I. INTRODUCTION

The increased focus on bullying by the media and legislature has corresponded with an increased risk of school district liability for the behavior of students. In many cases, student victims of bullying assert claims that the school district did not do enough to protect the student. This presentation will review the standards used by courts and the OCR to determine whether a school district is liable for student bullying and harassment. This presentation will also provide recommendations for investigating and responding to reports of bullying in order to minimize the potential risk of liability.

School bullying is not a new problem, but research shows that it is a pervasive one. A national survey found that 30% of teens in the United States are estimated to be
involved in bullying, either as a bully, a target of bullying, or both.\textsuperscript{1} The study found that bullying was most common in the 6\textsuperscript{th}, 7\textsuperscript{th}, and 8\textsuperscript{th} grades.

A. “Bullying” Defined

Minnesota law requires each school board to adopt “a written policy prohibiting intimidation and bullying of any student.” Such a policy must address “intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet Use.” Minn. Stat. § 121A.0695.

The Minnesota School Boards Association (“MSBA”) has issued Model Policy 514 that defines the term “bullying” as:

“Bullying” means any written or verbal expression, physical act or gesture, or pattern thereof, by a student that is intended to cause or is perceived as causing distress to one or more students and which substantially interferes with another student’s or students’ educational benefits, opportunities, or performance. Bullying includes, but is not limited to, conduct by a student against another student that a reasonable person under the circumstances knows or should know has the effect of:

1. harming a student;
2. damaging a student’s property;
3. placing a student in reasonable fear of harm to his or her person or property;
4. creating a hostile educational environment for a student; or
5. intimidating a student.

Minnesota law also requires each school board to adopt “a written policy governing student or staff hazing.” Such a policy “[m]ust apply to student behavior that occurs on or off school property and during and after school hours.” The policy must include “reporting procedures and disciplinary consequences for violating the policy.” The disciplinary consequences must be “sufficiently severe to deter violations and appropriate discipline prohibited

behavior.” In addition, “[e]ach school must include the hazing policy in its student handbook on school policies.” Minn. Stat. § 121A.69.

B. **In Some Circumstances, Bullying Is Also Considered to Be Harassment**

While students may bully one another for any number of reasons, it is important to remember that bullying may also be a form of harassment. If the harassment is based on the victim’s race, color, religion, sex, sexual orientation, disability, or other protected class, the school could face claims under the Minnesota Human Rights Act (“MHRA”) or a number of federal antidiscrimination statutes. These claims are *in addition to* the state common law claims discussed below. *See Montgomery v. Independent School District No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000).

Minnesota law requires each school board to adopt a written sexual, religious, and racial harassment and sexual, religious, and racial violence policy that conforms with the Minnesota Human Rights Act. *See* Minn. Stat. § 121A.03, subd. 2. As set forth in Section 121A.03, subdivision 2, the policy shall apply to students, teachers, administrators, and other school personnel. Further, the policy must “include reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy.” The policy “must be conspicuously posted throughout each school building, given to each district employee and independent contractor at the time of entering into the person’s employment contract, and included in each school’s student handbook on school policies.” In addition to adopting such a policy, “[e]ach school must develop a process for discussing the school’s sexual, religious, and racial harassment and violence policy with students and school employees.” Minn. Stat. § 121A.03, subd. 2.

C. **Peer-to-Peer Harassment/Sexual Harassment**

Schools are only liable for damages in student-to-student sexual harassment claims if administrators respond to severe, pervasive, and objectively offensive conduct in a “deliberately indifferent” manner. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999).

D. **Guidance from the U.S. Department of Education Office for Civil Rights**

1. An October 26, 2010 Office of Civil Rights (“OCR”) letter stated that federal anti-discrimination statutes may be violated if harassment based upon a protected class is “sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”
According to the OCR, a school district is responsible for addressing harassment incidents “about which it knows or reasonably should have known.” The OCR advises the following:

a. School districts should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints that will alert the school to incidents of harassment.

b. When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred.

c. If an investigation reveals that discriminatory harassment has occurred, federal antidiscrimination statutes require that a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

d. School districts should take steps to stop further harassment and to prevent any retaliation against the person who made a complaint, a person who was the subject of harassment, or a witness to harassment.

e. Remember that these duties are a school district’s responsibility even if the misconduct is covered by an anti-bullying policy and regardless of whether the victim of harassment had complained, asked the school district to take action, or has identified the harassment as a form of discrimination.

