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'Baton Bullying': Understanding Multi-Aggressor Rotation in Anti-Harassment Cases

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Kris Franklin

**“BATON BULLYING”:
UNDERSTANDING
MULTI-AGGRESSOR
ROTATION IN ANTI-GAY
HARASSMENT CASES**

In 2011, the Centers for Disease Control issued a factsheet entitled *Understanding Bullying*.¹ After defining what bullying is and how it occurs (in person, verbally, electronically), the factsheet asks “Why is bullying a public health problem?”² The answers, it seems, are multiple: “Bullying can result in physical injury, social and emotional distress, and even death. Victimized youth are at increased risk for mental health problems.... Youth who bully others are at increased risk for substance abuse, academic problems, and violence later in adolescence and adulthood.”³ The sheet concludes with the CDC’s four-step prevention plan of definition and monitoring, identifying and protecting the victims, developing and testing prevention strategies, and urging for widespread adoption of these strategies.

What a long way we have come from the *laissez-faire* attitude toward bullying that characterized interaction among children and between children and adults until fairly recently. Indeed, the idea that bullying is a comprehensive social problem, an issue that like smoking, obesity, or teen pregnancy, affects the health of the entire nation as much as that of the individual, is so widespread that the CDC does not even proffer an argument that bullying is within its purview. The fact sheet’s subtitle: “Why is bullying a public health problem?” presupposes that it is, and that its readers do not need convincing.

This consensus that bullying is a pervasive and potentially serious problem extends beyond the realm of public health⁴ and has become a topic of ongoing national conversation. Reams of commentary have emerged,⁵ while Emily Bazelon’s recent book about teen bullying has become a national bestseller.⁶ As *Newsweek* reported in 2010, consulting companies and software programs have sprung up to help schools and parents identify and resolve bullying in their communities.⁷ Bullying of adolescents by their peers can take many forms, but it is strongly associated with anti-gay sentiment and homophobic aspersions, to the extent that columnist Dan Savage launched the “It Gets Better Project” in response to a well-publicized rash of suicides by gay and

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lesbian adolescents (or teenagers who were presumed to be gay) in the wake of bullying by their peers.⁸

Over the past few years, schools have intensified their efforts to prevent or respond to bullying.⁹ This makes some sense: schools are where children spend the majority of their waking hours. They are the places in which kids interact with one another the most. Moreover schools are required to institute policies about any number of educational and public health issues, such as requirements for vaccination, achievement standards, health and safety principles, curricular expectations, teacher training levels. But the attention to bullying in schools is not just about protecting vulnerable children and punishing perpetrators, although that is certainly a significant part of their focus. Schools are also increasingly recognizing that they are the first place parents look to assign responsibility for countenancing bullying, and for failing to stop it in its tracks. That is to say, parents are suing, and school districts are paying.¹⁰

However, this increased focus on (and litigation around) the problem of peer bullying frequently overlooks a very particular kind of bullying that seems especially common, but is uniquely difficult for schools to address. Bullying, and the problem of anti-gay bullying in particular, may have received a fair amount of recent attention, sharpened by the increasing visibility of teenagers who openly identify as gay, lesbian, bisexual, or transgender,¹¹ yet there is still a troubling gap between acknowledging that homophobic bullying exists and understanding how, more often than not, it operates.

The consistent pattern that emerges in anti-gay bullying lawsuits from around the country does not easily fit the common image that the CDC invokes, in which bullying is seen as taking place between an individual perpetrator and a single victim.¹² Instead, while in most of these cases there was a sole victim (or at least only one plaintiff in the lawsuit), it is far more difficult to isolate a single bully. Rather, in these homophobic bullying cases at least, there is an array of perpetrators. It appears that children construct a culture in which the victimized child becomes fair game for anyone who chooses to bully him or her, and when one culprit is punished, another steps up in his or her place.

