

ARTICLE

Identifying, Investigating and Responding to School Bullying in Modern Times

While school bullying is not a new phenomenon, the media attention upon school shootings and suicides alleged to involve bullying victims is greater than ever. According to the experts, school bullying has widespread and harmful impacts on victims and other students, and it can push a student down the path toward self-harm or causing harm to others. School districts now see bullying as a major concern that must be confronted, rather than avoided, and they have increased efforts to discourage, detect, investigate, and prevent bullying at their school sites. Federal and state governments have also encouraged this focus and provide guidance and/or procedures to help address the issue.

On the federal level, the government has studied the issue of school bullying and violence and it has issued guidance to school districts that links and addresses both issues. For example, President Obama issued a Presidential Directive in 2013 that identified key school safety initiatives and specific proposals to curb school bullying after the tragic school shooting at Sandy Hook Elementary School in 2012.

At the state level in California, bullying is addressed several places in the Education Code. Initially, each school district should already comply with the Comprehensive School Safety Plan statutes which require policies to address harassment and strategies for promoting "a safe and orderly environment conducive to learning." (Ed. Code §§ 32280-32289.) These statutes encourage - but do not require - that these safety plans include policies and procedures to prevent school bullying. (Ed. Code §§ 32280-32289.)

Defining Bullying

With regard to student discipline, the California Legislature provided a definition of "bullying" when it revised the Education Code to include bullying as a disciplinable offense. (Ed. Code § 49800(r).) Section 49800(r) defines bullying to mean:

1. *Any severe or pervasive physical or verbal act or conduct;*
2. *That is directed toward one or more pupils; and*
3. *That has had, or can be reasonably predicted to have, one or more of the following effects:*
 - a. Placing a reasonable pupil or pupils in fear of harm to that his/her/their person or property;
 - b. Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health;
 - c. Causing a reasonable pupil to experience substantial interference with his or her academic performance; or
 - d. Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

This definition now clarifies the term "bullying" for disciplinary purposes, but



Trevin E. Sims
Partner
Los Angeles Office
tsims@lozanosmith.com



Darren C. Kameya
Partner
Los Angeles Office
dkameya@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this article does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

ARTICLE

still leaves many questions unanswered because of the unending variety of situations that could give rise to a bullying claim. Many times, student misconduct requires counseling and/or minor discipline even if it does not qualify for discipline under Section 49800(r) of the Education Code.

Further Guidelines for a Bullying Investigation

A school district is obligated to investigate allegations of bullying upon receipt of a bullying complaint or when a school district learns of a bullying incident, and Section 49800(r) provides a minimum standard for determining whether bullying has occurred for disciplinary purposes. In reality, however, local school districts still need to develop and universally implement practical standards for investigating bullying claims. An investigator will need to determine whether alleged misconduct is expellable bullying, significantly poor behavior, or just bad manners. "I know it when I see it!" is a phrase often used as a rule of thumb when evaluating the "obscenity" of free speech under the First Amendment. Without clearer standards set at the local level, this may be the rule of thumb used by schools to evaluate bullying complaints and it will open up administrative decisions to greater scrutiny.

Bullying is also addressed in the Education Code through the Safe Place to Learn Act (SPLA), which requires each school district to adopt policies to prohibit school bullying when it is based on protected classifications, and to implement procedures for filing and investigating complaints of bullying. (Ed. Code §§ 234-234.5.) The SPLA does not contain its own definition of "bullying," but both the California Department of Education (CDE) and United States Department of Education (USDOE) have published guidance on how "bullying" might be defined under applicable discrimination laws. The CDE has explained that:

"School staff must be aware of children's taunts that occur from time to time and acknowledge injured feelings and issues in dispute. Bullying becomes a concern when hurtful or aggressive behavior toward an individual or a group appears to be unprovoked, intentional, and (usually) repeated."

(Bullying at School, California Department of Education (2003).)

Characteristics of Bullying

The CDE has identified some characteristics of bullying, and has noted one researcher's determination that a bullying act consists of the following elements: (1) A desire to hurt; (2) A hurtful action; (3) A power imbalance; (4) Repetition of hurtful actions (typically); (5) An unjust use of power; (6) Evident enjoyment by the aggressor; and (6) A sense of being oppressed by the victim. In its most recent FAQs on bullying, the CDE defined bullying as: "Exposing a person to abusive actions repeatedly over time." (Bullying - Frequently Asked Questions, California Department of Education, <http://www.cde.ca.gov/lr/ss/se/bullyfaq.asp>.) Notably, the CDE's guidance does not refer to or rely upon the definition of "bullying" that is used for purposes of student discipline.

The USDOE has issued similar, but not identical, guidance when compared to the CDE's publications. While there is no federal statutory definition, the USDOE has described bullying as:

"[U]nwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time."

(Bullying Definition, StopBullying.gov, <http://www.stopbullying.gov/what-is-bullying/definition/>; See also "Analysis of State Bullying Laws and Policies, U.S. Department of Education (2011) ["Researchers have traditionally defined bullying as a repeated pattern of aggressive behavior that involves an imbalance of power and that purposefully inflicts harm on the bullying victim."].)

ARTICLE

For both the USDOE and CDE, bullying consists of behavior that: (1) is aggressive, (2) includes an imbalance of power; and (3) includes repetition (depending upon the severity of behavior). For purposes of defining bullying under the SPLA, school board policies (including the CSBA model policy) incorporate some variation of the elements used by the CDE and USDOE to describe an act of bullying.

Nuanced Differences Between Standards and Processes

There are subtle but important distinctions to consider when discussing bullying as a basis for student discipline, under the SPLA, or under a general student conduct code. Briefly, districts should remember that bullying under the SPLA requires an act motivated by protected characteristic (such as race, sex, gender identity, or disability), while bullying under student discipline standards does not. And while an investigation of bullying under the SPLA is subject to the district's uniform complaint procedure (UCP) with a right to appeal to the CDE, a finding of bullying for student discipline purposes does not follow the UCP appeal process unless it also involves a protected characteristic.

Districts should also be mindful of the differences in using "subjective" criteria vs. "objective" criteria when evaluating a bullying claim. For discipline purposes, Section 49800(r) expressly requires a review of the alleged misconduct and its effect from the perspective of the "reasonable pupil." It then defines "reasonable pupil" as "a pupil, including, but not limited to, an exceptional needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, or for a person of his or her age with his or her exceptional needs." This "reasonable pupil" requirement is not included in the bullying definitions used by the CDE or USDOE.

School administrators would benefit greatly from clearer guidance on what exactly constitutes bullying under the SPLA, and with greater harmony and consistency with the student discipline statutes. At present, however, the lack of statutory clarity and consistency makes staff training and the proper investigation of bullying claims all the more important. Both are essential for schools to take appropriate steps to prevent and respond to bullying, as required by law. Understanding and distinguishing these concepts will empower school administrators to follow the right process, to ask the right questions, and to seek the right information when investigating bullying complaints. Training on student bullying prevention, detection, and investigations is critical for school officials and will minimize a school district's potential liability if a school bullying complaint turns into a lawsuit claiming that the district negligently failed to fulfill its duty to provide a safe and secure educational environment for its students.