



How Schools Can Prevent and Defend Against Bullying Claims - Episode #134

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us today Attorney John J. Cloherty III from the law firm of [Pierce Davis and Perritano](#), a litigation and trial firm with offices in Massachusetts, Connecticut, and Rhode Island. John is a partner with the firm. He represents municipalities, schools, and school districts in defense of negligence, premises liability, negligent security, civil rights, and discrimination.

John also represents higher education institutions in tort, contract, and employment claims. John has defended numerous schools and officials in bullying cases including a successful appeal to the First Circuit Court of Appeals.

John, we're very pleased to have you with us today.

John J. Cloherty III: Thank you.

John Czuba: Today John is going to provide us with an update on school bullying claims. Bullying and cyber bullying continue to dominate headlines with several high profile cases. While schools and institutions have made efforts to address bullying, families continue to hold school districts and officials accountable for failure to prevent bullying, leading to school bullying claims. Lawsuits range from wrongful death to civil rights and due process violations.

Today's topic is the defense in schools in claims of failure to prevent bullying.

John, before we get into the claims details, can you provide for us a legal definition of what is bullying?

John Cloherty: Certainly. There's actually no uniform federal definition of bullying in...Mainly in all 50 states, they've adopted some form of anti-bullying legislation, which specifically define what they mean by bullying and harassment. Most are similar. Local educators and lawyers, you need to look at the local statutes and regulations in your own jurisdictions.

But generally they look at aggressive behavior or intentional harm directed towards another student that's repeated over time, and the courts also look at whether it's an imbalance of power between the aggressors and the targets.

It can cover a wide variety of conduct as you can imagine. It can be written, verbal, electronic, physical acts, something that's directed at a victim and causes physical or emotional harm or even just the threat of physical or emotional harm, which rises to the level of a hostile environment.

John Czuba: What claims are schools facing in the bullying area, John?

John Cloherty: Typically the lawsuits that we're seeing and the claims that we're seeing involve peer to peer bullying, a schoolchild being bullied by other students, either on or off campus, which the student or the parents claim the school administration was non responsive to or did not adequately respond.

The bullying can be verbal or accompanied by physical contact or assaults or even we've had cases of non-consensual sexual conduct on students. There also are claims of bullying by cyber bullying via social media, which we can discuss in more detail in a few minutes.

John Czuba: John, is liability different for private and for public schools?

John Cloherty: Yes, there's a big distinction here in the civil rights arena between private and public schools. The civil rights law under 42 USC section 1983 which provides a mechanism for liability if an actor violates someone's constitutional rights. Section 1983 however only applies to state actors and therefore would only apply to public schools. So private schools ordinarily would not be liable for civil rights violations under 42 USC section 1983.

That being said, however, the federal anti discrimination laws apply more broadly than section 1983. They would apply to any entities receiving federal funding and so that private schools can be held liable under federal anti discrimination law such as Title IX. Obviously the vast majority of private schools receive some sort of federal funding, so they'd have exposure there.

John Czuba: John, what legal theories are plaintiffs pursuing in school bullying cases?

John Cloherty: We see a whole array, different types of legal theories brought, and most litigants try to do the shotgun approach and bring as many claims as possible. There's claims under section 1983 for civil rights violations of substantive due process violations or equal protection. There's the statutory discrimination claims under Title VI or Title IX alleging sex discrimination.

There's claims brought under the Individuals with Disability in Education Act, the IDEA. Those involve special education students and the obligation to provide a free and appropriate public education. There's disability discrimination claims brought under section 504.

There can be state law civil rights claims. Massachusetts, where I practice, has a wide variety of statutes protecting or prohibiting discrimination in education or in public accommodations that might come into play.

The state laws for bullying prevention may or may not be actionable in themselves. Massachusetts law does not create a right of action, but other states may create a cause of act for violating the bullying prevention laws. Then of course there's the negligent claims like negligent supervision, negligent hiring, and negligent infliction of emotional distress.

John Czuba: John, are there additional concerns with special education students or disabled students?

John Cloherty: Certainly the special education students are subject to the IDEA regulations, and we find in Massachusetts law especially requires us that if there is a determination when doing the individualized education plan, the IEP, that's required under the IDEA, if that identifies a student as being vulnerable to bullying, then the IEP's really got to take steps to address how you're going to avoid and respond to bullying for this particular student.

On the flip side, if the bullying students, the perpetrators, are special education students, then the IDEA has protections for disciplining students. There's a whole array of procedural protections set forth in the federal law that governs whether you can discipline a special education student and how that discipline can be enforced also comes into play.

John Czuba: How are bullying claims interrelated with school's obligations to prevent sex based discriminations?

John Cloherty: This is where currently I'm seeing a lot of bullying claims have the interplay with the sex discrimination laws, mainly under Title IX which prohibits discrimination in education on the basis of sex. The Supreme Court as you may know had found a private right of action under Title IX, so students can sue if they are subject to a sexually hostile school environment under Title IX.

The standard of liability there as well as the school is deliberately indifferent towards known acts of harassment occurring in programs or activities.

