



The Evolving Law on Bullying

By Robert M. Schwartz

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When two students at Rutgers University invaded another student's expectation of privacy and broadcast to the world the student's sexual orientation, the student victim later committed suicide.

What happened at Rutgers is not an isolated event. On any given day, it seems that the media reports another act of bullying. In September, it involved the Rutgers student. In November, a 14-year old Michigan girl hanged herself after being made fun of for accusing an 18-year old of having sex with her. In Philadelphia, a 13-year old student was beaten and harassed by several of her female classmates after one of them became jealous over a boy who had expressed interest in the student victim. In October, the *Star Ledger* published an article about a father who shared the story of how his 13-year old son committed suicide after years of

bullying. The father related that it began when his son was in fifth grade. He said that his son had pleaded to take him out of school after rumors had spread that he was gay. The son also had received vulgar, homophobic emails. After being humiliated by a girl who faked an on-line relationship with him, his son hanged himself.

Most everyone has seen or experienced some form of bullying or harassment. As these stories illustrate, acts of bullying too often become toxic. While there may be many reasons for this, certainly one of them has to do with the fact that bullying is no longer limited to the playground or the classroom or the

school hallway. Now bullying can occur through e-mail, instant messaging, via text messaging, and on Facebook. And because messages on the web are visible to the world, it's much harder for students to escape bullying behavior.

As tragic as so many of these stories are, the statistics are no less alarming. In 2007, a national survey by the Department of Justice reported that 32% of students ages 12 to 18 had been bullied during the school year. A 2009 New Jersey Department of Education (DOE) survey indicated that 17% of high school students had been bullied during the previous 12 months through email, chat rooms,

instant messaging, websites, or text messaging. That didn't include in-person bullying.

And so, it's no wonder that the New Jersey Legislature passed the Anti-Bullying Bill of Rights, A-3466/S-2392 (Vainieri Huttle/Buono). It's not that there aren't statutes currently on the books that address the issue of bullying. There are. But media attention often engenders legislative response. The Anti-Bullying Bill of Rights Act is the New Jersey Legislature's response.

This article will review the law as it has existed until now, as well as the Anti-Bullying Bill of Rights Act. The legislation's overarching goals are to have more detailed reporting of incidents of bullying, ensure that investigations are undertaken, and require training of both staff and students on how to identify and stop bullying behavior. The aim is to promote better protection of student victims, punish the offenders, remediate the bullying behavior, and ensure that boards have and enforce their anti-bullying policies. But, before reviewing the new mandates contained in the legislation, it's helpful to understand the statutory and regulatory requirements that already exist.

Existing Law

The statutory framework in place before the January signing of the Anti-Bullying Bill of Rights Act was last adopted by the legislature in 2002. The legislative findings then were no different than now; that bullying and harassment have no place in our schools; that they disrupt a student's ability to learn and a school's ability to educate. To this end, in 2002 the legislature enacted the following statutes:

N.J.S.A. 18A:37-14 defines acts of harassment, intimidation, and bullying. They include:

1. Gestures, written, verbal or physical acts, or any electronic communication reasonably perceived as motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic,

2. that a "reasonable person" should know, under the circumstances, will have the effect of harming a student or damaging the student's property, or placing a student in reasonable fear of harm to his person or damage to his property;
3. that have the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.

N.J.S.A. 18A:37-15 provides that every district adopt a policy aimed at prohibiting acts of harassment, intimidation, and bullying on school property or at school-sponsored functions or on a school bus and aimed at addressing acts of harassment when they occur.

N.J.S.A. 18A:37-15.1 makes certain that school policies prohibiting harassment, intimidation or bullying include "electronic communication."

N.J.S.A. 18A:37-15.2 requires school districts to have their bullying policies available on their website.

N.J.S.A. 18A:37-16 immunizes from liability school employees who report incidents of harassment, intimidation or bullying.

N.J.S.A. 18A:37-17 "encourages" school districts to establish bullying prevention training programs for school employees and volunteers who have significant contact with students and encourages districts to develop a process for discussing the district's policy with students.

