

Bullying

Bullying in schools has been a hot topic for the past few years. According to a recent national survey of principals, half of the respondents rated bullying as a serious problem in their schools, ranked above issues such as ethnic and racial tensions among students. The following case and the accompanying questions and answers illustrate the current state of case law concerning student bullying.

The Case¹

During the 2002-2003 school year, Allen J. was enrolled as a third grader in Duquesne Elementary School in Duquesne, Pennsylvania. Since the district does not provide transportation, Allen walked to and from school with his two brothers, except on the relatively few occasions when his father picked up the children from school. Soon after starting school, Allen reported to his teacher that another boy in the class had been picking on and pushing him. The teacher responded by moving the other boy to a corner desk in the back of the room.

The next year, when Allen was in grade 4, four boys chased him and his brothers on their way home and pushed them into some bushes, resulting in a split lip for Allen. He told the principal about the incident and she issued a three-day suspension to each of the four boys. A different student also chased Allen later that year, calling him a “punk,” but he did not report that incident to anyone at school.

In the fifth grade, Allen suffered several more incidents of violence at the hands of fellow students. On one occasion, a student chased Allen around the art room and kicked him, necessitating medical treatment. The art teacher called the security guard but did not directly intervene due to district policy prohibiting teachers from using physical force with students. A few months later, another student chased Allen and kicked him in the face, inflicting a big red bruise over his eye. Allen went to the hospital for treatment and the principal suspended the other student for three days. Later that year, another boy, holding a brick in his hand, chased Allen around the school. Although Allen was not hurt, his mother convinced the administration to release her three sons 15 to 20 minutes early for the remaining days in the school year.

During grade 6, which was in the district’s middle school, the incidents did not abate. Allen’s mother withdrew him from school halfway through the school year, enrolling him in a cyber charter school. She also filed a civil rights suit against the school officials and the district in federal court, alleging that they had violated her son’s “liberty” of bodily integrity under the 14th Amendment due process clause.



The school officials admitted to knowledge of student bullying but argued that they had implemented remedial policies, such as:

- Requiring staff training, including a “Responsive Classroom” workshop;
- Contracting with private security guards and—after the lawsuit—hiring a police officer with additional authority;
- Using a specialized computer software program to regularly compile and report disciplinary data;
- Implementing a “solutions team,” including the principal and a social worker, to address disciplinary referrals;
- Hiring a behavior specialist with specific background in defusing conflicts; and
- Establishing a partnership with a local university that was focused on positive discipline.

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Questions and Answers

What do you think the court’s decision was in this case?

The court granted the defendants’ motion for summary judgment, meaning that they won as a matter of law without the necessity of a trial (*Magwood v. French*, 2007). More specifically, the court ruled that Allen’s mother had failed

to establish a genuine factual issue that the school officials had engaged in deliberate indifference. Quite the contrary, the court concluded, “at each and every turn, Defendants responded positively, not indifferently, let alone deliberately so.” The court also concluded that Allen’s mother had failed to show that a government (i.e., public school) official had affirmatively acted—rather than failed to act—to create the danger. Finally, the court ruled that the district was off the hook as a defendant because Allen’s parent had failed to demonstrate a policy or custom that amounted to deliberate indifference. For example, she did not show that inadequate training was directly linked to Allen’s injuries.

Is this decision typical of the results of other bullying-related federal civil rights suits based on the Constitution?

Yes. For example, in an appellate decision cited in Allen’s case, the 4th Circuit reasoned: “The school surely could have done more to protect [the plaintiff student], given the frequent and brutal attacks by [a named student and other students]. But the failure to protect itself is not sufficient to trigger constitutional liability in this situation” (*Stevenson v. Martin County Board of Education*, 2001).

In the vast majority of other bullying cases where the plaintiff parents relied on 14th Amendment substantive due process or equal protection, the courts have ruled in favor of the district defendants (e.g., *Priester v. Lowndes County*, 2004). Exceptions have been rare and have yielded only inconclusive and partial victories (e.g., *Gremo v. Karlin*, 2005).

Why did Allen's mother and other plaintiff-parents sue based on a constitutional violation rather than on common-law negligence?

