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Free and safe public education

CIVIL ACTIONS WHEN SCHOOLS TURN A BLIND EYE TO BULLYING

At what point does bullying become so severe and pervasive that it interferes with a student's ability to learn? What actions must an educational institution take in response to such bullying?

Every student has Constitutional Rights when it comes to a free and appropriate public education. The California Constitution, at article I, section 28, subdivision (c) (1), guarantees students the right to a safe education: Right to Safe Schools. All students and staff of public primary, elementary, junior high, and senior high schools, and community colleges, colleges, and universities have the inalienable right to attend campuses that are safe, secure and peaceful.

California's Education Code has expanded upon these rights. Pursuant to Education Code section 44807, all public school district employees have a statutory duty to maintain order, protect the health and safety of students, and/or maintain proper and appropriate conditions conducive to learning.

An environment in which persistent harassment prevents a student from feeling safe and focusing on her education is clearly not a condition conducive to learning.

School districts also have a duty to supervise the conduct of children at school and to enforce any and all rules and regulations necessary for their protection.

It is immaterial that fellow students, and not school district employees, were responsible for the harassment. Once the school became aware of the actions of these students, it had an affirmative obligation to stop the harassment.

In a unanimous 1970 decision, the California Supreme Court ruled that just because an injury occurred at the hands of a third party does not absolve a school of responsibility for the student's safety, explaining: "Neither the mere involvement of a third party nor that party's wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown." (*Dailey v. Los Angeles Unified School District* (1970) 2 Cal.3d 741, 747.)

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The Education Code provides guidelines for addressing the wearing of gang-related apparel, as well as possession of weapons on campus. The laws recognize the very real threat of physical violence that can result from both of these situations. When an active-shooter incident occurs on a school campus, we do not expect teachers and other school personnel to step in and attempt to disarm or otherwise interfere with the shooter's actions. That would be asking for an unreasonable level of heroism and self-sacrifice.

When bullying occurs on campus, in contrast, school personnel are not asked to put their lives on the line. All they are expected to do is to insert themselves into the situation and administer appropriate discipline. Words can be extremely hurtful to their targets, but they will not result in physical harm to third parties, such as teachers and school counselors.

This does not in any way diminish the severity of harm that students may suffer from bullying, harassment, and other non-physical violations. When children are the targets of hateful speech and have been singled out for disparagement and humiliation, the experience can be just as traumatic as any physical injury. Students subject to persistent harassment have been driven to hurt and kill themselves. Anyone who argues that words are benign is uninformed.

School-district employees and the students in their care have a special and unique relationship. Children in schools, regardless of age or grade, are inherently vulnerable. When they have been placed in the care of school personnel and are legally required to be on school campuses, school district employees owe a heightened duty of care to prevent any foreseeable harm to those students. (*Leger v. Stockton Unified School District* (1988) 202 Cal.App.3d 1448.)

The California Code of Regulations, title 5, sections 5551 and 5552, provides that a school principal is responsible for the supervision and administration of his or her school. School-district administration has a duty to adequately train staff and supervise staff members to ensure they are competently performing their jobs. An in-service or other annual training on bullying is not an unreasonable requirement, given the legal imperative to respond to and mitigate instances of bullying on campus and in classrooms.

These questions are central to a case I am litigating on behalf of E, a girl whose eighth-grade year at a public school was marked by increasingly hurtful treatment from fellow students. Despite repeated pleas from the victim and her parents throughout the course of the school year, school administrators consistently failed to take the bullying seriously or do anything to mitigate the damage that was being done to E.

By the end of that year, E's grades, along with her sense of safety and self-worth, had cratered. Her parents ended up enrolling her in a private school for ninth grade. The constitutional guarantee of a "free and appropriate public education" was nothing more than words on paper for this student.

E's story

What happened to E is no different than what goes on in middle schools across the country. A trio of girls who had once been E's best friends targeted her after she became close with the former boyfriend of one of the friends. Even though E had reached out to that friend and was told that there was no problem with E undertaking the new relationship, there clearly was a problem.

Taking a page from the Mean Girls playbook, the three girls apparently made a pact to turn E's life into a living hell. Using a range of communication tools, they marginalized, disparaged, and harassed E to the point where she no longer felt safe. They sent her demeaning text messages, posted hateful comments on social media, flipped her off in school hallways, pointed and laughed at her, and intimidated her in the classroom.

The school's administrators were well aware of what was happening to E; nevertheless, they did virtually nothing to help mitigate this situation. School personnel initially convened a free-form "restorative justice meeting," designed to address and resolve the conflict between the girls. A first step in ending the harassment, the meeting was a complete failure. Without guidelines or competent supervision, it was actually counterproductive, generating a marked escalation in the level of bullying and harassment against E over the course of the next few months.

A school counselor met one time with the nominal ringleader of the bullying circle. This, too, produced no concrete results. School administrators thereafter basically washed their hands of the whole matter, concluding that it was no more than "girls will be girls." Their work was done. No additional actions were taken, despite the ongoing and increasingly hurtful actions of the instigators – of which the school was regularly notified.

As the bullying became more severe and persistent during the course of the year, E began to inflict self-harm, cutting herself on several occasions. Ultimately, she ate her lunch in the nurse's office, missed classes that she shared with one of the harassers, and watched her grades in that class plummet. In the days before their promotion ceremony, the three girls circulated "The Petition to End E's Life." Instead of facing discipline, all three girls were treated with kid gloves and allowed to participate in the ceremony.

