

## **School Liability in Cases of Peer Harassment**

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*A ninth grade student, diagnosed with a congenital disorder which affects his appearance, is routinely bullied by his peers in his woodshop class. Despite his complaints to the class instructor, the harassment continues, culminating in an incident that leaves the student with a concussion and cracked teeth. The student sues the school and his teacher for the peer harassment, arguing that school officials failed to prevent his injury. Should the school be liable? At least one court did not think so. In the case of Werth v. Bd. of Dirs., the U.S. District Court for the Eastern District of Wisconsin found in favor of the school.<sup>i</sup>*

For years, evidence of bullying was ignored, swept under the classroom rug with such syllogisms as, “Boys will be boys,” and “Sticks and stones may break your bones, but words can never hurt you.” Today, bullying is recognized as a prevalent problem in many schools.<sup>ii</sup> Schools had mostly escaped liability for student-on-student bullying for decades, but, due to a recent case in the United States Supreme Court, a small window of opportunity was created to allow for school liability in cases of peer-to-peer harassment when certain criteria are met. In the landmark case of *Davis v. Monroe County Bd. of Educ.*, the United States Supreme Court held the defendant school board liable for acts of peer-to-peer sexual harassment. Cases such as *Davis* have helped to open the door to relief for victims of peer bullying by finding schools liable in certain situations. Yet, because of the traumatic nature of peer bullying, requiring students to show a pattern of behavior might be a dangerous precedent when, across the nation, student-victims appear to be turning to violence themselves and taking innocent lives in the process. The standard that the Court set forth in *Davis* should be broadened to allow for more school liability in cases of peer-to-peer bullying; specifically, the requirement that plaintiffs

demonstrate that the harassment they experienced was severe, pervasive and objectively offensive should be altered to allow for more subjectivity and the particular circumstances of the student-victim should be taken into account.

Bullying may be defined as aggressive behavior that is intended to cause harm, and involves an imbalance of power, that occurs over time.<sup>iii</sup> For purposes of this paper the terms “bullying” and “harassment” shall be used interchangeably. The term “peer bullying” shall refer to bullying that is instigated by students upon other students.

Student-on-student bullying may be based on the victim’s race, disability, gender, or sexual orientation.<sup>iv</sup> Studies have shown that peer bullying and harassment may affect students in middle-school and throughout high school.<sup>v</sup> Some students who are victims of bullying may suffer from anxiety, depression or other psychological problems.<sup>vi</sup> According to the Centers for Disease Control and Prevention (“CDC”), six percent of high school students surveyed reported not attending school on one or more days out of the past month because they feared for their safety.<sup>vii</sup> Another study has found that as many as 160,000 students leave school early on any given day because they are afraid of peer bullying .<sup>viii</sup> Some student-victims of bullying have turned to violence as a result of their traumatic experiences.<sup>ix</sup> According to the CDC, nearly fifteen percent of high school students had seriously contemplated taking their own lives during the year prior to the survey.<sup>x</sup> Based on a report by the U.S. Secret Service and the Department of Education regarding school shootings, in several cases, the “attackers had experienced bullying and harassment that was long-standing and severe.”<sup>xi</sup> Based on such findings regarding the harmful effects of the peer bullying, it has become an important education law issue.

The Supreme Court addressed peer harassment in *Davis v. Monroe County Bd. of*

*Educ.* The *Davis* Court found that a private damages action may lie against the school board in cases of student-on-student bullying only for harassment that is so: (1) severe; (2) pervasive; and (3) objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.<sup>xii</sup> In the case, the court found the school board liable under Title IX, where a fifth-grade girl alleged that a male student in her class sexually harassed her, both physically and verbally, for about five months.<sup>xiii</sup> The offending student later pled guilty to criminal sexual misconduct.<sup>xiv</sup> The student-victim claimed that the harassment had a concrete, negative effect on her ability to receive an education.<sup>xv</sup> This negative effect was demonstrated by evidence of a significant decline in the victim's grades.<sup>xvi</sup>

The rule in *Davis* stated that schools receiving federal funds may be liable for damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.<sup>xvii</sup> The *Davis* standard has been applied to other bullying cases involving racial harassment<sup>xviii</sup>, disability harassment,<sup>xix</sup> and harassment based on sexual orientation<sup>xx</sup>.

The first term included in the Court's definition is that the peer harassment be "severe" in order to be actionable. It is agreed that harassment that falls below this standard should not be the basis of school liability. However, the term should be clarified in order to explain what type of harassment would constitute severe behavior. For example, "severe" may be defined as physically or emotionally harmful. Further, a

subjective standard should be applied to this term in certain cases, since what may constitute severe harassment to one student would not be particularly severe for another.

