit on. Of those students who had been bullied, 79 percent
students are at the whim of their aggressors all hours of the day. Even worse, these acts of bullying and humiliation can be published to social networking cites and accessed by masses of people.

The Constitution, tort immunities, and the general reluctance for law enforcement to enter the classroom have always made bullying difficult to police. With cyberbullying, that difficulty has increased ten fold. Even more difficult questions, like who should be held responsible for the bullying and what remedial steps can be taken without infringing on a bullies right to free speech, make bullying much more difficult to combat.

Parents are generally responsible for the acts of their children under the age of eighteen. During school hours, public schools assume a custodial role over children. The United States Supreme Court has held that "[t]eachers and school administrators, it is said, act in loco parentis in their dealings with students: their authority is that of the parent." Essentially, parents entrust the safety and well being of their children to teachers and administrators. Put another way, teachers and school administrators assume a duty to care for students as a parent would during school hours.

said that they were bullied inside the school, and 28 percent said that they were bullied outside on school grounds. Of the students in 2005 who reported being bullied during the previous 6 months, 53 percent said that they had been bullied once or twice during that period, 25 percent had experienced bullying once or twice a month, 11 percent reported being bullied once or twice a week, and 8 percent said that they had been bullied almost daily").

11 "Cyberbullying is bullying that takes place using electronic technology. Electronic technology includes devices and equipment such as cell phones, computers, and tablets as well as communication tools including social media sites, text messages, chat, and websites," at stopbullying.gov

In many circumstances, schoolteachers and administrators are in a unique position capable of intervening and protecting victims of bullying. Nonetheless, the majority of courts have enabled schoolteachers and administrators to turn a blind eye to bullying and violence that occurs directly under their watch. The Internet makes it even easier to ignore the reality of bullying because it is no longer confined to the hallways and playground at the school. When reported incidents of bullying are disregarded and no effort is made by the schools to address the problems, and a child is injured as a result of that bullying, the targeted children and disheartened parents should be able to seek redress.

In recent years, bullying has been the subject of national news with alarming frequency. Tragic endings involving victims like Megan Meier, Tyler Long, and Phoebe Prince are becoming a dime a dozen. Stories like these and the involvement of political actors, like the United States Department of Education and President Obama, have stirred a national debate concerning the pervasiveness of bullying. As a result, narrow exceptions may have begun to carve out and hopefully, the coming years will see courts more willing to assign liability to schools that fail to act to address bullying.

II. Limited Legal Recourse

a. Civil Rights

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13 Megan Meier, a thirteen-year-old girl, hanged herself after being the victim of cyberbullying on MySpace.
14 Tyler Long, a seventeen-year-old boy with Asperger’s Syndrome, commit suicide after years of bullying from classmates.
15 Phoebe Prince, a fourteen-year-old native of Ireland, hanged herself after being the victim of bullying for a matter of months.
As was already established above, it is clear that there is no constitutionally protected right to an education. Nonetheless, as a part of the Education Amendments of 1972, Title IX worked to weed out discrimination in federally funded schools and to ensure equal access to educational opportunities.\textsuperscript{16} In \textit{Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.}, the Supreme Court of the United States analyzed whether a private right of action existed for student on student harassment in violation of Title IX. The Court held that Title IX puts recipient schools on notice that they may be held liable for failure to respond to and remedy violations of the Act by students and teachers.\textsuperscript{17} Therefore, schools should be held liable for acts of student on student sexual harassment when the school has knowledge of the harassment and was deliberately indifferent to that harassment.\textsuperscript{18} The “Dear Colleague” letter uses similar logic to hold school districts liable for violations of Title VI of the Civil Rights Amendments and Title II of the American’s with Disabilities Act. In the past several years, numerous complaints have been filed alleging just that.

Tyler Long, a seventeen year old who made national television when he committed suicide, is the subject of a lawsuit directed against Murray County School District and the Principal of the school.\textsuperscript{19} Tyler Long’s parents have alleged that each are

\textsuperscript{16} \textit{Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.}, 526 U.S. 629, 638 (1999).
\textsuperscript{17} \textit{Id.} at 630.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} David and Tina LONG, Individually, and as Natural Parents of Tyler Lee Long, Deceased, Plaintiffs, v. MURRAY COUNTY SCHOOL DISTRICT and Gina Linder, In her individual and official Capacity as Principal of Murray County High School, Defendants., 2010 WL 4215509 (N.D.Ga.).
liable under theories of due process, equal protection, and civil rights violations. As a result of Tyler’s Asperger’s Disorder, he was subject to continued bullying and harassment, which was brought to the attention of the Principal.\textsuperscript{20} The school and principle failed to supervise and protect Tyler and took no remedial action acting with deliberate indifference to the harassment.\textsuperscript{21} However, the deliberate indifference standard may present to be too high a threshold for liability.

