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

Panel 2—Cyberbullying In The Classroom: Educators, Policy, and Protecting Students

REMARKS OF GREGG JOHNSON**

I've spent the last nineteen years of my practice in New York State, practicing mostly in Federal Court, but also in state courts defending public officials, school officials, school boards, employment litigation, civil rights litigation and law enforcement litigation. I'm going to talk a little bit today on sort of two topics. One is to talk about how all of these legal concepts that we're discussing today impact the school. What are the challenges that are facing public schools in dealing with this issue, as well as all the other myriad of issues that school districts have to deal with in light of the constraints that are placed upon public schools? So I really want to spend some time talking about that in terms of

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how these laws and how these claims and how these risks pose challenges to public schools. And the second part of my comments will be directed at trying to talk about some practical strategies to utilize in trying to manage the risks.

When I talk about managing risks today it's co-extensive with the idea that there are the victims and this is an expanding problem, there's no doubt about that. So when I talk in terms of risk management, that's how I talk as a defense counsel, what my focus is on the prevention and effective intervention designed to prevent reoccurrence. All of which are part of the grand risk management plan. So, first let's talk about the issue of the challenges that are facing school districts, and from my reading of the law out there on this topic of cyberbullying, I think it's the concept of a hostile environment that has evolved in the law over the last twenty-five-plus years that is most often being used.

And you've heard all the reference to statutes, whether it's Title IX, whether it's the equal protection clause, whether it's the Section 1983 claim, but most of the claims that are being made in those cases are using this concept of a hostile environment. As we talk about it from the school context, that means a hostile learning environment.

Now I want to take a little bit of a regression as to where that legal framework came from, because it poses some unique problems for school districts, because when it was originally created by the Supreme Court back in 1986, it was applied in the employment context and public schools are not in the employment context when it comes to students. So that's where some of these challenges arise. I'll talk mostly about practical solutions, but I will talk about a little case law.

This concept of a hostile environment arises back, or at least broadly, back when the Supreme Court decided the case of *Meritor Savings*, which was a Title VII employment case.[1] Up to that point under the Civil Rights Act of 1964, Title VII, employees had to prove that there was a tangible adverse employment action that affected the terms and conditions of their employment. That was the language of the statute. And faced with a very difficult case where there was no tangible employment action, the Supreme Court crafted this concept of a hostile work environment—and it was the creation of the Court, it's not in any statute—still not in Title VII, it's not the Human

[1] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

Rights Law, it's not in any other employment statute.

What the Court recognized was, there are situations where behavior based on gender, based on someone's sex, can be so severe, so pervasive, that it ultimately deprives that person of an equal opportunity to pursue employment.[2] It was this notion that a supervisor or an employer could abuse the economic power that they had over employees that lead the Supreme Court to fashion this concept of a hostile work environment. And in doing so they made sure that there were constraints. They said, whether or not a particular behavior constitutes harassment that might be actionable, it has to be subjectively offensive to the employee. And all these concepts bleed over into the student situation.

There's a subjective element. If I come up here and I tell you a racy joke, half of you might think it's hilarious and thus, as to that half, the joke is welcomed. However, the other half of the audience might be offended. It's potentially actionable to the half that might be offended. So there's a subjective component. The objective component of course is that a single incident, a single insult, a single text message, a single slight is not actionable. So there's an objective standard such that conduct has to reach a level of severity and pervasiveness in order for it to be actionable.

We started in 1986 with the *Meritor* case and through the last twenty-five years this concept of a hostile work environment has evolved and it now includes hostile work environments created for all sort of folks, protected classes in particular. *Oncale,*[3] for example, was a big case in 1988 where the Court made clear that the conduct under Title VII to be actionable doesn't have to be based on sexual conduct as long as it's based on an individual's gender.[4] And that of course has been also applied to a variety of other harassment claims based on all other protected statutes. Conduct that is asexual, that is based on a person's gender, age, disability, race, et cetera, is actionable.

The Supreme Court decided in 1999 the big case for school districts, *Davis v. Monroe County*,[5] in which it recognized under Title VII that an individual student and/or parent can seek money damages under Title XI using the hostile work

[2] *Id.* at 74.

[3] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998).

