

Aced It!

Correctly Addressing Mental Health Needs in the Classroom

Karen Haase
 (402) 804-8000
kbs@kschoolsllaw.com
 /KBSchoollaw
 @KarenHaase

1

Disclaimers

- KSB School Law represents only public schools and related entities (like Educational Cooperatives).
 - We DO NOT represent teachers, students, parents, or district employees.
- This presentation and these slides DO NOT constitute legal advice.
- Neither this presentation nor these slides shall be construed to create an attorney-client relationship between you and KSB School Law or between you and us.
- You should have no expectation of confidentiality or that anything that we discuss today is privileged.

2

Overview for Today

- A Growing Issue
- Mental Health and IDEA Eligibility
- Mental Health and Section 504 Eligibility
- Punishment for Threats
- Bullying, Harassment, and Related Risks



"Lately a number of my other clients have been finding solace in not giving a crap."

3

Who are we talking about?

- Recent Statistics Compiled by NAMI
 - 16.5% of U.S. youth aged 6-17 experienced a mental health disorder in 2016 (7.7 million people)
 - 50.6% of U.S. youth aged 6-17 with a mental health disorder received treatment in 2016
 - Suicide is 2nd leading cause of death among people aged 10-34
 - The average delay between onset of mental illness symptoms and treatment is 11 years
- Half of all mental illness occurs before the age of 14, and 75 percent by the age of 24 (CMI)

4

Who are we talking about?

- Among children aged 2-8 years, boys were more likely than girls to have a mental, behavioral, or developmental disorder
- Among children living below 100% of the federal poverty level, more than 1 in 5 (22%) had a mental, behavioral, or developmental disorder
- Age and poverty level affected the likelihood of children receiving treatment for anxiety, depression, or behavior problems

5

Connection with Social Media Use



6

Wall Street Journal Report

About a year ago, teenager Anastasia Vlasova started seeing a therapist. She had developed an eating disorder, and had a clear idea of what led to it: her time on Instagram.

She joined the platform at 13, and eventually was spending three hours a day entranced by the seemingly perfect lives and bodies of the fitness influencers who posted on the app.

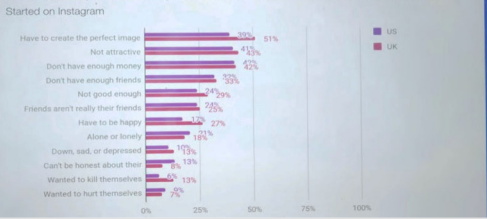
“When I went on Instagram, all I saw were images of chiseled bodies, perfect abs and women doing 100 burpees in 10 minutes,” said Ms. Vlasova, now 18, who lives in Reston, Va.

Around that time, researchers inside Instagram, which is owned by Facebook Inc., were studying this kind of experience and asking whether it was part of a broader phenomenon. Their findings confirmed some serious problems.

7

If you felt these things in the last month, did any start on Instagram?

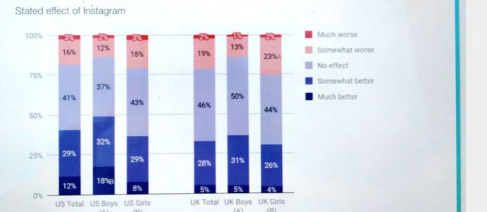
The perfect image, feeling attractive, and having enough money are the most likely to have started on Instagram



8

In general, how has Instagram affected the way you feel about yourself/mental health?

One in five teens say that Instagram makes them feel worse about themselves, with UK girls the most negative



9

In general, how has Instagram affected the way you feel about yourself/mental health?

Teens who struggle with mental health say Instagram makes it worse

- Young people are acutely aware that Instagram can be bad for their mental health, yet are compelled to spend time on the app for fear of missing out on cultural and social trends.
- Teens specifically call out the following as ways that Instagram harms their mental health:
 - pressure to conform to social stereotypes
 - pressure to match the money and body shapes of influencers
 - the need for validation -- views, likes, followers
 - friendship conflicts, bullying, and hate speech
 - over-sexualization of girls
 - inappropriate advertisements targeted to vulnerable groups

Stated effect of Instagram

Gender	Worse	Same	Better
Boys	44%	48%	8%
Girls	58%	37%	5%

Q: In general, how has Instagram affected the way you feel about yourself/your mental health? This chart displays the responses broken down among those who answered "the way you feel about yourself" and those who answered "your mental health".

