

Deliberate Indifference to a Hostile Environment

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The bullying of students, especially those of minority status, has been recognized as a serious public health problem. Under this nation's civil rights laws, these students should receive protection against harassment and schools should face liability for their failure to do so.

Yet in recent federal court cases, the courts have determined that schools were not liable when they responded to this harassment in a manner that clearly would not have been effective in stopping the ongoing harm because the response of the school officials failed to correct the hostile environment that was supporting the ongoing harassment.¹

If school districts are required only to respond to incidents reported by harassed students and face little to no risk of liability for their failure to exercise diligence in correcting a hostile environment that is known to be supporting ongoing acts of harassment, vulnerable children and teens will continue to suffer harms at the hands of their peers and sometimes school staff. The harms caused by this harassment are a recognized public health concern--resulting in long-lasting emotional harm and also interfering with students' right to receive an education.

The author of this article is a former attorney and a bullying prevention expert. Grounded in this background of understanding it is perceived that attorneys who are representing harassed students would greatly benefit by a better understanding of the research in this area as well as insight into how a bullying prevention expert views the case law, guidance from the U.S. Department of Education Office for Civil Rights (OCR), and arguments commonly presented by the National School Board Association (NSBA). Insight into this research can both guide the investigations and presentation of these kinds of cases in court.

Of concern is that unless and until federal courts hold schools accountable for taking the steps necessary to correct a hostile environment that is supporting students in engaging in harassment, millions of U.S. students will face daily torment that is not only interfering with their right to receive an education, but also resulting in significant, long-lasting emotional harm.

Imagine you are this student:

DS was less than eighty pounds and under 5'5" in the seventh grade. DS recalls other students calling him names, including "bitch," "faggot," and "queer," almost every day of seventh grade. He also claims he was regularly pushed in the hallways and cafeteria. ... In

¹ *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),

the eighth grade, the name-calling DS experienced in the seventh grade continued several times a week. The pushing in the hallways, cafeteria, and gym also persisted.

Realize that DS is required by law to attend school. As a result of this pervasive and persistent harassment:

DS begged not to go to school, and DS recalls missing “a lot of school” while attending Rutledge. DS could not sleep, lacked an appetite, and suffered from gastrointestinal problems. Stiles stated that she was afraid DS would commit suicide. DS recounted multiple injuries stemming from the bullying at Rutledge, including fractured ribs, busted mouths, a busted nose, bruises, a compression fracture, wedging vertebrae, and back pain.

A three-judge panel of the 6th Circuit deemed the school not to be deliberately indifferent. Why?

[E]ach time DS or his mother communicated a specific complaint of harassment, the school investigated promptly and thoroughly by interviewing DS, interviewing other students and teachers, taking detailed notes, and viewing video recording when available. At the conclusion of each investigation, the administrators disciplined students found guilty of wrongdoing either with a verbal warning or a suspension. ... The school also took proactive steps to reduce opportunities for future harassment: teachers separated DS in class from students known to bother him, (administrator) took steps to place DS in separate classes from his identified perpetrators in the eighth grade ... and (administrator) ultimately approved the hiring of a substitute teacher to monitor DS in school.

Based on the repetitive acts of harassment suffered by D.S., it is clear that a hostile environment existed for D.S.--based on a perception that he was gay. Bullying prevention professionals would maintain that is not possible to effectively address a hostile environment simply by investigating and applying consequences to identified aggressors the few times the situations were so egregious that D.S. or his mother reported. In addition to the more egregious hurtful acts, D.S. was experiencing daily insult--that no student should be forced to suffer.

When it becomes known to a school officials that harassment is pervasive, that is, involved hurtful behavior by a number of students, and persistent, that is has continued despite interventions with in the instances that have been reported, the situation can not be effectively addressed merely by investigating and intervening in individual reported incidents. A hostile environment exists. To address the hostile environment requires investigating and addressing the elements of the environment that are acting to further the pervasive and persistent harassment of the student or group of students.

This article will address:

- The harms to young people caused by bullying and harassment.
- Federal case law addressing the issue of school liability for student-on student or staff-on-student discriminatory harassment.
- Guidelines from the OCR and discussion with by the NSBA.
- Analysis of amicus brief arguments by NSBA.
- OCR guidance and expert testimony in discriminatory harassment cases.

- Additional relevant issues including staff harassment of students and situations involving students with disabilities.
- Research insight into issues of bullying and harassment in schools and the effectiveness of school responses, with guidance for plaintiff's attorney.
- Assessing the school's response to a hostile environment, with guidance for plaintiff's attorney.

The Harms to Young People Caused by Bullying and Harassment

In May 2016, the Board on Children, Youth, and Families of the Institute of Medicine and the National Research Council (NRC) issued a report, *Preventing Bullying Through Science, Policy, and Practice*. The report began with this statement of the concern.

*Bullying has long been tolerated by many as a rite of passage among children and adolescents. There is an implication that individuals who are bullied must have “asked for” this type of treatment, or deserved it. Sometimes, even the child who is bullied begins to internalize this idea. For many years, there has been a general acceptance when it comes to a child or adolescent with greater social capital or power pushing around a child perceived as subordinate—such that you can almost hear the justification: “kids will be kids.” ... Its prevalence perpetuates its normalization. **But bullying is not a normal part of childhood and is now appropriately considered to be a serious public health problem.***²

Indeed, the harms associated with bullying and harassment have been apparent for some time. A recent commentary in *Pediatrics* outlined the known resulting harms:

*Bullying can have life-long health consequences. It has been associated with stress-related physical and mental health symptoms, including depression, anxiety, post traumatic stress, and suicidal ideation. When bullying is motivated by discrimination or an attack on someone's core identity (eg, their sexual orientation), it can have especially harmful health consequences. The effects of bullying are not limited to the bullied. Bystanders who witness bullying may experience mental health consequences (eg, distress) as well.*³

A report by the American Educational Research Association also provided an overview of these concerns:

- *Bullied students experience higher rates of anxiety, depression, physical health problems, and social adjustment problems. These problems can persist into adulthood.*
- *Bullying students become less engaged in school, and their grades and test scores decline.*
- *In high schools where bullying and teasing are prevalent, the student body is less involved in school activities, performs lower on standardized tests, and has a lower graduation rate.*

² National Academies of Sciences, Engineering, and Medicine. 2016. *Preventing Bullying Through Science, Policy, and Practice*. Washington, DC: The National Academies Press.

³ Schuster MA, and Bogart LM. (2013) Did the ugly duckling have PTSD? Bullying, its effects, and the role of pediatricians. *Pediatrics*. 2013 Jan;131(1):e288-91.

- *Students who engage in bullying are at elevated risk for poor school adjustment and delinquency. They are at increased risk for higher rates of criminal behavior and social maladjustment in adulthood.*
- *Students who are bullied but also engage in bullying have more negative outcomes than students in bully-only or victim-only groups. ...*
- *Cyberbullied students experience negative outcomes similar to those experienced by their traditional counterparts, including depression, poor academic performance, and problem behavior. ...*⁴

In addition to the lifelong emotional harms these victims suffer, they are also being denied their right to receive an education. The need to protect students' right to receive an education was emphasized in *Brown v. Board of Education*.⁵

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. ... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Given the clear evidence of harms occurring to students at school, bullying and harassment prevention and effective interventions must have a higher priority in schools. A critical question arises regarding how students who are being bullied or harassed by their peers, and sometimes by school staff, can effectively protect their interests in situations when school leadership and staff are not effectively responding to prevent these known and well-documented harms.

People who suffer harms due to the actions or failure to act by others should be able to obtain both injunctive relief and damages by bringing an action in a court of law. Currently, there are significant barriers to doing so when the victim of harm is a child or teen and the ongoing harm is being inflicted on this victim while within the environment that is under the direct control of public school officials.

Federal Case Law

Leading Case Addressing Student-on-Student Harassment

The framework for the analysis of these cases was set forth in two Supreme Court cases, *Gebser v. Lago Vista Indep. School Dist.* and *Davis v. Monroe County Board of Education*, both private suits for damages under Title IX.⁶

In *Gebser*, the Court held that a school district was not liable for teacher-on-student sexual harassment unless it had actual knowledge of the harassment and responded to that knowledge with deliberate indifference. The Court rejected the use of agency principles to impute liability for

⁴ American Educational Research Association. (2013). *Prevention of Bullying in Schools, Colleges, and Universities: Research Report and Recommendations*. Washington, DC: <http://www.aera.net/newsroom/news/preventionofbullyingresearchreportandrecomm/tabid/14865/default.aspx>. pp. 9-10.

⁵ *Brown v. Board of Education* 347 U.S. 483 (1954).