In this context it is much harder for schools and school systems to successfully ameliorate the bullying, which correspondingly diminishes the victim's ability to hold the school or school systems liable for even horrific ongoing violence and harassment. Most importantly for children themselves, when bullying is imagined only as a two-party interaction between the bully and the bullied, the schools will not have the tools to address how anti-gay bullying actually works on the ground, so that despite what are often their best efforts, they may be incapable of putting a stop to the pattern of victimization.

Homophobic bullying in litigation

The foundational case of school liability for patterns of anti-gay harassment and bullying was *Nabozny v. Podlesny*.¹³ According to facts alleged in his complaint to the federal district court, Jamie Nabozny was continually harassed and assaulted by his middle-school peers in Ashland, Wisconsin. After he came out as gay in the seventh grade, other children hit him, spat at him, and called him “faggot.”¹⁴ The abuse culminated in a sexual assault in which a fellow student pretended to rape him in front of twenty other children, and did not stop until Nabozny was taken out of the school system after a suicide attempt.¹⁵ He returned to public high school and within days the harassment and violence resumed, leading to another suicide attempt. The following year, Nabozny was beaten to the ground and kicked repeatedly until he suffered internal bleeding.¹⁶

Throughout this relentless abuse, Nabozny contended, the Ashland school system was essentially inactive. The school principal promised to protect Nabozny, but made no real effort to address the problem.¹⁷ Even after the simulated sexual assault, and his hospitalization later for internal injuries, none of the perpetrators was punished. Instead, by eleventh grade the school guidance counselor told him that the school was not willing to help him and he should simply leave the school if he wanted the bullying to end.¹⁸ Ultimately, Nabozny moved to Minneapolis and sued the principals of Ashland’s middle and high school for gender discrimination under 42 U.S.C. §1983.¹⁹

While the District Court granted summary judgment dismissing Nabozny’s claim, the Seventh Circuit reversed this judgment. The Circuit Court reasoned that school leaders would not likely have allowed a girl to suffer the kind of verbal, physical, and sexual abuse that Jamie Nabozny underwent, and hence he potentially had a recognizable gender and sexual orientation discrimination claim.²⁰

This case was widely viewed as opening the door for students and parents to sue school systems over anti-gay bullying. A prior Supreme Court decision in *Davis v. Monroe County Board of Education*²¹ had invoked Title IX to require schools to act affirmatively in cases of peer-to-peer sexual harassment, and concluded that schools were liable if they demonstrated “deliberate indifference” to this kind of harassment.²² Following the breakthrough in requiring schools to address anti-gay bullying in *Nabozny*, the *Davis* deliberate indifference standard was frequently invoked in cases alleging homophobic aggression as well as sexual harassment.

The pattern of these cases is astounding in its predictability: a child is singled out, and any number of other students join in victimizing him or her repeatedly, with a varying array of perpetrators over time. The question for

the courts then becomes whether the school has been deliberately indifferent if it intervenes in individual instances of reported student misconduct against a bullied student, but does not stop the pattern of repeated harassment that so often typifies anti-gay bullying. Courts have been divided on whether schools have met their legal obligations when the peer aggression is pervasive and genuinely interferes with bullied kids' education, but where school officials have taken action against reported abusers.

In the *Bellefonte* case,²³ for example, John Doe was repeatedly harassed by fellow students from ninth grade onwards. Children called him “fag,” “queer,” and “gay boy”; he could not go into any public space in the school without being called names, or having students make sexually explicit comments.²⁴ This abuse led him to withdraw from afterschool activities like soccer and student government. At least twelve different children are named or referenced in the court's decision as alleged perpetrators involved in bullying Doe,²⁵ with the suggestion that still others were involved at least tangentially in harassing him.²⁶

In Tonganoxie, Kansas, Dylan Theno had a similar experience over the course of several years, although in his case the line between verbal and physical harassment was much thinner.²⁷ From seventh to eleventh grade, Dylan was called “queer” or a “fag” by other children; he was kicked and pushed as well. Fellow students threw rocks at him and yelled insults at him like “Dylan's a fag, Dylan likes to suck cock.”²⁸ He was continually harassed in the lunchroom by other children who accused him of masturbating at school.²⁹ While teachers disciplined students as Dylan reported them,³⁰ the harassment was a widespread problem that continued regardless of who was punished. More to the point, the bullying was relentless, lasting for years. Students wrote homophobic slurs on chalkboards, and while the teasing was not constant, it re-emerged again and again.³¹ While Dylan occasionally defended himself verbally and even physically, by eleventh grade he was begging his mother not to send him back to school.³²