10

Wall Street Journal Report

- 40%+ of Instagram's users 22 years old and younger
- 22 million teens log onto Instagram in the U.S. each day compared with five million teens logging onto Facebook
- Facebook internal documents:
 - "Thirty-two percent of teen girls said that when they felt bad about their bodies, Instagram made them feel worse. . ."
 - "We make body image issues worse for one in three teen girls. . ."
 - "Teens blame Instagram for increases in the rate of anxiety and depression. This reaction was unprompted and consistent across all groups."
 - Among teens who reported suicidal thoughts, 13% of British users and 6% of American users traced the desire to kill themselves to Instagram
 - Teens seen as the consumer group where continued growth is most likely

11

Wall Street Journal Report

- Facebook internal documents:
 - 14% of boys in the U.S. said Instagram made them feel worse about themselves
 - In their report on body image in 2020, Facebook's researchers found that 40% of teen boys experience negative social comparison
- "For some people it might be tempting to dismiss this as teen girls being sad," said Dr. Twenge. But "we're looking at clinical-level depression that requires treatment. We're talking about self harm that lands people in the ER."

12

Consistent With Past Studies



Screen Time Associated With Poorer Mental Health, But Closer Friendships In Children

Sep 08 2021

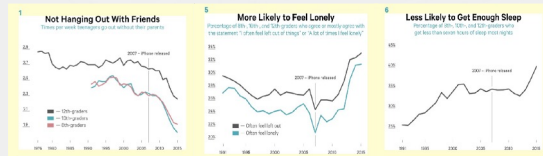
A new analysis suggests that "screen time" may be associated with both positive and negative effects on youth. Researchers explored relationships between screen time – including TV, video games, and social media – and behavioral outcomes in over 11,000 children ages 9-10. While increased screen time was modestly associated with poorer mental health, ADHD symptoms, academic performance and sleep, children with more screen time also tended to have more close friendships. Notably, researchers found that another characteristic of study participants – socioeconomic status – accounted for more of the differences among children than screen time itself. To learn more, see [the study in PLOS One](#).

13

Consistent With Past Studies

- Instagram most likely to cause young people to feel depressed and lonely out of major social apps, study says...

<https://www.cnn.com/2017/05/19/instagram-most-likely-to-cause-young-people-to-feel-depressed-and-lonely-out-of-major-social-apps-study-says.html>



14

Exacerbated by the Pandemic

- In the first half 2021, children’s hospitals saw 16.7% increase in mental health related emergencies and inpatient admissions among kids ages 5 to 17
- Beginning in May 2020, the CDC found that emergency department visits for suicide attempts began to increase among adolescents ages 12 to 17, with visits 39% higher

<https://www.nami.org/getattachment/a7c7671b-008b-4cc3-a1dc-1d21bbf26c9c/Letter-to-Congressional-Leadership-on-Children-Ado>

15

Exacerbated by the Pandemic

- Overall rates of ER visits have decreased during COVID, the proportion of visits related to mental health emergencies has grown
 - up 24% for kids ages 5 to 11
 - up 31% for kids ages 12 to 17

16

Who are we talking about?

- In the first half 2021, children’s hospitals saw 16.7% increase in mental health related emergencies and inpatient admissions among kids ages 5 to 17
- Beginning in May 2020, the CDC found that emergency department visits for suicide attempts began to increase among adolescents ages 12 to 17, with visits 39% higher

<https://www.nami.org/getattachment/a7c7671b-008b-4cc3-a1dc-1d21bbf26c9c/Letter-to-Congressional-Leadership-on-Children-Ado>

17

Affecting Our Staff, Too



"Can you come in here for a sec? I've been digging in my heels all morning and now I'm stuck."