⁶ *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999)

the misconduct of teachers and declined to impose direct liability under what amounted to a negligence standard.⁷

With respect to the question of which school staff member has knowledge, the court determined that this must “an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf.”⁸ The Court also addressed the degree of knowledge required, stating “some prior allegations of harassment may be sufficiently minimal and far afield from the conduct underlying the plaintiff's Title IX claim that they would not alert a school district official of the risk of a Title IX plaintiff's sexual harassment.”⁹

Thus, the question of knowledge requires an assessment of (1) whether school officials with the authority to take corrective action (2) had sufficient knowledge of the discriminatory conduct.

The situation in *Davis* involved student-on-student harassment. The civil rights statute that was involved in *Davis* was Title IX. Lower courts have relied on *Davis* to hold that students may sue school districts for deliberate indifference to peer harassment based on race, color, and national origin under Title VI, as well as disability under Title II and Section 504.

In *Davis*, the Supreme Court held that schools can be held financially liable if they are “deliberately indifferent to known acts of student-on-student sexual 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.”¹⁰

In accord with *Gebser*, the liability standard in *Davis* is based on the principle that recipients of federal funds should be held liable only for their own misconduct and not the misconduct of others. In several locations in the decision, the *Davis* decision addressed the two aspects of the situation over which school officials have control:

*The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.*¹¹

*These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the harassment occurs.*¹²

*Where, as here, the misconduct occurs during school hours and on school ground--the bulk of G. F.'s misconduct, in fact, took place in the classroom--the misconduct is taking place “under” an “operation” of the funding recipient. ... In these circumstances, the recipient retains substantial control over the context in which the harassment occurs.*¹³

Breaking the *Davis* standard down, the five elements of a case include:

⁷ *Gebser*, 524 U.S. at 284-86.

⁸ *Gebser*, 524 U.S. at 277.

⁹ *Gebser*, 524 U.S. at 291.

¹⁰ *Davis* 526 U.S. 646-647..

¹¹ *Davis* 526 US at 644.

¹² *Davis* 526 US at 645.

¹³ *Davis* 526 US at 645.

- Student is a member of, or perceived to be a member of, a protected class under federal statutes and the hurtful behavior is associated with the student's protected class status, or perception thereof.
- The school has actual knowledge of the harassment.
- The student or students engaging in the harassment are under the school's authority.
- The harassment is so severe, pervasive, and objectionably offensive that it is depriving the student of access to the educational opportunities or benefits provided by the school.
- The school has been deliberately indifferent to this harassment.

The determination of whether the student was a member of, or perceived to be a member of, a protected class under federal statutes and the hurtful behavior is associated with the student's protected class status, or perception thereof, the student or students engaging in the harassment were under the school's authority, and whether the harassment is so severe, pervasive, and objectionably offensive that it is depriving the student of access to the educational opportunities or benefits provided by the school is generally a straightforward determination.

The two factors most often the subject of litigation are whether the school had actual knowledge and whether the school acted with deliberate indifference to the harassment.

Knowledge

In *Davis*, the facts demonstrated that the school principal had been informed of concerns on numerous occasions, thus knowledge was not an issue. The Court did not specifically mention the *Gebser* standard of knowledge by a school official with authority to make corrective actions. However, lower federal courts have applied the *Gebser* standards on knowledge by the school to an assessment of this factor.

An example of this is in the Ninth Circuit case of *Reese v. Jefferson Sch. Dist. No. 14J*.¹⁴ In *Reese*, the court discussed this as follows:

*(A) school district is liable in damages only where it has "actual knowledge" of the harassment. In Gebser, the Court explained the actual knowledge requirement and announced that damages may not be recovered unless an official "who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination."'*¹⁵

In *Gebser* the Supreme Court did not go into detail regarding which staff positions were considered to meet the standard of having the authority to make corrective actions. However, in his dissenting opinion Stevens stated:

*If petitioner had been the victim of sexually harassing conduct by other students during those classes, surely the teacher would have had ample authority to take corrective measures.*¹⁶

¹⁴ *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000).

¹⁵ *Reese*, 208 F.3d at 739-40. (citations omitted)

¹⁶ *Gebser*, 118 S.Ct. at 2004 n. 8.

In *Murrell v. School Dist. No. 1*, the Tenth Circuit addressed the question of which school officials are considered to have the authority to make corrective actions and stated:

We decline simply to name job titles that would or would not adequately satisfy this requirement. “[S]chool districts contain a number of layers below the school board: superintendents, principals, vice-principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject the traditional hierarchical structure altogether.” Because officials’ roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. Davis makes clear, however, that a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision, would meet this definition.¹⁷

In *Murrell*, the court further discussed whether school staff in various positions may constitute an appropriate person with authority to make corrective actions. The court found:

(L)ittle room for doubt that the highest-ranking administrator at GWHS exercised substantial control of Mr. Doe and the GWHS school environment during school hours, and so her knowledge may be charged to the School District.

The court also noted that the school’s sexual harassment policy provided that harassment grievances should be filed with the principal. The plaintiff had also asserted that the teachers had a duty to supervise and ensure the safety of students. The court indicated that:

It is possible that these teachers would also meet the definition of “appropriate persons” for the purposes of Title IX liability if they exercised control over the harasser and the context in which the harassment occurred. Where the victim is complaining about a fellow student’s action during school hours and on school grounds, teachers may well possess the requisite control necessary to take corrective action to end the discrimination. (quotations and citations omitted)

The question of which staff members are considered to have the authority to make corrective actions was also addressed in a Ninth Circuit district court case, *J.B. v. Mead Sch. Dist. No. 354*.¹⁸ In this case, the court determined that the plaintiffs had failed to present sufficient evidence to create a genuine issue of material fact as to whether any school official had actual notice. In discussion, the court indicated that administrative officials are considered to have such authority, however in the evidence was that they had no knowledge.

The court then discussed the alleged knowledge of a teacher and stated:

As an initial matter, Mr. Graham, like all teachers at Mead, was an appropriate person for Title IX purposes because he had the authority to address the alleged discrimination and to institute corrective measures on J.B.’s behalf. See Gebser, 524 U.S. at 298 (defining “appropriate person”); Murrell v. Sch. Dist. No. 1 of Denver, 186 F.3d 1238, 1248 (10th Cir.

¹⁷ *Murrell v. School Dist. No. 1*, 186 F.3d 1238, (10th Cir. 1999).

¹⁸ *J.B. v. Mead Sch. Dist. No. 354*, No. 08-CV-223-EFS, 2010 WL 5173164, at *5 (E.D. Wash. Dec. 10, 2010).

1999) (recognizing that "teachers may well possess the requisite control necessary to take corrective action to end the discrimination").

The question of what level of knowledge was necessary to support a cause of action under civil rights statutes was also addressed in the Ninth Circuit district case, *J.B.* As noted above, in this case, the Court determined that the school district did not have the requisite knowledge. However, the manner in which this determination was made is helpful. The Court noted the standard:

To maintain his Title IX cause of action, J.B. must establish that an appropriate school official actually knew that he was being sexually harassed or abused. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998). "[I]t is generally accepted that the knowledge must encompass either actual notice of the precise instance of abuse that gave rise to the case at hand or actual knowledge of at least a significant risk of sexual abuse." Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1347-48 (M.D. Ga. 2007). Thus, it is not enough to show that the school district "should have known" of the abuse. Gebser, 524 U.S. at 283; Reese, 208 F.3d at 739; Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 823 (7th Cir. 2003). (emphasis added)

The statement which was quoted in *J.B.* from *Ross* referenced a prior decision from *Doe v. Sch. Admin. Dist. No. 19*.¹⁹ In *Doe (Dist. No. 19)*, the district court stated:

*Thus, it is clear that actual notice requires more than a simple report of inappropriate conduct by a teacher. On the other hand, the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student. Such a high standard would protect school districts from liability whenever a student was abused by a teacher, although the district might have had notice that the teacher had abused other students in the past.*²⁰

In *Doe (Dist. No. 19)*, the high school principal had been told by a substitute teacher of concerns that a teacher was publicly engaging in a sexualized manner with students and there were rumors the teacher had engaged in sexual activities with a student. The principal did not investigate. The accused teacher then allegedly engaged in sexual relations with Doe. The court indicated that the school district "could be considered to have actual notice if it had reports that (the teacher) was having sexual relations with another student."²¹

Significantly, Doe did not report the sexual incident to the school. Further, at a later meeting where the alleged abuser and several other faculty members were present, he and the other students denied that sexual relations had occurred. After this time, Doe told a friend, who told her parents, who reported to the school. While not specifically mentioned in this decision, clearly the fact that Doe himself had not reported directly to the school was not a relevant concern to the court.

Further helpful insight on the issue of sufficient knowledge has been provided by the Eleventh Circuit in the case of *Doe v. School Bd. of Broward Cnty*.²² In *Doe (Broward)*, a high school

¹⁹ *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, (D.Me.1999).

