

**Bullying In Schools:**

**The Challenges of Creating Administrative Accountability in the School Setting**

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## INTRODUCTION

The past few years have shown a growing awareness regarding the pervasiveness and seriousness of bullying in schools. This has been caused both by the media propagating numerous stories of children taking their own lives because they had been relentlessly bullied and by an increasing number of scholars taking an empirical approach to the short and long-term effects of bullying on both the bullies and bully victims. What both these sources have made clear is that bully victims can suffer from severe negative psychological and physical effects. Several recent studies have found an association between bullying and depression, anxiety disorders, and suicide-related behaviors.<sup>1</sup> Other studies point to lower academic achievement of bully victims as well as higher absenteeism caused by the fact that bully victims do not feel safe going to school or feeling that they do not belong.<sup>2</sup> Therefore, not only can bullying lead to the suffering of the victims' academic and social life, possibly hindering them from advancing in their future academic studies, but it can also leave the bully victim forever affected, with higher levels of depression, anxiety, and possibly even suicidal behaviors.

While some bullying takes place outside the school environment and is arguably beyond the reach of teachers and administrators, a substantial portion takes place within the school facilities. It has been a point of contention whether or not teachers should have the duty to step in and intervene when they have knowledge of a bullying situation. Most courts thus far have decided that question in the negative, finding no affirmative duty on the part of the school district. However, with the increasing awareness of the negative effects and pervasiveness of

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<sup>1</sup> Marci F. Hertz & Ingrid Donato (2013), *Bullying and Suicide: A Public Health Approach*, *Journal of Adolescent Health*, 53, S1-3.

<sup>2</sup> Glen M. Glew, Ming-Yu Fan, Wayne Katon, Frederick P. Rivara, Mary A. Kernic (2005), *Bullying, Psychosocial Adjustment, and Academic Performance in Elementary School*, *Archives of Pediatric Adolescent Medical*, 159, 1026-31.

bullying in school, there has been growing support to hold the school district accountable if they do not resolve bullying situations that occur under their supervision. The question is where can that duty come from, and how severe should the consequences be for school officials who do not act. While an affirmative duty requiring teachers to intervene when they have knowledge of bullying could likely be imposed by affirmative action by either the state legislature or the school district in the form of either a statute or a policy inclusion in a Student Handbook, there should be a common law cause of action against school districts for failure to intervene with ongoing cases of bullying in schools for breaching their duty to maintain a safe educational environment.

### BULLYING IN SCHOOLS AND ITS EFFECTS

Adolescents who are bullied are more likely to be depressed or anxious, have lower academic achievement, report feeling like they do not belong at school, have poorer social and emotional adjustment, greater difficulty making friends, poorer relationships with classmates, and greater loneliness.<sup>3</sup> Additionally, victims of bullying may develop physical manifestations of their anxiety and depression. Young people who are bullied are more likely to report abdominal pain and feeling tense over the course of a school year.<sup>4</sup>

One study reviewing the research on bullying of other scholars consolidated that research and found that bullying victimization and perpetration varies according to age, type of bullying, and time period over which bullying behaviors are assessed, with middle school-aged children being more likely to be involved in bullying than high school children, verbal bullying generally being more common than physical or cyber-bullying, and bullying being more likely to occur

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<sup>3</sup> Hertz & Donato, 2013

<sup>4</sup> Minne Fekkes, Frans Pijpers, A. Miranda Fredriks, Ton Vogels, & S. Pauline Verloove-Vanhorick (2006), *Do bullied children get ill, or do ill children get bullied? A prospective cohort study on the relationship between bullying and health-related symptoms*, *Pediatrics*, 117, 1568-74.

over a long period of time as opposed to occurring as isolated incidents.<sup>5</sup> Further, studies found that anywhere between 20% and 56% of young people are involved in bullying annually.<sup>6</sup> Further, while suicide attempts clearly do not result for all victims of bullying, one study of 6th, 9th, and 12th graders performed by Iris Wagman Borowsky and others found that 1.2% of youth uninvolved with bullying made a suicide attempt, compared to 6.5% for those who were frequent victims of verbal and/or social bullying.<sup>7</sup> Similarly, another study examined how the type of involvement in bullying (bully, bully and victim, and victim) explains differences in suicidal ideation and behavior among a young sample of early adolescents. Results indicated that while those who both are bullies and victims have the highest suicide ideation, about 38% of victims of bullying (compared to 12% of uninvolved youth) had thought about killing themselves in the past six months, and 28% of victims (compared to 9% of uninvolved youth) reported that they had deliberately tried to hurt or kill themselves within this same period.<sup>8</sup>