Still other cases escalated into serious violence, closer in character to *Nabozny*. In Michigan, Jon Martin was both verbally harassed and physically assaulted.³³ Classmates allegedly dumped food on his head in the lunch room, defaced his locker, threw BB pellets at him, sprayed him with water, grabbed his crotch and buttocks, and punched and shoved him in the hallways. In some instances the perpetrator(s) could not be identified, but at least seven different students are identified in Martin's complaint as having participated.³⁴

Similarly, in Toms River, New Jersey, “L. W.” was taunted as a “fag” and “homo” throughout elementary, middle, and high school.³⁵ Other students insulted him repeatedly, to the extent that L. W. considered it a “good day”

and “lucky” if no one had directed slurs at him.³⁶ The harassment intensified over time, to the extent that in seventh grade another child slapped him and whipped him in the neck with a silver chain, raising welts.³⁷ In high school, other students threatened to knife him, pushed him to the ground, and kicked him.³⁸ L. W.’s grades plummeted as he became increasingly fearful and resisted going to school. Again, the case references numerous children reported to have been involved in harassing or attacking L. W.,³⁹ and when a child was chastised and apologized, a hydra-headed alternate quickly arose to take his place.⁴⁰

Similar stories abound, and new cases are filed regularly.⁴¹ And as painful as these stories are, some cases are more serious still: school systems may also sued by parents whose children have committed suicide in the wake of ongoing harassment and violence.⁴²

While the more recent cases are factually quite similar to *Nabozny*, there is one significant difference. In *Nabozny*, the plaintiff could convincingly argue that Jamie Nabozny’s school, and specifically the guidance counselor and principal were genuinely “indifferent” to his suffering. When other students harassed or assaulted him they did nothing. While they promised to protect him, they neglected to do so. In fact, they implicitly blamed him for the violence visited upon him, and told him that the only way for it to end was for him to leave the school.⁴³

In more recent cases, however, many schools have been at least somewhat more sensitive to the targeted child’s plight. This, of course, is what advocates (and the CDC) would urge, yet it does make plaintiffs’ Title IX claims harder to substantiate. In *Davis*, the Supreme Court was clear about the standards by which schools should be judged (although in the context of sexual harassment, rather than bullying): the harassment should be “so severe, pervasive, and objectively offensive that it could be said to deprive [students] of access to educational opportunities,” that the school had “actual knowledge of the harassment,” and, most importantly, that the school was “deliberately indifferent to the harassment.”⁴⁴ In the cases discussed above it is not especially difficult to allege (or conclude) that the abuse the plaintiffs experienced was severe, pervasive, and objectively offensive, or even that the schools were aware of the problem the bullied child faced. But showing that schools have acted with deliberate indifference becomes a much more complicated question when school administrators do take action to address individual reported instances or violence or harassment, yet the bullying continues unabated, and often with renewed vigor, with an ever-changing array of new agents.

In many of these cases school officials took steps to punish students who were engaged in victimizing these children. For example: in the case of L. W., school officials counseled offending students, and even suspended some of

the perpetrators.⁴⁵ Teachers and administrators at Dylan Theno’s schools (middle school and high school) made both individually-directed corrections and school-wide announcements condemning homophobic slurs.⁴⁶ John Doe’s school investigated many of his claims, offered him an escort in school, and suspended one of his primary harassers.⁴⁷ Significantly, the court observed that “every time Doe reported an alleged incident of harassment” to the school’s assistant principal, who warned or disciplined the student involved, “that perpetrator never bothered Doe again.”⁴⁸ Accordingly, the trial court concluded that the school had acted responsibly, and that “no reasonable finder of fact could conclude that the School District was deliberately indifferent to the harassment of Doe,”⁴⁹ thus dismissing the case.⁵⁰ Yet despite school officials’ responsiveness, Doe was harassed from middle school through high school graduation, to the point of reporting suicidal thoughts in 9th grade.⁵¹