18

Todd v. Fayette Cty. Sch. Dist.
63 NDLR 88 (11th Cir. 2021)

- Middle school art teacher diagnosed with major depressive disorder and anxiety
 - Experienced a period of significant depression following father’s death
 - Informed principal, who referred her to a mental health professional and assisted in scheduling an appointment
 - Principal adjusted work schedule to attend appointments and was generally supportive
 - Things took a turn for the worse, and she allegedly:
 - Told another teacher: "if she had a gun, she and [her son] would not come back from" winter break
 - Described to another teacher six specific ways she considered killing herself and her son
 - Continued to threaten to kill self and son the following week at work; admitted to taking five Xanax during the day

19

Todd v. Fayette Cty. Sch. Dist.
63 NDLR 88 (11th Cir. 2021)

- Peers troubled by her behavior and reported to administration that she ingested multiple Xanax pills during the school day, appeared agitated, and threatened to kill herself and her son (a student at the school)
- Administration reported to SRO, who determined Todd is a potential danger and removed her from her classroom
 - School arranged for her to be driven to appointment with therapist due to concerns about her ability to drive after medication
 - Peer again reported that Todd referred to killing herself and her son
 - Administration arranged for Todd’s son to leave with family friend and convinced Todd to go to hospital
 - Involuntarily committed until released four days later

20

Todd v. Fayette Cty. Sch. Dist.
63 NDLR 88 (11th Cir. 2021)

- Administration then barred Todd from returning to work pending investigation into incident and placed her on administrative leave, then FMLA leave upon request
 - Todd was asked to resign but refused
- Doctor submitted letter that she would be fit to return, but that was shortly followed by reports of other threatening statements
- Administration determined that Todd made the threatening statements, was concerned about the safety threat she posed and determined she could not effectively work in the district
- Todd filed suit alleging violation of the ADA, Rehabilitation Act and FMLA

21

Todd v. Fayette Cty. Sch. Dist.
63 NDLR 88 (11th Cir. 2021)

- 11th Circuit: "Every day, and in many cases, throughout their entire adult lives, people with major depressive disorder contribute significantly and effectively in their jobs. And oftentimes, the [ADA] protects these individuals from adverse employment action taken for reasons relating to their condition. But even the best among us sometimes have setbacks. And the ADA does not require an employer to retain an employee who it believes behaved in a threatening and dangerous way--even if the employee's major depressive disorder is one reason, or the sole reason, that the employee engaged in that behavior."

22

Lockhart v. Marietta City Sch.

2021 U.S. App. LEXIS 30991 (6th Cir. 2021)

- Middle school PE teacher employed for 19 years
- Was shoveling snow on a morning in January, 2018
 - She claimed to have experienced a "deeply religious event" where she lost consciousness, was lifted, and carried by a "supernatural power"
 - Claimed to have seen visions as "God entered her body"
 - Felt relief from chronic pain
- When she returned to work, she shared her experience eagerly with students and staff

23

Lockhart v. Marietta City Sch.

2021 U.S. App. LEXIS 30991 (6th Cir. 2021)

- Informed her principal of the event and said she may need to hold a staff meeting about the experience
 - Principal later learned that she kept a class twenty minutes late to talk about her experience
 - Received parent complaints
- Principal instructs Lockhart to be careful about what she said
 - Responded with more discussion of her experience
- Concerns grew after further meetings where Lockhart vaguely referred to a future, news making event

24

Lockhart v. Marietta City Sch.
 2021 U.S. App. LEXIS 30991 (6th Cir. 2021)

- Placed on administrative leave
 - Followed by concerning social media posts
- District arranged for evaluation
 - Evaluation determined that Lockhart was no longer fit to perform the essential functions of her position
- District proceeded to termination
- Lockhart sued, and District Court granted summary judgement to district
- 6th Cir.: Affirmed
 - Cannot prove that her disability, rather than her misconduct, led to termination

25

Reynolds v. Little Rock Sch. Dist.
 121 LRP 26751 (8th Cir. 2021)