[4] *Id.* at 80.

[5] Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629 (1999).

environment theory.[6] But they fashioned that new standard, that heightened standard that Jonathan Bruno spoke about several times, that said school districts, recognizing that they are unique environments to some extent, that there has to be a showing of deliberate indifference.[7] That concept doesn't exist in Title VII law, but it does serve to protect to some extent school districts.

Deliberate indifference, what does that mean? What does that mean for educators? It does mean that it's something above negligence, that's the starting place. It's not negligence, it's something higher than negligence. It effectively, as you read the case law, means an awareness, knowledge of the conduct, and a reckless disregard for the conduct. Different judges, different cases, and different jurisdictions can define it in different ways, but that's effectively what it means for school districts.

Now the other thing the Supreme Court decided, or talked about, in the *Davis* case was the fact that in a Title IX context, we're not talking about employment of course, we're talking about access to public education and being denied access based on your gender at least in the Title IX concept.[8] So, there was a focus on whether or not that student is in fact being deprived of access to education. Jonathan Bruno mentioned a case where the case took that issue on, found that the student was successful in the educational environment and therefore it made it more difficult for them to bring a private cause of action under Title IX.[9]

With that as a backdrop, and I'm going to talk back and forth a little bit about employment versus the schools, because that highlights some of the problems school districts have, with this framework being a creature of case law over the last twenty-five years and now effectively being borrowed from the employment law that has evolved over the last twenty-five years, and applied to school districts since at least 1999. Let's start with some of the more obvious challenges that face public school districts.

First of all, you're not dealing with adult employees, you're not dealing with adult supervisors and subordinates, you're dealing with kids. You're dealing with minor kids and I'm going to talk to

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[6] *Id.* at 632–33.

[7] *Id.*; *See Remarks of Jonathan Bruno*, 22 ALB. L.J. SCI. & TECH. 503 (2012).

[8] *Davis* 526 U.S. at 632–33.

[9] *See Remarks of Jonathan Bruno*, 22 ALB. L.J. SCI. & TECH. 503 (2012) (referencing R.S. *ex rel.* S.S. v. Bd. of Educ. of Hastings-On-Hudson Union Free Sch. Dist., 371 Fed. Appx. 231 (2d Cir. 2010)).

you about conducting investigations and witness interviews. Those are all great concepts, but it's a much different task to interview a middle school thirteen year-old child about what happened than it is to go and try and interview an adult in the workplace.

So you have students of different ages, you're going to have school districts promulgating policies that have to be available to middle school students, even maybe elementary schools students and high school students. You have all of the biological, the social, the physiological, the hormonal changes that kids are going through in school.

You have the fact that, let's be honest, part of the school and educational process is to socialize kids, which is teaching them to some extent what's right and wrong and impulse control. That's part of the educational process also. It's a very fluid place unlike the employment context when you're talking about public school districts.

The other piece is that students tend to be in that school district in public school setting for twelve years, so they're not going anywhere, which is an issue we'll talk about later. Unlike the employment situation where, particularly if you're at will, you have a lot more latitude as a supervisor or an employer.

Then of course the other big challenge often times is parents. There usually is at least one, and maybe two attached to every student, and maybe sometimes there are four if you have a situation where you have a divorce. They're not only attached to that victim student, they're also attached to the student who's being accused. Very often what happens in where the rubber hits the pavement in the school district setting, is the school district is between two entities that are struggling for power over the situation and the relief that they want. They're between the victim, or purported victim, and their parents who are threatening potential lawsuits of torts, intentional infliction of emotional distress you've heard about, negligence, the Title IX claim, et cetera. Then on the other side they have the accused student whose parents are saying it didn't happen and if it did you can't do anything about it under the First Amendment, or that your investigation was too aggressive, you violated my child's Fourth Amendment rights, or my client was stigmatized by virtue of these allegations, et cetera. That's where the school districts find themselves—again, unlike the employment situation.

It probably doesn't surprise most of you that many parents in these situations, the parents of the accused or the alleged perpetrator, think that their son or daughter is the victim. And that might be true. One of the things that was already talked about, it's well said in the literature, that kids don't wake up in the morning and decide to engage in bullying behaviors spontaneously, there's usually a source. Maybe it is home, maybe they were bullied, maybe they're striking back, maybe the reported victim was the bully before. And you have to deal with all these dynamics, which again are much more fluid with minor students than they often times are with adults.