For example, in the case of *Werth v. Bd. of Dirs.* mentioned above, the plaintiff-student was diagnosed with cleidocranial dysostosis syndrome, a congenital disorder affecting bone development, and which is “characterized by absent or incompletely-formed collar bones, an abnormally shaped skull, characteristic facial appearance, short stature, and dental abnormalities.”<sup>xxi</sup> During two instances, the student was struck by a pair of safety goggles and by some wooden boards that were being used for projects in a woodshop class.<sup>xxii</sup> As a result of the incidents, plaintiff sustained swelling on his spine, a concussion and cracked teeth.<sup>xxiii</sup> For some students, being struck by safety goggles or relatively small wooden boards may not constitute severe harassment. However, if the student has a disability, then a more subjective standard should be applied. What ordinarily may be classified as mild behavior may have result in severe consequences for a student with a disability. If a court applies the same standard to all students, individuals with disabilities who may be more prone to injury will be disadvantaged. They will be left with no remedy in cases of peer harassment because, although the harassment they experienced will be very harmful to them, it will not meet the standard needed to hold a school liable.

The court in *Werth* also cites the brevity of the harassment, two instances of battery, in dismissing the plaintiff’s claim.<sup>xxiv</sup> However, the consequences of the harassment should also be examined. The plaintiff in *Werth* suffered severe, long-term injuries as a result of this “brief” encounter with his peers. The “severe” element espoused by the *Davis* Court should be clarified to allow for more subjectivity in regards

to students with disabilities; courts should look at whether the harassment was severe for the particular student and should look to the consequences of the harassment when determining its severity.

The second term used by the Court in *Davis* to identify actionable harassment is that such behavior be “pervasive.” In *Werth*, the court found no existence of pervasive harassment since the behavior involved different offenders, on different dates.<sup>xxv</sup> Yet the *Davis* Court provided no timeline for what would constitute pervasive harassment. Without such a timeline, students may have to suffer for months or even years before being able to file an actionable claim.<sup>xxvi</sup> Creating a standard for pervasive harassment is a dangerous precedent. For some students, the humiliation that they endure on a daily basis is too much to take and they turn to violence. Nationally, more than 1,600 children ages 10 to 14 committed suicide from 1999 through 2004, according to CDC.<sup>xxvii</sup> In their report on national school shootings, the U.S. Secret Service examined thirty-seven instances of school shootings that occurred between 1974 to 2000 in the U.S., finding that roughly “three-quarters of the attackers felt persecuted, bullied, threatened, attacked, or injured by others prior to the incident.”<sup>xxviii</sup> If schools, without fear of litigation, allow bullying to occur unrestrained over time, the end result may be the loss of student life.

The final term used by the *Davis* Court to define actionable harassment is that the behavior be “objectively offensive.” The standard that the bullying behavior be objectively offensive is fundamentally flawed. Bullying, by its very nature, is a personal attack on another. The court must make this standard more subjective in order to more effectively combat peer-to-peer bullying in schools. The court does not have to make the standard completely subjective, rather, it should simply alter the standard to be less

objective. One suggestion for such a change in wording would be to make the criteria whether a reasonable person in these circumstances would find the behavior offensive.

In *Werth*, the court did not find that this criteria was met where the plaintiff failed to prove that bullying was related to his disability.<sup>xxix</sup> The court seemed to place the burden on the student to prove that the bullying was a result of his disability, instead of having the school demonstrate that the bullying was caused by something other than the disability. School boards, arguably, are not aware of the type of behavior that goes on in their hallways; however, if the court had placed the burden on the school board to demonstrate that the bullying was not due to disability, perhaps school officials would focus more resources on monitoring peer-on-peer harassment. Additionally the court stated there was no indication that the bullies did anything that prevented the plaintiff from working on his class work, thus failing to establish that he was denied the benefits of a federally funded program due to his disability.<sup>xxx</sup> Apparently, the court did not find that the concussion sustained by the plaintiff interfered with his school work. If a more subjective standard is accepted regarding harassment, then students who undergo severe injuries may not be left without a remedy.

In an apparent attempt to clarify what types of cases of peer harassment may lead to causes of action, the *Davis* Court provided an example of such a scenario. The Court described a daily scenario where male students would physically threaten their female peers, and physically prevent the latter from using certain school resources, such as a computer lab, while school officials, who were aware of the harassment, ignored requests for aid from the female students wishing to use the resource.<sup>xxxi</sup> However the illustration provided in the case helps to emphasize why the standards in *Davis* need to be broadened.

