

## **Protecting Our Most Vulnerable Youth: An Evaluation of Bullying and Harassment in Indiana Schools**

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### **ABSTRACT**

*Students in the present educational landscape are experiencing issues of bullying and harassment at an alarming level. A primary duty of a school administrator is to ensure the safety of all students from the repercussions of unattended to bullying and harassment issues, which has become a significant challenge with the increase in remote education and internet access of youths around the globe. This article will first discuss key federal anti-bullying and harassment laws to provide a background of the nation's present stance on the issue, along with a narrowed examination of key anti-bullying and harassment laws in Indiana. Recommendations for school administrators to prevent bullying and harassment cases and to remediate school culture challenges will follow.*

**Keywords:** bullying, case law, harassment, safety, school culture

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**A** particular duty of education professionals and education institutions alike is to ensure the safety and security of individuals classified as students within the respective school district. Much like how higher education institutions need to enlist legal protections for their on-campus students, K-12 education institutions have similar, if not heightened, responsibilities to ensure their minor aged students are safe while participating in on-campus learning or activities. Specifically, education professionals have the duty to protect their students on an individual and unique needs basis, such as taking measures to

prevent students from the bullying and harassment of another district student, faculty, or staff member.

The U.S. Department of Education's Office for Civil Rights states that schools have the obligation, under federal anti-discrimination statutes, to take immediate and appropriate action to investigate and determine any reasonably known student-on-student harassment, as well as take prompt and effective reasonably calculated steps to end the harassment, eliminate any hostile environment, and prevent its reoccurrence (Ali, 2010). This means that even if the sexual misconduct, bullying, or harassment is not directly reported to an administrator within the school building by a student, any faculty or staff member that suspects bullying and/or harassment is taking place amongst students, must take action by reporting their suspicion to a designated administrator immediately.

The Office of Civil Rights also reminds education professionals that if discriminatory harassment fails to be recognized when addressing student misconduct, it may lead to inadequate or inappropriate responses that most significantly fail to remedy violations of students' civil rights (Ali, 2010). If faculty or staff members cannot decipher student misconduct behaviors from acceptable exhibited student behaviors, the school district risks liability in not providing a safe learning environment for all students. It is therefore the responsibility of each independent school district to ensure that their employees are educated and trained in recognizing student misconduct behaviors to avoid potential student civil rights violations and district litigation issues. It is essential to understand the protections in place for anti-bullying and harassment because when students are bullied and harassed, they are unable to fully participate in their educational opportunities – infringing on their civil rights – as well as impeding on their social and emotional development as adolescents.

## **FEDERAL ANTI-BULLYING & HARASSMENT LAWS**

There are four important federal statutes that education institutions must adhere to when developing their school district anti-bullying and harassment policies including: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; and Section 504 of the Rehabilitation Act of 1973 and; Title II of the Americans with Disabilities Act of 1990. The Civil Rights Act of 1964 originally stemmed from *Brown v. Board of Education* in 1954, that ruled that segregation in the public school system was a violation

of the Fourteenth Amendment to the United States Constitution. More specifically, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance. Some examples of conduct that may violate Title VI include, but are not limited to: minority students being assigned to public elementary school classes designed for special needs student or a school district failing to provide equal opportunity to students with limited English-speaking abilities (Justia, 2018).

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex, excluded from participation in, and benefits of any education program or activity receiving federal financial assistance (United States Environmental Protection Agency, 2017). Former Title IX guidance stated that education officials were expected to use a “preponderance of the evidence” standard to determine guilt in sexual misconduct complaints – where decisions would be based on the most convincing evidence presented. The new 2020 regulations, set in motion by an abundance of civil law suits – primarily by male students – accused of sexual misconduct – alleging that unfair Title IX procedures were violating their rights at the education institution. The new regulation will allow Title IX education officials to use either a preponderance of the evidence or “clear and convincing” standard – setting a higher burden of proof. Education institutions must now act upon complaints of misconduct that occur within an education program, such as in off-campus activities or at institution program events. The regulation also states that an institution can address sexual harassment of its students or employees falling outside of Title IX jurisdiction in any manner the school chooses. This new regulation ensures equal justice to those accused and acclaimed victims (U.S. Department of Education, 2020).

Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 both prohibit discrimination on the basis of disability (Ali, 2010). Section 504 is a federal law designed to protect the rights of individuals with disabilities in federally funded or financially assisted programs and activities – 504 regulations require school districts to provide a free and appropriate public education to each qualified student with a disability who is in the school district’s jurisdiction, regardless of the nature or severity of the disability. The Office for Civil Rights offers protections against retaliation, where recipients are prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose

of interfering with any right or privilege secured by Section 504. Students are qualified for protection under Section 504 if he or she is determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such impairment; or (3) be regarded as having such an impairment.