You have the problem of rapidly changing technology. When you are a school district and you're trying to conduct educational programs, get funding for it, pass resolutions with boards of education, sometimes by the time all of that works through the process the technology's changed. Five years from now we'll probably, if we were to redo this seminar, have a total different take on it because of how technology's going to move so quickly.

Identifying who the victim is and identifying who the perpetrator is, particularly in the school context when it comes to cyberbullying, is not always as easy as it may sound. We've talked about it and you've all heard about some of these easy cases, those aren't the ones that cause lawyers and school districts angst. It's the hundreds and hundreds of more difficult cases in the areas of gray. If you have a powerful student who is evil and maniacal and is sending text messages and victimizing a kid, knowing that kid is suffering, and you have a victim who is completely innocent and suffers the kinds of hardships that you've read about, that's an easy case from a legal perspective. But the truth be told, that for every one of those cases you have a dozen other cases where there are many, many shades of gray.

You have the fact that when you're talking about the electronic material, sometimes the material itself, it turns out to be offensive, came from the victim. You have a heralded case, I think out of Florida, where the young lady sent some graphic photos of herself to her boyfriend.[10] In that context there was nothing harassing about that or offensive about that, and I forgot

[10] Randi Kaye, *How a Cell Phone Picture Led to a Girl's Sucide*, CNN LIVING (Oct. 7, 2010), http://articles.cnn.com/2010-10-07/living/hope.witsells.story_1_photo-new-school-year-scarves?_s=PM:LIVING.

whether the relationship changed or whether someone else got hold of it, but both of those things can happen in these situations, and then that photo was then published and republished, and of course that creates a hell for that young lady. So here she is, she's the author of that material and you've now got to find out who's the publisher when you want to identify who the potential cyberbully is.

It also may not be as easy as it sounds to find out who the originator is. Now you're seeing cases where there are Facebook pages being set up in other people's names with other people's identities. And kids are very, very sophisticated in finding a way to humiliate somebody or get back at somebody without revealing their identity necessarily.

You have the problem that relationships and dynamics within the school's social fabric and cliques are changing. One day you're friends with this group of people and sending around this text message or this image or this joke about you is great, and it's all fun and games, and a week from now you're not part of that clique and now they're redistributing it to another group, and it seriously affects your student life and your ability to learn.

You of course then have the situations where you have a boyfriend-girlfriend or a relationship situation where all sorts of material that might be exchanged that is completely welcome, it's enjoyed, but next week, on Monday after you broke up on Friday, all of a sudden that same material, that same behavior is offensive and creates a problem.

School districts have again talked about students and the fluidity of these situations, it's not always as easy as it might seem. Public schools can't pick and choose their students, I mean that's been established since the Supreme Court decided *Goss v. Lopez* back in 1975.[11] Once a state decides that there's compulsory education, as the State of New York has, students have a property interest in that education, and it cannot be deprived without due process, which we'll talk about in a minute when we're talking about how you go about disciplining students.

Every student in New York State, absent some extraordinary circumstances, for example like the offending student was

[11] Goss v. Lopez, 419 U.S. 565, 574 (1975) ("Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent, fundamentally fair procedures to determine whether the misconduct has occurred.").

incarcerated as result of a crime, has a right to attend public education, and you've got to deal when you're talking about prevention, which is what I'm going to talk about in a moment, you've got to deal with the fact that you can't simply fire that student. You can't suspend that student or fire that student, and you may not be able to relocate that student to a different office or to a different campus as you could in an employment situation. So your ability to remedy the situation and prevent the situation from reoccurring and thus prevent liability is often times constrained in the school setting.

We talked about student discipline. Now first of all, in New York—and I think this is true in most states that before you can suspend a student and take them out of active involvement, you've got to provide them notice and an opportunity to be heard. If the suspension goes on for any duration you've got to provide them an evidentiary hearing, and they're allowed to have a lawyer at the evidentiary hearing, and you have to create a record of that evidentiary hearing. The school district or the has to bring in typically a lawyer, sometimes they'll do it on their own, and the district's attorney must present evidence much like a prosecutor would.