²⁰ *Doe (19)* 66 F. Supp. at 63.

²¹ *Doe (19)* 66 F. Supp. at 63.

²² , *Doe v. School Bd. of Broward Cnty*, 604 F.3d 1248 (11th Cir. 2010).

student was sexually assaulted by her math teacher. While this incident was the first instance of sexual harassment of Doe, two other female students had previously filed complaints against the teacher for sexual harassment and misconduct. Doe argued that the district sexually discriminated against her in violation of Title IX by exhibiting deliberate indifference to known prior harassment by the teacher against other female students at school.

The Eleventh Circuit stated clearly that “no circuit has interpreted *Gebser's* actual notice requirement so as to require notice of the prior harassment of the Title IX plaintiff herself.”

The two relevant cases the Eleventh Circuit referenced as the basis for this statement were *Escue v. N. Okla. Coll.* and *Baynard v. Malone*.²³ In *Escue*, the court stated:

*Although Gebser makes clear that actual notice requires more than a simple report of inappropriate conduct by a teacher, the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff student.*²⁴

And in *Baynard*, the court stated “We note that a Title IX plaintiff is not required to demonstrate actual knowledge that a particular student was being abused.”²⁵

In *Doe (Broward)*, the Eleventh Circuit also stated:

Notably, we have held in a Title IX student-on-student harassment case that the plaintiff sufficiently alleged actual notice where the primary substance of that notice differed significantly from the circumstances of the plaintiff's harassment.

In accord is *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, where the court had held the plaintiff has sufficiently alleged actual notice based on prior out-of-state reports of sexual harassment that had occurred two years prior to the present incident.²⁶

Under the facts in *Doe (Broward)*, the Eleventh Circuit found ample evidence that the two prior reports of sexual assault by the math teacher of other students, when viewed collectively, were sufficient to satisfy Doe's burden of raising a material issue of fact on the issue of actual notice. This was despite the fact that the investigations in these situations were ultimately inconclusive as to the teacher's actual sexual misconduct.

In the Ninth Circuit case of *Doe v. Green*, which involved sexual assault of a student by a coach who was also a teacher, the court noted that courts across the country have considered the meaning of actual notice in the context of civil rights claims.²⁷ The court quoted with approval this passage from *Johnson v. Galen Health Institutes, Inc.*:

*Consistent with the majority of other courts, the Court thus finds that the actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by other students.*²⁸

²³ *Escue v. N. Okla. Coll.* 450 F.3d 1146, 1154 (10th Cir.2006) and *Baynard v. Malone*, 268 F.3d 228,(4th Cir.2001)

²⁴ *Escue* 450 F.3d at 1154.

²⁵ *Baynard* 268 F.3d at 239 n. 9.

²⁶ *Williams v. Bd. of Regents of the Univ. Sys. of Ga.* 477 F.3d 1282, 1288-90, 1294 (11th Cir.2007).

²⁷ *Doe v. Green*, 298 F.Supp.2d 1025 (N.D. Nevada 2004).

²⁸ *Johnson v. Galen Health Institutes, Inc.* 267 F.Supp.2d. 679, 688 (W.D.Ky.2003).

The court in *Doe (Green)* also noted that “a complaint of harassment need not be undisputed or uncorroborated before it can be considered to fairly alert the school district of the potential for sexual harassment.”²⁹

Deliberate Indifference

An assessment of whether the school official’s response was deliberately indifferent requires an analysis of how the school official responded. Key language from *Davis* on how this assessment is to be made was nicely summarized in *Vance v. Spencer Cnty. Pub. Sch. Dist.*, a subsequent case:

The pivotal issue before us is what is required of federal assistance recipients under the “deliberate indifference standard.” The recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment. See Davis, 526 U.S. at 642, 119 S.Ct. 1661 (discussing Gebser v. Lago Vista School Dist., stating liability arose from recipient’s official decision not to remedy the violation). “[T]he deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.” Davis, 526 U.S. at 645, 119 S.Ct. 1661.

In describing the proof necessary to satisfy the standard, the Supreme Court stated that a plaintiff may demonstrate defendant’s deliberate indifference to discrimination “only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” Id. at 648., 119 S.Ct. 1661 ...

The recipient is not required to “remedy” sexual harassment nor ensure that students conform their conduct to certain rules, but rather, “the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.” Davis, 526 U.S. at 648-649, 119 S.Ct. 1661. The deliberate indifference standard “does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.” Id. at 648, 119 S.Ct. 1661. The standard does not mean that recipients must expel every student accused of misconduct. See id. Victims do not have a right to particular remedial demands. See id. Furthermore, courts should not second guess the disciplinary decisions that school administrators make. See id..

“The Supreme Court has pointedly reminded us, however, that this is ‘not a mere “reasonableness” standard’ that transforms every school disciplinary decision into a jury question.” Gant, 195 F.3d at 141 (quoting Davis, 526 U.S. at 649, 119 S.Ct. 1661). In an appropriate case, there is no reason why courts on motion for a directed verdict could not identify a response as not “clearly unreasonable” as a matter of law. See Gant, 195 F.3d at 141.³⁰ Notable Cases Early Circuit Court Cases Related to Student-on-Student Harassment

In *Vance*, an early Sixth Circuit case addressing student-on-student harassment, the school argued that it could not be held to be deliberately indifferent because it responded every time that the student reported concerns.³¹ The Court rejected this argument, stating:

²⁹ *Doe (Green)* 298 F.Supp.2d.

³⁰ *Vance v. Spencer Cnty. Pub. Sch. Dist.* 231 F.3d 253, 261 (6th Cir. 2000).

³¹ *Vance*, 231 F.3d at 253.

*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.*³²

In a subsequent Sixth Circuit case, *Patterson v. Hudson Area Schools*, the Court determined that the student-on-student harassment had occurred over years and the school had repeatedly used the same ineffective method to address it, which could have led a jury to find to be deliberate indifference, subjecting the district to liability.³³ After the case was remanded for trial, the jury returned a verdict of \$800,000 for the plaintiff. However, the District Court set aside the verdict, stating:

*In the instant case, the Court finds that the uncontroverted evidence is that Defendant's teachers and administrators responded to each and every incident of harassment of which they had notice.*³⁴

School districts, and their ally in many of these cases, NSBA, have subsequently argued, in reliance on the district court decision in *Patterson*, that if every time the student reported an incident, the principal investigated and intervened this should be sufficient to avoid a determination that the school was deliberately indifferent.

For example, in the Second Circuit case of *Zeno v Pine Plains*, the school district in this case had argued:

*[T]hat its disciplinary response could not constitute deliberate indifference because it immediately suspended nearly every student who was identified as harassing Anthony. In addition, it contacted students' parents or withdrew privileges (such as the right to participate in extracurricular activities).*³⁵

The evidence in the *Zeno* case demonstrated that punitive responses delivered by the school against those who were harassing Zeno were not only not preventing further hurtful interactions, they were making things worse because of retaliation. This led Zeno to resist reporting, unless the incident was egregious--a typical behavior of targeted students. In addition to the fact that the school investigated and responded to reported incidents, the school had a policy against bullying, a process to handle reports, trainings for staff and students, and had provided information to parents. The jury awarded Zeno \$1M, an award that was upheld on appeal.

The jury instruction provided was:

Deliberate indifference means that the defendant's response or lack of response to the alleged harassment was clearly unreasonable in light of the known circumstances. Deliberate indifference may be found where a defendant takes remedial action only after a

³² *Vance* 231 F.3d at 262.

³³ *Patterson v. Hudson Area Schools*, 551 F. 3d 438 (6th Cir. 2009),

³⁴ *Patterson v. Hudson Area Schools*, 724 F. Supp. 2d 682, 696 (ED Mich., 2010).

³⁵ *Zeno v. Pine Plains*, 702 F.3d 655, 664 (2nd Cir 2012).

*lengthy and unjustifiable delay or where defendant's response was so inadequate or ineffective that discriminatory intent may be inferred. In other words, deliberate indifference requires a finding that the District's actions or inactions in response to known harassment effectively caused further harassment to occur.*³⁶

In review, the Second Circuit found that the jury could have determined that the school's responses were inadequate. The suspensions and other disciplinary actions had not deterred other students who took up the harassment. The harassment became increasingly severe, including threats on the student's life and physical abuse. The disciplinary actions had little or no effect on the racial taunting in the hallways. Outside organizations had offered assistance, including programs that specifically addressed racial discrimination, both of which the district refused. The Court concluded:

Responses that are not reasonably calculated to end harassment are inadequate. ... The jury could have found and apparently did find that the District's remedial response was inadequate -- and deliberately indifferent -- in at least three respects.

