# CYBERBULLYING FROM CLASSROOM TO COURTROOM: APPROACHES TO PROTECTING CHILDREN IN A DIGITAL AGE*

*Panel 1—Cyberbullying In The Courtroom: Law, Litigation, And The First Amendment*

## REMARKS OF JONATHAN BRUNO**

Before I get into the cases—and that's really what I am going to discuss—I'm going to talk about claims that I see as a defense lawyer; school districts sued in bullying cases and some cyberbullying cases. I think as long as there's bullying, there are going to be lawsuits.

As part of my research I came across a great source, which provides a chart on all the different states and those states, which have enacted anti-bullying legislation. The source is from Cyberbullying Research Center.[1] The website is a really good source because it lists all the pending legislation as well as those anti-bullying legislations that has passed so far.

*On October 20, 2011 the Albany Law Journal of Science and Technology presented a symposium on the intersection of cyberbullying and the law. These are these remarks have been annotated and edited by the Journal staff. The webcast of the event is available at http://www.totalwebcasting.com/view/?id=albanylaw (last visited Aug. 23, 2012).

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[1] Cyberbullying Reseach Center, http://www.cyberbullying.us/ (last visited Aug. 1, 2012).

But as far as the case law is concerned, as a preliminary matter, there's no private right of action for cyberbullying. There's a case in Nassau County, *Finkel vs. Dauber,*[2] which has said the courts in New York should not recognize cyberbullying or internet bullying as a cognizable tort action.[3] And there's essentially a reason for that, because there exists other torts as well as constitutional claims, which victims of cyberbullying or bullying have available to them. I think anti-bullying legislation really imposes upon school districts obligations to create policies and procedures more as preventative measures. But the legislation is not necessarily private rights of action that you're seeing plaintiffs use as far as trying to collect civil damages.

There are a couple of cases that say there is no private right of action for cyberbullying. There is a case in Connecticut as well. So New York and Connecticut have antibullying legislation, but again, courts in those states have said that those laws do not provide a private right of action.

So what are plaintiffs doing? Well, in my experiencing—based upon what the case law says, is that they are bringing constitutional claims; they're bringing claims under Title IX and they're bringing claims under the IDEA, which is the Individuals with Disabilities Education Act.[4] Those are claims being brought by people suing for damages based on bullying, and the common theme is that it's prevented the students from receiving an educational opportunity at their school.

Most of the cases out there deal with public school systems, and I'll talk a little bit about private schools. I've represented private universities as well as public school districts, but the claims are pretty much the same.

I struggle with the term cyberbullying just because it's somewhat new, but bullying is bullying, and I agree there is anonymity with cyberbullying and I think it could be much harsher than regular bullying. But I don't think the law distinguishes between the two at this point—and I agree with

[2] Finkel v. Dauber, 906 N.Y.S.2d 697 (Sup. Ct. Nassau Cnty 2010).

[3] *Id.* at 703 ("[T]he courts of New York do not recognize cyberbullying or Internet bullying as a cognizable tort action. A review of the case law in this jurisdiction has disclosed no case precedent which recognized cyberbullying as a cognizable tort action.").

[4] 20 U.S.C. §§ 1681–1688 (2006) (Title XI); 20 U.S.C.A 1400 *et seq.* (West, Westlaw through P.L. 112-104 (excluding P.L. 112-91, 112-95, 112-96, and 112-102) (Individuals with Disabilities Act).

Doug—I don't think that you will see amendments on any statute or certainly not the Constitution based on cyberbullying. I think what you're going to see is allegations brought brought pursuant to due process, equal protection, Title IX, and the IDEA. But the fact patterns are going to be different, they're going to be based on cyberbullying as opposed to regular bullying.

I want to call attention to a case out of the Eastern District, it's *T.K. and S.K. vs. New York City Department of Education*.[5] It is a decision decided by Judge Weinstein, and it's an excellent decision because it really goes through this thorough discussion about bullying.

The case deals with what standard the Court going to apply in an IDEA case,[6] that's the type of claim that the victim and her parents were bringing in the *T.K.* case. What type of standard are the Courts going to apply for an IDEA claim? The Court went through all the different other types of claims that victims of bullying are bringing.

