Complicated Challenges

When Students Are Harassed—A Roadmap for Proper Response

By Diane Bernoff Sher

School officials must respond reasonably to student peer harassment, but what is a "reasonable response," and when do schools fail to meet this burden?

Bullying and harassment are, sadly, not news in schools around the country, but educators know that some groups—including immigrants, religious minorities, and students with limited English—are among the most frequent targets, along with LGBT students.

Four in ten of the educators who responded to a 2016 Southern Poverty Law Center survey reported an increase in verbal harassment, slurs, and derogatory language against students of color, Muslims, immigrants, and LGBT individuals. Eight in ten reported heightened anxiety among these same groups. Maureen B. Costello, *The Trump Effect: The Impact of the 2016 Presidential Election in Our Nation's Schools*, Southern Poverty Law Center (Nov. 28, 2016).

The problem is not new, although such anecdotal reports suggest that it may be worsening. Leaders of educational institutions and their staff must be on the same page in knowing how to respond.

A 2014 study found that youth from immigrant families are more likely than their non-immigrant peers to report being victimized by physical aggression and to be victimized because of issues related to their race, religion, and family income. *See* Michael L. Sulkowski *et al.*, *Peer Victimization in Youth from Immigrant and Non-immigrant US Families*, 35 Sch. Psychology Int'l 649 (2014).

In the December 31, 2015, "Dear Colleagues" letter addressing discrimination and harassment based on race, religion, or national origin, the U.S. Department of Education noted the challenges faced by educational institutions in protecting, for example, students whose families fled violence in Syria and recently had arrived in the United States. The Secretary of Education called on schools to ensure that young people at risk—including those who are, or are perceived to be, Syrian, Muslim, Middle Eastern, or Arab, as well as those who

■ Diane Bernoff Sher is presently a partner at the Philadelphia firm of Fineman Krekstein & Harris PC, where she represents insurers and advises and defends educational institutions. Ms. Sher recently returned to the firm, where she began, after a 10-year stint as assistant general counsel for the School District of Philadelphia. She was part of the team that defended the school district in a high-profile investigation by the U.S. Department of Justice into alleged racial harassment of Asian immigrant students at South Philadelphia High School. She also implemented district training programs on the anti-harassment policy that she helped create.

are Sikh, Jewish, or students of color—are protected from abusive name-calling, defamatory graffiti, and physical violence. The letter vividly describes the individual and societal harm that can result when schools fail to respond appropriately to such conduct: "If ignored, this kind of conduct can jeopardize students' ability to learn, undermine their physical and emotional well-being, provoke retaliatory acts, and exacerbate community conflicts." Letter from Arne Duncan & John B. King, Jr., to Educational Leaders, U.S. Dep't of Educ. (Dec. 31, 2015) ("Dear Colleagues" letter) (describing anti-harassment policy).

Although the school district took many actions in response to the racial harassment of a student over several years, the Second Circuit found those actions to be unreasonable "foot-dragging" and "half-hearted," and it upheld a $1 million jury verdict.

Besides the detrimental effects on students and the community that the "Dear Colleagues" letter describes, a school's failure to respond appropriately to harassment can be costly. The Civil Rights Act of 1964 provides a private right of damages against a school district for student-on-student harassment if the school district was deliberately indifferent to the known harassment. A finding of deliberate indifference depends on the adequacy of a school's response to the harassment. When school officials respond reasonably to harassment, they minimize the potential for the serious harm described in the "Dear Colleagues" letter. And in doing so, they help insulate themselves and their institution from claims for significant monetary damages. But what is a "reasonable response?" When do schools fail to meet this burden? The aim of this article is to assist counsel who represent educational institutions and school districts in identifying proper responses to harassment.

The Legal Challenge: A Reasonable Response to Known Harassment

Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

Title IX of the Education Amendments of 1972 makes the same guarantee but substitutes "on the basis of sex" for "on the ground of race, color, or national origin." 20 U.S.C. §1681(a). Title VI and Title IX are so similar that a decision interpreting one generally applies to the other. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009); *Doe v. Smith*, 470 F.3d 331, 338 (7th Cir. 2006).

Public and private educational institutions that receive federal funds are subject to these mandates.

The successful defense against lawsuits seeking monetary damages for harassment depends largely on how school administrators respond when they learn of such behavior. Although courts recognize that "[j]udges make poor vice principals," courts will closely examine the specific actions that school administrators take when they have knowledge of such harassment. *See Estate of Lance v. Lewisville Indep. Sch. Dist*., 743 F.3d 982, 996 (5th Cir. 2014). Liability can be imposed when school officials' responses to known harassment is "clearly unreasonable in light of the known circumstances." *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999).