So, what precisely do we expect schools to do when individual students appear to hand off turns at bullying the same victim, and will we hold the schools liable for an unending culture of victimization? Wrestling with this question provoked sharply diverging yet carefully considered opinions in the 2009 case of *Patterson v. Hudson Area Schools*.⁵² Dane Patterson’s experience is fairly typical of these cases: name-calling early on in middle school escalated over time into physical abuse. Coupled with allegations of almost-daily insults and slurs were pushing and shoving, and then vandalism of his belongings and school locker.⁵³ After Dane and his parents complained, the school disciplined the offending students, suspending some of them. They also assigned Dane to work with the teacher who ran the middle school’s resource room, focusing on academics and social skills.⁵⁴

The bullying carried on through high school, and in fact worsened.⁵⁵ In ninth grade, Dane experienced a traumatizing sexual assault: he reported that he was cornered by a student who rubbed his penis and scrotum on Dane’s face and neck, while another student blocked the exit.⁵⁶ In the wake of this attack, Dane’s parents sued the school under Title IX, claiming deliberate indifference to his harassment at the hands of his classmates. The school system counter-argued that it had acted appropriately, penalizing and even expelling perpetrators of peer aggression, offering resources for the targeted child, and educating students about the destructive effects of bullying.⁵⁷

The District and Circuit Courts considered the claim of “deliberate indifference” carefully, but came to markedly different interpretations of what that phrase entailed in situations like Dane’s.⁵⁸ The District Court maintained that officials in the Hudson Area School system “repeatedly took adequate and effective remedial action reasonably calculated to end harassment, eliminate the hostile environment and prevent harassment from occurring again.”⁵⁹ The decision details at least six remedies that the schools put in place either to

address bullying generally or Dane's harassment in particular: written policies against bullying, assemblies and peer mediation programs, adult supervision of shared school space like locker rooms and hallways, and decisive disciplinary action against offending students.⁶⁰ Noting these efforts, that in each individual incident of reported harassment school officials intervened, and "that...perpetrator...did not cause Dane any further problems,"⁶¹ the opinion concludes essentially that the school district had acted in good faith to end a particularly intransigent case of bullying.

The District Court's focus in its opinion seemed to be on the difficulty of eradicating adolescent bullying and the Hudson Area Schools' attempts to do so. Ironically, though, Dane Patterson's experience falls out of this analysis. Despite the fact that his schools seemed to have done a commendable job of talking about the problem of bullying,⁶² and did in fact respond to individual incidents, Dane remained a constant target of seemingly escalating harassment and violence. At what point could the school district be said to be indifferent to Dane's suffering, if it continues even after the school acts against specific perpetrators?

The Sixth Circuit, to whom the Pattersons appealed after their case was initially dismissed, brought a strikingly different emphasis to their "deliberate indifference" analysis. The majority's opinion centers instead on the school's awareness of Dane's continual victimization, reasoning in effect that despite the anti-bullying interventions the schools had in place, it was possible for a jury to conclude that officials exhibited deliberate indifference evidenced by the fact that at least in Dane's case, the measures seemed not to work.

The circuit court decision zeroes in on Dane's experience almost immediately by dramatizing his "distraught, anxious, and angry" response to the school-mandated apologies he received from students who had bullied him, and his insistence that they were insincere.⁶³ The Court distinguishes between the discrete acts of violence and harassment Dane experienced, to which the schools did respond, and the "severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped."⁶⁴ It was all well and good for the Hudson schools to talk in vague terms about "kindness" and "respect," but, as the Court points out, school officials should have realized that none of their strategies were actually solving the problem—Dane Patterson was still being attacked.