The Court first talked about the due process standard. The Court held that although the due process clause forbids the state from depriving a citizen of their rights to liberty and property and life, it does not require the state to protect the rights against invasion of the private actors.[7]

So what does that necessarily mean? Well, that means that unless you are either in a special relationship with the state or the state created the danger, you don't really have standing to pursue a claim for a due process violation. Thus far, the Second Circuit hasn't said that the existence of a special relationship exists in a public school setting.[8] So what you're seeing are bullying victims bringing due process claims in Federal Court and not having a lot of success, because so far, at least in New York and Connecticut, the Second Circuit hasn't said that that a special relationship exists. What Judge Weinstein also noted is, that even if you do have a special relationship, the conduct must be so egregious and outrageous that it shocks the conscious, and the reason that you have that rigorous standard is because it ensures the Constitution is not demoted to a tort claim.[9]

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[5] T.K. v. N.Y.C. Dep't of Educ., 779 F.Supp.2d 289 (E.D.N.Y 2011).

[6] *Id.* at 293.

[7] *Id.* at 315.

[8] *Id.*

[9] *Id.* ("This rigorous standard assures that the Constitution is not demoted to the equivalent of tort law.").

So you're seeing victims of bullying and their parents bringing these due process claims, and although it's not impossible to win these claims, I think what you're seeing is that they are having little success in succeeding on a due process claim.

Judge Weinstein next went to the equal protection standard. The equal protection clause basically requires that similarly situated people be treated alike. In order to succeed on an equal protection claim in they harassment context of a student, the plaintiffs must basically show that they were afforded a lower level of protection and that lower level of protection was based on a protective category.[10]

In *L.K.'s* case, it was allegedly based on her disability. In addition to showing that she was treated differently she was also required to show that the harassment was a result of some type of government custom or policy.

So what Judge Weinstein said is that the Equal Protection standard was too difficult, and he declined to apply it to plaintiffs' IDEA claim because to do so would essentially mean that the equal protection and the IDEA claims was indistinguishable.[11] You have to understand the IDEA is based on statute, it's statutory, so Judge Weinstein did not want to apply a constitutional standard to prove an IDEA claim.

Judge Weinstein then moved to the Title IX standard.[12] Title IX essentially prohibits sex discrimination in education, in any education program that receives federal funding from the government. For Title IX, it's discrimination based on sex. Claims under Title IX are analyzed under the standard set forth by the Supreme Court's decision in *Davis vs. Monroe County*.[13] To succeed on a Title IX claim a plaintiff must demonstrate that the school acted with deliberate indifference to sexual harassment that was so severe and pervasive and objectively offensive that it effectively barred access to an educational opportunity or benefit.

And in order to show deliberate indifference a plaintiff must show actual knowledge. What Judge Weinstein said was that the

[10] *Id.* at 316.

[11] *Id.* ("Applying this test to bullying under the IDEA suffers from inadequacies similar to those in applying the test developed under Due Process. To adopt it would take an IDEA violation outside of the realm of its statutory protections and into that of more difficult to prove constitutional violations.").

[12] *Id.* at 316.

[13] Davis v. Monroe County Board of Educ., 526 U.S. 629 (2009); *T.K.* 779 F.Supp.2d at 314.

principles of Title VII were applicable to the IDEA, but they had to be interpreted with the IDEA, which is designed to protect students with learning disabilities.[14]

So what the Court found was that there are four circuits, the second circuit included, that have held that bullying can be a basis for a violation of the IDEA, but that there was no uniformity as far as which standard should apply.

The Court concluded that in analyzing the various circuit court decisions, the question to be asked is whether school personnel was deliberately indifferent to or failed to, or failed to take reasonable steps to prevent bullying that substantially restricted the child with learning disabilities and her educational opportunities.[15] Judge Weinstein held that the school should be responsible for addressing harassment incidents it knows about, and should have or should have known about it, and if the school finds that harassment or bullying occurred, to take preventative steps in the future.[16] The difference between the standard under the IDEA and the due process is that under due process the bullying has to be so egregious and outrageous that it shocks the conscience, but under the IDEA it has to be severe and pervasive.[17] But either way the standard is very high for victims of bullying.

So what the Court concluded was although there was enough evidence that *L.K.* was disabled and that she was bullied, and that the school district knew about the bullying and didn't take reasonable steps to address it, the Court couldn't make a determination at that point on whether or not the bullying rose to the level of severe and pervasive conduct, and that's because under the IDEA you have to go through the administrative process and at the administrative process—that issue wasn't determined.[18] So the Court denied the school district's motion for summary judgment and remanded the case back for further determination on the issue of severe and pervasive.[19]

What's interesting is that Judge Weinstein goes through this long decision about bullying, why kids bully, different types of claims that are being brought, the standards on those claims, and

[14] *T.K.* 779 F.Supp.2d at 314–15.
[15] *Id.* at 316–17.
[16] *Id.* at 317.
[17] *Id.* at 315–317.
[18] *Id.* at 317–319.
[19] *Id.* at 319.

then actually comes to create the standard for bullying claims brought under the IDEA.