In *Davis*, the Supreme Court set a high bar for plaintiffs seeking to hold schools and school officials liable for student-on-student harassment. School officials must have had "actual knowledge" of harassment "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." To have "actual knowledge" of an incident, school officials must have witnessed it or received a report of it. *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 823–24 (7th Cir. 2003). To impose liability, school officials' responses to known harassment also must have been "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. Responses that are not reasonably calculated to end harassment are inadequate. *See, e.g., Vance v. Spencer Cty. Pub. Sch. Dist*., 231 F.3d 253, 262 (6th Cir. 2000).

School officials are given broad latitude to resolve peer harassment. The U.S. Supreme Court in *Davis* made clear that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Id*. at 648.

Unreasonable Responses to Harassment: An Instructive Case

Despite the high bar set in *Davis*, and the broad latitude given to school officials, large verdicts remain possible. The case of *Zeno v. Pine Plains Central School District,* 702 F.3d 655 (2d Cir. 2012), is instructive. Although the school district took many actions in response to the racial harassment of a student over several years, the Second Circuit found those actions to be unreasonable "foot-dragging" and "half-hearted," and it upheld a $1 million jury verdict.

Anthony Zeno, 16 years old, dark skinned, and biracial (half-white, half-Latino), moved from Long Island to Dutchess County, New York, and enrolled as a freshman in a high school that was 95 percent white. Racial insults, threats, and physical abuse ensued over the next three and a half years. He was assaulted, called a racial epithet nearly every day, and threatened with lynching.

The Second Circuit detailed Anthony's arrival at his new school:

> In February 2005, a few weeks after Anthony's arrival, a student— a stranger to Anthony—charged toward him, screaming that he would "rip [Anthony's] face off and… kick [his] a**,"and that "[w]e don't want your kind here." Other students held the aggressor back, while unidentified students in the crowd called Anthony a "n*****" and told him to go back to where he came from.

After this first incident, Anthony's mother, Cathleen Zeno ("Mrs. Zeno"), voiced her concerns to SMHS principal John Francis Howe. Howe told Mrs. Zeno that "this is a small town and [] you don't want to start burning your bridges."

For the rest of the year, Anthony was subjected to numerous racial comments and harassment at the school. For example, a student stripped a necklace from Anthony's neck, breaking it. The student claimed the incident was merely a joke and offered an apology: "Whoops, didn't mean to break your piece of fake rapper bling bling."

… Beyond disciplining each student involved in incidents during this semester with a warning or suspension, the District did not implement other remedial measures in response to the student harassment of Anthony.

Id. at 659.

The opinion goes on to describe in detail the escalating harassment along with the actions that the district took in response. For example, the principal asked staff members and teachers to keep an eye on Anthony and to reach out to him. Perpetrators were disciplined. The district suspended the students involved, typically for five days. The district moved one student to another school.

Anthony's lawyer, along with members of the County Human Rights Commission, reported the harassment to the district. Anthony's lawyer asked the district to provide Anthony with a shadow, who would accompany him at school, and to implement racial sensitivity programs to underscore the district's zero tolerance of racism and bias, both of which were offered to the district at no cost. The district declined both offers.

Instead, the district implemented separate, one-day programs for faculty and staff, students, and parents that were run by an outside contractor. The Second Circuit was critical of the program:

The course was called "Altering the Culture of Cruelty: A Legally Based Bullying and Harassment Prevention Program." The program discussed bullying and sexual harassment, but despite being customized for the District, its treatment of race and discrimination was tangential at best. The District never implemented discrimination-, bias-, diversity-, or race-specific programs during the 2005–2006 academic year.

Id. at 661

The harassment continued during Anthony's junior and senior years, resulting at one point in a violent fight. Anthony was repeatedly called "n*****" and subjected to racial slurs and insults, which he reported to the district. But even when a particular student was disciplined, the harassment continued because "if it wasn't the same kid, it would always be someone replacing that kid, because they were all connected."

The district responded by hiring a consultant who planned to conduct student focus groups, administer surveys, and meet with staff, parents, and community members to increase diversity awareness. The consultant was also supposed to train faculty and staff on the importance of acknowledging racial diversity and recognizing racial stereotypes, and to train students on diversity issues. During Anthony's junior year, however, the consultant only did preliminary work and held no training sessions.