- Reynolds was a special education teacher who frequently complained about the educational inequalities faced by students with disabilities
- Tensions grew as school became less receptive to his input and transferred him to a new position
- Reassignment coincided with a period of increased anxiety following a family tragedy
- Eventually required medical leave
- After four months of leave, school asked whether Reynolds would return
 - "Not at this time"; told to retire or be fired and Reynolds chose to retire

26

Reynolds v. Little Rock Sch. Dist.
 121 LRP 26751 (8th Cir. 2021)

- Filed EEOC complaint alleging the school failed to accommodate his disability
- Subsequently brought suit alleging he was retaliated against for advocating on behalf of students with disabilities in violation of Section 504
 - Parties agreed that the EEOC complaint was necessary precursor to 504 claims, although this may not be true
- 8th Cir.: Failure to exhaust his claims with the EEOC undermined his complaint
 - Should have argued exhaustion not required or maintained a consistent theory of relief across the venues

27

Mental Health and the IDEA



"Lately I've been working on self-care. It's a nice change of pace from self loathing."

28

34 C.F.R. § 300.34(a)

"Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training."

29

34 C.F.R. § 300.34(a)

"Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training."

30

34 C.F.R. § 300.34(c)(5)

"*Medical services* means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."

31

34 C.F.R. § 300.34(c)(13)

"*School health services and school nurse services* means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person."

32

34 C.F.R. § 300.34(c)(2)

"*Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel."

33

34 C.F.R. § 300.34(c)(10)

"Psychological services includes -

- (i) Administering psychological and educational tests, and other assessment procedures;
- (ii) Interpreting assessment results;
- (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;
- (iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;
- (v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and
- (vi) Assisting in developing positive behavioral intervention strategies."

34

IDEA Eligibility

- Child with an enumerated disability who, by reason thereof, needs special education and related services
 - Autism, **behavior disorder (ED)**, deaf-blindness, developmental delay, hearing impairment, intellectual disability, multiple impairment, orthopedic impairment, **other health impairment**, specific learning disability, speech-language impairment, traumatic brain injury, or visual impairment

35

M.P. v. West Hartford Bd. of Educ.

71 IDELR 207 (2d Cir. 2018)

- Student first hospitalized in December 2011
 - Began experiencing suicidal and homicidal ideations
 - After the student graduated, he was diagnosed with Asperger syndrome and a psychotic disorder
- Parents notified the school of student's hospitalization
- School convened Student Assistance Team (SAT) meeting

36

M.P. v. West Hartford Bd. of Educ.
71 IDELR 207 (2d Cir. 2018)

- Dec. 2011 SAT: "Student is humorous and well-liked, with high ability but inconsistent effort"
 - Agreed to accommodate student's condition and hospitalization, including excusing absences and allowing him to reduce course load
 - Asked for additional information regarding whether student should be diagnosed with ADD
- Jan. 2012: Student diagnosed with ADHD

37

M.P. v. West Hartford Bd. of Educ.
71 IDELR 207 (2d Cir. 2018)

- Shortly after ADHD diagnosis, district found Student eligible for Section 504 services but not IDEA
 - Implemented 504 plan with several accommodations
- March 2012: Student experienced an increase in anxiety culminating in refusal to attend school
 - School again evaluated student for IDEA services, but found him ineligible for ED because difficulties were not experienced over "a long period of time"

38

M.P. v. West Hartford Bd. of Educ.
71 IDELR 207 (2d Cir. 2018)

- Because student found ineligible for IDEA services, school amended his Section 504 plan to include homebound tutoring
- June 2012: After further troubling behavior, student again evaluated by district and this time was found eligible for IDEA services under ED
 - Began providing IDEA supports that improved student's performance and attendance

39

M.P. v. West Hartford Bd. of Educ.
71 IDELR 207 (2d Cir. 2018)

- At the end of the student’s senior year, dispute arose over the transition services to be provided
 - Parents brought claims against the district seeking two years of compensatory education on the grounds that it failed to meet child find obligation when it did not find the student eligible for services in January 2012
- Hearing Officer, District Court, and 2d Circuit all found district upheld its obligations