Think about doing that, interrupting the educational process and having that, in New York we call it a 3214 Hearing, that's the statute.[12] So you've got to have access to that information, the online material, the Internet material may not be readily accessible to the school district. It's not easy to go to Facebook or MySpace and get to a subpoena even to get them to turn over documents or the source documents that would lead you to connect that particular image or that Internet activity to a particular student. Even when you can do that it takes months in my experience, even when you are working in a Federal Court and have subpoena powers or get a court order. Imagine being a school district and trying to put together that case, to discipline a student who needs to be disciplined, and having to try and do it promptly before there's a reoccurrence. Due process requires money. It takes time. Sometimes you can't put that hearing together and then you've got winter recess to deal with, and everyone's gone in the school district, so it takes three or four weeks sometimes.

[12] N.Y. EDUC. LAW § 3214 (McKinney, Westlaw through L.2012, chapters 1 to 24).

So you have a myriad of issues in terms of discipline, and the other thing is that you can't really expel students. Like people use that term *expulsion*. It doesn't really happen anymore or as much in public education these days. Typically your ability as a school district to discipline is going to be limited to periodic suspensions. If you think about that, and you think about all that you know about cyberbullying, all we've heard today, does that really solve the problem? You're putting a kid who's engaged in inappropriate behavior, violated the policy, created turmoil for other students, and now you're taking six hours that he usually spent in school supposedly studying, and you're putting him at home with this technology, so he's got more time and anger and opportunity. Does that really create a solution for you? In many of the cases I think it doesn't.

Then of course we have the issue of all the special education issues. When you're talking about a student who is accused who is classified under the special education statutes. You can't discipline that student the same way you can discipline an unclassified student under federal law. You might have to conduct what's called a "manifestation hearing" or a "nexus hearing" to explore whether or not there's a relationship between that behavior and that disability before you can conduct the 3214 Hearing under state law and pursue discipline.[13] These are the realities that school districts deal with in trying to react to an incident of cyberbullying and prevent it through remedial steps.

You also have a bunch of state and federal laws that provide confidentiality to students. FERPA, the Buckley Amendment, is an example of that.[14] All educational information and records about students are covered by those amendments. One of the things that is real difficult and real frustrating for parents and administrators is that when your son or daughter is the one that's been victimized, you want to see justice, and those parents—rightfully so, understandably so—are emotional and they want to know what's being done. You have a school district, again in the middle, and they're not allowed to necessarily tell that set of parents all the things that they're doing to this other student who is the alleged accused. That is an enormous source of frustration for parents, and enormous difficulty with school

[13] *Id.* at § 3214(3)(g)(3)(vi).

[14] Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232g; 34 C.F.R. part 99.

districts in trying to remedy these situations and navigate the wards waters between these two sets of parents, or these two sets of groups.

Also, you've heard some discussion about limitations on the school's ability to police this behavior. I agree with Doug Abrams[15] about the fact that the First Amendment by and large is not going to present prevent a school district from implementing some sort of remedial action. You may need to be strategic about that remedial action. It could be that you have a First Amendment concern that you've got to be worried about, and therefore you need to think about education, intervention, monitoring to make sure that the behavior's prevented. Maybe you don't discipline a student, but that doesn't mean you hold your hands up as a school district as say, well, we can't do anything, the kid has First Amendment protections. It may mean that you just need to be more creative about how you go about finding a remedy.

But there is a limit to what school districts can do. There is a limit to the jurisdiction that school districts have, particularly in New York State where I practice, on disciplining students. There does need to be some nexus between the behavior and what happens at school. Back in April 2011, when I last spoke on this topic, I discussed the Blue Mountain School District case in which a federal district court in Pennsylvania suggested that a school district has wide latitude in disciplining students for off-campus conduct—so there are cases.[16]

In the Blue Mountain School District case, the district court dismissed the case on summary judgment in favor of the school district, dismissing the student's First Amendment claim.[17] And held you can be aggressive about this, and even though the kid created this MySpace page at home on the weekend, and even though it was targeted at one of the administrators and it humiliated him and it probably defamed him, although none of it was brought up in into the school. It was only brought into school when the principal, who was the subject of the posting, said,

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[15] *See Remarks of Douglas Abrams*, 22 ALB. L.J. SCI. & TECH. 483 (2011).