N.J.S.A. 18A:37-19 provides that school districts who incur additional costs due to the implementation of the anti-bullying legislation "shall apply to the Commissioner of Education for reimbursement."

In addition, the State Board of Education adopted N.J.A.C. 6A:16-7.9 which reiterates that boards of education must have policies prohibiting harassment or bullying on school grounds, at school functions, or on school buses. It also adopted N.J.A.C. 6A:16-7.1, the Code of Student Conduct, which provides that the reach of school officials extends to non-school events off school grounds when the conduct is such that it "materially and substantially"

interferes with the operation of the school. N.J.A.C. 6A:16-7.6(a)(2).

The courts have also addressed the issue of bullying. Finding that bullying is a form of harassment, which if directed at a protected class may rise to a violation of the New Jersey Law Against Discrimination, as well as its federal counterparts, the courts have laid out the rights of student victims and the responsibility of school districts, their staff, and their administrators. In the leading case of *L.W. v. Toms River Board of Education* 189 N.J. 381, 407 (2007) the New Jersey Supreme Court said:

A school cannot be expected to shelter students from all instances of peer harassment. Nevertheless, reasonable measures are required to protect our youth, a duty that schools are more than capable of performing... in the school setting... a school district may be found liable under the law against discrimination for student-on-student sexual orientation harassment that creates a hostile educational environment, when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment.

The Anti-Bullying Bill of Rights Act

So, it's clear that a detailed framework designed to address student-on-student harassment and bullying has existed since at least 2002. This begs the question as to why the Anti-Bullying Bill of Rights Act was shepherded through the legislature with such speed. Introduced near the end of October, soon after the tragic incident at Rutgers, only one month later the legislation was overwhelmingly passed by both houses of the legislature, and signed into law in January 2011. Summarized below are its key provisions:

Definitions

The definition of harassment, intimidation, or bullying is amended by specifying that the "harm" that a student may experience can be either physical or emotional. While this represents a change in the current definition in the statute, it doesn't change how bullying behavior has been viewed until now. The understanding has been that the harm that can result from bullying behavior can be both physical and emotional.

The legislation also adds an additional criterion to the definition; acts that create a "hostile environment at school." This, too, is in accord with what the courts have held to date. In *L.W. v. Toms River Board of Ed*, the New Jersey Supreme Court held that student-on-student bullying or harassment should be addressed by using the same standard as in hostile work environment cases. That standard is the "reasonable person" test: what would a reasonable person (teacher, supervisor, vice principal, principal, etc.) do in a similar situation?

Bullying Behavior Outside of School

The legislation maintains that for districts to be able to respond to bullying or harassing incidents off school grounds there must be a "substantial" disruption or interference with the orderly operation of the school. This only follows what is now contained in the Code of Student Conduct and what the courts have held; that school districts and their staff are required to act when bullying, harassing, or intimidating conduct outside of school is brought to their attention which "materially and substantially" impacts on the school environment.

Training

Instead of *encouraging* training, the legislation *requires* annual training on harassment, intimidation, and bullying involving employees, volunteers, students, parents, law enforcement, and community members. It also states that beginning with the 2012-2013 school year, candidates for school administrator or teacher certification will be required to complete a program on harassment, intimidation, and bullying and that such training will now be a part of the professional development requirements for such individuals.

Further, the legislation states that school districts may apply for a grant to be used for training programs established through the "Bullying Prevention Fund," to the "extent... funds...are made available." But the bill does not speak to what is in the fund, or how it will be funded, or what responsibility there is for the New Jersey Department of Education or any other agency to contribute to the fund.

Policies

Schools were already required to have policies aimed at prohibiting harassment, intimidation, and bullying on school property or at school-sponsored functions or on a school bus. The Anti-Bullying Bill of Rights Act would provide specificity for what is to be contained in the policy; that it must include a description of the type of behavior expected from each student, the consequences and appropriate remedial action for those who commit acts of harassment, intimidation, or bullying, and a procedure for reporting all acts of harassment, intimidation, or bullying. It also sets out the process by which the policy is to be created; that the process include parents and/or guardians, as well as school employees, administrators, students, volunteers, and "community representatives."

