

## **Deliberate Indifference to a Hostile Environment:**

### **A call for greater involvement by trial attorneys to protect vulnerable students**

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Embrace Civility in the Digital Age

Public school districts violate federal civil rights laws when discriminatory harassment of students based on race, color, national origin, sex, or disability is sufficiently serious to create a hostile environment that is interfering with the students' rights to receive an education, and school staff encourage, tolerate, do not adequately address, or ignore such harassment.

An unacceptably high number of students in public schools in the U.S. are suffering from daily bullying and harassment by their peers--and sometimes school staff. This emotional, and sometimes physical, abuse is known to have a life long harmful impact and to significantly interfere with the targeted students' ability to receive an education.

While bullying and harassment of students has received a higher degree of focus in recent years, there is no evidence of any significant decrease in the number of students reporting being bullied and harassed. In fact, in some states, it appears that the approach promoted by the state's anti-bullying statute is having an opposite effect.

For example, in the state of New York, the much-touted Dignity Act for All Students (DASA) was enacted in 2010. On the Youth Risk Behavior Survey in 2011, 18% of New York students reported being bullied. By 2015, this rate had increased to 21%. Under DASA, schools are required to make annual public reports of the number of bullying incidents--a black-mark on the school. In the 2015-16 school year, 71% of New York City schools reported zero bullying incidents.

The approach incorporated into state statutes has created the misperception that all educators must do is have rules in place against bullying, tell students to report, and have the principal investigate, respond with discipline if appropriate, and keep records. This approach has been set into place at the same

time that schools are under strong pressure to reduce disciplinary consequences. Thus, there is strong pressure on principals and staff to avoid ever considering hurtful acts of students to constitute “bullying.”

Students and their parents do not know how to retain data and report these incidents in accord with the tight definition in the statutes. Students who are being treated badly, sometimes on a daily basis, are too often told they are overreacting and there is nothing the school can or will do. It is no wonder that the majority of students who are harassed have often gotten to the point where they will not report these incidents. They know from experience that there is nothing the school will do--or reporting could make things far worse.

Under federal civil rights regulations, if a hostile environment is known to exist, schools are required to both investigate and intervene in the specific instances of which they have knowledge and to take necessary steps to correct the hostile environment that underlies the hurtful behavior.

An excellent publication is by the U.S. Department of Education’s Office for Civil Rights (OCR), entitled *Protecting Students from Harassment and Hate Crime: A Guide for Schools* (now out of date due to changes in the approach to gender role stereotyping). OCR did an excellent job in explaining the importance of a focus on school climate and outlining recommended steps a school should take.

The National School Board Association (NSBA), in an endorsement statement, was in full agreement:

*Research indicates that creating a supportive school climate is the most important step in preventing harassment. A school can have policies and procedures, but these alone will not prevent harassment. This is the kind of good preventive work the field needs to help ensure that schools provide a safe and welcome environment for all students.*

The leading Supreme Court case addressing student-on-student harassment is *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999). In this case, SCOTUS stated:

*Schools can be held financially liable if they are deliberately indifferent to known acts of student-on-student harassment and the harasser is under the school’s authority so long as the harassment is so severe, pervasive, and objectionably offensive that it can be said to*

*deprive the victims of access to the educational opportunities or benefits provided by the school.*

In an early case, *Vance v. Spencer Cnty. Pub. Sch. Dist.* 231 F.3d 253, 261 (6th Cir. 2000), the Sixth Circuit enunciated helpful guidelines:

*Although no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably in light of the known circumstances. Thus, where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.*

Unfortunately, a recent trend in the case law has been to dismiss cases upon a showing that every time the student reported, the principal investigated and applied discipline, if deemed appropriate. *Stiles v. Grainger County*, Tenn. MiLW, No. 01-91360 (6th Circuit, March 25, 2016) and *S.B. v. Harford County*, No. 15-1474 (4th Circuit, April 8, 2016).

In these two cases, despite evidence of ongoing, extensive harassment, which the students occasionally reported, all the principals did was respond to the specific reported instances. The interventions by the principals were clearly ineffective in stopping the ongoing harassment and no comprehensive steps were taken to correct the hostile environment that clearly existed.

At this time, the NSBA has switched from its prior clear statement of the ineffectiveness of sole reliance on policies and procedures and now argues that if the principal responds in any way to the incidents the harassed student has bravely reported, the school should not be considered deliberately indifferent or be held liable.

In ongoing harassment situations, this level of response by the school principal will generally be ineffective in correcting the specific hurtful situations and does nothing to correct the hostile environment that is fueling the ongoing harassment. In these kinds of cases, greater attention must be paid to the

failure of the principals to follow up to ensure effectiveness of their interventions, as well as their failure to engage the school community in comprehensive efforts to correct the evident hostile environment.

The regulations and evidence that raises the importance for a more comprehensive approach, that incorporates ongoing assessment of effectiveness, is readily available in the civil rights regulations and OCR guidance, as well as current academic research and guidance for schools--along with the above NSBA quote.

Unfortunately, at this point in time, there appears to be no other mechanism to exert influence on schools to take the concerns of discriminatory harassment more seriously than increased successful litigation against school districts.

Nancy Willard, M.S., J.D., has advanced degrees in special education and law. For over the last decade, she has focused her professional attention on concerns of digital safety and bullying. Her articles on bullying prevention providing guidance to school leaders have appeared such publications as *District Administration*, the American Association of School Administrators' *School Administrator*, and the National Association of School Psychologists' *Comunique*. She has recently shifted her focus to assisting trial attorneys as a trial consultant in cases involving discriminatory harassment of students. She has prepared a 90-minute video training for attorneys available on YouTube, which may, depending on the state, qualify for CLE credit. More information is available the the Embrace Civility in the Digital Age website at: <http://embracecivility.org>.