40

M.P. v. West Hartford Bd. of Educ.
71 IDELR 207 (2d Cir. 2018)

- 2d Cir.: District’s actions were both reasonable and accommodating. The student was provided FAPE under both IDEA and Section 504
 - IDEA defines emotional disturbance as requiring a student exhibit characteristics “over a long period of time”
 - Agreed district had basis to deny services until it could further monitor the student’s behavior

41

M.J.C. v. Special Sch. Dist. No. 1
58 IDELR 288 (D. Minn. 2012)

- Concerns about M.J.C.’s hyperactivity and behavior in school began in kindergarten
- Mom requests evaluation in 4th grade (fall)
 - Evaluated for speech-language, emotional behavioral disorder, and SLD
 - Not considered for other health impairment
- January: pediatrician recommended ADHD evaluation by psych and IEP/504; student diagnosed by psych
 - School received diagnosis of ADHD from psychologist, not doctor; did not reconsider eligibility

42

M.J.C. v. Special Sch. Dist. No. 1
58 IDELR 288 (D. Minn. 2012)

- Student again evaluated for disability in May
 - No written request to evaluate for emotional/behavioral disorder
 - Did not consider other health disability/impairment
- 5th Grade, student finally evaluated for OHD/OHI
 - Would have been eligible, but school decided that it lacked a written diagnosis of ADHD
 - Deemed psych report insufficient
 - Requested diagnosis from mother, but she couldn't immediately provide one from doctor
- Later transferred for behavior; numerous suspensions

43

M.J.C. v. Special Sch. Dist. No. 1
58 IDELR 288 (D. Minn. 2012)

- Dist. Ct.: District violated child find obligations and denied FAPE
 - Insufficient that District evaluated and requested
 - "School districts must provide 'medical services,' including evaluations by physicians, when needed. Because medical services identify children's disabilities and their need for special education, it is not a prerequisite to receiving these services that a child has already been qualified as having a disability. It is understandable that the District was frustrated by Martin's failure to provide a physician's diagnosis. But when a child like M.J.C. is so obviously failing, and his disability and need for special education are known, the law requires the District to act."

44

M.J.C. v. Special Sch. Dist. No. 1
58 IDELR 288 (D. Minn. 2012)

- Dist. Ct.: District violated child find obligations and denied FAPE
 - Insufficient that District evaluated and requested
 - "School districts must provide 'medical services,' including evaluations by physicians, when needed. Because medical services identify children's disabilities and their need for special education, it is not a prerequisite to receiving these services that a child has already been qualified as having a disability. It is understandable that the District was frustrated by Martin's failure to provide a physician's diagnosis. But when a child like M.J.C. is so obviously failing, and his disability and need for special education are known, the law requires the District to act."

45

N.G. v. Placentia Yorba Linda USD
76 IDELR 117 (9th Cir. 2020)

- Adult student with autism
- District had student placed in nonpublic school day program
- Parents request full-time residential placement because behavior progress at school not reflected at home
 - Allegedly exhibited aggressive and self-injurious behaviors at home to detriment of twin sister
 - District denied request

46

N.G. v. Placentia Yorba Linda USD
76 IDELR 117 (9th Cir. 2020)

- Parents filed complaint
 - Parties settled with agreement to fund residential placement for ultimately one year and to develop new IEP following placement
- Subsequent IEP: District declined to offer private placement
 - Parents subsequently complained district did not offer FAPE
- ALJ: District provided FAPE
 - Weight of the evidence demonstrates student making significant educational and behavioral progress prior to residential placement; regressed after residential placement
- District Court and 9th Circuit affirm

47

Financial Responsibility Circuit Split

- "Inextricably Intertwined" – 3rd, 4th, 6th, and D.C. Circuits
 - Where a student's educational needs are inseparable from social, emotional, and mental health needs and the student will not be able to benefit academically without the therapeutic aspects of a residential program the district will be responsible for funding the entirety of this placement.
 - If a student's social, emotional, and mental health problems are distinct from the learning process and the student is able to achieve a reasonable educational benefit and make meaningful educational progress in spite of these problems, a district may be required to finance only the educational component of the residential placement
 - *In Kruehle v. New Castle County School District*, 552 IDELR 350 (3d Cir. 1981)