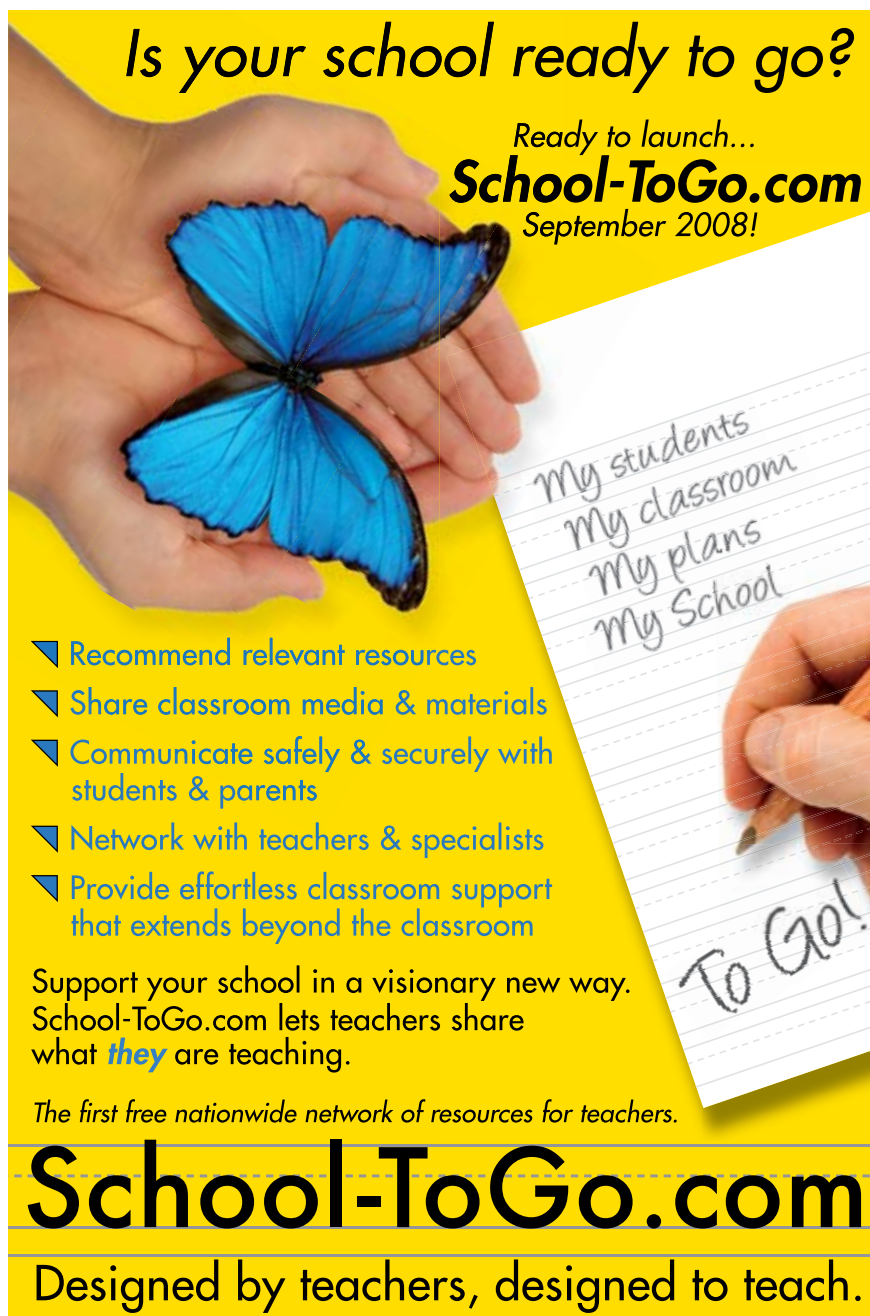
The reason in this case is that Pennsylvania provides governmental (for the school district) and official (for district employees) immunity, with limited exceptions that do not apply to bullying and other negligence cases premised on lack of adequate supervision. Most other states also have governmental immunity, but its extent varies widely and does not always cover negligence lawsuits arising from injurious bullying. (e.g., *R.P. v. Springdale School District*, 2007; *Scruggs v. Meriden Board of Education*, 2007). In those states that do not have applicable governmental immunity, parents have at least succeeded in getting past dismissal or summary judgment for a trial to determine whether school officials breached their legal duty for providing for student safety and, if so, whether said breach was the cause of the student's injury (e.g., *Bashus v. Plattsmouth Community School District*, 2006; *Wood v. Watervliet City School District*, 2006).

In terms of published case law, the parents have not succeeded in the vast majority of such suits (Zirkel, 2003), although in an occasional decision the plaintiff parent has been at least partially successful. For example, in *Bell v. Ayio* (1998), the trial court awarded \$193,400 in damages but the appellate court reduced the liability of the district defendants to \$41,700.

If Allen had been a minority or special education student, would the plaintiff's legal claim and its judicial outcome have been different?

These students have added legal protection, but winning money damages in court still presents notable hurdles for the plaintiff parents. First, they must show that the bullying is specifically based on race or disability. For example, in *Saggio v. Sprady* (2007), the court summarily denied the suit based on the absence of a racial connection. Second, they have to show deliberate indifference on the part of the school officials and a causally linked policy or custom. As a result, plaintiff parents of

minority students who have been the victims of alleged bullying have not been successful in the vast majority of judicial decisions to date, based on 14th Amendment substantive due process or equal protection (e.g., *Barmore v. Aidala*, 2006; *Yap v. Oceanside Union Free School District*, 2004). These parents may have more fruitful litigation avenues via Title VI of the Civil Rights Act (e.g., *Bryant v. Independent School District*, 2003) or, in some states, corresponding state laws, although these



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have not yet yielded published court decisions concerning bullying.