2. National School Boards Association Response

Following the publication of the letter from the OCR, the National School Boards Association (NSBA) published a reply dated December 7, 2010.2 In this letter, the NSBA expresses its concern over the OCR’s statement of the law, which the NSBA believes expands the standards for liability for school districts. The NSBA is concerned that the OCR may invite “misguided litigation” against school districts. Specifically, the NSBA disagrees that school districts can be liable for damages related to peer harassment without actual knowledge of the harassment. The OCR stated that districts are responsible for addressing harassment about which it

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2 Letter from Francisco M. Negron, NSBA General Counsel, to Charlie Rose, General Counsel, Department of Education, in response to OCR’s “Dear Colleague Letter” (Dec. 10, 2010).
“knows or reasonably should have known.” Because this standard goes beyond actual knowledge, it is broader than established case law such as *Davis v. Monroe County Board of Education*, 526 U.S. 619 (1999).

3. Department of Education Response to the NSBA

In a response letter dated March 25, 2011, the OCR disagreed with NSBA’s contention that the OCR would invite “misguided litigation.” The OCR’s position is that the letter is meant to help schools identify and respond to harassment, thereby helping insulate schools from liability, not increasing it. In regard to NSBA’s critique that the letter expands the scope of liability for schools, the OCR stated that the standards outlined were for administrative enforcement of federal civil rights laws, meaning action taken by the OCR, not for use by private plaintiffs through lawsuits filed in the courts.

II. LEGAL CLAIMS RELATED TO BULLYING

A. Federal and State Civil Rights Laws

1. Standard of Liability

The ruling in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d (1999) established the precedent for holding school districts liable for damages in cases of peer-to-peer harassment. *Davis* involved a situation where a fifth grade female student was the subject of verbal harassment, consisting of comments of a sexual nature, and numerous acts of objectively offensive touching.

The plaintiff claimed that the peer-to-peer sexual harassment violated Title IX. The Court held that school districts receiving federal funds could be held liable for damages in peer harassment cases if the harassment is proven to be so “severe, pervasive and objectively offensive” that it deprives the victim of access to educational opportunities and benefits and if the school had actual knowledge of the harassment but was deliberately indifferent to it. While this case was based upon a violation of Title IX, the ruling has been applied in cases involving harassment based on race, color, national origin, and disability.

2. Limitations of Civil Rights Laws in Addressing Bullying

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3 Letter from Russlyn Ali, Department of Education, Assistant Secretary for Civil Rights, to Francisco M. Negron, General Counsel, NSBA, in response to NSBA’s letter (Mar. 25, 2011).
Civil rights laws provide a remedy for a victim only if the harassment or bullying is motivated by the characteristics of the targeted victim based upon the protected classification of the victim (i.e.: race, gender, disability).

B. **State Common Law Torts**

1. **Failure to Supervise (General Duty)**

   School districts have a duty to provide a safe learning environment for students. The question of liability for student bullying can be analyzed as one of foreseeability – should the school district have predicted such an incident, and would supervision have prevented the incident? *See Sheehan v. St. Peter’s Catholic School*, 188 N.W.2d 868 (Minn. 1971); *Raleigh v. Independent School District No. 625*, 275 N.W.2d 572 (Minn. 1978), *S.W. v. Spring Lake Park School District No. 16*, 592 N.W.2d 625 (Minn. App. 1999); *Anderson v. Shaughnessy*, 526 N.W.2d 625 (Minn. 1995).

   If a school district has knowledge of repeated instances of similar past bullying by a student or group of students and fails to take action to prevent the bullying, a court will likely find that the bullying which caused the physical or emotional harm to the student was foreseeable.

2. **Standard of Liability**

   a. While the specific standard of liability will vary depending upon the nature of the claim brought, as a general rule, a victim will be required to prove that the school district: (1) owed the victim a duty of care to prevent the bullying conduct; (2) that this duty was breached; (3) that the victim was harmed; and (4) that the harm was caused by the conduct or lack of conduct by the school district.

   b. There are two standard tests for causation:

      i. “But-for” test - the harm would not have occurred “but for” the school district’s conduct

      ii. “Substantial factor” test - the school district’s conduct was a material element and a “substantial factor” in bringing about the harm
C. Recent Cases

For the most part, courts continue to apply the “deliberate indifference” standard, which is a high bar for finding school liability. However, how the differing standards for finding school liability are ultimately reconciled is yet to be seen. Distinctions between the U.S. Supreme Court’s standard and the OCR’s enforcement standard remain.


