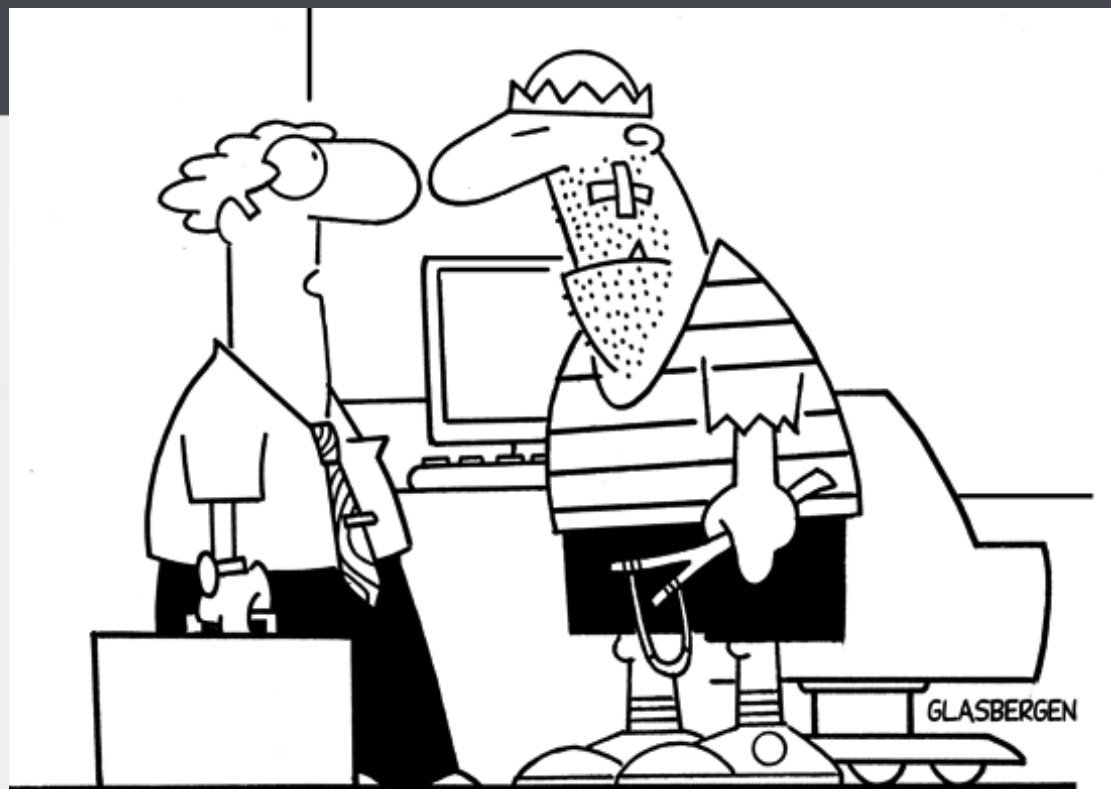


LEGAL UPDATE ON BULLYING AND STUDENT DISCIPLINE



"I'm new here. Are you the person they call the office bully?"

**Karen Haase
Tim Malm**



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Bullying at a “tipping point”

- 49 states have anti-bullying laws
- Heavy emphasis by OCR and USDOE
- Increase in bullying/harassment litigation nationwide:
 - [Holben, Diane M. and Zirkel, Perry A. \(2014\) "School Bullying Litigation: An Empirical Analysis of the Case Law," Akron Law Review: Vol. 47: Iss. 2, Article 1](#)