More recently in August of 2011, Judge Weinstein was presented with another bullying case.[20] This time it wasn't an IDEA claim, but a due process and equal protection claims.[21] Judge Weinstein granted the school district's motion to dismiss right away.[22] In, he elected not to exercise supplemental jurisdiction over the state law claim. And the reason that he elected not to do so is because he said that bullying is a developing state-law issue and that state and local governments should really be addressing, and are better suited to address those issues, than the Federal Courts.[23]

So at least as far as due process claims, equal protection law claims, claims under Section 1983, which is the vehicle by which you can sue for a constitutional violation, we're seeing that plaintiffs who sue public school districts are having a very difficult time meeting the threshold.

Now, I want to talk about two cyberbullying cases—and I call them cyberbullying just because they had a component of technology.

One case in which my office was involved in was *S.S. vs. Hastings-on-Hudson Union Free School District*.[24] In that case a female freshman received, over the course of a seven days, three very sexually explicit e-mails from another school authorized e-mail account. The school did an investigation, but they weren't able to determine definitively whether the e-mail address from where it was sent from, that the student actually sent the three e-mails. An important fact in the case was that the student was able to successfully finish out her school year and she actually got good grades.[25]

So after the school year was over her parents sued under Title IX. The District Court granted the school district summary judgment and the Second Circuit affirmed. The Court essentially

[20] K.W. v. City of N.Y., 275 F.R.D. 393 (E.D.N.Y. 2011).

[21] *Id.* at 396.

[22] *Id.* at 400.

[23] *Id.* ("[T]he subject of bullying in New York public schools is a developing state legal issue. In general, state and local government are better suited than federal courts to fashion appropriate policy and relief when bullying interferes with a student's learning.").

[24] R.S. *ex rel.* S.S. v. Board of Educ. of Hastings-On-Hudson Union Free Sch. Dist., 371 Fed. Appx. 231 (2d Cir. 2010).

[25] *Id.* at 232.

said that the e-mails received over a seven-day period were not severe or pervasive enough to constitute sexual harassment under Title IX.[26] The Court also took note of the fact that the student didn't seem to have suffered any damages; she finished school, she did well. So courts aren't only looking at the conduct of the bully, but are also looking at the effect of the conduct on the victim.

A case out of Connecticut, *Brodsky vs. Trumbull Board of Education*[27] is another cyberbullying case that had to do with instant messaging; again the bullying occurred both in school and out of school. The bullying that took place outside of school was based on the instant messaging.[28] Like in *S.S.*, the Court said that the instant messaging was not severe or pervasive enough to meet the threshold under Title IX.[29] One thing that the Court did say that was interesting was that the Federal Law was, "not intended and does not function to protect students from bullying generally or to provide them recourse for this treatment not based on sex."[30] So essentially, what the Court was saying is that the Constitution doesn't protect against regular bullying or teasing or things that kids normally do. There has to be a higher threshold under the Constitution to amount to a constitutional violation.

A case that I came across that was pretty interesting for no reason other than how the Court reached its conclusion was *L.W. vs. Tom's River Regional School Board*.[31] In that case a kid was being bullied based on his perceived sexual orientation. This was a case based out of New Jersey, so what the parents did was they filed a complaint with the New Jersey Division of Civil Rights and actually obtained a favorable determination from the Division, and the School District appealed the determination.[32] The Division utilized a Title IX standard in its determination since—the claim was based on the student's perceived sexual orientation.[33]

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[26] *Id.* at 232–34.

[27] Brodsky *ex rel.* S.B. vs. Trumbull Board of Educ., Civ. No. 3:06cv1947, 2009 WL 230708 (D. Conn. Jan. 30, 2009).

[28] *Id.* at *2.

[29] *Id.* at *8.

[30] *Id.* at *7.

[31] L.W. vs. Tom's River Regional Sch. Bd., OAL Docket No.: CRT 8535-01, 2004 WL 2652451 (N.J. Div. of Civ. Rights Jul. 26, 2004).

[32] *Id.* at *26.

[33] *Id.* at *2.

However, on appeal, the Appellate Division in New Jersey, declined to apply the standard of Title IX, finding that it was too rigid in its application. What the Court said was that they would apply the same standard as sexual harassment in the workplace under New Jersey state law.[34] What that meant was, as far the Appellate Division in New Jersey in concerned, they are not willing to have plaintiffs plead and prove such a high standard as Title IX, but rather are allowing them to proceed under the standard applicable to the New Jersey law against Discrimination.