For the Sixth Circuit, the "pervasive" nature of the bullying is its defining characteristic. The students bullying Dane were functioning not as individuals but as a collective. As one element of the collective fell away, another moved in to take its place, maintaining the structure of bullying within which Dane

existed.⁶⁵ Ultimately, the court points out, the argument that the Hudson Area Schools took action “misses the point,” and allows the schools to claim that they were responded effectually to counter bullying.⁶⁶ But they must not have been effective, the court reasoned: after all, Dane was still bullied, and more intensely. To disregard that fact “ignores the realities of [Dane’s] situation.”⁶⁷

In looking at this case from Dane’s vantage point, and recognizing that a school in which a child can be this intensely victimized cannot claim that it is effective in responding to bullying, the Circuit court recasts *Patterson v. Hudson Area Schools* as a case about “the realities” of Dane Patterson’s situation, not about the good intentions of a school system. Bullying is an actual experience that a specific child undergoes, not just a difficult set of policy issues for a school to address.

But the Circuit court opinion was not a unanimous one. In fact there is a vigorous dissent that offers a very different set of standards by which to judge the Hudson Area Schools. The dissenting opinion contrasts the Hudson schools, which made numerous efforts to counter peer bullying, with cases in which schools did nothing to stem ongoing harassment even when they were well aware of the activities.⁶⁸ While the dissenting judge sympathizes with Dane Patterson,⁶⁹ he points out that no individual student ever harassed Dane more than once, and that this lack of recidivism shows the efficacy of the schools’ policies.⁷⁰

It is unreasonable, the dissent contends, to expect a single school system to eradicate bullying. Rather, the fact that the schools were, in the dissent’s repeated mantra, “100% effective” in making sure that identified culprits never bullied again, should demonstrate that Hudson Area schools cared about bullying and took significant action to curb it.⁷¹ They took Dane Patterson’s complaints seriously, punished students involved, provided school counselors and social workers, and engaged in educating students against bullying.⁷² The schools could only act on incidents about which they knew, and could only discipline students whom they could identify. Asking any more of the school district would be “manifestly unreasonable,” since it would hold schools liable for acting to prevent future harassment by new harassers.⁷³

Taken from a model of bullying behavior as the actions of one individual student against another, the dissent’s position seems eminently reasonable. What more could we ask the schools to do than implement bullying-awareness programs and respond decisively to any acts of harassment that nevertheless occur? But looked at from the harassed kids’ perspective, the very conclusion that the dissent finds so unreasonable—identifying and reacting to a steady pattern of offensive behavior directed toward a specifically-targeted victim—would hold schools responsible for addressing precisely the sort of

ongoing bullying patterns that Dane Patterson (and the many other plaintiffs like him) were actually enduring.

Addressing the pattern of multiple aggressors

The cases discussed here, and especially the various opinions in Patterson, show how crucial the framework for understanding how homophobic bullying works is in these cases of continued aggression. It may be easy under Title IX to identify a school's responsibility to respond to specific offenses, and to make sure that each perpetrator of harassment did not commit further offenses. But if few or none of the identified harassers are identified as bothering the bullied child again, it is possible to conclude that the schools' approach is entirely "effective" even when the harassment itself lingers for years in the hands of ever-replaceable actors.

The difference between the majority and the dissent in Patterson, then, is one of contextualization of how anti-gay bullying actually works. For the majority, Dane's harassment was "pervasive"—that is, constant, relentless, and occurring regularly and frequently. For bullying to be omnipresent in this way, and yet not have repeated perpetrators, there must be some sort of cultural consensus that Dane was an open target, available for the homophobic cruelty of any and all children. That is, the students at the Hudson Area Schools were engaging in multi-aggressor rotational harassment. They functioned as a relay team, so that if one child stepped back from bullying Dane, another or others could step forward; passing the baton from one to another (or others). When an individual student was caught, punished, and no longer operated as a bully the rest of the "relay team" would pick up the slack, receiving the baton from the student who had to fall back.