During Anthony's senior year of high school, the consultant's preliminary work finally resulted in sensitivity training sessions for students. However, the court noted that students were randomly selected to participate but could opt out. *Id*. at 662–63. Two assemblies were held, but they didn't focus on racial harassment.

After leaving the district with less than a full diploma, Anthony eventually brought suit, alleging discrimination in violation of Title VI. Following trial, the jury found that the district had violated Anthony's civil rights and awarded him $1.25 million in damages, later reduced to $1 million.

On appeal, the Second Circuit first concluded that the evidence presented at trial was sufficient to support the jury's conclusion that Anthony was subjected to actionable harassment and then turned to the issue of whether the school district's response rose to the level of deliberate indifference. The court ultimately found ample evidence to support the finding that the district's two types of responses to the harassment of Anthony—immediate discipline of Anthony's identified harassers, and later, various non-disciplinary responses—were unreasonable and thus deliberately indifferent. The court noted that the sufficiency of a school district's response must be considered in light of the known circumstances, and as the known circumstances change, the sufficiency of a response may also have to evolve.

Simply put, responses that are not reasonably calculated to end harassment are inadequate. The *Zeno* court noted the holding in *Vance v. Spencer County Public School District*, 231 F.3d 253, 262 (6th Cir. 2000): "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."

Simply put, responses that are not reasonably calculated to end harassment are inadequate.

The court pointed to five circumstances that should have informed the district's continued response to student harassment of Anthony.

1) The district knew that disciplining Anthony's harassers—through suspensions or otherwise—did not deter others from engaging Anthony in serious and offensive racial conduct.
2) The harassment directed at Anthony grew increasingly severe.
3) The disciplinary action had little effect, if any, on the taunting and other hallway harassment.
4) The school district knew that the harassment predominantly targeted Anthony's race and color.
5) Within a year of Anthony's arrival, the local human relations commission and N.A.A.C.P. offered the district both a free shadow, to accompany Anthony during the school day, and a free racial sensitivity training series (which the school district declined).

Zeno, 702 F.3d at 669.

The court said that the district "dragged its feet" for more than a year before implementing any non-disciplinary, remedial action, stating that at some point after Anthony's first semester, the district should have done more than simply discipline the individual perpetrators.

The court held that the jury could have reasonably found that the district's additional remedial actions were little more than "half-hearted measures." The basis of these findings is particularly instructive for counsel tasked with guiding a school's response to persistent harassment. The court criticized the school's additional programs because they were too general and (1) did not focus on racial bias or prejudice, or (2) made attendance optional.

The court rejected the district's argument that it did not know that its responses were inadequate or ineffective, holding that a jury reasonably could have found that the district ignored the many signals that greater, more directed action was needed.

The delay in implementing bias-specific training was significant. It did not occur until nearly 21 months after peer harassment of Anthony began. Attendance was optional. Anthony saw none of his harassers at the event. Similarly, although the district reorganized an extracurricular student group (STOP) aimed at addressing prejudice, STOP members were a self-selecting group. The court noted that the district's actions "could not have plausibly changed the culture of bias at [the high school] or stopped the harassment directed at Anthony." *Id*. at 670.

Finally, the court rejected the district's argument that it did not know that its responses were inadequate or ineffective, holding that a jury reasonably could have found that the district ignored the many signals that greater, more directed action was needed.

What are the lessons from *Zeno*? Clearly the school personnel felt that they did take "some action" in response to the reports of harassment. The perpetrators were disciplined. Culpable students were suspended, their parents were notified, they were denied access to extracurricular activities, and at least one student was transferred to another school. Assemblies took place. A consultant was brought on. Any attorney who regularly represents school districts would recognize these measures to address student misconduct, including harassment based on race, color, or national origin. Why were these actions insufficient here?

While it is true that the school administrators did not adopt every suggestion that Anthony and community representatives advocated, they were not required to. Administrators have discretion in how to respond to incidents of harassment. One such case is *Doe v. Galster*, 768 F.3d 611 (7th Cir. 2014), in which plaintiff "Jane Doe," who was born in Russia and came to the United States at the age of two, was tormented in middle school. Several male classmates bullied her, sometimes hurling gendered or ethnic insults. The bullying turned violent near the end of seventh grade. Three boys were eventually charged with criminal battery and were expelled or withdrew from school. The court held that a reasonable jury could find that the violent attacks that Doe suffered—which ultimately resulted in her leaving the school district—constituted severe harassment that caused a negative and "systemic effect" on Doe's education. Nonetheless, the Seventh Circuit upheld summary judgment in favor of the school, based on longstanding authority, stating:

> School administrators must "continue to enjoy the flexibility they require" in disciplinary decisions unless their response to harassment is "clearly unreasonable." [Citing *Davis,* 526 U.S. at 648–49]. The Court stressed in *Davis* that Title IX does not require administrators to "engage in particular disciplinary action." We echoed this concern in *Gabrielle M*. We said that a "school may take into consideration administrative burdens or the disruption of other students' or their teachers' schedules in determining an appropriate response [to peer harassment]." As the Fifth Circuit has observed, "Judges make poor vice principals…."

Id. at 619 (internal citations omitted).

Why, then, did the court in *Zeno* point to the failure of the school administrators to employ a shadow or implement the human relation commission's suggestions as a basis for upholding the jury verdict on deliberate indifference? Why was the "flexibility" that *Davis* requires not a defense in the *Zeno* case?

One answer may rest in the fact that the harassment continued over a number of years. The *Zeno* court believed that the school administrators repeated interventions over time with no basis for expecting that anything would change. As in the quote often wrongly attributed to Albert Einstein, "Insanity is doing the same thing over and over again and expecting different results," the lesson for school administrators and their counsel is clear: If the action taken over time is not effective, a court will probably not consider repetition of the same action to be effective. Look for different solutions!

Secondly, in cases of persistent, severe harassment, schools can't be slow to recognize that a given response is ineffective. In *Zeno*, the school district rejected the proffered human relations commission training, yet the consultant that they eventually retained provided no training for an entire school year while the harassment continued. Descriptors such as "half-hearted" and "foot-dragging" describe the court's—and most likely the jury's—view. The harassment described in *Zeno* suggests a schoolwide problem. Even when one perpetrator was disciplined for, say, using racial slurs, the testimony at trial was that other students would pick up the name-calling. A school-wide problem requires a schoolwide solution, and yet the district was slow to address it.

Finally, if the solution to an intractable harassment problem is hard to find, school administrators should be open to outside suggestions, and they should demonstrate

a willingness to follow through on those suggestions. Most importantly, the solutions should be specifically tailored to the school and its individual issues and concerns. Consultants who provide generic training or programming without attempting to address the specific challenges in the schools may be missing an opportunity to move the needle on solving the problem that brought them to the school in the first place. In *Zeno*, the court made particular mention of the lack of targeted training that the school district elected to provide.

Reasonable Responses to Harassment: What Should Defense Counsel Look For?

If the response of school officials in *Zeno* was unreasonable, what are the hallmarks of responses to harassment that do not result in imposition of liability? When harassment results in litigation, what interventions should defense counsel look for in preparing a defense?

The decision in *Galster*, is instructive: "After every reported or observed incident of bullying involving Doe, school officials promptly intervened. As the incidents persisted and escalated, so did the school's responses." 768 F.3d at 620. Thus prompt and escalating disciplinary and preventive measures allowed the school in *Galster* to escape liability *despite* the court's finding that plaintiff experienced severe, escalating harassment that negatively impacted her education. In other words, the school knew about the harassment, failed to stop it, it escalated, and the plaintiff was harmed. Yet, the school faced no legal liability. What exactly did the school officials in *Galster* do?

Many of the actions listed below, which the court cited with approval, are relatively simple, common sense responses, and yet the cumulative effect of such actions over time creates strong evidence against "deliberate indifference." Defense counsel are most likely to uncover examples that a court generally would approve of not necessarily in formal student records, but in meeting with teachers, counselors, and other school-based personnel.

- When T.M. erased some of Doe's work in sixth grade English class and Doe told the teacher, the teacher spoke with T.M. and explained that what he did was wrong. When the gym teacher saw T.M. throw a ball at Doe in gym class, the teacher involved the school counselor, who also spoke with Doe about the name-calling between her and T.M.
- When the problems between Doe and T.M. resurfaced in seventh grade, school officials again responded swiftly and reasonably to incidents that they knew about. When a teacher saw T.M. dump Doe's papers on the floor, he ordered T.M. to help her pick them up. When M.C. knocked papers off Doe's desk, a teacher intervened.
- When the band director noticed Doe and T.M. pushing in band class, he gave both of them detention. The school counselor continued to meet with Doe about once or twice a week.
- School officials reduced contact between Doe and T.M. by moving their lockers, assigning them to different study groups, and asking them to agree to stay away from each other.
- When a teacher saw T.M. and his friends chasing Doe with sticks, the teacher had the boys put the sticks down. When another teacher saw Doe throw ice cream at T.M. and T.M. push Doe down into a mud puddle, she sent them both to the office and the students' parents were called.
- When Doe reported the escalating harassment to the principal, he completed a thorough investigation, including interviewing witnesses, within 12 days of learning of the severe harassment. Not long after the investigation, the principal met with the Does and informed them of his decision to recommend the three boys for expulsion.