48

Financial Responsibility Circuit Split

- "Necessary for Educational Purposes" – 9th Circuit
 - The "analysis must focus on whether [the] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process."
 - *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 16 IDELR 944 (9th Cir. 1990)

49

Mental Health and Section 504



"I'm working on me, I'm working on me.
I'm working on me..."

50

Section 504 29 U.S.C. § 794(a)

"No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]"

51

Eligibility

- A child is eligible for protections Section 504 and ADA if he or she:
 - Has a physical or mental impairment
 - Which substantially limits
 - A major life activity
 - And "needs or is believed to need" services
- It is **not** necessary to establish adverse affect on educational performance

52

Physical or Mental Impairment

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or **any mental or psychological disorder**, such as mental retardation, organic brain syndrome, **emotional or mental illness**, and specific learning disabilities

53

Substantially Limits

- Congress: "[An activity is substantially limited when it is] restricted as to the conditions, manner or duration under which they can be performed in comparison to most people."
- Excludes "transitory" impairments, which generally last 6 months or less; BUT
- Includes "episodic" impairments and impairments which are in remission

54

Child Find
34 C.F.R. § 104.32

- A recipient who operates a public elementary or secondary education program or activity shall annually:
 - Undertake to identify and locate every qualified [person with a disability] residing in the recipient’s jurisdiction who is not receiving a public education; and
 - Take appropriate steps to notify [persons with disabilities] and their parents of the recipient’s [child find] duty

55

When is a 504 referral required?

- When a district believes that the student has a physical or mental impairment that substantially limits one or more major life activities; and the student is in need of either regular education with supplementary services or special education and related services.
 - Cannot consider “mitigating measures” (except glasses)

56

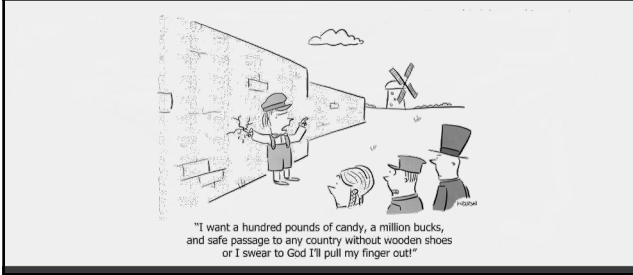
When To Refer A Student

- Parents report health condition
- Parents request evaluation*
- Student failing to make progress
- Staff refers student to SAT*
- Student returning to school after a serious injury
- Student failed to verify for SpEd - consider immediately eligibility for Section 504 services
- Student habitually absent

**Parent request is a "trump card"*

57

Punishment of Students with Disabilities for Social Media and Threats



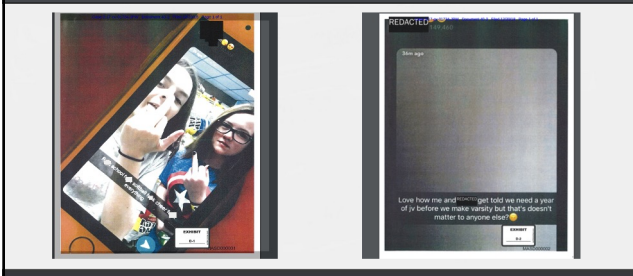
58

Mahanoy Area Sch. Dist. v. B.L. 141 S. Ct. 976 (U.S. 2021)

- High school sophomore tries out for cheer, gets assigned to JV while a freshman makes varsity
- Saturday, while with a friend at a gas station, she posts selfie on snapchat with her middle fingers raised and the caption *F*ck school f*ck softball f*ck cheer f*ck everything*
 - Followed with another post about being told she needs another year of JV while a freshman was elevated