First, although the District disciplined many of the students who harassed Anthony, it dragged its feet before implementing any non-disciplinary remedial action -- a delay of a year or more. ... At some point after Anthony's first semester, the District should have done more, and its failure to do more "effectively caused" further harassment. ...

Second, the jury could have reasonably found that the District's additional remedial actions were little more than half-hearted measures. ... Although actually eliminating harassment is not a prerequisite to an adequate response, ... the District's actions could not have plausibly changed the culture of bias at SMHS or stopped the harassment directed at Anthony. ...

*Finally, despite the District's present argument that it did not know its responses were inadequate or ineffective, a jury reasonably could have found that the District ignored the many signals that greater, more directed action was needed.*³⁷

Recent Decisions Regarding Deliberate Indifference That Raise Significant Concerns

The Sixth Circuit's more recent decision in *Stiles v Grainger* raises significant concerns about a shift in the reasoning in this Circuit.³⁸ The fact that *Vance* was also a Sixth Circuit case, increases the concern about the decision in *Stiles*. The basis upon which the student D.S. in the *Stiles* case was treated and the harms he suffered were set out in the introduction.

It is important to note several things about this fact situation, that the research set forth below will provide further insight into. D.S. was being daily harassed, by being called names and being pushed and shoved. He did not report these incidents to school officials--and the vast majority of students do not do. The fact that this level of harassment was occurring in such a pervasive and persistent manner, leads to the conclusion that the environment in the school was exceptionally hostile to D.S.

In the decision, the Court essentially ignored the overall situation that the harassment of D.S. was ongoing and focused only on the actual incidents reported to the principal by D.S. In other

³⁶ *Zeno*, 702 F3d

³⁷ *Zeno*, 702 F3d

³⁸ *Stiles v. Grainger County*, No. 01-91360 (6th Circuit, March 25, 2016).

words, the Court ignored the fact that despite the interventions by the school official, in the incidents D.S. reported to the school, D.S. was suffering almost daily harassment--a hostile environment which no amount of intervention in the more egregious instances would address.

It is unknown whether the approach of the Court was based on how the case was pled and presented by plaintiff's counsel. What appears to be occurring in the presentation of these cases is a specific enumeration of the instances of harassment that were reported to the principal by the student, which the school then responds to by demonstrating how the principal responded in each of these reported cases.

In effect, by following this approach, plaintiff's counsel appears to be placing too great of a focus on individual reported incidents in pleadings, presentation, and arguments in the case and an insufficient attention to the overall concern of the existence of a hostile environment that is contributing to persistent and pervasive harassment. Even minor acts, such as name-calling and pushing in the hallways should be considered evidence of chronic traumatic events that result in significant emotional distress. The manner in which these cases are being presented could, unfortunately, contribute to the tendency of the court to then focus solely on the school's response in these reported incidents.

It is possible that plaintiff's counsel is proceeding in this manner because of the required element under *Davis* of "knowledge." Nothing in the language of *Davis* requires that the "knowledge" element should cause the case to focus solely on individual incidents that are reported by the harassed student. What is required is that the school official knows that this harassment is occurring. Evidence that will support a finding of knowledge could include repeated student or parent reports, staff reports, and prior school records.

Further, when the question is whether the school official has knowledge that a hostile environment exists, which is supporting pervasive or persistent harassment of a student or group of students, such knowledge is established by evidence of the repeated incidents.

As noted above, the Sixth Circuit concluded that the plaintiff had failed to create a triable issue as to whether the school had exhibited deliberate indifference to D.S.'s situation. The limited response of the school officials was to investigate each incident D.S. reported and responding as deemed appropriate, separating D.S. from the students who continued to harass him, and eventually hiring an aide to monitor his situation--which any middle school student will tell you is a recipe for causing greater harassment in situations where the aide is not present.

The Sixth Circuit found the situation factually different from *Vance* and *Patterson* because the school engaged in multiple investigations, several in-school suspensions, and class scheduling that separated D.S. from his harassers and that D.S. was occasionally considered to be an instigator--which was curious reasoning given that a police officer had suggested that D.S. take up martial arts.

Lastly, and demonstrating its abject lack of basic humanity given the ongoing harassment and numerous physical injuries suffered by D.S., the Court stated.

(T)he course of known harassment in this case lasted one-and-a-half years in comparison to over three years in Patterson. ... One-and-a-half years of similar, but not rote, responses to incidents that each involved a different student or group of students do not amount to

*clearly unreasonable conduct, even if they might become so over the course of a longer period of time.*³⁹

The school officials took no actions whatsoever to investigate and address concerns related to the environment and context in which the harassment was occurring. Their sole focus was on the harassers, with no focus on the hostile environment that was clearly supporting the ongoing harassment.

The other recent case in this area, also decided in spring 2016, was *S.B. v. Harford County*, a Fourth Circuit case.⁴⁰ Here is the description of the challenges faced by S.B.

*S.B. was a student with disabilities such as Attention Deficit Hyperactivity Disorder, weak visual-spatial ability, and a nonverbal learning disability. There is no question but that his years at Aberdeen High School, which he entered in the fall of 2010, were difficult ones. S.B.'s fellow students often bullied him, sometimes severely. Some of S.B.'s classmates insulted him using homophobic slurs. Others sexually harassed or physically threatened him. And S.B. faced — and sometimes contributed to — racial tensions with his classmates; in one significant episode, S.B. responded to three black students who had been calling him names with a racial epithet and made other threatening remarks.*⁴¹

In this case, there were questions regarding whether the school knew that S.B. was being harassed based on disability, as there were also gender and race-related incidents. For the purpose of this article, we will address the Court's reasoning on the issue of deliberate indifference. The Fourth Circuit wrote:

*[T]he record shows conclusively that the school in fact investigated every single incident of alleged harassment of which it was informed by S.B. or his parents. And in nearly every case, the school disciplined offenders with measures ranging from parent phone calls to detentions to suspensions. Finally, as the district Court emphasized, from January 2013 to June 2013, the school assigned a paraeducator—a school professional who works with students—to accompany S.B. during the school day to ensure S.B.'s safety as well as to provide objective witness to alleged acts of bullying.*⁴²

Here again, note that although it was clear from the facts presented that a hostile environment existed, no actions were taken by the school to investigate and address factors within the environment that were resulting in pervasive and persistent harassment of S.B.

The standard enunciated in these two cases essentially boils down to a determination that even if a student is experiencing pervasive and persistent harassment and is clearly suffering significant harms, all a principal must do is investigate any incident the student bravely reports and respond in some manner and the school can avoid liability

Reducing the analysis of the reasonableness of a school response to a determination of how a school official responded to reported incidents ignores the clear language in *Davis* that school officials not only have authority over students who have engaged in harassment, but also the underlying environment.

³⁹ *Stiles* at 18 (slip).

⁴⁰ *S.B. v. Harford County*, No. 15-1474 (4th Circuit, April 8, 2016).

⁴¹ *S.B.* at 4 (slip)

⁴² *S.B.* at 16 (slip).

What was either unsuccessfully argued or was dismissed by the Court was the clear fact that if different students or groups of students are harassing a protected class student, the critical issue of concern is not the behavior of these individual students, but the fact that a hostile environment exists that is supporting many students in thinking that their hurtful actions are acceptable. A failure by school officials to recognize this is clearly unreasonable in light of the circumstances and constitutes deliberate indifference to the fact that within this school a hostile environment exists that is supporting these pervasive and persistent hurtful actions.

If a hostile environment exists, no amount of intervention with individual students will stop the pervasive and persistent harassment. The school has control over both the harassers and the environment which is supporting the harassment. Unless and until the school addresses the nature of the hostile environment, the harassment is guaranteed to persist.

Office of Civil Rights Guidance

In October 2010, OCR issued an important *Dear Colleague Letter* that addressed the intersection between bullying and discriminatory harassment. The letter started as follows:

*Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.*⁴³

OCR further stated: "A school is responsible for addressing harassment incidents about which it knows or reasonably should have known." OCR also stated:

*When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.*⁴⁴

Following this statement were numerous examples that made it clear that to avoid an adverse agency action, schools must not only intervene in reported incidents, they must engage in comprehensive efforts to change the school culture that was underlying such incidents. This documented the agency focus on both prongs of what the *Davis* court considered under the control of the school, especially the second. Analyzing this Letter overall, the clear intent was to provide guidance to schools on the additional steps they must take to remedy a hostile environment, when the school becomes aware that interventions in individual incidents are not effectively stopping the ongoing harm.

After an example of racial harassment:

⁴³ OCR, 2010 *Dear Colleague Letter*. <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

⁴⁴ *Id.*, at 3-4.

The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.⁴⁵

After an example of religious-based harassment:

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age- appropriate program to educate its students about the history and dangers of anti- Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.⁴⁶

After an example on sexual harassment:

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school's policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district's Title IX coordinator. The school also

⁴⁵ *Id.* at 4-5.