These studies show that there is a very strong connection between being a victim of bullying and maladjustment, mood disorders, and possibly even suicidal ideation. While causation has not yet been determined, and it is possible that youth with social problems and/or mood disorders are simply the primary targets of bullying, the results indicate that victims are at a higher risk for these outcomes and that bullying does not decrease those risks. Therefore, due to the seriousness of the possible outcomes identified above, and the pervasiveness of bullying

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<sup>5</sup> Hertz & Donato, 2013

<sup>6</sup> Hertz & Donato, 2013

<sup>7</sup> Iris W. Borowsky, Lindsay A. Taliaferro, & Barbara J. McMorris (2013), *Suicidal Thinking and Behavior Among Youth Involved In Verbal and Social Bullying: Risk and Protective Factors*. *Journal of Adolescent Health*, 53, S4-12.

<sup>8</sup> Dorothy L. Espalage & Melissa K. Holt (2012), *Suicidal Ideation and School Bullying Experiences After Controlling for Depression and Delinquency*, 53, S27-31.

within the school system, school districts should not be allowed to simply ignore all bullying which occurs under their supervision.

Teachers and administrators are arguably in the best position to step in in a case of bullying. Due to the requirements of every state that compel students to attend school, and the assumed desire for victims of bullying to avoid their bullies when they are not compelled to be in the same location, victims are most likely to be in the same vicinity as their bullies during school hours, traveling to and from school, and at school functions/events. During those times, it is the school officials, not the parents, who are entrusted with the care of the students.

#### POSSIBLE REMEDIES FOR THE VICTIMS OF BULLYING

##### ***A. Situations In Which A Duty Has Already Been Found To Apply to School Officials***

Some courts, including the United States Supreme Court, have found that teachers have a duty to protect their students when hazardous conditions are present, as well as finding that sometimes a teacher or administrator has a duty to try to prevent or stop harassment and bullying under Title IX.

Some Courts have created a higher duty of care on educational professionals to supervise their students in situations where potentially hazardous conditions are present. For example, the Nebraska Supreme Court found that a school was negligent in allowing an inexperienced welding student to wear an untreated cotton shirt, because it failed to ensure that the student wore proper clothing, and failed to provide a leather apron.<sup>9</sup> Additionally, a duty to supervise

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<sup>9</sup> Norman v. Ogallala Pub. Sch. Dist., 609 N.W.2d 338, 348 (Neb. 2000)

both inside and outside<sup>10</sup> the classroom has been found when the school official did not act as a reasonably prudent person would in a similar circumstance.<sup>11</sup>

Courts have also been more willing to award damages under a violation of Title IX. A breach of duty will likely be found if school officials are found to be “deliberately indifferent” to sexual harassment or harassment directed at an individual because of a disability, when the official has actual knowledge of that harassment, and the harassment 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>12</sup>

### ***B. Courts Are Unwilling To Find A Violation Of Substantive Due Process In School Settings***

Many parents have brought claims against school districts on behalf of their children claiming that the school district violated their children’s due process rights by failing to intervene and prevent the occurrence of bullying. However, they have not had any success with their claims. The United States Supreme Court in DeShaney v. Winnebago County held that while the Due Process Clause forbids the state itself from depriving individuals of life, liberty, or property without due process of law, its language cannot fairly be extended to “impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”<sup>13</sup>

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<sup>10</sup> A discussion concerning where school officials would have a duty to act is beyond the scope of this paper, but while there are limitations on where an official would be expected to prevent harm, this duty can be extended to beyond the classroom walls.

<sup>11</sup> See e.g. Johnson v. Sch. Dist. of Millard, 573 N.W.2d 116, 120 (Neb. 1998) (teacher held to have been negligent for failing to supervise first graders playing the London Bridge game because it was reasonably foreseeable that children might swing another child in such a manner that the sudden release of their hands could cause an accident).

<sup>12</sup> See e.g. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999) in reference to sexual harassment and Werth v. Bd. of Dir. of the Pub. Sch. of the City of Milwaukee, 472 F.Supp. 2d 1113, 1127 (E.D. Wi. 2007) applying Davis to harassment due to one’s disability.

<sup>13</sup> DeShaney v. Winnebago Cnty. Dep’t. of Soc. Serv., 489 U.S. 189, 195 (1989).

