

**LEGAL AND PRACTICAL: USING PROFESSIONAL JUDGMENT IN RESPONSE TO ALLEGATIONS OF  
DISABILITY-BASED HARASSMENT UNDER RECENT CASE LAW**  
by Laura O’Leary and Cindy Michaels

**I. WHAT IS BULLYING?**

**A. Definition**

On June 16, 2011, Governor Perry signed into law H.B. 1942 which addressed bullying in the schools. The Texas Education Code now defines bullying as, “engaging in written or verbal expression, expression through electronic means, or physical conduct that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district and that: (1) has the effect or will have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student’s person or of damage to the student’s property; or (2) is sufficiently severe, persistent, and pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student.”<sup>1</sup>

Additionally, in order to constitute bullying, the conduct must both exploit an imbalance of power between the student perpetrator and the student victim through written or verbal expression or physical conduct, and interfere with a student’s education or substantially disrupt the operation of a school.<sup>2</sup> This requirement of an imbalance of power between the perpetrator and the victim helps to distinguish between bullying and fighting or verbal altercations between students.

Cyber bullying is included within the statutory definition of bullying due to the legislation’s reference to electronic means of communication; however, bullying based on physical conduct is only included in the statutory definition if it occurred on school property, at a school sponsored or related activity or in a vehicle operated by the district, such as a school bus.

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<sup>1</sup> Tex. Educ. Code §37.0832(a).

<sup>2</sup> Tex. Educ. Code §37.0832(b).

## **B. Requirements for School Districts**

### **1. Adopt Policies and Procedures Regarding Bullying**

As of the 2012-2013 school year, school boards were required to adopt policies and procedures concerning bullying, include these policies and procedures annually in their student and employee handbooks, and post on their website the procedures for reporting bullying.<sup>3</sup>

The required policy must: prohibit bullying; prohibit retaliation against anyone who makes a good faith report of bullying; provide a procedure for promptly notifying the parents of the students involved in any bullying incident; provide procedures students should follow to get help if they are bullied; identify counseling options for bullying victims, witnesses, and perpetrators; establish procedures for reporting and investigating allegations of bullying and for determining whether bullying in fact occurred; prohibit discipline for acts of reasonable self-defense by a victim of bullying; require that discipline for a perpetrator of bullying who is a student with disabilities comply with the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 et seq.<sup>4</sup>

The Texas Association of School Boards (“TASB”) policy FFI (LOCAL) meets these standards and has been widely adopted.

### **2. Transfer of Students Involved in Bullying**

#### **(1) Required for Victims**

Texas Education Code §25.0342(b) requires school boards to transfer to another classroom or to another school within the district, a student who has been the victim of bullying, if so requested by the student’s parent. Before making such a transfer, the board of trustees or its designee must verify that the student has been a victim of bullying, and this determination is not

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<sup>3</sup> Tex. Educ. Code §37.0832(c-e).

<sup>4</sup> Tex. Educ. Code §37.0832(c).

subject to appeal.<sup>5</sup> The 2011 bullying legislation did not change this provision but instead added a provision for the transfer of bullies themselves.

## **(2) Permitted for Perpetrators**

The 2011 legislation created the opportunity for schools to transfer to another classroom or another campus, a student who engaged in bullying.<sup>6</sup> Note, however, that if the perpetrator is a student with a disability who receives special education services, an ARD committee must conduct a manifestation determination review before the district can implement a transfer which would constitute a change in placement for the student.<sup>7</sup>

## **II. WHAT IS HARASSMENT?**

### **A. Definition**

According to Texas Education Code §37.001(b)(2), harassment includes: threatening to cause harm or bodily injury to another student; causing physical damage to the property of another student; subjecting another student to physical confinement or restraint; or maliciously taking any action that substantially harms another student's physical or emotional health or safety.