The school district now says that it did everything it was legally obligated to do. It has claimed immunity from all liability for the harm suffered by the victim.

Bullying is never OK

The California Education Code provides a framework for school districts to handle reports of bullying. Education Code section 48900, subdivision (r) defines bullying as follows:

> (1) "Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or

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more acts committed by a pupil or group of pupils as defined in Section 48900.2 [Sexual Harassment], 48900.3 [Hate Violence], or 48900.4 [Threats, harassment, intimidation], directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:
(A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.
(B) Causing a reasonable pupil to experience a substantially detrimental effect on the pupil's physical or mental health.
(C) Causing a reasonable pupil to experience substantial interference with the pupil's academic performance.
(D) Causing a reasonable pupil to experience substantial interference with the pupil's ability to participate in or benefit from the services, activities, or privileges provided by a school.

Education Code section 48900.9, subdivision (b) provides that a pupil engaged in an act of bullying may be referred to a school counselor, school psychologist, social worker, child welfare attendance personnel, or other school support service personnel for case management and counseling, or participation in a restorative justice program. These interventions are neither insular nor mutually exclusive. A reasonable reading of the law supports the conclusion that schools must do anything and everything to mitigate bullying and keep students safe.

In fact, Education Code section 48900.5, subdivision (a) makes it clear that if other means of correction, such as participation in a restorative justice program, fail to bring about proper conduct, then appropriate disciplinary actions such as suspension or expulsion must be imposed.

Instead of being helpful, the restorative justice meeting convened by E's school actually exacerbated the problem, causing further issues between the girls. E was subjected to even more harassing and threatening messages following the meeting, all of which she duly reported to her parents, counselors, and the school psychologist.

In E's case, there was no confusion regarding who was responsible for the harassment. E provided school personnel with copies of text messages and social media postings by the harassers. These communications clearly disparaged and demonized her. Other than one restorative justice meeting and a single one-on-one with one of the girls, the school took no further steps to halt the harassment. In fact, the parents escalated their concerns to the school and district by sending emails, requesting and attending meetings. All of this fell on deaf ears. There was no discipline, suspension or expulsion of any of the girls. In the days leading up to the promotion ceremony, administrators even gave the girls extra support. When E's parents learned that the bullies would be at the promotion ceremony, they made an appointment with the superintendent of schools. Despite the parents' concerns, and the threat to E's life, they were told there was nothing that they could do, and the mean girls would be allowed to participate in the promotion ceremony. This provided further torment to E.

School immunity

The school district has the temerity to take the position that it did everything it was required to do for E and that it is immune from prosecution. This is a misreading of the applicable law.

The district is relying on Education Code section 48900.5, subdivision (a) to support its arguments that it used appropriate discretion. But this code section actually requires much more than school administrators did in this case. The law requires that school districts take appropriate disciplinary actions when alternative approaches, such as a restorative justice program, fail to stop improper conduct.

Failure to comply with the Education Code is not an act of "discretion." At best, it demonstrates a misunderstanding of the dynamics between the students involved in the bullying situation; at worst, it is a conscious decision to put students' safety behind other priorities. In E's case, the school appears to have concluded that the girls' interaction was a normal phase in their relationship, despite evidence of ongoing harm to E. The district's failure to take further action in the face of ongoing evidence of harm can only be seen as a violation of the law.

By using a "girls will be girls" mantra, the school district essentially blamed the victim for the injuries she suffered. It sought to minimize and trivialize the reasons for the tension between the victim and her bullies. In this way, the district could argue that it had no duty to intervene to stop the bullying.

When a school district does not take appropriate action in the face of bullying and harassment, and when such failure causes a student to fear for her safety, the district has clearly failed to provide access to a "free and safe public education," as required under state law. Such a breach of statutory duty removes any immunities that might otherwise apply.

If injury to an individual results from the manner in which an employee performs a discretionary act, as opposed to from the discretionary decision to act or not act, the discretionary immunity provided by Government Code section 820.2 does not apply. (*McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261 ["[C]lassification of the act of a public employee as 'discretionary' will not produce immunity under section 820.2 if the injury to another results, not from the employee's exercise of 'discretion vested in him' to undertake the act, but from his negligence in performing it after having made the discretionary decision to do."]); see also *Roseville Community Hospital v. State* (1977) 74 Cal.App.3d 583, 589; and *Johnson v. State of California* (1968) 69 Cal.2d 782, 793-794.)

As long as there is a causal connection between the exercise of discretion and the injury, there is no immunity. This is the essential

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requirement of Government Code section 820.2. (See *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252.) This means that when a victim is injured because of an employee's breach of duties, immunity does not apply. When the public employee is not immune, the public entity cannot assert immunity under the Government Code.

It does not require an advanced degree to see the causal connection between E's anxiety, depression, and self-harm, on the one hand, and the aggressive, vitriolic, and hateful communications sent her way for an entire academic year. Nor does it take special training to understand that school administrators, counselors, and psychologists had the ability and the legal duty to stop the harassment. Their failure to do so was the direct cause of E's injury. E is therefore entitled to recover compensation for the damages she has suffered as a result of the district's failure to protect her.

Christa Ramey is a founding partner of Ramey Law PC *in Los Angeles. Her areas of expertise include catastrophic personal injury, medical malpractice, wrongful death, and school bullying and abuse.*