59

Mahanoy Area Sch. Dist. v. B.L. 141 S. Ct. 976 (U.S. 2021)



60

Mahanoy Area Sch. Dist. v. B.L.
141 S. Ct. 976 (U.S. 2021)

- Teammates brought post to attention of coaches
- Coaches determined that the snap violated team and school rules that B.L. acknowledged prior to season
 - Team rules required cheerleaders to “avoid foul language and inappropriate gestures” and to refrain from sharing “negative information regarding cheerleading, cheerleaders, or coaches on the internet.”
- B.L. removed from team; decision upheld by administrators and board
- B.L. sued

61

Mahanoy Area Sch. Dist. v. B.L.
141 S. Ct. 976 (U.S. 2021)

- Supreme Court
 - Schools can regulate off-campus speech, including on social media
 - Must actually cause or be reasonably likely to cause a “material and substantial disruption”
 - Exceptions for inculcating values and civility (*Fraser*) may not apply at all off-campus
 - Courts should be “skeptical” of discipline for off-campus speech because it is functionally a 24/7 rule, schools aren’t “in loco parentis”, and schools are “nurseries of democracy”

62

Mahanoy Area Sch. Dist. v. B.L.
141 S. Ct. 976 (U.S. 2021)

- Supreme Court
 - Schools are given more deference (apparently) when the speech constitutes
 - bullying
 - harassment
 - threats
 - violation of online school activities, and
 - breaches of school security devices

63

J. H.-B. v. Pocono Mtn. Sch. Dist.
522 F. Supp. (M.D. Pa. 2021)

- Student diagnosed w/ ASD and Tourette’s Syndrome
- Students reported that student had made statements about having a hit list; locker search revealed nothing
- Counselor looked at the student’s Instagram; discovered:
 - images of the Las Vegas mass shooting
 - images of people using automatic weapons
 - images of black people captioned with racist language
 - references to school shootings,
 - references to ethnic cleansing expelled after posting hit list on social media

64

J. H.-B. v. Pocono Mtn. Sch. Dist.
522 F. Supp. (M.D. Pa. 2021)

- School emergency excluded student; required psychological evaluation before returning to school
- Initial evaluation said no threat; school required:
 - forensic psychological evaluation
 - a psychoeducational evaluation
 - a psychiatric evaluation
- Upon return, student required to pass through metal detector and submit to weapons search every day

65

J. H.-B. v. Pocono Mtn. Sch. Dist.
522 F. Supp. (M.D. Pa. 2021)

- Student sued claiming:
 - Equal Protection
 - ADA and Section 504
 - First Amendment
- School moved for summary judgment on all claims

66

J. H.-B. v. Pocono Mtn. Sch. Dist.
522 F. Supp. (M.D. Pa. 2021)

- Equal protection: claims dismissed (school wins)
 - District did not treat student differently because of his neuroatypicality, but because he allegedly threatened school violence and Instagram posts could have rationally led District officials to believe that the threat was more credible
- ADA and Section 504: claims dismissed (school wins)
 - Student not discriminated against based on his disability but based on district assessment of the threat he posed

67

J. H.-B. v. Pocono Mtn. Sch. Dist.
522 F. Supp. (M.D. Pa. 2021)

- First Amendment: claims allowed to proceed (school loses)
 - If student had made hit list, his speech would be unprotected
 - Here, Instagram posts did not cause material and substantial disruption, so cannot be punished for them

68

Wake County Bd. of Ed.
121 LRP 34531 (NC SEA 2021)

- Gen ed teen made a bomb threat was involuntarily committed
- District suspended and ultimately expelled him
- After discharged from the hospital and still serving his suspension, the district initiated a referral and held an MDR
- MDR team determined that the teen's conduct wasn't a manifestation of a suspected disability

69

Wake County Bd. of Ed.
121 LRP 34531 (NC SEA 2021)

- The parents filed for due process
- ALJ:
 - Prior to threat, student wasn't "on the radar" for suspected disabilities, earned As, and had no history of misconduct
 - Gratuitous MDR occurred before any eligibility determination
 - Once the district decided to conduct one, the review should have been compliant

70

Wake County Bd. of Ed.
121 LRP 34531 (NC SEA 2021)

- ALJ:
 - District denied the parents meaningful participation
 - Failed to consider relevant medical documentation or wait for completed evaluations
 - Failed to request that mental health providers attend the MDR
 - Ultimately found that misconduct was not a manifestation of a disability so errors were harmless

71

Bullying, Harassment, and Related Risks



"I don't mean to interrupt, but have you ever considered this might make one hell of a musical?"