TASB Policy FFH (LOCAL) defines harassment of a student as “physical, verbal, or nonverbal conduct based on the student's...disability...that is so severe, persistent, or pervasive that the conduct: 1) affects a student's ability to participate in or benefit from an educational program or activity, or creates an intimidating, threatening, hostile, or offensive educational environment; 2) has the purpose or effect of substantially or unreasonably interfering with the student's academic performance; or 3) otherwise adversely affects the student's educational opportunities.” Examples of harassment may include: offensive or derogatory language directed

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<sup>5</sup> Tex. Educ. Code §25.0342(c) and (e).

<sup>6</sup> Tex. Educ. Code §25.0342(b-1).

<sup>7</sup> Tex. Educ. Code §25.0342(b-2).

at another person's need for accommodation; threatening, intimidating, or humiliating conduct; offensive jokes, name calling, slurs, or rumors; physical aggression or assault; theft or damage to property.

**B. Requirements for School Districts**

School districts must prohibit harassment in their student codes of conduct and must notify parents annually of the provisions of the student code of conduct.<sup>8</sup> School districts must have a policy which includes procedures for addressing complaints of harassment based on disability. These procedures must incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability harassment.<sup>9</sup>

TASB policy FFH (LOCAL) meets these standards and has been widely adopted. This policy: prohibits harassment; prohibits retaliation for good faith reports of harassment; permits discipline for false claims of harassment; encourages students to make reports to a teacher, counselor, principal, or other school district employee; encourages district employees with notice or suspicion of student harassment to report to the §504 coordinator; requires §504 coordinator to investigate the complaint, which may include interviewing the alleged victim(s), perpetrator(s), and any witnesses, and shall include preparation of a written report including a determination of whether harassment or bullying occurred; requires a prompt response including appropriate disciplinary action if harassment occurred; requires confidentiality to the greatest extent possible; permits a student who is dissatisfied with the outcome to appeal through policy FNG (LOCAL).

**III. POTENTIAL SOURCES OF LIABILITY FOR A SCHOOL DISTRICT**

**A. OCR Investigation**

A parent unhappy with a school district's perceived response or lack of response to

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<sup>8</sup> Tex. Educ. Code §37.001(b) and (d).

<sup>9</sup> 34 C.F.R. § 104.7(b); 28 C.F.R. § 35. 107(b).

allegations of disability-based bullying or harassment may file a complaint with the U.S. Department of Education Office for Civil Rights (“OCR”). The OCR can initiate an investigation and possibly institute sanctions against a school district found not to be in compliance with federal laws prohibiting disability-based discrimination.

## **B. Private Cause of Action**

Alternatively, a parent or a student may bring a private lawsuit seeking money damages alleging intentional disability discrimination under §504 and the Americans with Disabilities Act (“ADA”). Students and their parents have begun to bring suits against school districts claiming that the students were injured due to bullying or harassment at school. These cases generally allege that although a third party, not school district personnel, engaged in the bullying or harassing conduct, the school district should be held liable for its failure to respond appropriately to the bullying or harassing conduct. These cases often involve tragic or shocking situations and profound injury to a child, and they often receive widespread media attention. In some highly publicized cases, parents have claimed that their children’s suicides were caused by a school district’s failure to respond appropriately to complaints of bullying.<sup>10</sup>

### **1. The standard of liability is not clear**

The Fifth Circuit Court of Appeals recently heard a case involving peer harassment of a disabled high school student who alleged that she was sexually abused by another student in a school bathroom on four occasions over the course of two years.<sup>11</sup> Although the Court vacated and withdrew its initial opinion, it seemed to indicate that a deliberate indifference standard and a gross misjudgment standard might apply with respect to a school district’s potential liability for disability-based peer bullying or harassment.

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<sup>10</sup> See, e.g., *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F.Supp.2d 632 (S.D. Tex., 2012); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, No. 4-11-CV-32, 2012 U.S. Dist. LEXIS 160580 (E.D. Tex. Sept. 11, 2012).

<sup>11</sup> *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513 (5<sup>th</sup> Cir. 2013).