This reality frequently characterizes homophobic bullying in schools. As the cases discussed here show, the victimized students were the recipients of multi-aggressor rotational bullying. Identifying particular offenders was, to a certain extent, beside the point. In a culture of baton bullying, the only constant is the figure of the child-who-is-bullied. That is, for these homophobic victimization cases, the child who is perceived to be "the fag."⁷⁴ Indeed, the term "fag" is, in situations of homophobic baton bullying, synonymous with "recipient of harassment." Calling a child a "fag" appears frequently to initiate that child into a system of multi-aggressor bullying in which the perpetrators continue to hand the baton back and forth for as long as they are able.

If courts continue to evaluate Title IX claims of deliberate indifference to bullying through an interpretive frame that understands case-by-case (punish student X or Y) or vague generalized responses (Be kind! Be respectful!) as reasonable remedies—that is, as a frame that believes bullying is the work solely of individually-acting bullies—then they cannot actually address the

genuine experiences of the victimized children. Moreover the legal analysis of these Title IX cases can never move beyond the tension we see between the district and circuit court opinions in *Patterson*, or between the majority and the dissent in the Sixth Circuit.

And in this era of zero-tolerance, peer mediation, and anti-bullying public service announcements, litigators representing the victims of bullying will continue to have a difficult time proving deliberate indifference unless they can point to the realities of homophobic harassment: that it is frequently multi-aggressor and rotational, and that depends upon a group consensus that “faggots” deserve this kind of treatment. As we see with the cases discussed here, plaintiffs can succeed in holding schools responsible for indifference to their plight when courts understand the systemic nature of the way they are targeted. Therefore litigators raising these kinds of Title IX claims, and seeking to have schools sanctioned for ineffectual intervention even in the contemporary climate in which bullying is understood to be a genuine problem, will need to start educating the courts about the systemic nature of multi-aggressor rotational bullying. They will need to cultivate social scientific data, rely on expert witnesses, craft narratives of baton bullying, and in general sensitize the courts to the lived experience of the victims of this sort of culture of targeted harassment.

Beyond litigation, though, and as important as developing these strategies may be for lawyers, children who are at the mercy of multi-aggressor rotational bullying might be better served by a societal shift in how we understand anti-gay harassment. How might we develop in-service trainings for teachers, guidance counselors, and lunchroom workers that address the consensus inherent in this kind of bullying? Ultimately, of course, the goal is not to rely on retrospective litigation. Instead we must understand the pattern and frequency of rotational aggression, and examine where it comes from and how schools can effectively intervene. It’s time for people who care about kids, especially kids who are especially vulnerable because of their sexual orientation, their gender identity or expression, to recognize the systemic mechanisms behind homophobic bullying to put an end to it, not just piece-by-piece but whole-cloth.

In the meantime, lawyers who pursue these cases can serve their clients well by helping courts understand the patterns that actually play out in these children’s lives.

NOTES

1. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, UNDERSTANDING BULLYING FACT SHEET, (2012) available at <http://www.cdc.gov/violenceprevention/pdf/bullyingfactsheet2012-a.pdf>.