⁴⁶ *Id.* at 6.

might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.

After an example on gender harassment:

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an ad hoc basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.⁴⁷

After an example on harassment based on disabilities:

In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.⁴⁸

Clearly, because of the excellent guidance provided by OCR, schools have received insight into the wide range of possible responses they could initiate in response to a recognition that their interventions with individual perpetrators of harassment is not resulting in a reduction of the problem and additional steps must be taken to address the underlying hostile environment.

Communications between OCR and NSBA

In a letter to OCR related to this *Dear Colleague Letter*, NSBA vigorously objected to the OCR's use of the standard "should have known."⁴⁹ It should be noted that "should have known" has always been the OCR standard in civil rights agency investigations.

NSBA alleged that OCR was seeking to significantly expand the standard of liability and establish a negligence standard.⁵⁰ OCR responded that this was the standard it intended to use for agency

⁴⁷ *Id.*, at 8.

⁴⁸ *Id.* at 9.

⁴⁹ Letter from Francisco M. Negrón Jr., General Counsel, Nat'l Sch. Bds. Ass'n, to Charlie Rose, General Counsel, U.S. Dep't of Educ. (Dec. 7, 2010), available at <https://cdn-files.nsba.org/s3fs-public/reports/NSBA%20Response%20to%20OCR%20Guidance%20December%202010.pdf?mpyvWzGFJFXB1iNnt1T1PU0BlhaTW4P7>.

⁵⁰ NSBA Letter at 2.

considerations and to achieve an injunction and an acknowledgement that this was not the appropriate standard in cases for monetary damages.⁵¹

NSBA also argued that the *Letter* “expands the second prong of Davis’ hostile environment test by declaring that a hostile environment exists when the harassment ‘interfere[s] with or limit[s] participation’ rather than ‘effectively bar[ring] access to an educational opportunity or benefit.”⁵² OCR responded by indicating that its language was in accord with OCR policy.⁵³ The OCR has always focused on the existence of a hostile environment.

NSBA further took issue with the focus on the need to recognize that a hostile environment exists and take steps to remedy that environment, stating, “nothing in *Davis* suggests that some undefined threshold exists where responding to specific incidents is not enough and instead the school district must implement a more ‘systematic’ response to ‘end’ a ‘hostile environment.’”⁵⁴

OCR responded in this manner:

*You also state that Davis does not require schools to prevent recurrence of harassment, whereas DLC requires schools to eliminate harassment and prevent it from occurring again. Again, the requirement to eliminate the hostile environment and prevent its recurrence is based on long-standing policy with respect to the standards used by OCR in administrative enforcement of federal civil rights laws. Further, even in the case of private suits for monetary damages, schools have a duty to take action to prevent recurring harassment where its remedial actions have proven inadequate or ineffective. (citing Vance)*⁵⁵

While OCR made it clear that it is essential for schools to focus attention on the existence of a hostile environment. However, it indicated that it was not seeking to require specific actions by a school. OCR indicated that it suggested responses that a school “may” make, that such approaches may not be required in every case. OCR further indicated that each case is fact-specific and depends on the school and agreed with NSBA’s statement that it is important to consider “the administrator’s own educational experience, judgement, and knowledge.”⁵⁶

Thus, OCR clarified that it was not seeking to require any specific standards for how a school that recognizes the existence of a hostile environment must respond, but that it is essential for a school to recognize the existence of a hostile environment in situations where interventions with individual perpetrators has been ineffective in stopping the ongoing harassment, and take steps to remedy this environment.⁵⁷

Important OCR Guidance Related to Remediating Hostile Environment

Prior to the 2010 *Dear Colleague Letter*, OCR had issued important guidance on the steps that are necessary for a school to take to remedy situations when a hostile environment is found to exist. Notably, in *Davis*, the Court specifically referenced guidance from OCR in making its decision, thus clearly indicating the appropriateness of reliance on such guidance. The Court stated:

51 OCR Response to NSBA available at https://cdn-files.nsba.org/s3fs-public/reports/ED_Response_-_NSBA_Bullying_Letter_2011.pdf at 4.

52 NSBA Letter at 3.

53 OCR Response at 5.

54 NSBA Letter at 4.

55 OCR Response at 5-6.

56 OCR Response at 6.

57 OCR Response at 6.

[A]lthough they were promulgated too late to contribute to the Board's notice of proscribed misconduct, the Department of Education's Office for Civil Rights (OCR) has recently adopted policy guidelines providing that student-on-student harassment falls within the scope of Title IX's proscriptions. See Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039– 12040 (1997) (OCR Title IX Guidelines); see also Department of Education, Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11448, 11449 (1994).⁵⁸

The following is from the 2008 Sexual Harassment Guidance:

What are some examples of steps the school should take to end the harassment and prevent it from happening again?

The appropriate steps should be tailored to the specific situation. For example, the school may need to develop and publicize new policies or conduct training. Depending on the nature and severity of the harassment, counseling, discipline, or further separation of the victim and harasser may be necessary.

Responsive measures should be designed to minimize the burden on the victims as much as possible. If the school's initial response does not stop the harassment and prevent it from happening again, the school may need to take additional, stronger measures.⁵⁹

The following is from guidance on Racial Incidents and Harassment:

Recipient's Response

Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it. Thus, if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or non-employees.

In evaluating a recipient's response to a racially hostile environment, OCR will examine disciplinary policies, grievance policies, and any applicable anti-harassment policies. OCR also will determine whether the responsive action was consistent with any established institutional policies or with responsive action taken with respect to similar incidents.

Examples of possible elements of appropriate responsive action include imposition of disciplinary measures, development and dissemination of a policy prohibiting racial harassment, provision of grievance or complaint procedures, implementation of racial awareness training, and provision of counseling for the victims of racial harassment.⁶⁰

⁵⁸ Davis 526 U.S.

⁵⁹ OCR, (2008) *Sexual Harassment: It's Not Academic*, at 13. <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf>.

⁶⁰ Racial Harassment Guidance "Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice," 59 Federal Register 11448 (March 10, 1994).

Although not noted in *Davis*, but highly relevant is this guidance is from a guide on protecting students from harassment and hate crimes:

REMEDYING HARASSMENT BY STAFF. When an employee commits harassment, districts should consider the advisability of various kinds of remedial action. The district should be sure that its personnel policies, collective bargaining agreements, and staff codes of conduct are adequate to deal with unlawful harassment by teachers, administrators, and other employees, including provisions for discipline or removal. Where a district employee perpetrates harassment, an apology by the district may be in order. Offender rehabilitation programs may be appropriate. Repeated or serious instances of harassment generally warrant stringent sanctions.⁶¹

Research Insight into Bullying and Harassment

The **Comments** set forth in the following section address both how these concerns could be assessed, as well as how the concerns could be investigated by an attorney for a student or group of students.

Effectiveness of School Staff in Responding to Student-on-Student Harassment

The foundational approach most schools implement to address bullying and harassment, frequently in response to state statutory requirements, is to adopt a policy that prohibits bullying, establish a process to allow students, students' families, staff, and others to report incidents of bullying, require that school personnel intervene and report incidents of bullying they witness or are aware of to a designated school official, establish a process to ensure that a designated official investigates and implements an intervention, and a requirement to maintain records.⁶²

While this policy-based foundation is clearly necessary, there is ample research evidence that while these requirements have generally been in place in most schools for over a decade, compliance by school staff is often lacking and ineffective in reducing bullying incidents or effectively resolving the hurtful situations. Further, merely implementing this policy-based foundational approach will be insufficient to effectively establish an environment that supports all students. The NRC report noted:

There has been an emerging concern that some programs and strategies commonly used with the goal of preventing or stopping bullying may actually increase bullying or cause other harm to youth or the school community. For example, suspension and related exclusionary techniques are often the default response by school staff and administrators in bullying situations; however, these approaches do not appear to be effective and may actually result in increased academic and behavioral problems for youth.⁶³

A study in 2007 showed that while 87% of school staff thought they had effective strategies for handling bullying, 58% of middle and 66% of high school students believed adults at school were

61 *Protecting Students from Harassment and Hate Crime: A Guide for Schools* - January 1999, See Part II: Identifying and Responding to Incidents of Harassment . <https://www2.ed.gov/offices/OCR/archives/Harassment/incidents1.html#restrict>

62 Federal Partners in Bullying Prevention. *Key Components in State Anti-Bullying Laws*. <http://www.stopbullying.gov/laws/key-components/index.html>.

63 NRC Report, supra. at 209.

not doing enough to stop or prevent bullying.⁶⁴ Further, while only 7% of school staff thought they made things worse when they intervened in bullying situations, 61% of middle school students and 59% of high school students reported that staff who tried to stop bullying only made things worse. Lastly, while 97% of school staff said they would intervene if they saw bullying, 43% of middle school students and 54% of high school students reported they had seen adults at school watching bullying and doing nothing.