This illustration demonstrates the obstacles in store for a student-victim who wishes to establish liability on the part of a school district. These hurdles facing the victim can be understood by separately examining each element of the *Davis* Court's example. In the scenario, the students acting as aggressors physically threaten their victims. This overlooks verbal harassment that could be just as damaging to students. The court in *Davis* is quick to point out that mere name-calling among students will not be sufficient to constitute an actionable claim.<sup>xxxii</sup> This is acknowledged as a necessity to prevent frivolous litigation, yet it may also lead to lenience towards derogatory words of a racial or sexual nature that are patently offensive to certain groups. Also, in the scenario, the harassment occurs daily. This is also unrealistic as bullying does not necessarily have to take place every single day in order to be harmful to its victims.

The next element of the example is that the victims are prevented from using a particular school resource by their peers. The Court here seems to be limiting causes of action based on the victim being generally deterred from attending school, instead, it is essential that the victim demonstrate deprivation of a particular school resource. Arguably, instigators of bullying do not care whether their victims use the computer lab or athletic field; their aim is to physically or mentally harm their victims. The loss of educational benefits appears to be collateral damage, dependant on the harms the student has sustained due to bullying. The victim may have had such negative experiences that he or she no longer attends school. The Court also later backtracks to state that it is not necessary to show physical exclusion of an educational resource.<sup>xxxiii</sup> This indicates that the Court seemed to realize that its standard was too narrow, and attempted to broaden it.



The *Davis* illustration continues that school officials must deliberately ignore any bullying behavior and points out narrowly that the officials must ignore any requests for assistance that the victim may have made in regards to educational resource. It is not sufficient for victims to tell school officials about the harassment itself, the victim must specifically complain about the fact that the harassment is depriving them of the particular educational resource. Thus, the illustration provided by the Supreme Court in *Davis* is too narrow to adequately cover cases of peer harassment that should be actionable. The Court also established that peer harassment must be severe, pervasive, and objectively offensive.<sup>xxxiv</sup> Each of these three terms should be broadened to allow for more school liability.

Schools may argue that broadening the standards set forth in *Davis* would be burdensome and would lead to frivolous litigation. Justice Kennedy wrote in his dissent in *Davis*:

“The majority's limitations on peer sexual harassment suits cannot hope to contain the flood of liability the Court today begins. The elements of the Title IX claim created by the majority will be easy not only to allege but also to prove. A female plaintiff who pleads only that a boy called her offensive names, that she told a teacher, that the teacher's response was unreasonable, and that her school performance suffered as a result, appears to state a successful claim.”<sup>xxxv</sup>

The idea that *Davis* would open the floodgates of litigation has not come to fruition. Few courts in the aftermath of *Davis* have found in favor of the bullied student. Often, when a court does find in favor of a student, it is in what may be classified as an extreme case.

<sup>xxxvi</sup> Kennedy also cites news-stories of first-graders being suspended for kissing their classmates<sup>xxxvii</sup>, but for every such instance of school discipline gone awry, there is another where a court has found no school liability under similar facts.<sup>xxxviii</sup> Therefore,

while schools may have tendency to overreact in the face of ruling such as that of *Davis*, other courts will reign in the hysteria by limiting school liability.

If the *Davis* standards were broadened, it would likely lead to only slightly more cases in favor of student-plaintiff since the broadened standards would only affect students in special circumstances, such as those with disabilities. While schools may be burdened by this possible additional litigation, the benefits of broadening the standards would outweigh the negatives. This balancing test may also be applied to any burden the school would have to undertake regarding policy changes dealing with harassment. While bullying has not been conclusively tied to student suicides or to school shootings, many have noticed a pattern corresponding to victims of bullying and violence. Despite recent findings that the Columbine school shooters had not been bullied, other such attackers have been bullying victims. The U.S. Secret Service writes in its report on national shootings that:

“Bullying was not a factor in every case, and clearly not every child who is bullied in school will pose a risk for targeted violence in school. Nevertheless, in a number of the incidents of targeted school violence studied, attackers described being bullied in terms that suggested that these experiences approached torment. These attackers told of behaviors that, if they occurred in the workplace, likely would meet legal definitions of harassment and/or assault.”<sup>xxxix</sup>

A balancing test should be used to determine whether the proposed modification to the *Davis* standards would be too burdensome to schools. A school district’s ability to efficiently perform its duties, and its interest in not being dragged into litigation may be weighed against students’ interests in not being bullied. Upon first glance, the results of this test would appear to be obvious: school districts, many already underfunded, would clearly not want to spend their money on litigation, while , on the other end of the scale, kids tease each other fairly regularly and children can be particularly frivolous when it

comes to friendships with other students. However, when taking into account the effects of bullying on children, the scales lean the other way. If a student, bullied by his peers constantly, decides to bring a gun to school to shoot his offenders, the school's interest in preventing bullying rises significantly.