2. *Id.* at 1.
3. *Id.*
4. Though it has gained significant traction there. For a summary of recent studies and discussion of public health strategies to address the problem, see Marcia Feldman Hertz, *Bullying and Suicide: A Public Health Approach*, 53 J. OF ADOLESCENT HEALTH S1, (2013).
5. In books alone, a search of Amazon's titles for the subject of "bullying kids" returns 1797 hits (last visited Sept. 5, 2013). A Google search on the same date for "bullying articles 2013" returned over 38 million hits.
6. EMILY BAZELON, *STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY* (2013). Attention to the book and the issue was significant enough to launch author Emily Bazelon's appearances on such popular television programs as *The Colbert Report* and *Morning Joe*.
7. Nancy Cook, *The Booming Anti Bullying Industry*, NEWSWEEK (OCT. 4, 2010) available at <http://www.thedailybeast.com/newsweek/2010/10/04/the-booming-anti-bullying-industry.html>.
8. See <http://www.itgetsbetter.org/>. Nine out of ten LGBT teens report being bullied at school. *Gay Bullying Statistics*, <http://www.bullyingstatistics.org/content/gay-bullying-statistics.html>.
9. For just one of countless informational projects and resources that have emerged to help schools address the problem of peer bullying, see <http://www.stopbullying.gov/prevention/at-school/>.
10. Just this summer, for example, an openly gay student in Indianapolis accepted \$65,000 and a removal of discipline from his transcript after being expelled for bringing a stun gun to school and subsequently claiming that he did so in self-defense when the school had failed to protect him from bullying. Mark Hanson, *Gay Teen Settles Bullying Lawsuit Against School District*, ABA JOURNAL (July 12, 2013, 3:23 PM), at http://www.aba-journal.com/news/article/gay_teen_settles_bullying_lawsuit_against_school_district/.
11. LGBT legal advocates Lambda Legal suggest that the average age young people come out is now about 16, down from 19–23 just a short time ago. Facts: Gay and Lesbian Youth in Schools, at <http://data.lambdalegal.org/pdf/158.pdf>. See also, JASON CIANCOTTO & SEAN CAHILL, EDUCATION POLICY: ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH, 32 (Report of the National Gay and Lesbian Task Force Policy Institute, 2003) available at <http://www.thetaskforce.org/downloads/reports/reports/EducationPolicy.pdf> (suggesting that much more information about anti-LGBT harassment is available now in part because many more LGBT students self-identify earlier than used to be the case).
12. From the Fact Sheet: "definitions of bullying vary [but] most agree that bullying includes: . . . [r]epeated attacks or intimidation between the same children over time." NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, *supra* note 1 at 2.
13. 92 F.3d 446 (7th Cir. 1996).
14. *Id.* at 451.
15. *Id.* at 452.
16. *Id.*
17. *Id.* at 451-53.
18. *Id.* at 452-53.

19. §1983 cases address alleged civil rights violations that deprive a person or group of persons the privileges immunities of U.S. citizenship. In his complaint, Nabozny alleged equal protection and due process violations under the 14th Amendment. *Id.* at 449. Even though Nabozny was successful in his lawsuit, §1983 complaints for school bullying have not become commonplace. Instead, almost all subsequent anti-gay harassment cases have been litigated under Title IX of the Civil Rights Act of 1964, which prohibits sex discrimination in education.
20. *Id.* at 455-56.
21. 526 U.S. 629 (1999).
22. 526 U.S. 629, 644-45 (1991).
23. *Doe v. Bellefonte Area Sch. Dist.*, 2003 WL 23718302 at 2-4 (M.D. Pa. 2003)(not reported)(note that “Doe” is a pseudonym to protect the identity of the plaintiff who was still a minor when the case began).
24. 2003 WL 23718302 at 2-4 (M.D. Pa. 2003)(not reported).
25. *Id.* at 2-5 (describing conduct of Josh F., Lance E., Sean B., Tyler R., Eric C., Josh H., Andy L., April H., Brandon R., Dan H., Tara T. and a “girl or girls” in Doe’s 10th grade English class).
26. *E.g.*, references to harassment by further “unknown students.” *Id.* at 4.
27. *Theno v. Tonganoxie Unif. Sch. Dist.*, 377 F. Supp. 2d 952 (2005).
28. *Id.* at 954-958.
29. This seemed to stem from an admittedly made-up rumor about Dylan that began in seventh grade, but mentions of the story and harassment based on it continue well into Dylan’s high school years. *Id.* at 958, 961.
30. *Id.* at 954, 955, 956, 957, 958, 959, 960 and 961.
31. *Id.* This despite the fact that even the plaintiff seemed to agree that school officials had on a number of occasions actively intervened when other students used homophobic slurs or otherwise taunted Dylan. *Id.* at 955, 956, , 957, 958, 959, 959, 961.
32. *Id.* at 961.
33. *Martin v. Swartz Creek Comm. Schs.*, 419 F. Supp. 2d 967, 968-971(E.D. Mich. 2006).
34. *Jake V., Patrick R., Nick C., Mike O., Jeff K., Kaylee B. and Ryan A.* *Id.* at 969-971.
35. *L.W. v. Toms River Reg’l Schs. Bd. of Ed.*, 915 A.2d 535 (N.J. 2007).
36. *Id.* at 540 and 541.
37. *Id.* at 542.
38. *Id.* at 542-44.
39. “A group of ten to fifteen students” in the middle school cafeteria, R.C., R.G., D.M., M.S., J.A., C.C., B.E., T.L., R.B., P.D., J.P., T.S., D.R., W.K., L.B., J.F., M.F., L.T.. *Id.* at 539-544.
40. See, for example, the very similar circumstances alleged by Joseph Ramelli and Megan Donovan in *Donovan v. Poway Unif. Sch. Dist.*, 167 Cal. App. 4th 567 (Div. 1 2008).
41. Just one example that received a fair amount of national publicity was *Doe v. Anoka-Hennepin Sch. Dist.* No. 11-cv-01999-JNE-SER (D. Minn., filed July 21, 2011). The case was settled out of court in 2012. See Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist.*, No. 11-cv-01999-JNESER (D. Minn. Mar. 6, 2012), ECF No. 82, available at <http://www.justice.gov/usao/mn/downloads/Anoka-Hennepin%20FINAL%20Consent%20Decree.pdf>.