A 2008 study found that students overwhelmingly believed that most teachers ignored or did not recognize such hurtful activities, were not prepared to intervene if asked, and were incapable of doing anything effective if they took actions.⁶⁵

A 2014 study in middle schools found that the highest reported prevalence rates of bullying were in classrooms, hallways, and lunchrooms.⁶⁶ The locations findings in this study are comparable to the location findings in the National Crime Victimization Survey--School Crimes Supplement (NCVS-SCS).⁶⁷ These are the places where presumably staff supervision should be the highest. The fact that these incidents were witnessed by staff and continued to occur increased the distress of the students. The researchers noted:

It is of serious concern that the most dangerous areas in terms of both prevalence of any victimization and the number of different ways that it takes place—those being hallways, classrooms, and lunchrooms—represent the 3 areas where schools often have (or at least are supposed to have) significant and constant monitoring procedures (classrooms and lunchrooms) or regulations (along with some monitoring) about who can be in that space at any given time (hallways). This suggests that frequent bullying and victimization will occur even when there is contextually authoritative oversight supposedly in place.⁶⁸

The researchers further noted:

Research commonly suggests that the experience of being bullied in school produces students who are disengaged from pursuing their education. This disengagement may not simply come from their experiences of peer abuse somewhere on school property outside of the learning environment. The academic alienation produced by the experience of being bullied may come much more directly in many instances from what students experience in the classroom than what has been commonly thought to be the case. When bullying occurs in such a salient academic space with an authority figure and peers within close range, it may be even more embarrassing and hurtful, making students feel even more unsafe because it occurs in a place where students should least commonly expect to be bullied. This study suggests that the mere presence of teachers in the classroom serving as authority figures does not provide the influence necessary to lower the incidences of harassment and bullying in that context compared with other school locations. Thus, it is of utmost importance to address classroom harassment bullying along with such behaviors in less monitored

64 Bradshaw, C.P., Sawyer, A.L. and O'Brennan, L.M. Bullying and Peer Victimization at School: Perceptual Differences Between Students and School Staff. *School Psychology Review*, Volume 36, No. 3, pp. 361-382 (2007).

65 Thomson P. & Gunter H. 2008. Researching bullying with students: a lens on everyday life in an 'innovative school'. *International Journal of Inclusive Education* 12: 185–200.

66 Perkins HW, Perkins JM, Craig DW. (2014) No safe haven: locations of harassment and bullying victimization in middle youth organizations. *J Sch Health*. 84: 810-818.

67 U.S Department of Education (April 2015) *Student Reports of Bullying and Cyberbullying From the 2013 School Crimes Supplement to the National Crimes Victimization Survey*. <http://nces.ed.gov/pubs2015/2015056.pdf>. (NCVS Survey)

68 Perkins, et. al. supra at 815.

contexts. Learning as well as healthy emotional development in general may be severely impaired by students' fear of being victimized during class time and by their reluctance to attend class due to this fear of being unsafe.⁶⁹

In a study the author of this article conducted a study of 1,500+ secondary students in October 2015. Students were asked how frequently they experienced someone being hurtful to them in the last 30 days and, if they had experienced this, how upset they were and how effective they felt in getting this to stop. An analysis was done to identify the more vulnerable students, those who had been treated badly once or twice a week or almost daily, were upset or very upset, and who felt it was very difficult or impossible to get this to stop. Nine percent (9%) of the students who responded to this survey were considered to be more vulnerable based on this criteria. Based on an estimated secondary student population in U.S. schools of 25,000,000, this equates to over 2.2 million students who find themselves in this situation in the U.S.

More vulnerable students were asked to think about a significant recent incident and to indicate whether a school staff member was present, and if so whether things got better, stayed the same or got worse, and how the staff member responded. Sixty-five percent (65%) of the students indicated a staff member was present and that things got better only 13% of the time--47% of the time things stayed the same and 40% of the time things got worse. The most common staff responses that made things stay the same or get worse were when the staff member just watched or ignored the situation.

Comment: Thus, based on the research, it is critically important for the school official to investigate how any staff member who might have witnessed the hurtful incident responded and the effectiveness of that response. If the school official determines that there is a pattern of staff behavior in ignoring or not responding to harassment in an effective manner, this concern will clearly be contributing to a hostile environment and must be addressed through both the expression of requirements for staff and professional development to ensure staff interventions in the situations they witness are effective.

If in any reported incident, a staff member clearly was present and failed to intervene in an effective manner, the school official should be deemed to have actual knowledge of the failure of staff to effectively respond, thus effectively placing this situation within the *Gebser* standards if the school official did not promptly engage in corrective actions with this staff member.

Plaintiff's counsel is advised to specifically ask the student about instances where a staff member was present and determine the response by that staff member, the effectiveness, how this made the harassed student feel, and whether impacted this student's willingness to report to a school official. The student should also be asked about any identifiable response by other students that appeared to be related to the staff member's lack of response or ineffective response.

In discovery, plaintiff's counsel is advised to ask for evidence of policies and recommended practices related to how staff should intervene when these situations are witnessed, as well as documentation on recent professional development received by staff to ensure their effectiveness in doing so.

In an analysis of incident reports, it is advised that a determination should be made regarding whether the manner in which the student reported the incident should have put the school

⁶⁹ Perkins, et. al. supra at 817.

official on notice that a staff member might have been present and whether the principal asked both the student and the staff member about the incident. Additionally, if the staff member did not intervene or did not intervene effectively, an inquiry into whether the school official engaged in corrective action should be made.

Reporting Hurtful Incidents to School

The vast majority of secondary students do not report hurtful incidents to a school official. Data from 2013 NCVS-SCS indicated that only 39% of students who reported someone had bullied them at school said that they told an adult.⁷⁰

One 2004 study at the elementary school level found that there was a perception among the students that the school tolerated bullying because nothing was ever done and therefore it was a waste of time to report.⁷¹ A 2004 study of secondary students revealed that students did not report their situation to teachers or other adults for fear of being viewed as a “squealer,” belief that the school staff would act in a way that would make their situation worse, and they did not trust school staff to keep secrets told to them in confidence.⁷² In a 2007 study, students associated telling a teacher with a double jeopardy: they might not be believed and telling might result in retaliation by the perpetrators.⁷³

The *Youth Voice Project* asked students who were repeatedly bullied and had experienced moderate to very severe levels of distress whether they reported to an adult at school and, if so, whether things got better, stayed the same, or got worse.⁷⁴ The findings indicated:

- Elementary (grade 5). 46% did not tell an adult, 29% told and things got better, 17% told and things stayed the same, 11% told and things got worse.
- Middle school (grades 6 to 8). 68% did not tell an adult at school, 12% told and things got better, 8% told and things stayed the same, 12% told and things got worse.
- High school (grades 9 to 12). 76% did not tell an adult at school, 7% told and things got better, 8% told and things stayed the same, 9% told and things got worse.⁷⁵

In the author’s study, 64% of the more vulnerable students indicated they had not reported the most significant recent incident to the school--11% indicated they reported and this made things better, 16% reported and things stayed the same, 9% reported and things got worse.

The primary reasons students provided for not reporting were that they did not think a school staff member would do anything to help, thought that a school staff member might make things worse, thought they would be blamed, thought they probably deserved it, and were concerned the student being hurtful would retaliate.

Comment: This research data obviously calls into serious concern that the current standard encouraged by school districts and the NSBA, and adopted by some courts, is that all a school

70 NCVS Survey, supra.

71 MacDonald H, Swart E. (2004). The culture of bullying at a primary school. *Education as Change* 8: 33–55.

72 Garpelin A. (2004). Accepted or rejected in school. *European Educational Research Journal* 3: 729–742.

73 Oliver C, & Candappa M. 2007. Bullying and the politics of ‘telling’. *Oxford Review of Education* 33: 71–86.

74 Davis, S. and Nixon, C. (2013) *Youth Voice Project: Student Insights into Bullying and Peer Mistreatment*. Research Press: Illinois; Davis S. and Nixon, C. (2011) *Youth Voice Project, National Data Set. Youth Voice Project*. <http://www.youthvoiceproject.com>.

75 Davis and Nixon, supra.

official must do to avoid liability is investigate and respond to student reports. Given the low rate at which students report, due to their perception of the lack of effectiveness in doing so--a lack of effectiveness that appears to be grounded in experience--every school officials who investigates and intervenes in a harassment situation that has been reported should follow up with the student involved to determine effectiveness of the intervention.