The court concluded that the parents of a special education student who hanged himself had not presented sufficient evidence of deliberate indifference required to establish a peer-on-peer harassment claim under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act. Although there was evidence of pervasive and severe harassment of the student, the school district was not deliberately indifferent to the harassment. The plaintiffs relied on OCR’s suggested remedial actions to urge the court to replace the “deliberate indifference” standard with a “reasonableness” standard derived from the OCR’s “Dear Colleague” letter. The court was not persuaded, stating that “OCR applies a different and less exacting legal standard in enforcement actions than courts apply in actions for monetary damages.”


The Second Circuit found a school district liable for being deliberately indifferent, which may signal a diminishing of the “deliberate indifference” standard. The court found that a jury could find the district liable where the district’s response to bullying was “clearly unreasonable” and inadequate or ineffective in preventing further discrimination. The district had disciplined the individual harassers and implemented school-wide programming aimed at improving the school climate, but the court found that these responses “could not have plausibly changed the culture of bias or stopped harassment.” Such reasoning bears resemblance to the OCR’s interpretation that schools are under an obligation to implement myriad remedial actions to eliminate harassment.

III. BULLYING LEGISLATION

Currently, all states except Montana have enacted statutes regarding peer bullying. State anti-bullying statutes generally:
1. Define bullying to include harassment and intimidation;

2. Recognize that bullying can occur through electronic means;

3. Require schools to include bullying prevention in training standards or curriculum;

4. Require schools to adopt policies, procedures, and prevention plans addressing bullying; and

5. Require schools to gather data on reported incidents of bullying and harassment.

IV. DISCIPLINING STUDENTS FOR BULLYING BEHAVIOR OCCURRING OFF-CAMPUS

One problem schools face while trying to address bullying activities is that the conduct often happens off school grounds. This limits the ability of a school to take action against the student. A school district has the power to discipline students for off-campus misconduct only if the misconduct is a continuation of or has a *nexus* with improper conduct that occurred on school grounds or the student’s actions have a direct and immediate effect either on school discipline or on the general safety and welfare of students. *In re Expulsion of Z.K. and S.K.*, 695 N.W.2d 656 (Minn. App. 2005) (citing *In re Expulsion of J.M.*, MDCFL (Feb. 18, 1997)). Although this encompasses a great deal of student actions, it is not unlimited.

The Minnesota State High School League rules governing student conduct, however, are in effect all year round. Thus, a school district may be able to declare a student ineligible to participate in extracurricular events, including athletic teams, for conduct occurring during the summer, for violating those rules.

A. Bullying in the 21st Century – Cyber-bullying

When considering challenges to discipline imposed on students for internet speech created off-campus, courts generally use the “substantial disruption” and “true threat” tests. Courts have determined more often than not that student internet speech created off-campus is protected by the First Amendment. While the internet speech may have been unsavory or mean-spirited, this is not enough to impose discipline without evidence of a substantial disruption at school or true threat to a student or school employee.

1. Factors to Consider When Determining Whether to Discipline a Student for Internet Misconduct
a. **Off-Campus v. On-Campus Computers**

Where did the student create or access the Internet speech? Schools have the power to exercise control over what students do on school computers, while their power over off-campus computer use is more limited.

b. **“Substantial Disruption” or “True Threat”**

If the student has only engaged in Internet speech created and accessed off-campus, the latitude allowed for punishment is narrower. The following are some questions for administrators to ask when determining whether to discipline a student for Internet speech:

1. Does the speech have a nexus with the school? The speech must generally involve the school itself, students or employees to implicate a school’s power to discipline.

2. Does the website or online content “materially” and “substantially interfere” with the operation of the school?

   Some questions used to determine the existence of a material and substantial disruption are:
   
   - Did the student seriously encourage other students to violate laws or school rules?
   - Is there specific and significant fear of disruption, not merely some remote apprehension of a disturbance?
   - Is the fear of disruption more significant than a mere fear of discomfort and unpleasantness from an unsavory viewpoint?
   - Is the disruption merely hurt feelings?
   - Were teachers unable to control or teach their classes for a significant period of time?