In short, the defense presented evidence to convince the court that as the harassment escalated, so did the school's response. As a result, the Seventh Circuit affirmed the grant of summary judgment for the defendants on Doe's Title VI and Title IX claims.

The holdings in *Galster* and *Zeno* are relied on by courts throughout the country. For example, in *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398 (5th Cir. 2015), the Fifth Circuit upheld the lower court's grant of summary judgment in favor of a mostly all-white school district in a case in which three African-American students were subjected to racial epithets and slurs over a number of years and a noose was placed next to a plaintiff's car in the school parking lot with a racially offensive note. The court observed,

> This was not the first incident involving a noose at the high school. The previous year, Doug Giles, another African-American student, found a noose made out of a shoelace in his locker. Giles reported the incident to Defendant Davis, who then addressed the boys athletic class, telling them that such actions were unacceptable and would not be tolerated. When no one admitted his involvement in the incident, Davis ordered the students to run laps as punishment.

Id. at 402.

Defense counsel are most likely to uncover examples that a court generally would approve of not necessarily in formal student records, but in meeting with teachers, counselors, and other school-based personnel.

The *Fennell* court found that the plaintiffs presented sufficient evidence of severe and pervasive racial harassment that was actionable under Title VI, stating that there is no question that repeatedly being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon is actionable harassment. *Id*. at 409.

However, the *Fennell* court found that the plaintiffs failed to raise a genuine dispute over whether the school district was deliberately indifferent to the harassment. The court stated:

> On several occasions, (the school district) responded to incidents of students using the word "n*****" with relatively

mild punishments, such as only addressing the class about the use of the word or contacting the offending students' parents. The weakest response came with respect to the shoelace noose found in Giles's locker, where Defendant Davis only reprimanded the students in the class and ordered them to run laps. Taken together, these relatively weak responses to harassment are concerning but are not tantamount to Marion ISD intentionally "subject[ing] its students to harassment."

No teacher would overlook a physical assault. The message has to be that non-physical harassing behavior is equally unacceptable, and if left unchecked, disrupts learning and can lead to physical violence.

Id. at 411.

The *Fennell* court relied on *Galster* for the proposition that "[s]chool officials are given broad latitude to resolve peer harassment." Ultimately, the court concluded that "[i]neffective responses… are not necessarily clearly unreasonable.… Because some action was taken in an attempt to address each of these issues, these incidents do not create a genuine issue of material fact as to deliberate indifference." *Id*.

Other factors undoubtedly influenced the court in *Fennell*. The trial court noted that the incidents of racial harassment, although serious, "were disbursed over more than a decade." *Fennell v. Marion Indep. Sch. Dist.*, 2014 U.S. Dist. Lexis 120033, at *52. In addition, the school district took actions to address what the court described as "racist attitudes [that] are already ingrained in some of its students." *Id*. For example, the school district consulted with the NAACP and subsequently brought in the U.S. Department of Justice to assist with cultural sensitivity training, in addition to the training that the school district already provided. *Id*. at *50.

Other courts, as in *Zeno*, may have viewed the facts in *Fennell* differently; "some action" is not necessarily enough to satisfy the *Davis* mandate. Nonetheless, given the potential for harm to students and costly litigation, school personnel are best advised to be on the same page when it comes to responding to harassment.

An Action Plan: Getting School Administration, Staff, and Students on the Same Page

The proper response to harassment is a win-win opportunity—better for the students, and an inoculation against liability. Attorneys who represent educational institutions and school districts can serve their clients by offering the following roadmap:

Prevention

A positive school climate is the most effective deterrent to student bullying and harassment. No easy fix exists for schools struggling with these challenges, but strong leadership setting firm expectations for behavior in school, coupled with consistent enforcement, is a good start. A climate of tolerance, respect, and civility cannot be created overnight. However, the way that administrators respond to incidents that occur while the school is on its path to an improved climate can affect the length of the journey. Proper responses require administrators, staff, and students all to be on the same page regarding what harassment is, what to do if it occurs, and how it will be addressed.