Section 504 regulatory provision 34 C.F.R. 104.3(j)(2)(i), defines a physical or mental impairment as,

any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Title II of the Americans with Disabilities Act (ADA) prohibits all public entities, regardless of whether they receive federal funds, from discriminating against an individual with a qualifying disability “by reason of such disability.” Both Section 504 and Title II of the ADA prohibit disability-based peer harassment in schools as well. Harassment of an individual with a disability is defined by the Department of Education as, “intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities in the institution’s program” (2010). Kimmel (2017) provided examples of peer harassment of a student with a disability that may create a hostile environment including, but not limited to:

- (1) several students continually remark out loud to other students during class that a student with dyslexia is “retarded” or “deaf and dumb” and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.
- (2) A student repeatedly places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates’ ability to enter the classroom.
- (3) Student continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

It is also noted that if such peer harassment adversely effects an elementary or secondary student's education, it could also be violating the Individuals with Disabilities Education Act (IDEA) by denying disabled students a free and appropriate education (FAPE). However, regardless of whether an individual decides to bring a claim for Section 504, Title II, or even IDEA, the plaintiff will most likely be required to exhaust administrative remedies prior to seeking judicial review.

### **INDIANA ANTI-BULLYING & HARASSMENT LAWS**

School districts must also ensure that their policies are not only in alignment with the federal statues, but also in alignment with their respective state statutes. For example, Indiana has several pieces of legislation and laws that help protect Hoosier students against bullying such as, but not limited to: Burns Ind. Code Ann. § 20-33-8-0.2 (2013) and IC 20-19-3-11.5. Indiana anti-bullying laws, Burns Ind. Code Ann. § 20-33-8-0.2 (2013), defines bullying as, overt, unwanted, repeated acts or gestures, including verbal or written communications or images transmitted in any manner (including digitally or electronically), physical acts committed, aggressions, or any behaviors, that are committed by a student or group of students against another student with the intent to harass, ridicule, humiliate, intimidate, or harm the targeted student and create for the targeted student an objectively hostile school environment that: (1) places the targeted student in reasonable fear of harm to the targeted student's person or property; (2) has a substantially detrimental effect on the targeted student's physical or mental health; (3) has the effect of substantially interfering with the targeted student's ability to participate in or benefit from the services, activities, and privileges provided by the school.

As society continues to evolve into a digital atmosphere, especially with COVID-19 creating a surge of online and virtual remote learning opportunities for students, it is essential to recognize that bullying and harassment of students occurs within online platforms as well. Indiana anti-bullying laws, such as IC 20-19-3-11.5, have been designed to cover this format of off-campus conduct whenever, (1) the individual committing the bullying behavior and any of the intended targets of the bullying behavior are students attending a school within a school corporation; and (2) disciplinary action is reasonably necessary to avoid substantial interference with school

discipline or prevent an unreasonable threat to the rights of others to a safe and peaceful learning environment.

Protections for Indiana students are best implemented when Hoosier school districts use preventative measures such as establishing written discipline rules that prohibit bullying. These anti-bullying rules must contain key policy and procedural elements such as, (1) statements prohibiting bullying; (2) provisions concerning education, parent involvement, and intervention; (3) procedures for reporting and investigations; (4) discipline provisions for teachers, school staff, or school administrators who fail to initiate or conduct an investigation; (5) discipline procedures for false reporting; (6) procedures outlining the use of follow-up services that includes support services for the victim and bullying education for the bully; (7) statements of disciplinary consequences for violation of the policy; and (8) requirements regarding how the policy will be publicized within the district.

The U.S. Department of Health and Human Services (2017) stated that these policies must be reviewed independently on a periodic schedule to ensure its compliance with present and/or updated state laws. It shall also be noted that Hoosier school districts are required, by law, to report documentation of the number of reported bullying incidents each year.

### **INFLUENTIAL BULLYING & HARASSMENT CASE LAWS**

One influential case that was brought to the Supreme Court was *Davis v. Monroe County Board of Education*. This particular case involved a student suing her local school board for allowing known sexual harassment by other students to continue against her. The student was a fifth-grade female who endured continual physical and verbal harassment by one of her classmates throughout the entire school year. Description of the physical and verbal harassment included the accused student rubbing against her genital area and breasts while making comments about wanting to feel her boobs and get into bed with her – to which both the female student and her mother complained about to her teachers and the principal on several different occasion, with nothing being done to stop the harassment from occurring. The accused student was eventually charged with and pleaded guilty to sexual battery – which was the only time that the harassment officially ceased.