**a. Deliberate indifference**

The deliberate indifference standard arises from a U.S. Supreme Court case involving student sexual harassment, in which the Court found that a school district could be held liable for its own failure to remedy third party harassment if district personnel with the authority to address the conduct had actual knowledge of third party conduct that was so severe, pervasive, and objectively offensive that it deprived the victim of access to the educational opportunities or benefits provided by the school.<sup>12</sup> Deliberate indifference is found only where the district's response to the harassment is clearly unreasonable in light of the known circumstances.<sup>13</sup>

In the vacated *Stewart* opinion, the court indicated that it would be consistent to apply a deliberate indifference standard to claims of disability-based peer harassment given the similarities in the wording of federal statutes prohibiting sexual harassment and prohibiting disability harassment.<sup>14</sup> Indeed, in a Texas district court case released shortly after *Stewart*, the court applied a deliberate indifference standard to such a claim.<sup>15</sup>

Deliberate indifference is a high standard. A school district will not be found deliberately indifferent unless, essentially, school district personnel knew that a student was being seriously mistreated by his peers but decided to do nothing about it or responded in a way that was clearly unreasonable, given what they knew. *M.J.*, however, is a troubling case for school districts because the district court held that the school district might have been deliberately indifferent to disability-based peer harassment due to the intermittent lack of response of one general education teacher to a special education student's complaints of in-class bullying and

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<sup>12</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

<sup>13</sup> *Id.* at 648.

<sup>14</sup> *Stewart*, 713 F.3d at 519.

<sup>15</sup> *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978-DAE, 2013 U.S. Dist. LEXIS 63350 (W.D. Tex. May 3, 2013).

harassment.<sup>16</sup> The student in this case also claims to have complained during an ARD of bullying in that general education classroom and claims that his concerns were ignored.<sup>17</sup>

In the deliberate indifference context, proper documentation of communications with students and parents and of district personnel's responses to reports of bullying or harassment is key in establishing what the district knew and whether the district responded reasonably.

## **2. Gross Misjudgment/Professional Bad Faith?**

The gross misjudgment/professional bad faith standard arises from a Fifth Circuit Court of Appeals case, in which the Court declined to impose liability under §504 for conduct amounting to negligence or misjudgment, holding instead that “facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504...against a school district predicated on a disagreement over compliance with IDEA.”<sup>18</sup> The court adopted the gross misjudgment standard because §504 requires a demonstration of intentional discrimination against a student on the basis of his disability and does not create “general tort liability for educational malpractice.”<sup>19</sup> The Court warned that courts should not substitute their own judgment for that of educational professionals.<sup>20</sup>

District courts in Texas have generally deferred to the judgment of educational professionals, finding no gross misjudgment, for example, when: 1) a deaf fourth grade student who was subject to seizures drowned during a summer enrichment program run and staffed by the District, even though the District had not communicated to the program staff the fact that the student had seizures, and even though the evidence suggested that the student fell into the pool

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<sup>16</sup> *Id.* at \*26.

<sup>17</sup> *Id.* at \*25.

<sup>18</sup> *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5<sup>th</sup> Cir. 2010).

<sup>19</sup> *Id.* at 454.

<sup>20</sup> *Id.*

after she had a seizure while sitting on the edge of the pool;<sup>21</sup> 2) a disabled sixth grade student who was left unattended in his wheelchair beside a river during a school field trip, fell from his wheelchair into the river and had to be pulled out of the water by his classmates;<sup>22</sup> 3) a student in a wheelchair was excluded from or injured during field trips, physical education activities, and an off-campus band performance;<sup>23</sup> and 4) a school district violated IDEA with respect to an autistic, deaf student due to improper notice to parents, improper destruction of evaluation materials, and the school's failure to provide sufficient American Sign Language training to the student.<sup>24</sup>