What's different between New Jersey and New York is that the New York Human Rights Law does not cover public school districts, which are not educational corporations or associations.[35] So as far as New York is concerned, parents of kids that are bullied or victims that are bullied are not going to be able to seek redress for some type of sexual harassment based bullying under the New York State Human Rights Law.

There's also a case in the Eastern District of North Carolina called *Stevenson vs. Martin County Board of Education,*[36] that involved a claim brought under Section 1983 for an alleged 14th Amendment violation. In that case, a student who was bullied and beat up by other students claimed that he had a deprivation of his property interests as opposed to his liberty interests.[37]

Usually when these kids and their parents sue they're saying that you deprived me of my liberty interests. Here the student was alleging that because of the bullying he was deprived of his property interest in an education.

The Court rejected that argument and the reason it rejected it is because the kid left school voluntarily.[38] The decision may have been differently if this student stayed and took on the bullying. The Court said it might have ruled in his favor, but

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[34] 381 N.J. Super. 465, 488 (A.D. 2005).

[35] *But see* Ithaca City School Dist. v. New York State Div. of Human Rights, 926 N.Y.S.2d 268, 272, *granted leave to appeal*, 17 N.Y.3d 716 (App. Div. 3d Dep't 2011) (holding public school districts are subject to the New York Human Rights Law, reasoning that the statue's language "educational corporation" requires broad interpretation).

[36] Stevenson *ex rel.* Stevenson vs. Martin Cnty. Bd. of Educ., 93 F.Supp.2d 644 (E.D.N.C 1999).

[37] *Id.* at 647.

[38] *Id.* ("Because Alex voluntarily left the public school to attend a private school, he cannot state a claim for deprivation of a due process property interest.").

unfortunately it did not.[39] The Court also said that there was no special relationship to establish liability.[40] So once again, plaintiffs that are suing under the due process clause have a really high burden of proof in establishing the existence of a special relationship.

And in *Stevenson* they also tried unsuccessfully to sue under the Safe Schools Act, but the Court noted that they really didn't know what type of relief it provided. They noted that no Federal Court has relied on the Act for any purpose and the Department of Education has not promulgated any regulations claiming the student's rights under the Act.[41]

So you're seeing plaintiffs and their lawyers trying to come up with more creative causes of action to sue school districts, but are being met, at least in Federal Court, with a lot of resistance.

So what does the case law tell us so far? Basically that plaintiffs are going to continue to sue as long as bullying occurs and they're going to sue for constitutional violations. I've seen it ten years ago. I don't think that's every going to change. And what I think what will happen is that we're going to see plaintiffs and their lawyers continue to test the Constitution and the case law to see if they can get some traction on some of these claims. But the standard of proof is very high and unless you have a situation where there is a special relationship between the school district and the student, plaintiffs probably are not really going to have much success.

You might ask, well, what about private institutions, private educational institutions? You're not seeing a lot of cases out there, and maybe that's because maybe they settle or whatever. But I'm not sure that just because you have a private institution that it necessarily creates a special relationship which the Supreme Court said is necessary in order to have standing to sue under the due process clause.

One last thing—my time's almost up. One thing that was noted was bullying that is occurring outside of the school district school or outside the school in general. For the most part courts aren't dismissing claims just because bullying occurred outside the school. As far as federal claims are concerned, it's really more about whether or not the school district had actual knowledge of

[39] *See id.*
[40] *Id.*
[41] *Id.* at 648–49.

the bullying or had reason to know of the bullying, whether it takes place inside our outside the school.

So if it's occurring on Facebook, MySpace, somewhere else where it's not the school's Facebook page, I think that plaintiffs will have a very difficult time proving deliberate indifference or severe and pervasiveness, because the school district has to have actual knowledge of it, and be deliberately indifferent they the severe and pervasive bullying. I think those victims may have a very difficult time. If you have a situation where a student's bullying on a school's Facebook page or an e-mail that's provided to them by the school district for an intranet system, I think that's a different story. I think plaintiffs might have better success in proving their claim under those factual scenarios.

So I think I am out of time, so I appreciate you all listening to me. Sorry that I had to sort of rush through it, but there's a lot of cases out there and the bottom line is they deal with bullying, and they're starting to deal with cyberbullying, but you're not necessarily seeing the Court's analysis change just because it's called cyberbullying. It's still a very difficult burden and I think for cyberbullying cases it's going to be an even more difficult burden of proving deliberate indifference that's necessary under either Title IX or under the IDEA.