The Supreme Court held that students subjected to peer sexual harassment may sue their school districts for damages when the districts are known to be, “deliberately indifferent to sexual harassment, of which they

have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school” (Kimmel, 2017, p.5). Kimmel (2017) also stated that lower courts have been known to rely on Davis to hold that students may sue school districts for deliberate indifference to known peer harassment based on race, color, and national origin under Title VI, as well as disability under Title II and Section 504. In essence, lower courts have used Davis as an opportunity to decide what qualifies as deliberate indifference to sex-based harassment.

Another influential anti-bullying and harassment case was that of *Zeno v. Pine Plains Central School District*. In this case, a bi-racial high school student was harassed by his peers for three-and-a-half years including being taunted, harassed, menaced, and physically assaulted. The bi-racial student was called a “nigger,” “homey,” “gangster,” “hood,” and referenced his “fake rapper bling bling” nearly every day. In addition, the bi-racial student also suffered threats to his life with references to lynching, graffiti warning that “Zeno will die,” and physical attacks so violent that the high school called the police (Kimmel, 2017, p.13). Second Circuit court found that the bi-racial student was deprived of three educational benefits as a result of the harassment: (1) a supportive, scholastic environment free of racism and harassment; (2) a regular “Regents diploma” that was more likely to be accepted by a four-year colleges or employers than the type of diploma he received upon leaving the school in his junior year; and (3) the ability to complete his education at the high school, instead of being driven to leave (Kimmel, 2017).

During this case, the Second Circuit evaluated the adequacy of the district’s response in terms of whether it was reasonably calculated to end the harassment or the district knew its remedial efforts were ineffective; finding the school district deliberately indifferent. This jury’s finding of deliberate indifference in this case shows plaintiffs can satisfy the high standard of liability when schools fail to respond adequately to severe and pervasive bullying (Kimmel, 2017). Zeno offers a great counter-argument to a districts’ defense using the ‘deference card,’ showing that courts should not – and will not – defer to administrators’ inadequate responses to egregious harassment.

A third case, which occurred recently in Southern Indiana, was the case against Franklin Community School Corporation. The anonymous Plaintiff filed a lawsuit against the school corporation for negligence, constitutional violations, and violations of the Rehabilitation Act and the

Americans with Disabilities Act (N. et al v. Franklin Community School Corporation, 2019). The case involved a fourteen-year-old student diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, depression, language impairment, and is identified as a student with a disability under the Individuals with Disabilities Education Act (IDEA).

The Plaintiff alleged that children at the school repeatedly called the student names and subjected her to physical abuse leading to two suicide attempts by the victim. Despite numerous complaints, Plaintiffs claimed the Defendants did nothing to limit the bullying and harassment. The Defendants claimed that they have written policies on harassment and bullying that prohibit bullying of any kind and that they promptly dealt with the situations every time the Plaintiff filed a report. The Plaintiffs maintained that the Defendants have been “deliberately indifferent in responding to student-on-student harassment and bullying in their schools, particularly when the harassed students are disabled” (N. et al v. Franklin Community School Corporation, 2019, p.2). The school district ended up coming to an agreement to pay an \$85,000.00 settlement to the Plaintiff.

A fourth case, which also occurred recently in Southern Indiana, was the case Evansville Vanderburgh School Corporation. The Plaintiff, referred to as J.A.W. a transgender high school student, sued the district after being denied the ability to use the restrooms that corresponded with his gender identity. J.A.W. is undergoing hormone therapy under a physician’s case, but was informed by a school administrator that he was not allowed to use the male restrooms and if he does he will risk disciplinary repercussions. The Plaintiff and the American Civil Liberties Union (ACLU) claimed that the denial of J.A.W.’s ability to use male restrooms violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a) (J.A.W. v. Evansville Vanderburgh School Corporation, 2018).

Although the Plaintiff did not report bullying and harassment issues by his peers, the denial by school administration for J.A.W. to use the restroom of his identifying gender can be viewed as a form of institutional harassment. J.A.W. reported feeling extreme emotional discomfort using the female associated restrooms or locker rooms that he intentionally restricted his fluid intake to avoid using the restrooms altogether. The Plaintiff even stated that the nurse’s restroom, which was originally offered for him to use, was often locked and located far from his classes. This caused a big inconvenience and disruption to his education (J.A.W. v. Evansville



Vanderburgh School Corporation, 2018). Ultimately, in 2019, U.S. District Court Judge William T. Lawrence ruled that the Evansville Vanderburgh School Corporation did violate J.A.W.'s rights.