Bullying prevention can be achieved in a manner that does not excessively burden a school. In some states, such as New York, school districts are required by the state's Department of Education, to report incidents of bullying and to take actions to prevent bullying, including creating programs involving the teaching of conflict resolution and anger management skills.<sup>x1</sup>

While the case of *Davis v. Monroe County Bd. of Educ.* has helped victims of peer bullying obtain some relief, the standards regarding peer harassment, namely that it be severe, pervasive, and objectively offensive, need to be broadened to allow for more school liability. This can be done by making the standards more subjective to reach students in special circumstances, such as those with disabilities. Any burdens caused by the broadened standards would be outweighed by the school's interest in preventing student suicides and school shootings.

<sup>i</sup> 472 F. Supp. 2d 1113 (2007)

<sup>ii</sup> [BULLYING, VICTIMIZATION, AND PEER HARASSMENT: A HANDBOOK OF PREVENTION AND INTERVENTION 3-4 \(Joseph E. Zins, et al. eds., 2007\).](#)

<sup>iii</sup> [APA RESOLUTION ON BULLYING AMONG CHILDREN AND YOUTH \(2004\) available at www.apa.org/pi/cyf/bullyresolution704.pdf](#)

<sup>iv</sup> *Id.*

<sup>v</sup> [Sourcebook of Criminal Justice Statistics Online \(citing: Jill F. DeVoe et al., INDICATORS OF SCHOOL CRIME AND SAFETY: 2005, U.S. Departments of Education and Justice \(2005\), 75, 88, 91, 93 \) available at http://www.albany.edu/sourcebook/pdf/t3612003.pdf](#)

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vi Centers for Disease Control and Prevention, *Understanding School Violence Fact Sheet, 2* (2008), available at <http://www.cdc.gov/ViolencePrevention/youthviolence/schoolviolence/index.html>, statistic cited from 2005.

vii *Id.*

viii *Id.*

ix Alan Scher Zagier, *Parents Blame Bullies for 5<sup>th</sup> Grade Suicide*, abcNEWS.com (2008), <http://abcnews.go.com/US/wireStory?id=4139504>

x Danice K. Eaton, et al. Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States, 2007*, (2008) available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5704a1.htm>

xi U.S. Secret Service & U.S. Dept. Of Educ., “The Final Report And Findings Of The Safe School Initiative: Implications For The Prevention Of School Attacks In The United States.” 21 (2004). Available at: [http://www.secretservice.gov/ntac/ssi\\_final\\_report.pdf](http://www.secretservice.gov/ntac/ssi_final_report.pdf) [hereinafter *Secret Service*]

xii *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632. (numerals added).

xiii *Id.* at 632.

xiv *Id.* at 653.

xv *Id.* at 652, 654.

xvii *Id.* at 650.

xviii *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928 (2003).

xix *Murrell v. School District No. 1*, 186 F.3d 1238, 1243 (1999).

xx *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (2005).

xxi *Werth*, 472 F. Supp. 2d at 1116-1117.

xxii *Id.* at 1119-1120.

xxiii *Id.*

xxiv *Id.* at 1129.

xxv *Id.* at 1128.

xxvi See *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (2005) (plaintiff-student harassed based on gender orientation from seventh grade until he left school in eleventh grade.)

xxvii Alan Scher Zagier, *Parents Blame Bullies for 5<sup>th</sup> Grade Suicide*, abcNEWS.com (2008), <http://abcnews.go.com/US/wireStory?id=4139504>

xxviii Secret Service, *supra* note 11, at 21

xxix *Werth*, 472 F. Supp. 2d at 1128.

xxx *Id.* at 1128-29.

xxxi *Davis*, 526 U.S. at 650-51.

xxxii *Id.* at 652.

xxxiii *Id.* at 651.

xxxiv *Id.* at 629, 632. (numerals added)

xxxv *Id.* at 680.

xxxvi See, *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 256-57 (2000) (Plaintiff, a female student, experienced verbal and physical sexual harassment from sixth grade until ninth grade, when she was diagnosed with depression, and finally withdrew from school. Plaintiff testified that, despite talking to school officials

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harassment by her peers increased to the point that she was propositioned or touched inappropriately in virtually every class.)

<sup>xxxvii</sup> *Davis*, 526 U.S. at 681-82.

<sup>xxxviii</sup> See, e.g., *Gabrielle M. v. Park Forest-Chicago Heights*, 315 F.3d 817 (2003) (Alleged harassment by kindergartener of a girl in his class was not so severe, pervasive, and objectively offensive that it denied girl access to education).

<sup>xxxix</sup> Secret Service *supra* note 11, at 35.

<sup>xl</sup> Merri Rosenberg, *Required Course: Bully Prevention* N.Y. TIMES, March 17, 2002, at 14 WC 5.

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