However, in *Stewart*, two judges from the Fifth Circuit opined not only that a gross misjudgment standard could apply to a claim that a school district failed to investigate disability-based discrimination and harassment complaints, but that this standard amounted to a “species of heightened negligence” which might impose upon a school district an ongoing responsibility to calibrate a student’s IEP to effectively address these behaviors.<sup>25</sup> This would seem to make gross misjudgment a lower standard than deliberate indifference. One judge strongly dissented from this opinion, explaining that in his view, “bad faith, gross misjudgment, and deliberate indifference all rest upon substantially identical levels of culpability.”<sup>26</sup> Because the *Stewart* opinion has been withdrawn by the court, the gross misjudgment standard remains somewhat ill-defined, but the district court cases treating gross misjudgment as a high standard continue to be good law.

In the gross misjudgment context, proper documentation of communications with

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<sup>21</sup> *Estate of A.R. v. Grier*, No. H-10-0533, 2013 U.S. Dist. LEXIS 12323 (S.D. Tex. Jan. 30, 2013).

<sup>22</sup> *J.D. v. Georgetown Independent School District*, No. A-10-CA-717 LY, 2011 U.S. Dist. LEXIS 79335 (W.D. Tex. July 21, 2011).

<sup>23</sup> *I.A. v. Seguin Independent School District*, 881 F.Supp.2d 770 (W.D. Tex., 2012).

<sup>24</sup> *S.F. v. McKinney Independent School District*, No. 4:10-CV-323-RAS-DDS, 2012 U.S. Dist. LEXIS 29584 (E.D. Tex. March 6, 2012).

<sup>25</sup> *Stewart*, 713 F.3d at 524.

<sup>26</sup> *Id.* at 536 (Higginbotham, dissenting).

students and parents and of district personnel's responses to reports of bullying or harassment remain important for establishing what the district knew and how it responded. Additionally, documentation of the effectiveness of the district's response may also become necessary.

#### **IV. SPECIAL EDUCATION'S ROLE IN RESPONDING TO DISABILITY-BASED BULLYING AND HARASSMENT**

##### **A. Train Staff and Students**

Special education personnel should be trained on: how to recognize and respond to incidents of suspected disability-based bullying or harassment; procedures for reporting and documenting such incidents; and counseling options available for students involved in these incidents. Teachers and administrators should be trained on procedures for investigating reports of bullying or harassment, determining whether bullying or harassment occurred, and giving notice to the parents of students involved in suspected bullying or harassment incidents. School staff should take all such reports seriously, even when the incidents in question do not ultimately meet the definitions of bullying or harassment.

Additionally, special education personnel should teach their students how to identify and respond to bullying or harassment, and that school staff will take reports of bullying or harassment seriously and will prohibit retaliation against any student reporting suspected bullying or harassment. Teachers should explain to students the difference between harsh words, rough play, or mild teasing on the one hand, and true bullying or harassment on the other hand. Students should be taught how to report incidents of suspected bullying or harassment and how to seek help if they are experiencing bullying. Students should be reminded that the student code of conduct prohibits both bullying and harassment, and should be warned of the potential consequences for engaging in bullying or harassment of other students.

**B. Document Carefully and Consistently**

Both general and special education personnel must thoroughly and consistently document reports of disability-based bullying and harassment, investigations of such reports, and their communications with the parents of the students involved in such incidents. This is true both for incidents which are found to meet the definitions of bullying or harassment and for incidents which are not found to fit those categories. Such documentation can be tremendously important in establishing the district's knowledge of, and response to, any reports of alleged bullying or harassment in the event of litigation.

**C. Communicate With Parents**

Parents are not well acquainted with the legislature's definitions of bullying or harassment and tend to believe that anything that caused their child to come home from school upset or bruised was an instance of bullying. Although teachers know that bullying is often not the cause of such conditions, unhappy parents are the first step toward a lawsuit. School personnel should consistently follow up on phone calls from parents or notes from home claiming that their child was bullied or harassed. Documentation of a teacher's or administrator's response to such reports may make the difference between a quick resolution of a difficult situation and protracted litigation.