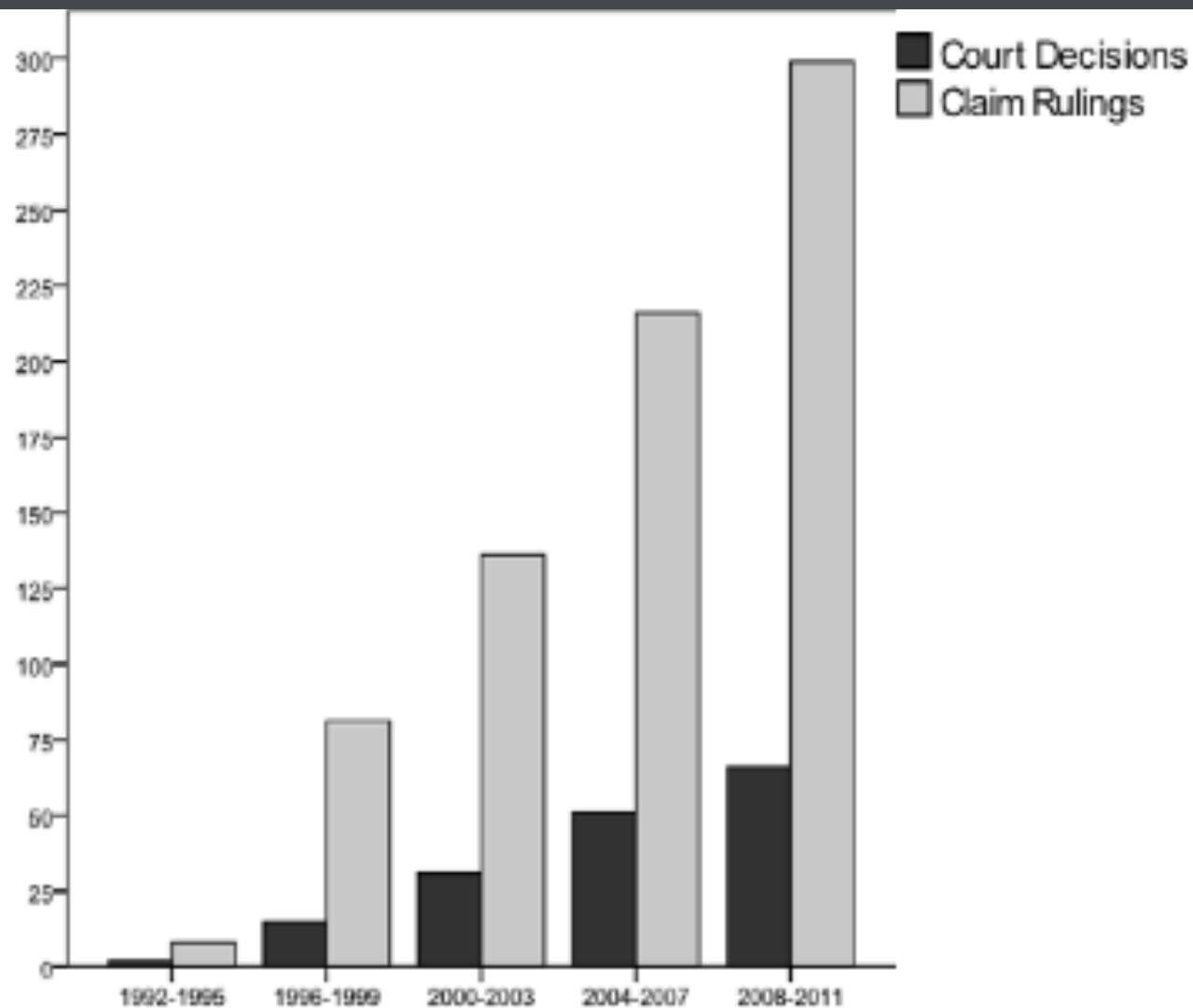
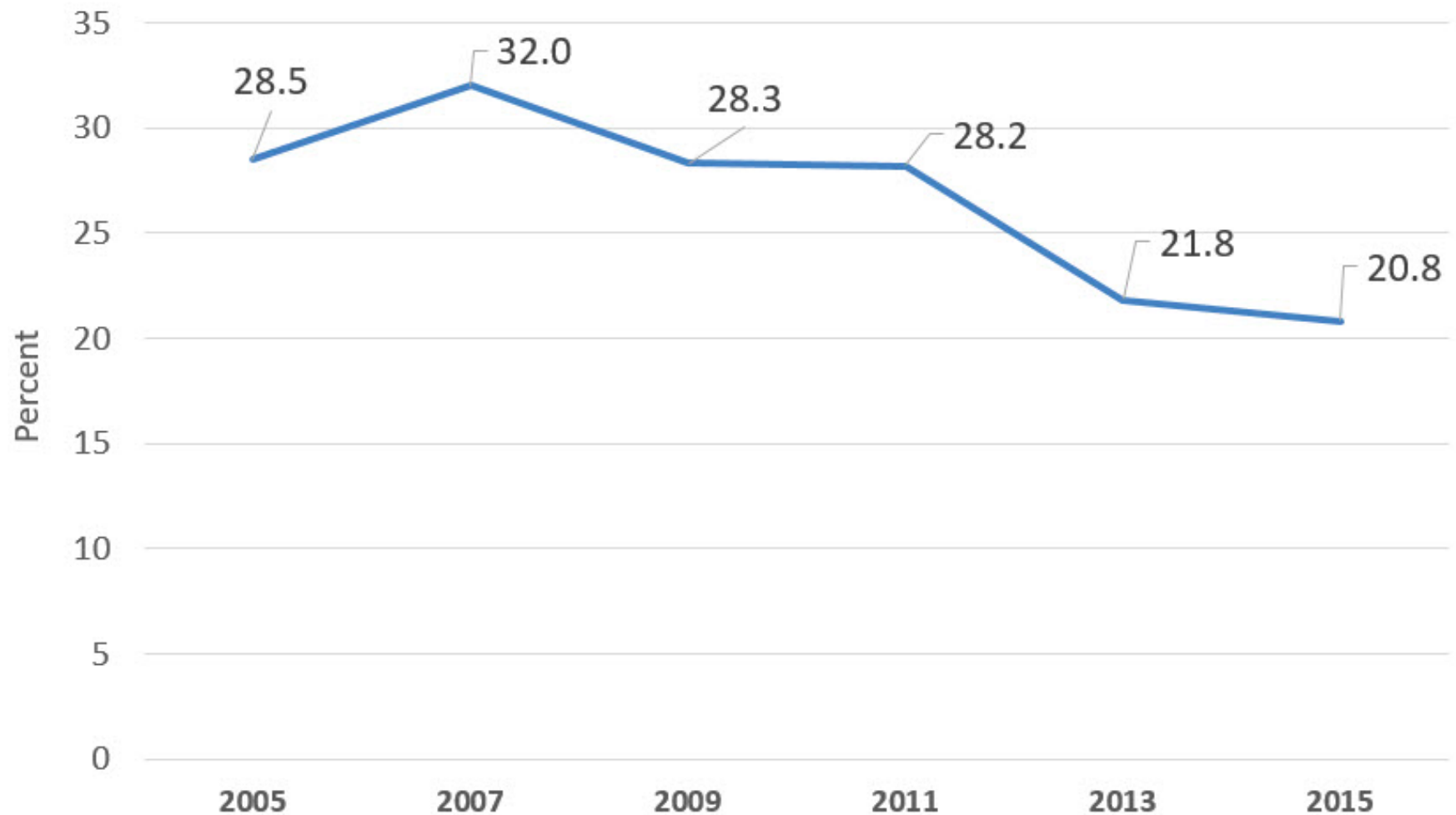