Given the reluctance of students who are being harassed to report to a school official, it is necessary in any situation where there appears to be ongoing harassment of a student for the school official to not only ask questions about a reported incident, but also to ask questions about the student's relationships in general. Further, recognizing that a school intervention very well could not have resolved the situation or could have led to retaliation that is making matters worse. It is necessary for the school official to follow up after any intervention to ensure that the intervention was effective.

Plaintiff's counsel is advised to ask students what happened after any incident was reported to and handled by a school official, specifically inquiring about any resulting continuing negative interactions with the student who engaged in harassment or any of this student's supporters. Attorneys should specifically inquire of the student, whether the school official followed up to ensure the intervention was effective, should evaluate the incident record to determine whether such follow up was conducted, and should inquire about such follow up in deposition.

When harassment appears to be pervasive or persistent, as an initial intervention, the harassed student will require a safety plan to be implemented. This plan should address concerns that are present in any particular location or situation in the school or other school-related locations, such as the school bus, include routine connections with this student by a designated staff member, and include the implementation of strategies that may be necessary to address any personal challenges this student is facing that may be contributing to the ongoing situations.

Note, based on guidance from OCR and effective practice in bullying prevention, it is considered inappropriate to make changes in the schedule or classes of the harassed student. If changes are deemed necessary, the students engaging in the harassment should be the ones for whom changes occur. Further, appointing a staff member to follow the student throughout the school building is an approach that likely will increase harassment at any time the staff member is not present, because this approach will further stigmatize the student in the eyes of his or her peers. This safety plan should be assessed and updated if continuing problems are evident.

Plaintiff's attorney are advised to request evidence of how the school official established an appropriate safety plan and ask the student how well that safety plan was implemented.

If the harassed student is on an IEP or 504, the special education staff should have conducted an assessment of the student's functional skills related to interpersonal relationships. An assessment the effectiveness of all general teachers with whom this student is associated to determine their insight and skills to effectively handling any social, emotional, relationship challenges this student may be experiencing should also have occurred.

An IEP or 504 meeting must have been held to discuss the concerns and make appropriate changes to the IEP or 504 plan related to addressing the needs both of the student and all staff who regularly interact with the student. Plaintiff's attorneys should request a copy of the assessment, the revised IEP or 504 plan, and notes from the IEP or 504 meeting.

Staff Bullying of Students

There is very little research on the issue of staff bullying of students but this is a serious concern that should not be overlooked.

In one study, teachers from elementary schools completed an anonymous survey about staff bullying.⁷⁶ The definition provided was “a teacher who uses his/her power to punish, manipulate, or disparage a student beyond what would be a reasonable disciplinary procedure.”

Notably, 45% of the teachers admitted to bullying a student. Two kinds of teachers who engaged in bullying were identified--those who intentionally humiliate students and those overwhelmed by situations that resulted in their being hurtful. Teachers felt that bullying behaviors by teachers was largely the result of a lack of support from the administration, in addition to a multitude of other causes such as a lack of training and that classes that were too large. Teachers also said that those teachers who engaged in bullying lacked the ability to effectively manage their classrooms.

Another study defined bullying by teachers as “(a) pattern of conduct, rooted in a power differential, that threatens, harms, humiliates, induces fear, or causes students substantial emotional distress.”⁷⁷

Like student-on-student bullying, staff bullying is considered an abuse of power that tends to be chronic and involves degrading a student in front of others.⁷⁸ There are usually no negative consequences for teachers who engage in bullying. Those students who are targeted often have some manner of vulnerability because they are unable to stand up for themselves, others will not defend them, or they have some devalued personal attribute. Frequently, teachers make references to how this student differs from other students who are more capable or valued. As a result, the student may also become a target by peers. As explained:

Teachers who bully feel their abusive conduct is justified and will claim provocation by their targets. They often will disguise their behavior as “motivation” or as an appropriate part of the instruction. They also disguise abuse as an appropriate disciplinary response to unacceptable behavior by the target. The target, however, is subjected to deliberate humiliation that can never serve a legitimate educational purpose.

Students who are bullied by teachers typically experience confusion, anger, fear, self-doubt, and profound concerns about their academic and social competencies. Not knowing why he or she has been targeted, or what one must do to end the bullying, may well be among the most personally distressing aspects of being singled out and treated unfairly. Over time, especially if no one in authority intervenes, the target may come to blame him or her self for the abuse and thus feel a pervasive sense of helplessness and worthlessness.

Bullying by teachers produces a hostile climate that is indefensible on academic grounds; it undermines learning and the ability of students to fulfill academic requirements.⁷⁹

76 Twemlow, S.W., Fonagy P., Sacco F., & Brethour J. (2006) Teachers who bully students: a hidden trauma. *Int J Soc Psychiatry*. Vol 52(3) 187-198.

77 McEvoy, A. (2005). Teachers who bully students: Patterns and policy implications. Paper presented at the Hamilton Fish Institute's Persistently Safe Schools Conference, Philadelphia, PA. p. 3.

78 *Id.*

79 *Id.* at 2-3.

While these studies refer to “teachers,” the staff member engaging in harassment could also be a school administrator or other staff member.

The Gay Lesbian Straight Education Network (GLSEN) study *2011 National School Climate Survey* found that over half (56.9%) of sexual minority students heard teachers or other staff make homophobic comments or negative comments about a student’s gender expression at school and when school staff were present, less than a fifth of the students reported that staff frequently intervened.⁸⁰ GLSEN’s 2013 survey found 61.6% of LGBT students who reported a hurtful incident to school staff said school staff did nothing in response, 55.5% of LGBT students reported personally experiencing LGBT-related discriminatory policies or practices at school, and 34.8% said their administration was very or somewhat unsupportive of them

The GLSEN study, *From Teasing to Torment: School Climate Revisited, A Survey of U.S. Secondary School Students and Teachers* asked students whether they had heard biased comments from teachers and other staff members.⁸¹ The survey participants included all students, not just those who identified as LGBT. Students reported the following:

- Sixteen percent (16%) of students reported that teachers and staff members use the expression “that’s so gay” or “you’re so gay” and 15.3% heard them make other homophobic remarks.
- Twenty one percent (21%) reported that teachers and other staff members had made sexist remarks.
- Twenty-three percent (23%) reported that teachers and other staff made comments about students’ academic ability.
- Fourteen percent (14%) of students reported hearing teachers and other staff make racist comments.
- Twenty-six (26%) reported that teachers and other school staff had made negative remarks about how “masculine” or “feminine” students are.
- Fourteen percent (14%) reported that teachers and staff members made negative religious remarks
- Thirteen percent (13%) reported ever hearing teachers or other school staff make anti-transgender comments.⁸²

A report issued by The Council of Parent Attorneys and Advocates documented reports of children with disabilities who were subjected to abuse by school staff.⁸³ While unfortunately students who are obese do not appear to receive protection under statutes that protect those with disabilities, in a survey of students with obesity or weight problems attending a weight loss camp, 42% of these students reported being bullied by physical education teachers or sport coaches and

80 Kosciw, J. G., Greytak, E. A., Palmer, N. A., & Boesen, M. J. (2014). *The 2013 National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation’s schools*. New York: GLSEN.

81 Greytak, E.A., Kosciw, J.G., Villenas, C. & Giga, N.M. (2016). *From Teasing to Torment: School Climate Revisited, A Survey of U.S. Secondary School Students and Teachers*. New York: GLSEN.

82 *Id.*

83 Butler, J. (2009) *Unsafe in the Schoolhouse: Abuse of Children with Disabilities*. The Council of Parent Attorneys and Advocates, Inc. http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf;

27% reported being bullied by teachers.⁸⁴ Recently, anti-Islamic hurtful behavior by staff or students has been identified as a concern.⁸⁵ The National Clearinghouse on Supportive School Discipline has outlined the concerns of harsh and exclusionary disciplinary policies and practices have been applied disproportionately to members of specific demographic groups such as racial and ethnic minorities, males, and students with emotional, behavioral or cognitive disabilities.⁸⁶

In the author's survey, students were asked how frequently in the last month, they had witnessed a school staff member be hurtful to a student. Student responses were: 9% Almost every day. 12% Once or twice a week. 21% Once or twice a month. 58% Never.

The results on questions about student-on-student hurtful behavior were then analyzed based on their response to the question about witnessing staff being hurtful to students.⁸⁷ Students were classified as "ever" or "never" having witnessed staff being hurtful to a student.

The results were very significant. Those students who had "ever" witnessed staff be hurtful to a student were significantly more likely to report witnessing, engaging in, or being targeted by hurtful behavior.