42. See, for example, *Estate of Brown v. Ogletree*, 2012 WL 591190 (S.D. Tex).
43. *Nabozny*, *supra* note 13 at 452.
44. *Davis*, 526 U.S. at 633, 642.
45. *L.W.*, 915 A.2d at 542.
46. *Theno*, 377 F. Supp. 2d at 955, 956, 957, 959-60, 961.
47. *Doe*, 2003 WL 23718302 at 2, 3, 4 and 5.
48. *Id.* at 5.
49. *Id.* at 8.
50. *Aff'd* 106 Fed. Appx. 798, 800 (3d Cir. 2004)(not reported).
51. 203 WL 23718302 at 5.
52. 551 F.3d 483 (6th Cir. 2009), *rev'g and remanding* 2007 WL 4201137 (E.D. Mich.) (not reported).
53. *Id.* at 439-40.
54. *Id.* at 440-41. (This intervention in particular meant that Dane's eighth grade year was almost completely free of incident).
55. *Id.* at 442.
56. *Id.* at 442-43.
57. 2007 WL 4201137 at 8.
58. The other two prongs introduced in *Davis*: a (1) sustained and severe pattern of "objectively offensive" behavior that (2) school officials were aware of, were deemed satisfied by the District Court. *Id.* at 5-6
59. *Id.* at 8.
60. *Id.* at 8-10.
61. *Id.* at 8.
62. And in fact, the school district's general anti-bullying campaign forms the heart of the decisions discussion of the schools' efforts on Dane's behalf. The only remedy that seems to have been specific to Dane's specific situation was the punishments given to his various tormentors. Coming after the fact this could not possibly serve to prevent further harassment except as a general deterrent. And in even if so, the deterrence appears not to have been especially effective in this case.
63. 551 F.3d at 440.
64. *Id.* at 447.
65. *Id.* at 448. (holding that "[w]e cannot say that, as a matter of law, a school district is shielded from liability if [it] knows that its methods. . . , though effective against an individual harasser, are ineffective against persistent harassment against a single student.")
66. *Id.* at 449.
67. *Id.* (fn. 9).
68. *Id.* at 451 (Vinson, J., *dissenting*).
69. *Id.* (acknowledging that "this is a sad case").
70. *Id.* at 452-54.
71. *Id.* at 452, 452-55.

72. *Id.* Moreover, the dissent notes, Dane did not always report every incident of bullying, nor could he name the students who vandalized his locker or defaced his belongings. *Id.* (fn. 4).
73. *Id.* at 460.
74. Whether openly gay, such as Nabozny, Martin, and Ramelli & Donovan; perceived to be gay, such as L.W., Theno and Patterson, or different from majority students in a variety of ways, as was Brown.



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