Figure 1. Longitudinal Trend in Frequency of Court Decisions and Claim Rulings

**CHART 1. National Crime Victimization Survey
School Crime Supplement - Bullying over Time**



Justin W. Patchin and Sameer Hinduja
www.cyberbullying.org

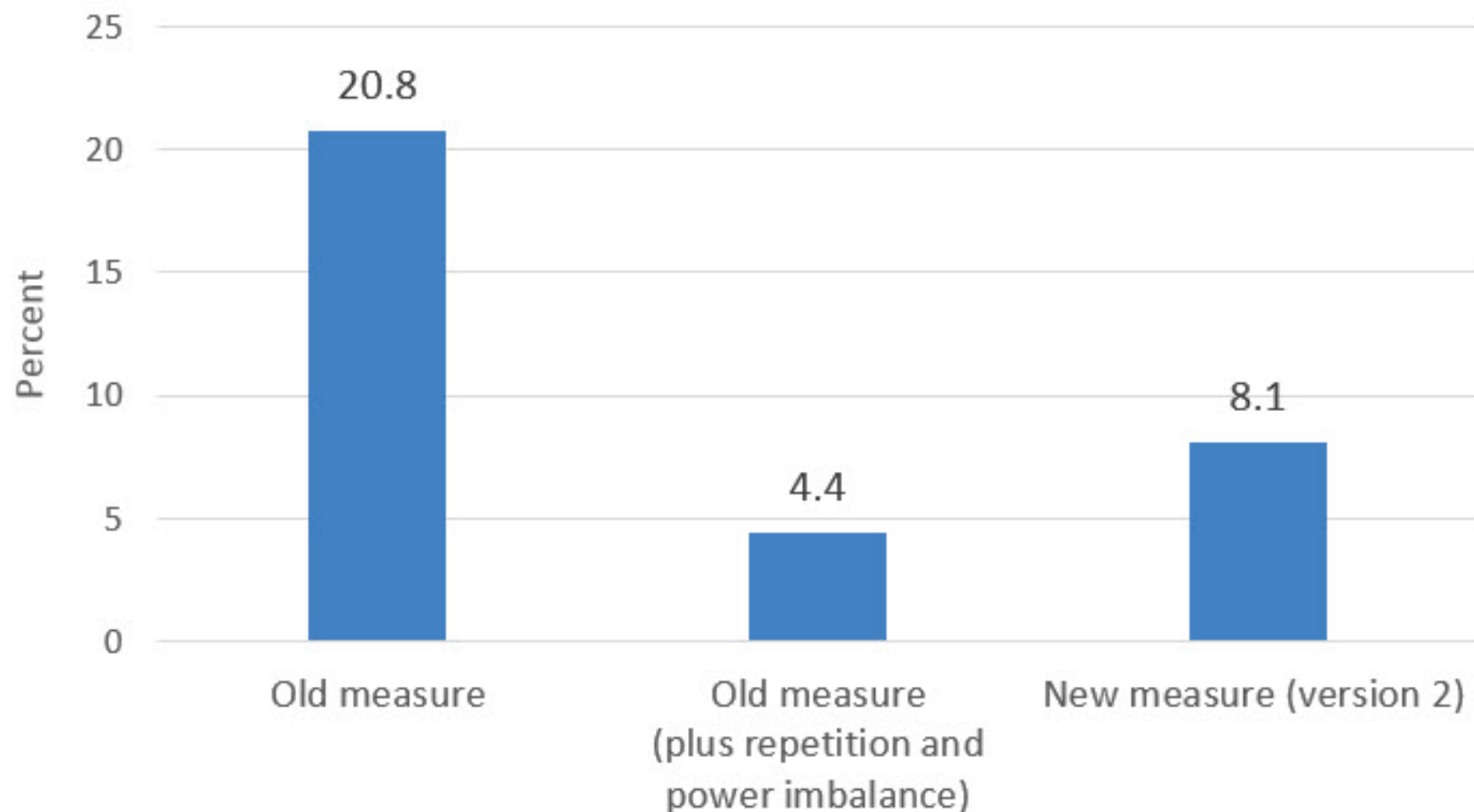
Suicide Risk is Declining but Still of Significant Concern

- Youth suicide rates have steadily declined in the US over the past two decades
- Suicide remains the leading cause of death for high school youth (ages 15-19)
- Suicide is the fourth leading cause of death for middle schools students (ages 10-14)
- Although there is very little evidence of **causation**; there is strong **correlation** between being victimized and suicide risk

Bullying Definitions

- 2010 CDC and USDOE sponsored summit on bullying-prevention efforts
- CDC's new uniform definition (as of 2015):
 - "Bullying is any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated"
 - "behaviors could be verbal, physical or relational"

CHART 2. National Crime Victimization Survey School Crime Supplement - New Bullying Measure (2015)



Justin W. Patchin and Sameer Hinduja
www.cyberbullying.org

Bullying in Nebraska

“any ongoing pattern of physical, verbal, or electronic abuse on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose by a school employee or his or her designee, or at school-sponsored activities or school-sponsored athletic events.”

Cyberbullying?

Cyberbullying, v: the use of technology such as computers and cell phones to engage in repeated, and hostile behavior by an individual or group, that is intended to harm others.

The term "cyberbullying" is used when the victim or bully is a child or teen. The term cyber harassment is used when the victim is an adult.