Following this reasoning, courts have refused to find an affirmative duty to require school officials to prevent bullies from harming students.

In a recent case from the Third Circuit of the United States Court of Appeals, Morrow v. Balaski, the plaintiffs claimed that their two daughters were subjected to bullying in the form of a series of threats, assaults, and acts of racial intimidation at the hands of a fellow student and her accomplice. Unable to obtain help from school officials, the plaintiffs were ultimately compelled to remove their children from their school and thereafter, brought suit alleging that school officials denied them substantive due process under the Fourteenth Amendment by not protecting their daughters.<sup>14</sup> The Third Circuit, following DeShaney's precedent, held that the school did not have a "special relationship" with students that would give rise to a constitutional duty to protect them from harm from other students. This has been the common theme in the rejection of these string of claims. Regardless of the indifference of the school officials, because they have no duty to give rise to the constitutional claim, the claimants have no constitutional remedy.

DeShaney further reasoned that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means."<sup>15</sup> Morrow explained that while "a minor child attending public school most certainly does not have the freedom of action or independence of an adult," the Supreme Court has not had occasion to specifically decide whether that is sufficient to create a

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<sup>14</sup> Morrow v. Balaski, 719 F.3d 160, 163 (3d Cir. 2013).

<sup>15</sup> DeShaney, 489 U.S. at 200.

special relationship between public schools and their students under the Due Process Clause.<sup>16</sup> Therefore, until the United States Supreme Court rules on a case containing this issue, it seems that all lower courts are refusing to recognize the presence of a “special relationship.”

One exception to this recognition of a violation of due process occurs when the school officials actually create or enhance a danger to the students in violation of those students' substantive due process rights.<sup>17</sup> However, under most circumstances, it would be extremely unlikely that an individual will be able to successfully argue that the school created or enhanced the danger to the bullied students.

### ***C. Schools Should Have A Common Law Duty To Maintain A Safe Educational Environment***

Due to the denial by courts to allow recovery by parents and bullied children for a constitutional breach of duty, parents should instead pursue negligent tort action claims against school officials for failure to maintain a safe educational environment.

Each negligence tort action claim must satisfy four elements to succeed: the presence of a duty, a breach of that duty, the breach being both the factual and legal cause of the injury to the plaintiff, and an actual injury. Once a duty is established requiring teachers to maintain a safe educational environment, victims of bullying would be able to succeed in their claims in many situations.

#### *1. Duty*

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<sup>16</sup> Morrow, 719 F.3d at 168. See also Sargi v. Kent City Bd. of Educ., 70 F.3d 907, 911 (6th Cir. 1995) (compulsory attendance laws do not create special relationship between school districts and their students that gives rise to affirmative duty on part of district to protect its students, as such laws do not restrict student's liberty such that neither child nor parents are unable to attend to child's basic human needs).

<sup>17</sup> Morrow, 719 F.3d at 163.



This duty to maintain a safe educational environment could come from different sources, mainly from a state enacted statute, a school district enacted policy, or a court-established common law duty.

In general, under tort law, an actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect. Thus, the presence of a statute is evidence of a duty, and by violating the statute, at the very least, the violation is *prima facie* evidence of a breach of duty.

A state could pass a statute requiring all school officials to maintain a safe educational environment and/or to intervene when they have knowledge of ongoing bullying activity. To determine whether a breach has occurred, in a situation where a school official is being sued for negligence based upon a breach of the duty created in the statute, the court could apply an objective standard and determine whether a reasonable person under the circumstances would have acted in a different way or have chosen to intervene in an occurrence of bullying.

The same reasoning could apply to a policy enacted by the school district evidenced by its inclusion in a student handbook or the equivalent for school officials. The Court in Moss Point School District v. Stennis addressed the issue of whether a Student Handbook can impose a ministerial duty on school officials.<sup>18</sup> The Supreme Court of Mississippi concluded that since a Mississippi statute stated that “[i]t shall be the duty of each superintendent, principal and teacher in the public schools . . . to observe and enforce the statutes, rules and regulations prescribed for the operation of schools,” the Mississippi legislature had granted the school district the authority to create a rule or regulation (in this case through a student handbook) which imposed a positive

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<sup>18</sup> Moss Point Sch. Dist. v. Stennis, 132 So. 3d 1047, 1052 (Miss. 2014).

duty on a school.<sup>19</sup> Similarly, in an appellate case out of Tennessee, the Tennessee legislature had passed a law requiring each school district to adopt a policy prohibiting harassment, intimidation, or bullying. Complying with this, the school in question had included in their student handbook that “[s]tudents shall be provided a safe learning environment” and went on to prohibit bullying and harassment, set forth the procedure to be followed when a student or parent complains of a violation of the harassment policy, and describe the punishment for students who violate the policies.<sup>20</sup> Therefore, the school district has the option of imposing on its officials an affirmative duty to prevent harassment and maintain a safe educational environment.