- This analysis revealed that 85% of students who "ever" witnessed a staff member be hurtful to a student indicated that they had also witnessed a student being hurtful to a student, whereas, only 56% of students who "never" witnessed a staff member be hurtful to a student indicated that they also had witnessed a student being hurtful to another student.⁸⁸
- Fifty percent (50%) of students who "ever" witnessed a staff member be hurtful to a student indicated that they had engaged in hurtful behavior directed at another student, whereas, only 13% of students who "never" witnessed a staff member be hurtful to a student engaged in hurtful behavior directed at another student.⁸⁹
- Lastly, 73% of students who "ever" witnessed a staff member be hurtful to a student also indicated that someone had been hurtful to them, whereas, only 36% of students who "never" witnessed a staff member be hurtful to a student reported that someone had been hurtful to them⁹⁰.

Comment: These results indicate that in situations where students are experiencing ongoing harassment from other students, there is a relatively significant probability that they are also experiencing staff being hurtful to them. It is essential that plaintiff's counsel investigate this possibility. The critical issue, under *Gebser*, will be whether the principal knew that this was occurring.

Plaintiff's counsel should ask the harassed student whether there were any concerns associated with staff members engaging in disparagement. If so, ask the harassed student and his or her

84 Puhl, R.M., Peterson, J.L. & Luedicke, J. (2013) Weight-Based Victimization: Bullying Experiences of Weight Loss Treatment-Seeking Youth. *Pediatrics* 131:e1-e9.

85 <http://www2.ed.gov/policy/gen/guid/secletter/151231.html>. Straus, V. , Thea Renda Abu El-Haj and Sigal Ben-Porath (2015) How should schools respond to anti-Muslim actions against students? *The Washington Post*. <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/16/how-should-schools-respond-to-anti-muslim-actions-against-students/>.

<http://supportiveschooldiscipline.org/connect/discipline-disparities>

87 The Chi-square test of independence was used to determine how witnessing staff maltreatment of students related to student responses to these questions.

88 Chi-square (3) = 223.94, p<.001.

89 Chi-square (3) = 241.14, p<.001.

90 Chi-square (3) = 259.75, p<.001.

parent whether these concerns were reported to the school official and ask if the school official ever asked the harassed student about relations with school staff.

Plaintiff's attorney should also ask the student about any incident where a staff member denigrated him or her that was witnessed by any other staff member and determine through discovery whether the staff member who witnessed the maltreatment of the student reported this to the responsible school official.

An additional line of inquiry, in light of clear guidance provided to schools from OCR as noted above, should be in relation to the district's policies, collective bargaining agreements, and codes of conduct related to harassment of students by staff. Particular attention should be paid to when these policies, agreements, or codes require reporting to a school official who has authority to institute corrective action when a staff member witnesses or hears about a colleague being hurtful to a student. If a staff member witnessed or hears about a parent being abusive, that staff member has a mandatory obligation to report such abuse. A similar requirement should be present related to staff abuse of a student.

School staff are mandated by law to report any incidents of suspected child abuse. Plaintiff's counsel should consult the specific law in his or her state to determine whether the language might cover instances of school staff abuse of a student. If this is the case, then any staff member who was aware of such abuse and failed to report could be reported for this failure under mandatory reporting

Assessing the School's Response to an Identified Hostile Environment

The following are steps that would commonly be recommended by bullying prevention experts, as well as have been set forth both in the OCR guidance related to how schools respond when there is evidence of pervasive or persistent harassment directed at a student or group of students and the interventions in the individual reported incidents have not been effective in significantly reducing the ongoing harassment. These outlined steps set forth important considerations and a process to be followed that holds the best promise for effectiveness in remedying a hostile environment.

- Remedying a hostile environment will require involvement of school staff who can bring different expertise to the situation, as well as potentially involving law enforcement and/or community organizations.
 - Plaintiff's counsel should ask for all reports of meetings where a school team met to discuss the hostile environment and reports from meetings with law enforcement and/or community organizations.
- Effectively remedying an hostile environment requires a comprehensive assessment of the nature of the environment. It is generally recommended that schools regularly conduct surveys to assess school climate, bullying, and harassment. If a hostile environment is suspected, school officials should also conduct focus groups with the students who are within the protected class that is suspected of being harassed in an ongoing manner.
 - Plaintiff's attorney should request copies of all survey results and evidence of results of any focus group meetings. Given the research findings on the staff involvement in the making of disparaging or harassing comments to or about students, in focus

groups with protected class students, they should have been asked about their relationships with staff members and if any are having any difficulties related to staff member comments made to or about them.

- The school team should conduct an overall assessment of the school's approach to reduce bullying and harassment, develop action plans to remedy any identified concerns, and determine how the effectiveness of those plans will be assessed.
 - Plaintiff's attorney should ask for documentation on how issues related to the the school's approach was conducted, what concerns were identified, the plans to address any identified concerns, and the means by which the effectiveness of these plans will be evaluated.
- The overall effectiveness of school staff in detecting, intervening, and reporting hurtful incidents should be assessed and action plans should be put into effect to remedy any identified concerns. These plans should include better directives to staff and professional development on strategies staff can use to more effectively intervene.
 - Plaintiff's attorney should ask for documentation on how the effectiveness of staff responses to student harassment was conducted, what concerns were identified, the plans to address any identified concerns, and the means by which the effectiveness of these plans will be evaluated.
- An overall assessment of the cultural competence of the school community--staff and students--in relation to both the specific protected class of students and all protected class students should be conducted, action plans should be put into effect to remedy any identified concerns, and a determination of how the effectiveness of those plans will be assessed should be established. In an assessment and development of plans to improve the cultural competency of a school, the involvement of a community organization that works to address the concerns of the relevant protected class or classes is highly advised.
 - Plaintiff's attorney should ask for documentation on how issues related to the cultural competence of the school community was conducted, what concerns were identified, the plans to address any identified concerns, and the means by which the effectiveness of these plans will be evaluated.
- An overall assessment of how the school is addressing the social, emotional, and interpersonal relationship skills of students should be conducted, action plans should be put into effect to remedy any identified concerns, and a determination of how the effectiveness of those plans will be assessed should be established.
 - Plaintiff's attorney should ask for documentation on how issues related to the the social, emotional, and interpersonal relationship skills of students was conducted, what concerns were identified, the plans to address any identified concerns, and the means by which the effectiveness of these plans will be evaluated.

Readers should note that these recommended action steps do not suggest the requirement of any specific actions by a school. Each situation of a hostile environment in a school is fact-specific. It is important to consider the educational experience, judgement, and knowledge of the school

official and additional staff who are involved in assessing and enunciating plans to address the situation that exists within their school.

Further, schools should not face liability if their initial efforts do not yield immediate positive results. Even if a school dramatically improves its school climate, some incidents involving students who engage in harassment can be anticipated. The overwhelming and frequent nature of these incidents should be reduced.

Conclusion

As was stated at the start of this article, the reason for this article is not an effort to seek to hold an increasing number of schools financially liable. The concern is that unless and until federal courts hold schools accountable for taking the steps necessary to correct a hostile environment that is supporting students in engaging in harassment, millions of U.S. students will face daily torment that is not only interfering with their right to receive an education, but also resulting in significant, long-lasting emotional harm.

It is the author's hope that attorneys who are in a position to represent students who are being harmed through harassment by other students, and sometimes school staff, will find the insight provided to be helpful in their cases.

About the Author

Nancy Willard has a M.S. in Special Education and a J.D., from Willamette University College of Law. She taught "at risk" children, practiced computer law, and was an educational technology and digital safety consultant before turning her attention to issues of cyberbullying and bullying.

She wrote the first book ever published on cyberbullying, *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats, and Distress* (2007, Research Press) and *Cyber-Safe Kids, Cyber-Savvy Teens, Helping Young People Use the Internet Safety and Responsibly* (2007, Jossey Bass). *Cyber Savvy: Embracing Digital Safety and Civility* (2011, Corwin Press).

She is also author of *Student Off-Campus Speech: Assessing "Substantial Disruption,"* published by the *Albany Law Journal of Science and Technology*. She has written numerous articles for school leaders, including those published in *American Association of School Administrators School Administrator*, *National Association of School Psychologists's Comunique*, and for *District Administration*.

Nancy's approach to youth risk prevention recognizes that in the digital age it is necessary for adults to empower young people with the values and skills to embrace civility. To help young people embrace civility requires a focus on the quality of the school or organization climate, empowering young people with the values and skills necessary to foster positive relationships, and ensuring that when adults intervene in hurtful situations this results in an effective resolution that fully supports all involved students.

Nancy is available as a trial consultant or expert witness to assist attorneys in cases involving discriminatory harassment of students. She would welcome the opportunity to become involved in the initial investigation and discovery phases, as this is the best time to assist counsel in asking helpful questions of their client and school officials. She is also available to assist in developing both the factual and legal presentation of the case. She is especially interested in being involved in the development of settlement agreements that can both remedy the harms to the student or students involved and assist the school in taking the steps necessary to correct its hurtful environment to ensure the protection of other and future students.

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