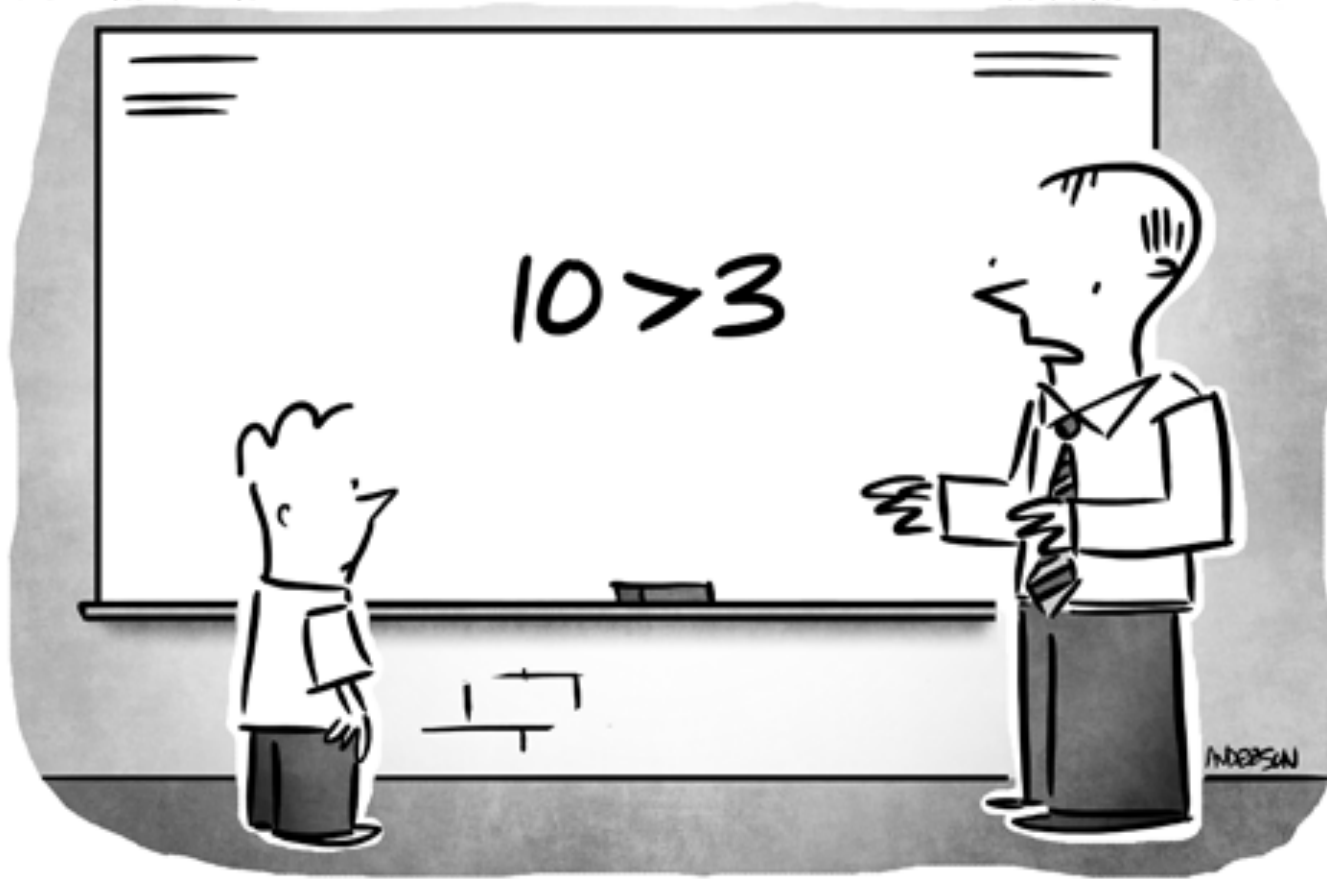
The Plan for Today: Investigation Checklist

- Is it Bullying?
- Is it Harassment?
- Is it Hazing?
- What are the School's Options for Responding to Avoid Liability?

Is it Bullying?

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"It's not bullying, it's just greater than."

Bullying Definitions

- “Bullying is any **unwanted aggressive** behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an **observed or perceived power imbalance** and is **repeated multiple times or is highly likely to be repeated**”

Objective or Subjective?

- Unwanted = subjective
- Aggressive = objective
- Unequal Power = subjective
- Repeated = objective
- Highly likely = subjective

Sanches v. Carrollton-Farmers Branch ISD

647 F.3d 156 (5th Cir. 2011)

- Cheerleader feuding with another cheerleader
- Alleged that peer sexually harassed her by:
 - Calling her a “ho”
 - Spreading a rumor she had a hickey on her breast
 - Slapping her boyfriend’s butt
 - Telling others she was pregnant with boyfriend’s baby

Sanchez v. Carrollton-Farmers Branch ISD

647 F.3d 156 (5th Cir. 2011)

- Court: not severe, pervasive or objectively unreasonable
 - Case is “a petty squabble masquerading as a civil rights matter, that has no place in federal court or any other court”
 - “Courts must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Early on, students are still learning how to interact appropriately with their peers.”