If the state and school district choose not to impose on school officials an affirmative duty to maintain a safe educational environment, the courts should choose to impose a heightened duty on teachers to exercise reasonable care to maintain a safe educational environment. Teachers, by choosing to become teachers and entering the employment of schools, knowingly decide to take on responsibilities in caring for the children entrusted to them as students. Courts have already imposed upon teachers the duty to supervise in a reasonable manner.<sup>21</sup> This reasoning can be extended to support the idea that teachers, by voluntarily assuming their role, should therefore be responsible for a greater duty of care for their students, and this should include duty to use reasonable efforts to maintain a safe educational environment.

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<sup>19</sup> The relevant Student Handbook excerpt read: “THREATS[:] Anyone who threatens violence is guilty of a serious criminal act and will be immediately reported to the proper authorities. Any threat made against a teacher, student, staff member or any other person should be reported immediately to the principal or designee. If on investigation the principal determines that a serious threat has been made, the offender will be reported to campus security, the city police and the juvenile authorities.”

<sup>20</sup> Moore v. Houston Cnty. Bd. of Educ., 358 S.W.3d 612, 617-18 (Tenn. Ct. App. 2011).

<sup>21</sup> Johnson, 573 N.W.2d at 120.

Some states already impose such a duty on its teachers. The Kentucky Supreme Court in Williams v. Kentucky Department of Education, reasoned that a child is compelled to attend school and therefore “the protective custody of teachers is mandatorily substituted for that of the parent.”<sup>22</sup> The Court then stated that this creates a “special relationship” between a school district and its students which imposes an affirmative duty on the district to take all reasonable steps to prevent foreseeable harm to its students.<sup>23</sup> The Sixth Circuit of the U.S. Court of Appeals, recognized this duty as relating to bullying when it entertained a negligence claim by a student from Kentucky against his middle school for “repeatedly ignoring Plaintiff’s requests for help, creating an atmosphere of hostility toward Plaintiff and his disabilities, and refusing to stop the persistent harassment and abuse by other students at [the school].”<sup>24</sup> While the Court ultimately denied the claim because the evidence demonstrated that the school had not ignored the students requests for help, the negligence claim could have succeeded if a breach of that duty imposed by common law had been recognized. Therefore, other courts who have not yet adopted this affirmative duty, could follow the string of reasoning by the Kentucky Supreme Court.<sup>25</sup>

## 2. *Breach of Duty*

Once a duty to maintain a safe educational environment has been established, assuming that the presence of severe bullying is found to be mutually exclusive with a safe educational environment, courts would need to determine where it would be appropriate to find that the duty has been breached. For policy reasons, it would not be wise to impose absolute liability upon teachers for all bullying that occurred within the school. Either a subjective or an objective standard would be appropriate to determine if a breach has occurred.

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<sup>22</sup> Williams v. Kentucky Dep’t of Educ., 113 S.W.3d 145, 148 (Ky. 2003).

<sup>23</sup> Williams, 113 S.W.3d at 148.

<sup>24</sup> S.S. v. Eastern Kentucky Univ., 532 F.3d 445, 459 (6th Cir. 2008).

<sup>25</sup> This same reasoning is what has been denied under a claim for a constitutional claim.

Under a subjective standard, a breach would occur if the school official in question was aware that the bullying was going on and was affecting the victim in such a way as to make him or her feel unsafe at school, and the official did nothing to intervene. This could be shown by evidence that the official had been notified of the bullying, or had witnessed it occurring on multiple occasions.

Under an objective standard, a breach would occur if a reasonable person under the same circumstances as the school official should have been aware that the bullying was going on and was affecting the victim in such a way as to make him or her feel unsafe at school, and the official did nothing to intervene. This could also be shown by evidence that the official had been notified of the bullying, or had witnessed it occurring on multiple occasions, but also that under the circumstances, a reasonable person would have realized what was going on.