## **BULLYING & HARASSMENT SCHOOL CULTURE CHALLENGES**

In a 21st century school environment, more K-12 students are on the receiving end of bullying due to the multiple methods and modalities that bullies and harassers have available to them. The rise in technology and social media available in addition to the vast cultural diversity amongst the student body of U.S. public school districts, have created surges of experimental bullying, harassment, sexual misconduct, and ignorance amongst school administrators in how to handle such bullying and harassment claims through their most exhaustive measures. The Indiana Governor's Council for People with Disabilities (2012) stated the most common types of bullying and harassment that school-aged students face includes: (1) Physical Bullying: physical harm or threat of, as well as stealing, damaging, or forcing someone to do things they don't want to do are all types of physical bullying. (2) Verbal Bullying: name calling, teasing, or insulting someone is the most common type of mistreatment that people with disabilities experience; with females being the most common contributors for committing such type of harassment. (3) Relationship Bullying: spreading lies or rumors about someone or making someone do things they don't want to do by means of coercion are common forms of relationship bullying. (4) Cyber Bullying: sending hateful messages through email, text message, social media, and/or posting hurtful or embarrassing things or spreading lies or rumors about someone online.

Approximately 160,000 students stay home from school each day because they are afraid of being bullied, with 6 out of 10 children being witness to bullying on a daily basis (National Education Association, 2012). The types of bullying that student victims endure depend on each individual situation, however, it is most likely that: students with visible disabilities are subjected to verbal bullying or exclusion from social activities; students with learning disabilities report higher rates of teasing and physical abuse; cyberbullying victims are various, but tend to be young students who regularly use the internet (Indiana Governor's Council for People with Disabilities, 2012). In essence, although victims of bullying and harassment vary upon each independent situation, it is more common that victims of

bullying are those individuals with some form of disability, regardless of severity or classification.

The Indiana Governor's Council for People with Disabilities (2012) explained that when students are victims of continuous harassment and bullying, sometimes even with administrative intervention, they will often face additional challenges including, but not limited to: developing serious physical conditions such as ulcers, irritable bowel syndrome, eating disorders, or sustain life-long emotional problems, such as low self-esteem, anxiety, violent anger or aggression, and depression. When students are faced with enduring bullying and harassment, in addition to the physical and internal turmoil of being bullied, they will struggle in their ability to feel a sense of belonging and safety on school grounds. When a student does not feel safe at school or feel like they belong at school, they will ultimately find it difficult, if not impossible, to concentrate or find any realm of motivation to continue their studies and learn from their educators during or outside of class.

Once a student has become a victim of bullying, Vossekuil et al (2004) claimed that retaliation is common. Retaliation from victims enduring bullying and harassment could lead to events of suicide or other violent and deadly retaliation such as school shootings. In other words, not only is being a victim of bullying a challenge for multiple reasons but being a school district administrator ensuring the safety of all students from the repercussions of unattended to bullying and harassment issues is another challenge.

## **RECOMMENDATIONS FOR SCHOOL ADMINISTRATORS**

According to federal and state anti-bullying and harassment laws, school personnel are required to take immediate action to investigate reports of bullying and harassment within their building and amongst their students. Therefore, a key recommendation for school administrators would be to ensure that all school staff and faculty are aware of the legal terms, conditions, and requirements of their role as a school stakeholder responding to reports of student bullying and harassment. School administrators should not only adopt anti-bullying and harassment policies but should regularly educate and update school staff and faculty on the expectations they are required to uphold on the issue of student bullying and harassment. School administrators could begin by recruiting staff and faculty members onto a school safety committee that is responsible for leading research and presenting appropriate, relatable,

and educational professional development sessions to other building stakeholders on anti-bullying and harassment.

Another key recommendation would be to foster an inclusive school culture among students, faculty, staff, and administration. A suggested implementation of positive school culture would be to provide incoming grade level students with an upper grade level student mentor. Student mentors would be expected to participate in social emotional learning exercises and practices with their mentee on a scheduled basis determined by the school. These exercises would be supervised by a faculty, staff, or administrative member, but headed by student mentor leaders. Nationally recognized youth mentoring programs, such as the Best Buddies Program and the Boys & Girls Club are exceptional examples of how youth student and peer mentors can encourage more positive school experiences.

Another recommendation for school administrators would be to foster values and norms within the school building that recognize and celebrate personal achievement and good behavior. School administrators should think positively about their school climate and search for instances where students, faculty, or staff accomplished a personal achievement or conducted behavior that was admirable within a particular situation. For instance, if a student is observed helping a lost peer find their classroom, school personnel should be advised to notify an administrator so that positive behavior can be recognized as announced. This is valuable considering a goal of creating a positive school culture could be encouraging students to offer their help to one another. If more positive behavior is recognized, celebrated, and appreciated, students will be more likely to partake in these behaviors.

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