Sanches v. Carrollton-Farmers Branch ISD

647 F.3d 156 (5th Cir. 2011)

■ Court:

- “Dating and relationships are an inescapable part of high school, as the resulting stress. It is a trying time for young people, who experience a wide range of emotions, and often lack the skills to control them.... That is the sort of unpleasant conflict that takes place every day in high schools, and it is not the proper stuff of a federal harassment claim

Brown v. Ogletree

863 F. Supp. 2d 632 (SD Tex. 2012)

- Lawsuit by parents after student suicide
- “state-created danger” theory
 - Schools not obligated to protect students from third party harm
- Equal protection claim
 - School equally indifferent to bullying claims by both boys and girls
- Deliberate indifference
 - School refused to enforce its anti-bullying policy

CM v Pemberton Township HS, 117 LRP 3841 (NJ 2017)

- Student with ADHD suffered from two incidents of bullying
- Fist Incident, tripped by a peer
 - broke phone injured knee
 - School reviewed video, interviewed harasser
- Second Incident: Bitten and bruised by a peer
 - School determined bite was by a boyfriend mom didn't like
 - School took no action

CM v Pemberton Township HS, 117 LRP 3841 (NJ 2017)

- Parent filed OCR Complaint
- OCR
 - Policy inadequate
 - Resolution agreement
 - Supplemental investigation

CM v Pemberton Township HS, 117 LRP 3841 (NJ 2017)

- Parent filed suit in NJ US district court
- Court:
 - “at most, two isolated incidents”
 - “complaint does not state how student has been denied equal access to education”
 - No evidence that either incident was connected to disability

Morrow v. Balaski, **719 F.3d 160 (3rd Cir. 2013)**

- Sisters bullied at school by specific student
 - Called “cracker,” “retarded”
 - Threatened on MySpace and by phone
 - Attacked in lunchroom
- Charged criminally, given probation and no-contact order
- No-contact order given to school
- Bully later
 - Pushed down a flight of stairs
 - Elbowed in throat

Morrow v. Balaski, **719 F.3d 160 (3rd Cir. 2013)**

- Parents sued, alleging deliberate indifference
- Court
 - School's failure to expel
 - “we decline to hold that a school's alleged failure to enforce a disciplinary policy is equivalent to an affirmative act” of deliberate indifference
 - School's failure to enforce no-contact order
 - “no-contact orders cannot reasonably be interpreted as imposing any obligation on the [school] to ensure ... compliance with the orders or to otherwise enforce them.”

Is it Harassment?



"I'd like you to keep your eyes and ears open to make sure our office is safe from any charges of sexual harassment. Thanks, babe."

Harassment Definitions

- Behavior which is
 - Severe, pervasive or persistent
 - Creates a hostile environment at school.
 - Is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school
 - Based on a student's race, color, national origin, sex, disability, or religion*

Differing Legal Standards

- The Courts

- deliberate indifference
- Schools must respond reasonably to known harassment

- OCR: schools should

- Prevent harassment from happening in the first place
- Eliminate harassment which it knows about or should know about
- Remediate the effects of harassment

Dear Colleague Letter: “Harassment and Bullying,” 55 IDELR 174 (OCR 10/26/2010)

- **Before a claim, schools must:**
 - Have a clear anti-discrimination policy
 - Have a curriculum focused on character/respect
 - Ensure a safe environment to report
- **After a claim, schools must**
 - Promptly investigate harassment claims
 - Follow up with students when harassment is suspected
 - Take steps beyond disciplining bullies
 - Provide victim with remedial measures

Sex Harassment and Gender Based Bullying

- Includes acts or hostility based on sex-stereotyping or gender expectations
- Sexual orientation not protected – but harassment based on LGBT status IS protected

Vance v. Spencer County Sch. Dist., 115 LRP 17173 (5th Cir. 2015)

- Student perceived of as gay
- Peers harassed from 6th to 9th grade
 - Called her the “gay girl”
 - Asked to describe oral sex
 - Snapped her bra and grabbed her butt
 - Reported being propositioned or touched inappropriately in virtually every class
 - Pressed against a wall hands held down while other students pulled her hair and yanked off her shirt

Vance v. Spencer County Sch. Dist., 115 LRP 17173 (5th Cir. 2015)

- Reported to counselor and principal
 - Administrators talked to offending students
 - Reported the more she complained the worse the harassment got worse
- Filed Title IX complaint
- Jury awarded \$220,000
- Appealed

Vance v. Spencer County Sch. Dist., 115 LRP 17173 (5th Cir. 2015)

- School: not deliberately indifferent because we did **something** even if it was ineffective
- Court:
 - School never disciplined
 - School did not report assault to law enforcement
 - School was on notice that talking to harassing students was ineffective

Vance v. Spencer County Sch. Dist., 115 LRP 17173 (5th Cir. 2015)

■ Court:

- "...where a school district had 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."

Patterson v. Hudson Area Sch. Dist.

551 F.3d 438(6th Cir. 2010)

- Student viewed by peers as gay
- Middle school:
 - name calling and verbal harassment on a daily basis
 - Fag, faggot, queer, man boobs
- high school:
 - pushed into lockers
 - Stole his planner and drew sexually explicit pictures
 - “a naked student rubbing against him” in a locker room.
 - Urinated on his clothes in gym class, threw tennis shoes in toilet
 - “you suck penis” written on locker

Patterson v. Hudson Area Sch. Dist.

551 F.3d 438(6th Cir. 2010)

- School had anti-bullying policy
- When reported to administrators
 - frequently unable to determine wrongdoers
 - When kids could be identified, they were punished
 - Other students then harassed
- other times teachers ignored
 - One teacher: "How does it feel to be hit by a girl?"
- Jury awarded \$800,000

Patterson v. Hudson Area Sch. Dist.