In order to substantiate a claim of deliberate indifference, the plaintiff must show that “the school district, (1) has actual knowledge of the harassment; (2) had reason to believe that it posed a serious risk to the student; (3) either failed to take readily available measures to address the risk or took measures knowing they would be ineffective to protect the student; and (4) has no excuse or justification for acting or failing to act as it did.”\textsuperscript{22} This standard allows school staff and administration to turn a blind eye to bullying and harassment to avoid any actual notice. Even school districts that were put on notice of bullying and harassment are repeatedly held to have not acted with deliberate indifference. Simple actions like verbal warnings have been held to be effective means to eliminate harassment.\textsuperscript{23}

Claims arising under Title VI violations pose an even higher threshold for liability because a private right of action exists only for “intentional discrimination.”\textsuperscript{24} It is

\textsuperscript{20} See supra note 19, ¶ 57
\textsuperscript{21} See supra note 19, ¶ 56
\textsuperscript{22} Anne M. Payne, Particular Public School District Liability Issues Arising from Student or Staff Use of Computers, Internet, or Other Electronic Media to Harass or Bully Students, 115 Am. Jur. Trials 355 (2012).
unclear whether a school district’s failure to address bullying based on race, color, or national origin arises to “intentional discrimination.”\(^{25}\) Plaintiff’s injured as a result of bullying are simply unable to reach the high legal threshold needed to satisfy a claim against a school district.

Nearly twelve years after the landmark decision in *Davis*, the “Dear Colleague” letter advocates for an expansion of the precedent set by the Supreme Court. The Department of Education opines that school districts need not receive notice of the bullying if a court finds they reasonably should have known about the bullying.\(^{26}\) This should open the door for liability against schools that were not put directly on notice of the bullying and will hopefully force school administration and staff to address bullying before tragedies like Tyler Long’s suicide occur.

Courts need to adopt the standard laid out in the “Dear Colleague” letter to force school districts to assume responsibility for bullying taken place under its watch. But where does this leave the vast majority of victims of bullying who fall outside Civil Rights protection? What about the child who is bullied for being overweight, or for their taste in music, or the way they dress?

**b. Other Legal Remedies**

Other legal theories should exist to hold school districts liable for failure to address bullying outside Federal Civil Rights violations. Unfortunately, almost uniformly,


\(^{26}\) See supra note 1, page 2 “[a] school is responsible for addressing harassment incidents about which it knows or *reasonably should have known*” (emphasis added).
courts are reluctant to assign liability under theories of substantive due process violations, statutory violations, or even general negligence suits.

Like Tyler Long’s parents, many individuals injured by bullying have sued the school district for substantive due process violations for placing the student in a position in which harm was likely to result. However, the Supreme Court held in *DeShaney v. Winnebago County Department of Social Services*, that a state actor has no affirmative duty to act to protect a person from injuries caused by the actions of a third party. This principle weeds out almost all substantive due process claims.

In recent years, 49 states have passed laws dealing with bullying and harassment in schools. Montana is the lone holdout. Such statutes may give rise to school district liability for bullying as a violation of a statutory duty. A basic negligence case may be premised on a breach of a statutorily imposed duty, permitting a victim of bullying to sue the school district although they have not been subject to any federal civil rights violations. However, school districts have an arsenal of legal caveats and protections to shield themselves from statutory violation claims as well as basic negligence suits.

Unfortunately, in the age of the Internet, more and more bullying is taking place online. Rather than directly addressing the issue of cyberbullying, many schools are

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28 [www.bullypolice.org](http://www.bullypolice.org)
29 See supra note 28.
30 See supra note 22.
instead insulating themselves from liability by implementing Internet usage contracts.\textsuperscript{31} Internet usage contracts act as a general exculpatory clause exempting schools from liability, whether they are at fault or not, by requiring the students and/or their parents sign a contract before accessing the Internet in school.\textsuperscript{32} Schools have a general duty to supervise students in their care.\textsuperscript{33} And a failure to protect students from foreseeable injuries may result in liability.\textsuperscript{34} Why should schools be able to shield themselves from their general duty to supervise students through Internet usage contracts? Such contracts only encourage schools to turn a blind eye to cyberbullying and harassment. If there is no risk of liability for injuries caused by incidents of cyberbullying, why devote limited school resources to combat it?