Anti-Bullying Specialist

Required for every school, the anti-bullying specialist is to be appointed by the principal. To create the appearance of revenue neutrality the proposal is for the principal to appoint someone from among the school's staff; the guidance counselor, or psychologist, or another individual "similarly trained" who is employed in the school, or if these titles do not exist in a school, then another existing employee in the school. The anti-bullying specialist is to (1) chair the school safety team, (2) lead any investigation of bullying, and (3) act as the primary school official responsible for preventing acts of bullying. The anti-bullying specialist is also to have "input" into the required annual re-evaluation of the district's policy on harassment, intimidation and bullying, a copy of which will have to be transmitted to the executive county superintendent within thirty (30) school days of its revision.

Anti-Bullying Coordinator

The superintendent is to appoint an anti-bullying coordinator. Here, too, the idea is that the appointment will be revenue-neutral because the anti-bullying coordinator is to be chosen from existing staff. The coordinator is to (1) coordinate and strengthen a school district's policies on harassment, intimidation, and bullying, (2) collaborate with each school's anti-bullying specialist,

(3) provide data in collaboration with the superintendent to the NJDOE regarding harassment, intimidation and bullying, and (4) meet at least twice a year with each school's anti-bullying specialist to discuss and strengthen procedure and policies to prevent, identify, and address harassment, intimidation, and bullying.

School Safety Teams

The legislation requires School Safety Teams for each school. A team is to consist of the principal, or the principal's designee, a teacher, the anti-bullying specialist, a parent of a student in the school, and "other members to be determined by the principal." The School Safety Team is designated to (1) receive the complaints of harassment, intimidation, or bullying that have been reported to the principal, (2) receive copies of the investigation reports, (3) review and strengthen a school's policies that address harassment, intimidation, and bullying, educate the community, (4) participate in training programs, and (5) collaborate with district's anti-bullying coordinator in the collection of data and the development of the district's policies.

To maintain student confidentiality, or the semblance thereof, the legislation provides that the parent named to the School Safety Team shall not receive the complaint or the investigation report, and shall not participate in identifying and addressing patterns of harassment, intimidation, or bullying of students in the school. *Presumably, the other members of the team will not be permitted to share with the parent member of the team the information in the complaint or the investigation report or the intended remedy.*

Reporting Requirements

1. All acts of harassment, intimidation, or bullying are to be reported verbally to the school principal *on the same day* that an employee or "contracted service provider" witnesses or receives "reliable information" regarding an incident.
2. The principal is to inform parents or guardians of all students involved in an alleged incident and may discuss, depending on the situation, the availability of counseling and

other intervention services. *While no time frame is given here, the presumption is that parents need to be informed promptly.*

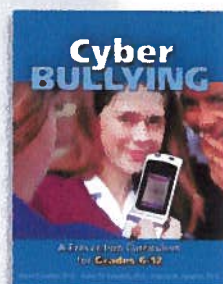
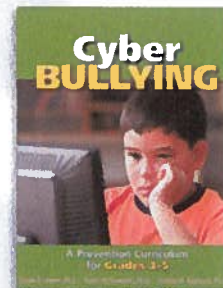
3. All acts of harassment, intimidation, or bullying must be reported in writing to the principal *within two (2) days* of when it was witnessed or when "reliable information" was received.

Investigation Requirements

1. The principal or the principal's designee is to "initiate" an investigation within one (1) school day of the report of the incident. *The statute does not state whether it is within one school day after receipt of the written report or one school day after receipt of the oral report.*
2. The investigation is to be conducted not by the principal, but by the school's anti-bullying specialist who is to be appointed by the principal. Additional personnel may be appointed by the principal to assist the anti-bullying specialist. *The problem here is that though the principal may be disciplined for how the investigation is conducted and/or whether it is completed in a timely fashion, the principal is not the one charged to conduct the investigation.*
3. The investigation must be completed "as soon as possible, but *not later than ten (10) school days* from the date of the written report of the incident..." If, after the investigation is conducted, additional relevant information is received, the anti-bullying specialist may amend the investigation report.
4. The results of the investigation are to be reported to the superintendent *within two (2) school days* of the completion of the investigation.
5. In accordance with regulations promulgated by the State Board of Education, the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying, impose discipline, or order counseling as a result of the findings of the investigation.
6. The superintendent is to report the investigation's results to the board of education *no later than the date of the next board*

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meeting following completion of the investigation along with information on any service provided, training established, or discipline imposed or recommended, "or other action taken or recommended" by the superintendent.

7. Parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, including the nature
8. The principal, in conjunction with the anti-bullying specialist shall determine the "range" of ways to

of the investigation, whether the district found evidence of harassment, intimidation or bullying, and whether discipline was imposed. This information is to be provided *in writing within five (5) school days* after the results of the investigation are reported to the board.

address the incidents of harassing and/or bullying behavior.

9. A parent or guardian may request a hearing before the board after receiving the information and the hearing shall be held *within ten (10) days* of the request. The hearing is to be conducted in executive session.
10. At the next board meeting the board is to issue a decision in writing to affirm, reject, or modify the superintendent's decision/recommendation.
11. The decision may be appealed to the Commissioner of Education within ninety (90) days after issuance of the board's decision.

Disciplining School Districts and Staff Who Fail To Act

The legislation imposes potential discipline on a principal or other school employees who do not comply with required timelines or who fail to report incidents of bullying and/or harassment. However, as noted above, the law already provided for a standard, or a duty of care for school administrators or other employees who receive reports of harassment, intimidation or bullying. In the matter of *L.W. v. Toms River*, the court held that school personnel are accountable for their actions regarding bullying

behavior; that they are subject to what a "reasonable person" would do in a similar position and in a similar situation; and that this includes action to be taken for bullying or harassment that occurs outside of school, if the behavior is such that it "materially and substantially" impacts on the school environment.

Conclusion

While a statutory framework designed to identify and stop harassing, intimidating, and bullying conduct already existed, the Anti-bullying Bill of Rights Act adds to that framework by imposing additional requirements. The time frame within which reports shall have to be made and investigations conducted will now be codified, the noncompliance with which may subject the principal and other staff members to discipline. Each school will have to have a designated anti-bullying specialist, among whose duties will be to conduct investigations of reports of bullying conduct. Each school will have to have a school safety team whose purpose will be to assist in making the school safer. Each district will have to have an anti-bullying coordinator who will be charged with coordinating the district's anti-bullying training and implementation of policy. In addition, if there are additional costs associated with these requirements, the legislation

specifies a fund to which districts may apply for assistance, though it does not provide for funding.

Having reporting requirements and ensuring that the reports are properly investigated, and the bullying conduct is remedied, are all certainly important to the process. However, creating an environment of tolerance for difference, which is the ultimate antidote for bullying conduct, will still come down to the training school staff and their students receive.

The court in *L.W.* saw the interconnection between bullying behavior and the school's climate; the need to address the bullying conduct, to punish the offender in accordance with the type of bullying reported, and to protect the victim, but most of all to promote a climate of tolerance and acceptance. While certainly this is the aim of the legislation as well, the glaring reality is that it leaves school districts on their own to find the resources necessary to meet the new mandates. As a result, the challenge for school districts continues to be to provide in these financially difficult times the required resources for effective training for staff and students alike, to create to the greatest extent possible a school climate where bullying has no place.

About the Author

Robert M. Schwartz currently serves as chief counsel to the New Jersey Principals and Supervisors Association. He has been an attorney specializing in the areas of school law and public sector labor relations for a period of more than 30 years. Mr. Schwartz is a frequent presenter at school law forums across the State of New Jersey and was an instructor for the Rutgers/FEA Education Law and Policy Institute from 2005 to 2008.

Mr. Schwartz earned his B.A. from the American University, School of Government and his J.D. from the Franklin Pierce Law center in Concord, New Hampshire. After clerking for a New Jersey Superior Court Judge, he became the first counsel to the New Jersey Elementary and Middle School Administrators and later became the first counsel to the New Jersey Principals and Supervisors Association, as well as the Foundation for Educational Administration.