551 F.3d 438(6th Cir. 2010)

- Court on appeal:
 - School still liable, even though dealt successful with each identified perpetrator
 - District came to know these methods were not ending the harassment

Patterson v. Hudson Area Sch. Dist.

551 F.3d 438(6th Cir. 2010)

■ Court:

- “Even though a school takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district’s response is clearly unreasonable. We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student.”

Doe v. Bellefonte Sch. Dist., 106 F. App'x. (3rd Cir. 2004)

- Student targeted based on “effeminate characteristics”
- 10th and 11th Grade suffered verbal harassment:
 - Gay, faggot, queer boy and peter eater
 - Ridiculed in hallway, threw papers at him
 - Ridicule of way victim dressed
 - One physical assault
- Student sued

Doe v. Bellefonte Sch. Dist., 106 F. App'x. (3rd Cir. 2004)

■ Court:

- Sufficient evidence that harassment was “severe, pervasive and objectively offensive” BUT School not deliberately indifferent
- “every time the plaintiff reported harassment, the **school took action** that was 100% effective to eliminate a repeat offense by the perpetrator of that incident”
- The fact that other students kept bullying was not evidence of school’s indifference

Claims based on Race, Color or National Origin



"I'M NOT RACIST - I HATE EVERYONE."

Zeno v. Pine Plains Central Sch. Dist., 702 F. 3d 655 (2nd Cir. 2012)

- **Bi-racial high school student:**
 - Frequent references to skin tone, calling him "n*gger" nearly every day
 - Referred to him as "homey" and "gangster"
 - Referred to his "'hood" and "fake gangster bling"
 - Graffiti: "Zeno will die"
 - Physically assaulted
- **School's response**
 - Suspended nearly every harasser
 - Anti-bullying training for students, parents and teachers
 - Called police for at least one assault

Zeno v. Pine Plains Central Sch. Dist., 702 F. 3d 655 (2nd Cir. 2012)

■ Court:

- District initially delayed in punishments
 - Later knew that disciplining harassers did not deter others from harassing
 - Harassment got worse
 - Anti-bullying was for one day, focused on bullying generally rather than race, attendance was optional
 - School's remediation actions "were little more than half-hearted measures"
- ## ■ \$1 million verdict

M.D. v. School Bd. Of Richmond

No. 1301813 (4th Cir. 2014)

- African-American Kdg student bullied by Hispanic peers
 - “repeatedly and continuously directed vulgar and offensive racial epithets” at student
 - Physically assaulted him
 - Stole his property
 - Called him “gay”

M.D. v. School Bd. Of Richmond

No. 1301813 (4th Cir. 2014)

- Mom reported bullying to school, asked for copy of policy
- School staff routinely told parents staff could do no more than speak to bullies
- Vice Principal: "I can only punish within limits of my authority. I can't control what kids do."

M.D. v. School Bd. Of Richmond

No. 1301813 (4th Cir. 2014)

- In April, Principal agreed to “personally address” the situation
- Parents withdrew from school
- Principal met with “bullying specialist” to develop plan
- Parents refused to return student to school

M.D. v. School Bd. Of Richmond

No. 1301813 (4th Cir. 2014)

- Parents sued under Title VI (race) and IX (sex)
- Court:
 - “The issue here is not whether Plaintiff has suffered severe bullying on account of his race and sexual orientation at the hands of fellow students. . . .”

M.D. v. School Bd. Of Richmond

No. 1301813 (4th Cir. 2014)

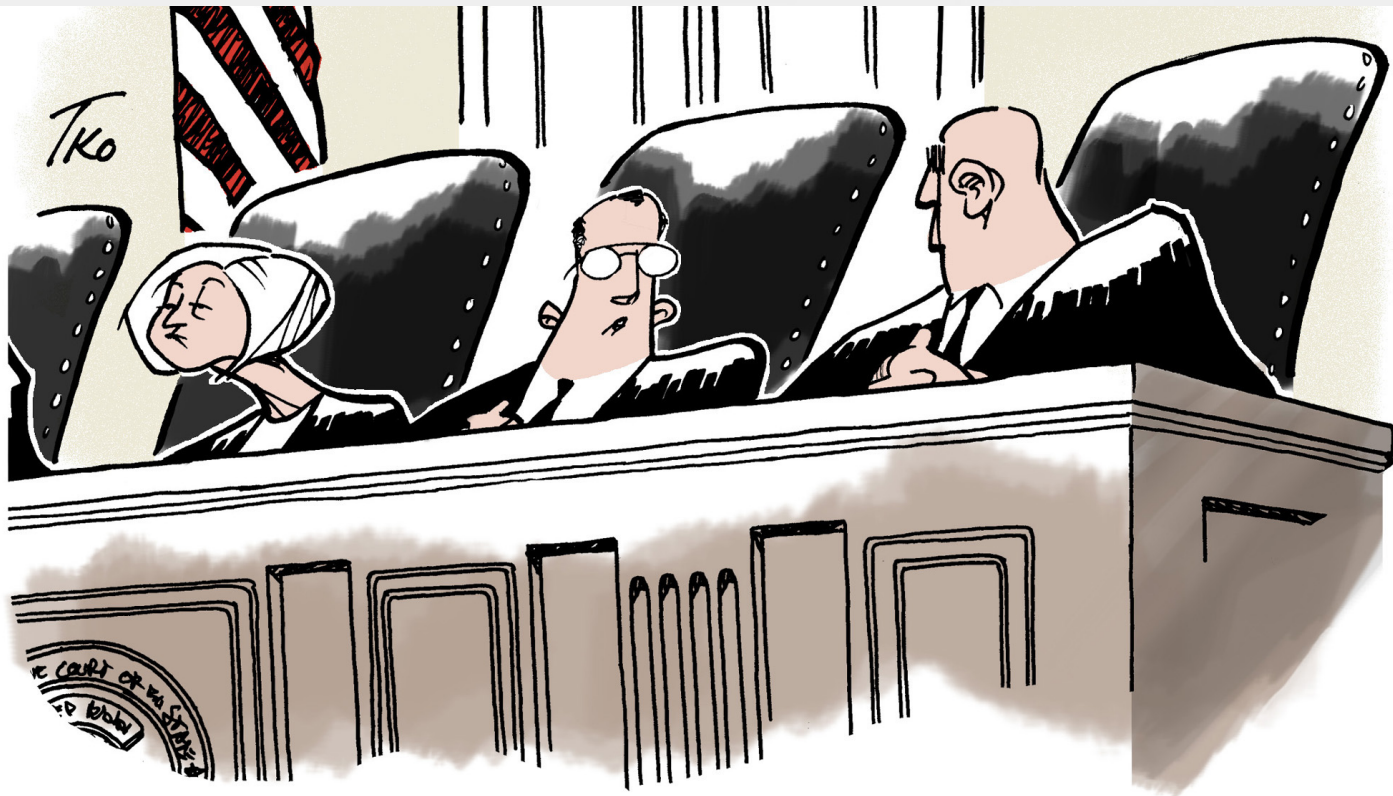
■ Court:

- “The pivotal issue is whether Plaintiff states a claim against [the school] based on ill-treatment by fellow students.”
- Although staff did nothing but speak to offending students for two months, principal was willing to get involved
- School not deliberately indifferent

Claims Based on Disability



Court Decisions



*“Don’t spread it around, but on the really tough ones,
I just go with ‘eenie, meenie, minie, moe.’”*

Nevis v. Mart ISD., 115 LRP 17173 (5th Cir. 2015)

- Student with tic disorder
 - Peers called names
 - Stole items from locker
 - Fight in hallway
 - Lunch table chemicals sprayed in eye
- Student reported each instance
- Principal
 - Conducted teacher training on bullying
 - Held student assembly with outside speaker
 - Punished offenders in some but not all incidents

Nevis v. Mart ISD., 115 LRP 17173 (5th Cir. 2015)

- Parents sued
- Court: school only liable for “deliberate indifference”
 - “School officials are not requires to purge” their schools of all bullying to avoid liability
 - Principal
 - documented her investigation or each reported incident, including punishments administered and why
 - Took action to try to prevent future incidents

Dorsey v. Pueblo Sch. Dist.

115 LRP 51297 (D. Colo. 2015)

- Student with hypoglycemia and asthma bullied:
 - verbally and physically harassed
 - "tasered" in the sides and stomach
 - "punched, slapped and placed in a headlock, leaving bruises on her neck, arms, leg, and stomach"
- All incidents reported
- School officials stated they would "take care of the situation."

Dorsey v. Pueblo Sch. Dist.

115 LRP 51297 (D. Colo. 2015)

■Principal

- investigated but no record of punishment for specific students
- Directed staff to supervise
- Recommended that student be taken out of all her classes and moved to a different student group

■Court:

- Incidents “very troubling”
- Did not rise to level of deliberate indifference
- No clear link between harassment & disability

Kendall v. West Haven Dep't. of Ed.

33 IDELR 270. (Conn. Sup. Ct. 2000)

- Elementary special ed student injured by another student
 - Parents called and reported prior incidents to assistant principal
 - Assistant principal said she would take care of it
 - Assistant principal then called out of building

Kendall v. West Haven Dep't. of Ed.

33 IDELR 270. (Conn. Sup. Ct. 2000)

- The student seriously injured when the bully attacked him in the school cafeteria.
- Court awarded \$67,000 in damages
- Found the assistant principal personally liable

OCR Decisions



"SO YOU'RE ONE OF THE CLOWNS FROM WASHINGTON WHO TELLS US HOW TO RUN OUR BUSINESS?"

Fairfield-Suisun (CA) Unif. Sch. Dist., 51 IDELR 139 (OCR 2008)

- 14 y/o student suffered severe burns as a toddler
 - Portions of hair and face missing
 - Lost right hand
- Reported that a classmate was making derogatory comments about her physical disabilities.

Fairfield-Suisun (CA) Unif. Sch. Dist., 51 IDELR 139 (OCR 2008)

- **School Response:**
 - Interviewed harasser, who said victim gave as good as she got
 - Did not interview other students
 - Told girls to stay away from each other
- **Parents filed OCR complaint**

Fairfield-Suisun (CA) Unif. Sch. Dist., 51 IDELR 139 (OCR 2008)

- OCR: school's response inadequate
 - Did not investigate whether bullying was "because of disability"
 - "Students with disabilities will almost certainly have disputes with other students at some point. However, if a district has information that a student was harassed because of a disability, it must take prompt action to investigate the complaint."

Bluestein (KS) Unif. Sch. Dist.

53 IDELR 305 (OCR 2009)

- HS student LD reading & math, ED
- Alleged harassment:
 - Peers called him "a moron" and "retarded" in front of teachers
 - The principal told the student he needed to be a ditch digger until he understood how to act.
 - The principal cursed at the student following a disciplinary incident
- Parents filed complaint with OCR

Bluestein (KS) Unif. Sch. Dist.