Defining Prohibited Behavior

As educational institutions, schools should be well equipped to teach students what harassment looks like, and why it is not permitted. Students learn by example. The administration and staff have to agree that racial slurs, derogatory comments, laughing at students speaking their native language, calling immigrants "Osama bin Laden" and telling them to "go home," and intimidating behaviors such as bumping and pushing are not "normal" or "rite of passage" teasing. No teacher would overlook a physical assault. The message has to be that non-physical harassing behavior is equally unacceptable, and if left unchecked, disrupts learning and can lead to physical violence.

Why is it necessary to point this out? Some staff may have been victims of such "teasing" themselves, may doubt its seriousness, or feel that they are ill equipped to address the problems of society at large. These concerns are genuine, and school leadership is in the best position to address them. But counsel should be clear to define prohibited harassment, and the need to address it.

Instruct Students to Report Harassment

It may be counterintuitive, but victims of harassment often do not know what they are supposed to do about it. Recent immigrants may think "that's just the way it is here." Some cultures frown on complaining, or fear "coming to the attention of the authorities." It is not easy to overcome resistance to reporting harassment, but a good place to start is explicit instruction, in language that the students understand. Students are most likely to report if they are told they can discuss it with any member of the school staff that they trust. That brings us to the next point…

School Staff Must Know What to Do if a Student Reports Being Harassed

If a teacher or other school employee witnesses a student being harassed, or if a student reports it, there must be clarity on next steps: *The incident must be brought to the attention of the person designated to investigate and respond to harassment complaints.* Teachers and other staff must understand that they cannot brush complaints aside or minimize them, because this will only deter future reporting and risk an escalation of the offensive behavior. Teachers and other school staff who receive reports of harassment are not in a position to conduct a thorough investigation. Well-meaning staff may take individual actions—such as moving a student to a different seat, or allowing a student to eat lunch in his or her classroom—that fail to address harassment that takes place in other settings. A good practice is for one or more persons to be designated

by the principal to receive reports of bullying and harassment so that they can be fully investigated.

In *Zeno*, the court noted that a jury could have reasonably found that the district ignored the many signals that greater, more directed action was needed. Specifically, although the school officer charged with investigating Title VI complaints knew that Anthony was being harassed, she elected not to investigate, which might have prompted an earlier and adjusted administrative response.

School Staff Must Intervene When They Witness Harassment, if They Can Safely Do So

If a teacher or other member of the school staff witnesses an example of harassment—be it use of racial slurs, pushing or shoving, or worse—and simply ignores it, a strong message is conveyed. Consistent, prompt intervention by adults who encounter unacceptable behavior sends an equally strong message that the conduct will not be tolerated.

Complaints of Harassment Must Be Properly Investigated

The failure of the school to conduct an investigation properly likely contributed to the high verdict in *Zeno*. The steps of a proper investigation must include, at a minimum, speaking to the person reporting harassment, getting his or her account in a language with which he or she feels most comfortable speaking, and following up with witnesses and any written, photographic, or other evidence. Reasonableness is the key concept to conducting a proper investigation commensurate with the nature of the allegations.

A Reasonable Response to Incidents of Harassment

If a finding of harassment is warranted, the school's response must be reasonably calculated to put an end to it. Depending on the nature of the incident, a reasonable response can include appropriate discipline or supportive interventions for the accused student; appropriate support for the victim; involvement of school counselors, psychologists, and other supports for the accused student and victim; parental notification and involvement; and efforts to separate the accused student from the victim.

However, a disciplinary response alone may not be sufficient. If the school culture is a factor in the continuing harassment, it must be addressed along with the conduct of individual students. Appropriate, focused, schoolwide training for students, faculty, and even parents, may be required.

Conclusion

While the law recognizes the deleterious effects of peer harassment in schools, it does not hold school districts and their personnel liable for every such incident that occurs. Preventing such conduct is difficult. The fundamental demand on schools under the Civil Rights Act is that once a school has actual knowledge of harassment, it should take actions that are reasonably calculated to put an end to it.

School law attorneys can help their clients draft appropriate anti-harassment policies and procedures designed to bring clarity to the difficult and complicated challenges around student harassment. In difficult cases, attorneys can assist clients to devise appropriate responses. If a school's efforts aren't working, don't keep repeating them, seek additional guidance, and ensure that the school's response is specific to the facts of the situation at hand, or be prepared to pay a potentially heavy price.