72

Bullying at a "tipping point"

- All 50 states have anti-bullying laws
- Heavy emphasis by OCR and USDOE
- Basis for "deliberate indifference" discrimination claims
- 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.](#)

73

Bullying Defined

- CDC's 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 highly likely to be repeated"

74

Objective or Subjective?

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

75

Harassment Defined

- 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

76

Suicide Risk is Declining but Still of Significant Concern

- Youth suicide rates have steadily declined in the U.S. 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 school students (ages 10-14)
- Although there is very little evidence of causation, there is strong correlation between being victimized and suicide risk

77

Differing Legal Standards

- The Courts
 - Deliberate indifference
 - Some courts utilize bad faith/gross misjudgment standard
 - 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

78

DCL "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

79

Bowe v. Eau Claire Area Sch. Dist.
71 IDELR 168 (W.D. Wis. 2018)

- Student with Asperger syndrome victimized by a number of different students in a variety of incidents
 - Peers directed derogatory and demeaning insults toward the student, often in language that was clearly inappropriate
 - Student's house was also vandalized in acts of bullying
 - Bag of feces was left at the home
 - On another occasion the house was egged

80

Bowe v. Eau Claire Area Sch. Dist.
71 IDELR 168 (W.D. Wis. 2018)

- Over the course of the student's time at the district, the student and his parents complained of 30 discrete acts of bullying
- "Defendants investigated each complaint, which generally involved interviewing the students involved, and sometimes the investigation included referring the matter to police or speaking to the classroom teacher."

81

Bowe v. Eau Claire Area Sch. Dist.

71 IDELR 168 (W.D. Wis. 2018)

- If the district determined that a student behaved inappropriately, it would call the student's parents or implement corrective action
 - Corrective action ranged from counseling, to suspension, to referral for criminal charges
- Parents took issue with the adequacy of these responses, alleging that the failure to more severely punish bullies constituted deliberate indifference

82

Bowe v. Eau Claire Area Sch. Dist.

71 IDELR 168 (W.D. Wis. 2018)

- Court: District "certainly favored counseling" rather than more punitive forms of punishment... But...
 - The counseling appeared effective in many instances
 - Bullying incidents alleged included a large number of schoolmates, rather than the repeated actions of a select few

83

Bowe v. Eau Claire Area Sch. Dist.

71 IDELR 168 (W.D. Wis. 2018)

- Court: "Continued counseling of a handful of students after numerous instances of bullying might be clearly unreasonable, but the evidence does not indicate that's what happened here."
 - While the district should not be "particularly proud of its response to the problem," the district did not act with deliberate indifference

84

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

85

Bullying Could Result in Denial of FAPE

- *M.L. v. Federal Way Sch. Dist.*, 105 LRP 13966, 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 could not meet this standard

86

Practical Pointers on Response

- Keep "Responding and Reporting" separate in your mind
- Investigate reported incidents
 - Focus on the small stuff
- Determine if bullying is related to victim's disability
- Document, Document, Document
- Don't make promises you can't keep

87

Supporting the Victim

- Educational Responses
 - SEL
 - Resilience
- SAT/Test
- Social Skills Interventions
- Follow up
 - Report back with information regarding handling

88

Consider IEP of Bully

- Ensure IEP and supports implemented with fidelity
 - Remember to consider this as part of Manifestation
 - Manifestation for every removal 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

89

Questions?

Karen Haase



(402) 804-8000
 karen@ksbschoollaw.com
www.ksbschoollaw.com

KSB School Law @KarenHaase

90