53 IDELR 305 (OCR 2009)

- OCR
 - Teacher admitted truth of “retarded”
 - Sped director admitted truth of “ditch digger”
 - School should have taken prompt remedial action
 - Required training and new policies

Westfield (MA) Public Schools

53 IDELR 132 (OCR 2009)

- Student had non-verbal learning disability, received services in resource room
- Alleged harassment (at hands of other special ed students):
 - Students said he smelled bad
 - Threatened with a knife (after telling racial joke)
 - Called "retard"
 - Tape put in the Student's hair
 - Fight over treatment of girlfriend

Westfield (MA) Public Schools

53 IDELR 132 (OCR 2009)

- Filed complaint with OCR
- School: none of these incidents “because of disability
- OCR:
 - “on their face, these acts and comments appeared to be general harassment or bullying, not harassment based on the Student's disability. ... OCR could not find that the District was on notice of any of the alleged disability harassment...”

Westfield (MA) Public Schools

53 IDELR 132 (OCR 2009)

■OCR:

- When school received written report of “retard” taunt, on notice and should have investigated based on disability harassment
- School required to train and adopt new policies

IEP Issues Related to Bullying and Harassment

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"What was initially thought to be a simple process is in fact an incredibly complicated, intricate, and complex system that I've codified and organized into a few easy-to-follow rules that are more difficult to implement than you'd think."

Fear of bullying does not justify placement restrictions

- *J.E. v. Boyertown Area Sch. Dist.* 56 IDELR 38 (ED Pa. 2011)
 - “a free appropriate public education does not require that the District be able to prove that a student will not face bullying at a placement”
- *Charlotte-Mecklenburg (NC) Schs.*, 113 LRP 18233 (OCR 2013)
 - Fear of bullying did not justify school failing to include severe and profound students in school dances

Bullying could result in denial of FAPE

- *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005)
 - “If a teacher is deliberately indifferent to teasing of a disabled child and if the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE.”
 - [Parent lost because she couldn't't meet that standard]

Is It Hazing?



OFFICE HAZING

Hazing Questions

- Was it an activity which endangered the physical or mental health or safety of an individual?
- Was it for the purpose of initiation into admission into, affiliation with, or continued membership with any organization?

LB 710

- Amended 28-311.06
- Formerly applied only to “membership with an organization of student members operating under the sanction of a postsecondary educational institution”
- Intent: give schools and prosecutors more clarity
- Penalty: Class II Misdemeanor
 - 6 months in jail and/or
 - \$1,000 fine

Doe v. Torrington Pub. Sch., 2016 U.S. Dist. LEXIS 42090 (D.Conn. 2016)

- Freshman reported hazing in football locker room, school punished offenders

Doe v. Torrington Pub. Sch., 2016 U.S. Dist. LEXIS 42090 (D.Conn. 2016)

- After punishment
 - Called p*ssy, bitch, baby, faggot, fat ass
 - Physically assaulted
 - When student retaliated whole team had to run gassers
 - Principal: "I am sick of hearing about phantom bullies."

Doe v. Torrington Pub. Sch., 2016 U.S. Dist. LEXIS 42090 (D.Conn. 2016)

- Over summer, student sexually assaulted by teammates
- When school was notified, offenders expelled, team trained
- Court:
 - When school was notified, reacted promptly
 - Without discipline against team, school would have been liable
 - Individual teammates held liable

Maine Township High Sch.

Dist. 207

(III. 2016)

- Hazing on soccer team
 - Held freshmen down
 - Pulled down pants
 - poked in the rear with fingers and a stick
- School agreed to pay \$1 million
- 6 students in convicted of criminal assault and hazing
- 2 coaches were fired
- Head coach charged with hazing, battery and failure to report child abuse

Responses to Bullying/Harassment



First Question: To Whom Will You Report?

- Report back to victim?
 - OCR requires in Title IX
 - [Probably also required in disability]
 - Check your policies
- Report to Law Enforcement?

Reporting to Law Enforcement

- Neb. Rev. Stat. § 79-293 (principals must report all violations of criminal code)
 - Hazing: Neb. Rev. Stat. §§ 28-710 & 28-711
- Will be evidence that district was not deliberately indifferent
- **Not sufficient** to meet district's obligations under Title IX, IDEA, Section 504, etc.

Second Question: What Should be Done with the Bully?



"As it turns out your son isn't looking for attention after all. He's just a jerk."

Jurisdiction and Authority

- Did the incident occur on school grounds, in a school vehicle, or at a school activity?
- Did the incident occur on district “property” (such as a 1:1 iPad) even if off school grounds and outside of school/activity time?

Location of Offense

- *C.R. v. Eugene School District 4J*, 835 F.3d 1142 (9th Cir. 2016) *cert. granted* March 14, 2017

Location of Offense

- Even if the incident occurred outside school grounds, vehicles, activities, and not on any other district property:
 - Did the incident cause you to “reasonably forecast” a material and substantial disruption of school functions?
 - Did the incident actually cause a material and substantial disruption of school functions?
 - Did the incident reasonably cause another student to miss school functions or school activities?

Other Options for Dealing with the Bully?

- Restorative Justice
- SAT
- Educational services
- **Emphasize no retaliation**

What if the Bully has an IEP?

- Remember manifestation for change in placement over 10 days
- Consider reconvening IEP team to add BIP, 1:1 support, social skills
- If student's behavior impedes the learning of others, can be moved to a more restrictive placement

Third Question: What Should be Done with the Victim?

- Educational Responses
 - SEL
 - Resilience
- SAT/Test
- Social Skills Interventions
- Follow up

Questions?

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