The next step would be to determine how much the official had to do to satisfy the duty to restore a safe educational environment for the victim of the bullying. This would be open to the discretion of the courts, and likely determined on a case-by-case basis, but an official would obviously breach their duty if they chose to do nothing. At a minimum, the official would need to react and take reasonable steps such as notifying the principal and the parents of what was going on.

### 3. *Causation*

To establish causation, the plaintiff would need to establish both cause in fact and proximate cause.

To show cause in fact, the plaintiff would have to show that but for the official's failure to intervene, the plaintiff would not have felt unsafe in the educational environment. Since it is the bully who is technically causing the victim to feel unsafe, a court could have an issue with

establishing cause in fact. However, because an official is in a better position to cause the bullying to come to an end and have the power to discipline the bully and attempt other approaches to help the student feel safe, a court should find that, if the official has committed a breach of their duty, that breach is the cause of the student's injury, at least insofar as the injury that was manifested after the breach.

To show proximate cause, the plaintiff would need to show that their injuries were foreseeable consequences to the official's failure to maintain a safe educational environment. Because bullying involves acts of third parties, the school may argue that the bullying is an intervening cause. However, this argument should almost always fail because if there has been a breach, either the school official knew or should have known that the bullying was occurring, and therefore, any emotional or economic injury (stolen property), and most physical injury should be reasonably foreseeable, especially in light of recent research cited earlier in this paper showing the extensive effects of bullying.

#### 4. *Injury*

Establishing an injury is likely to be an easy task for the victim of bullying. The bullied student would need simply to demonstrate that the bullying affected him or her in a negative palpable way. Evidence of emotional distress, physical manifestations of distress such as stomach aches, depression, and anxiety, declined academic achievement or absenteeism, and any economic injuries such as stolen property would be able to show an injury to the bullied student.

#### POSSIBLE DEFENSE OF IMMUNITY AVAILABLE TO SCHOOLS

Historically, schools have been afforded a level of immunity against tort claims raised by students for damages. One type of immunity is sovereign immunity, completely insulating school districts from tort claims. However, this type of immunity has been greatly limited or completely

abolished in most states. Thirty or more states have now by common law or statute completely abolished sovereign immunity,<sup>26</sup> and “in virtually every state, the traditional defense of sovereign immunity will no longer completely insulate school districts from their tortious conduct and from the tortious conduct of their educators in the scope of their employment.”<sup>27</sup> Therefore, while the defense of sovereign immunity may be properly raised by a school district in a few jurisdictions to prevent any liability based upon a breach of the duty to maintain a safe educational environment, in most jurisdictions, this defense will be unavailable.

A second type of immunity insulates school districts for basic policy decisions made by the school district, but this extends only to basic policy decisions and not to the exercise of discretionary acts at an operational level. Therefore, the school district would remain liable for negligence of its employees at the operational level, where there is no room for policy judgment.<sup>28</sup> Therefore, this defense would not be available to school districts unless they have a policy specifically stating that school officials are not to intervene in a situation where bullying exists, which if such policies do exist, they are likely very few in number. However, even if such policies restricting intervention would be enacted, it is likely, especially based upon the recent empirical research concerning the negative impact on bullying, that they would be struck down for violating public policy.

Therefore, under most circumstances, the school should not be able to successfully argue that they are immune for tort action for failure to maintain a safe educational environment.

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<sup>26</sup> Michael J. Kaufman & Sheryln R. Kaufman, *Education, Law, Policy, and Practice* 776 (3d ed. 2013).

<sup>27</sup> *Id.*

<sup>28</sup> *Ogallala*, 609 N.W.2d at 342.

## CONCLUSION

While some may be hesitant to hold school districts accountable for the bullying of their students due to the financial burden that tort liability damages may pose to the already strapped education budget of most districts throughout the United States, one way to ensure the accountability of school officials is to create a disciplinary disincentive. States would be able to limit the damages available in such tort actions by passing statutes, and each court would have the discretion to determine on a case-by-case basis whether a school official actually breached their duty to intervene, preventing teachers who did not knowingly disregard the presence of a severe case of bullying from creating liability for their districts. While the creation of an affirmative duty of school officials to intervene in severe cases of known bullying would surely result in some school districts losing some much needed money, the likely long-term result would be that school districts would enact comprehensive bullying prevention and intervention policies in an attempt to prevent the development of issues in the first place. This would likely lead to bullying occurring at a lower level of prevalence and the maintenance of a healthier learning environment where fewer students are prevented from achieving their full potential due to the malicious acts of their peers.