Although parents of special education students also have not fared well in liability lawsuits based on the Constitution (e.g., *Scruggs v. Meriden Board of Education*, 2007; *Smith v. Guilford Board of Education*, 2007; *Smith v. Port Hope School District*, 2007), they have special protections in some state laws in addition to two alternative federal statutory alternatives. Actions taken under Section 504 and the Americans with Disabilities Act have survived defendants' motions of dismissal or summary judgment in a few cases to date, although the plaintiffs still have to prove bad faith or gross misjudgment in most jurisdictions (e.g., *Smith v. Guilford Board of Education*, 2007).

In most jurisdictions, the Individuals with Disabilities Education Act does not provide money damages but does provide other remedies, such as compensatory educational services or tuition

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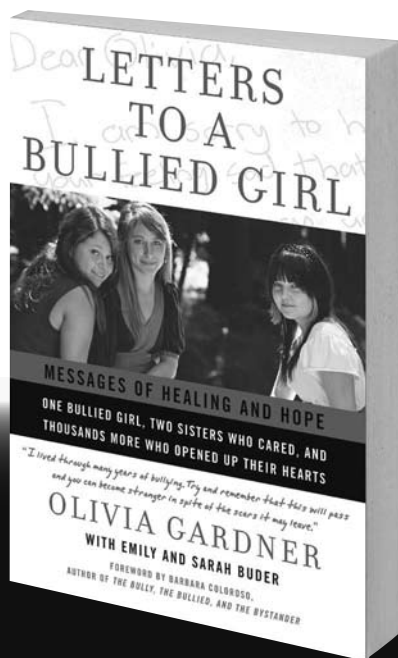
reimbursement (e.g., *Shore Regional High School District v. P.S.*, 2004) if the bullying amounts to a denial of the eligible child's entitlement to "free appropriate public education" (FAPE). However, the courts have dismissed the majority of such FAPE cases to date due to the plaintiff's failure to exhaust the available mechanism of a due process hearing (e.g., *R.P. v. Springdale School District*, 2007; *Smith v. Port Hope School District*, 2007) or the failure to connect the alleged disability harass-

ment to FAPE (e.g., *Stringer v. St. James R-1 School District*, 2006). The exceptions are relatively rare (e.g., *Walden v. Moffett*, 2006).

If Allen had been a female student and the bullying amounted to sexual harassment, would these differences have been judicially significant?

Not in most cases. Parents of such students have not fared well in bullying lawsuits based on the Constitution (e.g., *Doe v. Ennis Independent School District*, 2007). Since the Supreme Court's decision in *Davis v. Monroe County Board of Education* (1999), they face slightly easier but still difficult hurdles for liability under Title IX. By way of contrast, typically due to more flagrant facts, in some cases where the bullying was based on the victim's perceived homosexuality, the plaintiff-parent has been able to succeed in surviving dismissal (e.g., *Seiwart v. Spencer-Owen Community*

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School District, 2007) or in reaching a conclusive victory (Theno v. Tonganoxie Unified School District, 2005). Additionally, some states provide stronger protection for such students in their human relations statutes (e.g., L.W. v. Toms River Regional School District, 2007; Washington v. Pierce, 2005).

Do states' anti-bullying laws change the odds in such liability lawsuits?

It depends on the specific language of the law and the nature of the parents' claim. For example, a Georgia appellate court recently upheld the dismissal of a federal civil rights suit based on that state's anti-bullying law because a state statute cannot provide the basis for a Section 1983 claim (Chisolm v. Tippens, 2008).

Conclusion

Anti-bullying efforts have increased in schools and in state laws. Although bullying is an imprecise term that overlaps with special legal protections against sexual, racial, and disability harassment, it has thus far not been a major source of liability in terms of published case law. However, preventive efforts and unpublished cases, including settlements, may help explain the limited height of the tip of the iceberg thus far. In any event, the same conclusion that I reached five years ago still applies today:

The real reason for a school to take a strong stance against bullying is not to avoid legal liability. Although anti-bullying policies and practices must be carefully crafted to pass constitutional muster in terms of vagueness or overbreadth, such efforts are worthwhile simply because, whether it results in grave physical injury or not, bullying is bad—bad for the victims, bad for the perpetrators, and bad for a civil society. As part of their basic mission as purveyors of values, public schools must teach and enforce rights over wrongs. (Zirkel, 2003) [E]

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Note

¹Because this case arose at the pretrial stage of the defendant district's summary judgment motion, the "facts" herein are allegations resolved in favor of the plaintiff-parent.

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WORD SEARCH

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I	T	N	J	Y	Y	R	V	V	D	W	M	M	L
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