Most tort claims for bullying will also fail as a result of some variation of sovereign immunity.\textsuperscript{35} As a result, schools will only face liability for conduct that is reckless, malicious, or in bad faith, an extremely high bar for recovery.\textsuperscript{36} Even when sovereign immunities are somehow eliminated, proximate cause issues generally prevent recovery. In the case of \textit{Smith v. Lincoln Park Public Schools}, the court found that the proximate cause of Smith’s injuries was student on student harassment and

\textsuperscript{32} See supra note 31 at 540-41.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} See supra note 25.
\textsuperscript{36} See supra note 25.
bullying, not the failure of the school district to intervene.\textsuperscript{37}

Courts in Connecticut have begun to craft an exception to sovereign immunities permitting liability against school districts for the “identifiable person.”\textsuperscript{38} For liability to attach, there must be an identifiable victim, at risk of imminent harm.\textsuperscript{39} An identifiable victim can either be a class of foreseeable victims or specific identifiable victims.\textsuperscript{40} Although this may expand on the potential for liability against school districts, the identifiable person standard is still severely limited, as it requires the harm to be limited by temporal and geographical zones.\textsuperscript{41}

III. Why School District Liability is Necessary

Courts need to open the doors for victims of bullying to recover against their school districts and administrators. If schools continue to be shielded from liability, there is no incentive to address and combat bullying. Even worse, parents like David and Tina Long are left with no legal recourse for their son’s preventable suicide.

Jessica Logan, a victim of cyber-bullying, is one of many victims whose suicide will not be vindicated through the courtrooms. Jessica Logan sought help from her schools resource office when nude pictures of her went viral throughout her high

\textsuperscript{39} Id.
\textsuperscript{40} Id.
school.\textsuperscript{42} The resource counselor responded that there was little he could do.\textsuperscript{43} Jessica committed suicide shortly after, following months of harassment. How can a school resource officer, whose job it is to address social and emotional problems of students, hold no responsibility for his failure to take any reasonable steps to help Jessica and prevent future bullying?

Whether it is through civil rights violations, other constitutional law arguments, or state law negligence actions, case law shows that victims of bullying, like Jessica Logan, rarely find recourse for their injuries through the civil courtrooms. What is also clear is that bullying only escalates when school administration and adult personnel fail to take action and intervene.\textsuperscript{44} Nation wide standards for bullying intervention and prevention should be set. Teachers and staff should be trained on how to address students who present with bullying problems.\textsuperscript{45} School administration and staff should be required to intervene and to take necessary steps to eliminate bullying in schools. Failure to do so should open up school districts to direct liability for acts of bullying and cyberbullying that it was aware of or reasonably should have been aware of.

A negligence suit is premised on a general duty owed, a breach of that duty, and a


\textsuperscript{43} See supra note 42, at 245.

\textsuperscript{44} See supra note 25, at 189.

\textsuperscript{45} Kathleen Conn, \textit{SEXTING AND TEEN SUICIDES: WILL SCHOOL ADMINISTRATORS BE HELD RESPONSIBLE?}, 2010 WL 5462412 (Dec. 9, 2010).
causal connection between the breach and the resulting injury.\textsuperscript{46} It is established that schools owe a general duty to students through the doctrine of \textit{in loco parentis}.\textsuperscript{47} The risks posed by bullying are clear and the victims are identifiable. The same rules of tort law should apply to schools that fail to take reasonable action to eliminate bullying.

Liability exposure forces manufacturers to create safer products, encourages doctors to take adequate precautions, and reminds citizens to avoid negligent behavior. Exposing school districts to liability for injuries caused by bullying will force schools to take necessary steps to curtail the bullying epidemic. Schools should be expected to foresee bullying and harassment in schools and to realize it can result in severe consequences. The magnitude of bullying in schools is clear. Students spend the majority of their childhood and teenage years within the walls of the schoolhouse. If students cannot feel safe from bullying and harassment in school, the school system is failing. Courts should expand school district liability for injuries caused by acts of bullying which reasonably could have been prevented by reasonable intervention and action.

\textsuperscript{46} See supra note 45.
\textsuperscript{47} See supra note 45.