If there's ever bullying that's tinged with any kind of sexual hostility such as homophobic names or slurs being accused between the students, that usually gives rise to a Title IX claim.

The significance of that is ordinarily if there is no sexually tinged conduct and the students are trying to bring a civil rights claim under, say, the due process clause of the Constitution, they're going to fall short because the case law is pretty well established that the government doesn't have an obligation to protect an individual from private violence or harassment under the due process clause.

There's a number of exceptions to that, but basically we've successfully argued and there's reported cases that the failure to prevent bullying cannot give rise to a substantive due process violation under the Constitution.

What we find is that litigants will then seize upon any sexually harassing type remarks that are part of the bullying to bring a Title IX claim because they know if they try to pursue a substantive due process claim, it's going to fall short.

John Czuba: John, how can schools defend themselves in bullying cases?

John Cloherty: The best response or the best defense to bullying claims is prevention. If you have your workforce trained to detect and prevent bullying, it's going to go far in making sure the claims never came forward.

Then documenting whatever bullying prevention efforts you take including documented training of your staff in how to detect and respond to bullying, education of the students in preventing bullying, and whatever investigations are conducted should be well documented as well.

John Czuba: Is there any distinction from claims that school officials or employees engage in regards to bullying?

John Cloherty: What we've been talking about so far is the peer to peer bullying. Different level of proof for that type of bullying as opposed to if the teacher or a staff member is supposedly being sexual hostile or harassing students. There is more likelihood to be a finding of direct liability or vicarious liability for the school if the conduct at issue is being done by their own teaching staff.

John Czuba: What are you seeing as far as bullying claims on the federal or state levels?

John Cloherty: Most of the claims we see are brought in the state courts, but if they're federal claims included in the complaint, we routinely remove them to federal court. We find that the federal jurists are much more familiar with the civil rights laws and the case law and statutes and much more willing than state jurists to rule on dispositive motions.

John Czuba: Cyber bullying is all over the news these days. Is that different than the other types of bullying?

John Cloherty: Not really. It's just a different format for bullying. The regulations and the case law usually recognize that bullying can take place either directly, face to face, or by virtue of the social media or electronic bullying and prohibit it there as well.

The big issue that we find is how can the litigant prove liability for a school for conduct that takes place off campus or in the student's own room if they're doing this on social media. The courts are going to look to whether the computers were accessed on campus or the social media postings became so widely known that they disrupted the educational opportunities of the student in the classroom.

John Czuba: John, how does hazing come into play?

John Cloherty: Hazing is where there's bullying or harassment in the initiation into a student organization like being on a football team or being on some other kind of sport. Certainly that falls within the definition of bullying.

Where we see this become problematic is we've had cases where there's a football camp even taking place in another state where hazing occurs, and the school can be held liable or called to task if they don't prevent bullying that takes place away from the campus.

John Czuba: How are schools at risk in bullying cases?

John Cloherty: The main risk that occur are the schools are dismissive of the claims of bullying or non-responsive to the bullying or they don't document the efforts to address the bullying or preserve records. Failing to communicate with parents or students about the efforts that they're taking can be problematic. In other words, they're disciplining a student and addressing the bullying, but the victim of bullying is not aware of that. That's a problem.

Of course there's federal and state laws regulating disclosure of student discipline and student records under FERPA and elsewhere, so you got to be careful about that.

Other types of issues we see is when bullying takes place in the past, it's addressed, and then the students are promoted to another grade, and the students are put back in the same arena or same classroom. The school doesn't have a continuity of treatment protection for the victim of the bullying.

John Czuba: What can schools do to protect students and also reduce their liability risk?



John Cloherty: The best practices are to have an anti bullying plan in place and to make sure that is known to all the staff through professional development training and updates and to require reporting by all school employee including non-teaching staff of any suspected bullying and then to investigate and discipline.

When you do investigate, you've got to document your investigation, written reports, and take appropriate disciplinary action. You've got to follow that up, like I talked about earlier, with notifications of the parents and the guardians of both the perpetrator and the victim and then make sure you have policies in place for other things like Internet safety and that type of thing.

John Czuba: What trends do you see in the volume of bullying claims being brought against schools?

John Cloherty: Anecdotally, in our experience, we saw a real large increase in the bullying back when these high profile cases first came on the scene and the bullying legislation came into play. But since then, it's tapered off.

I think that's really attributed to the schools themselves being more proactive, putting in place these bullying policies, and enforcing them with written investigations and doing their diligence. There's been fewer and fewer bullying cases although they still come up with some regularity over time.

John Czuba: John, thank you very much for joining us today.

John Cloherty: Thank you, John.

John Czuba: That was John J. Cloherty III from the law firm of [Pierce Davis and Perritano](#), a litigation and trial firm with offices in Massachusetts, Connecticut, and Rhode Island.

Special thanks to today's producer, Frank Vowinkle. Thank you all for joining us for the *Insurance Law Podcast*.

To subscribe to this audio program, go to iTunes or our Web page, www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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