[16] J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist., No. 3:07cv585, 2008 WL 4279517 (M.D. Penn. Sept. 11, 2008), *rev'd in part*, 650 F.3d 915 (3d Cir. 2011).

[17] *Id.* at *6, *9 ("[A]s vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though it arguably did not cause a substantial disruption of the school.").

"Hey, let's go on the Internet and make a print out of it.[18] Well, in July, the Third Circuit Court of Appeals said "no, no," and reversed that decision reinstating the First Amendment claim by the offending student who had been disciplined.[19]

So there are limitations. And in deciding as a school district, and as a school district lawyer, if that's the area of practice you're in, how you're going to prevent the situation, you need to be cognizant of the fact that, the jurisdiction's not unlimited and you may need to conduct an investigation in order to establish a nexus that provides a justification for going ahead and taking disciplinary action.

The regulatory environment for school districts is not something they can sit and think about, it's happening right now. I just point to the fact that in October 2010 the U.S. Department of Education issued a Dear Colleague letter to every school district in the United States explaining that how they're going to go about enforcing these things.[20] There is a battle in the courts in New York State about whether or not The Division of Human Rights in New York State have jurisdiction to hear student claims.[21] And of course you've heard about the Dignity for All Students Act.[22]

So let me talk to you quickly about some strategies that come out of my experience in how these situations are sometimes mishandled that lead to liability.

First of all, policies—the policies need to be available to all students. You've got a draft a policy and publish a policy in such a way that there is no excuse for any student in that district to get access to a complaint. School districts need to be very clear about memorializing the complaint. A lot of school districts, for whatever reason, have this concept in their complaint protocols for informal complaints and formal complaints. In my view of the world, this is nonsense and not helpful. A complaint is a

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[18] *Id.* at *1–*2.

[19] 650 F.3d at 936.

[20] U.S. Dep't of Ed. Off. for Civ. Rights, Dear Colleague Letter Harassment and Bullying—Background, Summary, and Fast Facts (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf.

[21] *See* Ithaca City Sch. Dist. v. New York State Div. of Human Rights, 926 N.Y.S.2d 268, 272–72 (App. Div. 3'd Dep't 2011), *granted leave to appeal*, 17 N.Y.3d 716 (App. Div. 3'd Dep't 2011) (holding public school districts are subject to the New York Human Rights Law).

[22] 2010 N.Y. Sess. Laws ch. 482 (McKinney) (codified at N.Y. Educ. Law § 12(2)).

complaint, it should be memorialized in some way, and it should be addressed in the context of your policies locally.

One of the things school districts need to keep in mind when they undertake an internal investigation is to always maintain control of the investigation, and make sure that the school district keeps its focus and doesn't allow that investigation to be hijacked or intimidated. What I mean by that is you've got two sets of parents potentially; one set of parents wants to do the investigation, they want to drive the investigation, they want to find out what you did every day to investigate the conduct and they want to tell you which witnesses that you should be interviewing and how they should be interviewed. The other set of parents, of course, you know, has an opposite agenda. The school districts responsibility under the law though is not to satisfy either of those groups necessarily. The school district's obligation is to make sure that that student, who has come forward, has a safe learning environment, and has access to education. So that's the focus.

One of the things I think often school districts do in either not addressing these issues well enough or the way they should is they think in terms of discipline and perpetrators and victims, and winners and losers, and between all of those extremes, which are all fine and the easy case. The much more important thing to keep focus on is that this behavior needs to stop now, and we as a school district need to make sure that it is not repeated next week, or next month.

That is probably the biggest thing folks and school districts fail to do is that once you have an intervention, once you've done a mediation implemented remedial measures, once you've meted out discipline and that student's now back from the suspension, the game's not over, now you've got a responsibility to monitor it, and you need to check in with that student who was the victim in the situation and find out whether or not they're feeling safe, find out whether or not that behavior has reoccurred. That's how you make sure that you're never found as a school district to be deliberate an indifferent.