3. Does the website or online content constitute a “true threat?” Threats of physical violence are not protected by the First Amendment whether made inside or outside school?
Some questions used to determine the existence of a true threat are:

- Was there a threat of physical violence to students or staff?
- What was the reaction of those who heard the threat?
- Did the person who made the threat communicate it directly to the person who was the object of the threat?
- Did the speaker have a history of making threats against the threatened person?
- Did the threatened person have a reason to believe that the speaker had a propensity to engage in violence?

4. If discipline is imposed based on a student’s internet speech, the decision should be supported with evidence of the “material disruption” or “true threat” created by the speech.

B. Cases Involving Discipline for Online, Off-Campus Speech

This past year, three discipline/bullying matters were appealed to the United States Supreme Court. The Court denied certiorari in all three matters. This denial means that the decision of the lower court is unchanged.


A student created a fake website profile for his school’s principal on MySpace during non-school hours at his grandmother’s home. The website portrayed an unflattering image of the principal based on a theme of the principal being a large man. It also implied the principal used drugs and engaged in other illicit behavior. The student who created the profile and other students accessed the profile from school computers. Upon learning of the profile and the student’s involvement in creating it, the school suspended him for ten days and placed him in an alternative learning program. The district court, affirmed by the appellate court, held that the District could not punish the student for his off-campus behavior
even though it “reached inside” the school. The profile did not create a substantial disruption inside the school, and therefore the student’s actions were protected by the First Amendment.


This case involved very similar actions as those from the *Layshock* decision above. This decision again concerned a student creating a fake MySpace profile for a school principal, however this time the profile implied the principal was a pedophile and sex addict. No students accessed the profile at school. The school learned of the profile and suspended the student. The appellate court again held that there was no substantial disruption to the school despite the more severe content of the profile. Although the student’s actions were lewd or vulgar, because the actions occurred off-campus, the District could not punish the student for them.


A student created a MySpace group titled “S.A.S.H.” or “Students Against Sluts Herpes” from her off-campus computer. The content of the page was directed primarily at another student, Shay N. Many individuals participated in the group, posting pictures of the student and making otherwise derogatory comments about her. The student who created the group was suspended and prohibited from attending school activities. The Court held that given the targeted, defamatory nature of the student’s speech, who created the group which was aimed at a fellow classmate, the conduct created “actual or nascent” substantial disorder and disruption in the school justifying disciplinary action against the student. The Court also held that it was foreseeable that the student’s conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the group’s members and the target of the group’s harassment were students.

V. **PREVENTING BULLYING**

It is in the school’s best interest to make sure parents and students are aware of the school’s stance on bullying, and aware that there could be consequences, even for first time bullies. One provision to add to a bullying policy is notification of parents of any bullying incidents. Informing parents about bullying that is going on at school may make those parents aware of bullying that is occurring at home. A school’s ability to
punish a student’s behavior for off-campus, online bullying is limited, and increased parental monitoring may limit bullying in ways that a school cannot.

A. Ten Tips to Stop Bullying:

1. Raise school-wide awareness of the seriousness of bullying through speakers, review of anti-bullying policies and other initiatives.

2. Use student surveys to determine the extent of bullying behavior in your school.

3. School administrators, teachers, athletic coaches, and other staff must consistently enforce the District policies and intervene if bullying occurs.

4. Address the student code of silence. Encourage students to file complaints when they are bullied or witness bullying.

5. A school district should investigate every report it receives about bullying. School district officials or a designated third party may conduct the investigation.

6. The school district should take steps to protect the complainant or reporter pending completion of the investigation. Many students fear reporting a bully because “they will be next.”

7. Upon completion of the investigation, the school district should take immediate action. Discipline may include warning, suspension, or expulsion depending on the nature and severity of the bullying.

8. Depending on the situation, some forms of bullying may constitute criminal conduct. Just as school districts report weapons and drug offenses to the police, they should report bullying activities that are criminal in nature to the police or juvenile authorities.

9. Districts should keep appropriate records documenting any action to stop student bullying.

10. The worst reaction to a complaint is to do nothing, or to be perceived as doing nothing. Although many student complaints about other students will fall into the teasing/name-calling category of typical student misconduct that can be dealt with swiftly and immediately by the staff person involved, some will require more serious action.