

United States Court Rulings, School Board Policies, and Procedures, and Student Stress and Anxiety

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Abstract—Student stress and anxiety can be caused by external factors to the school environment that are unalterable by educators. However, those stressors internal to the school environment or find their way into the school such as cyberbullying can be impacted negatively or positively by legal and ethical procedures and policies. In the last decade and more pointedly under the Trump Administration, legislators, government agencies, court rulings, and school board policies have addressed issues that contribute to student stress and anxiety. In 2017 procedures for alleged victims of dating violence changed and in 2018 it was proposed to define sex, erasing federal recognition of transgender students. In 2012, the Supreme Court of the United States elected not to establish for educators a substantial disruption standard against the right to free speech. These court finding and others regarding literacy education, child abuse, suicide and discipline, and educational records are also addressed.

Keywords— School Law, Ethics, Student Stress, School Environments.

I. INTRODUCTION

Educators never know all the stressors that children face in their home community. It is difficult for educators to change what happens to students between 3 in the afternoon and 8 the next morning but the astute educator/advocate can scan the school community and work to impact or alleviate contributors to stress and anxiety. The United States courts have provided supportive legal muscle (Alexander and Alexander, 2012) but they have also missed opportunities to rule for a safer more respectful school climate (Stone, 2017). This paper will examine school policies/procedures and court rulings that contributed to or alleviated student stress.

II. DATING VIOLENCE UNDER THE TRUMP ADMINISTRATION

The Office of Civil Rights (OCR) of the U.S. Department of Education has defined a hostile environment under Title IX of the Education Amendments of 1972. “A hostile school environment is when conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program” (U.S. Department of Education, 1972). In the popular television series *Thirteen Reasons Why* the fictitious Bryce Walker committed dating violence against Hannah Baker (Stone, 2017). At the time of this series the OCR had in place a Dear Colleague Letter (DCL)

outlining school districts’ obligations in dating violence (U.S. Department of Education, 2011). The Trump Administration on September 22, 2017 made this DCL null and void and issued in its place a new Q&A publication (U.S. Department of Education and U.S. Department of Justice, 2017). The same general directives are in place with some important changes (Equal Rights Advocates, 2012).

Pre September 22, 2017, Hannah’s school had to investigate and use the “preponderance of evidence” standard to decide if sexual violence occurred. Post September 22, 2017, Hannah’s school must still investigate but may now choose either the preponderance of evidence standard or a higher threshold to determine guilt called the “clear and convincing evidence” standard. Betsy DeVos, U.S. Education Secretary, explained the change, “. . . the process also must be fair and impartial, giving everyone more confidence in its outcomes” (2017, p.1).

School officials pre-September 22, 2017 would have had to protect Hannah before, during and after the investigation such as removing Bryce Walker from her classes. After September 22, 2017, protection before and during the investigation would not necessarily be the course of action instead the new Q and A document says, “Interim measures may be appropriate” but are not required and interim measures have to be available to both the complainant and the alleged perpetrator. School officials are instructed to not make any assumptions that favor the alleged victim.

III. THE TRUMP ADMINISTRATION AND TRANSGENDER YOUTH

Title IX of the Education Amendments of 1972 states “no person shall be subjected to discrimination in any educational program or activity based on sex” (U.S. Department of Education, Office of Civil right, 1972). Undefined in Title IX is sex but before February 2017, Title IX was being applied to transgender youth. The legal landscape changed for transgender youth the current administration set aside the Dear Colleague Letter followed immediately by the Supreme Court of the United States (SCOTUS) refusal to hear *G.G. v Gloucester*. Gavin Grimm (G.G.) was fighting for the right to use the male bathroom (*G.G. v. Gloucester County School Board*, 2016). Prior to February 2017, a U.S. Department of Education’s DCL said “a school generally must treat transgender students consistent with their gender identity”(U.S. Department of Education, what is the date on the transgender one). Along with the prior administration’s warning that if

school districts failed to allow students to use the bathrooms matching their gender identity they could lose their federal funds (U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights Office of the General Counsel, May 8, 2014).

Currently, Title IX is still being used in the courts to try and argue for the rights of transgender people but this too may soon change. In October 2018, the current administration released a draft definition of sex (Department of Health and Human Services, 2018). The draft says sex would be determined "on a biological basis that is clear, grounded in science, objective and administrable... as either male or female, unchangeable, and determined by the genitals that a person is born with." "The sex listed on a person's birth certificate, as originally issued, shall constitute definitive proof of a person's sex unless rebutted by reliable genetic evidence." The interpretation of gender would erase federal recognition and protection under Title IX for students who identify as a gender other than the one they were assigned at birth (Green, Benner, and Pear, 2018).

IV. CHILD ABUSE REPORTING

A principal, teacher, special educator, and school counselor all pled "no contest" to failure to report child abuse and were sentenced to probation, fines, and community service (Sepic, 2017). The evidence against the educators included two years of email exchanges showing that the 12-year-olds safety and well-being was a topic of conversation among them as they discussed his safety with expressed concerns such as: he is 10 to 20 pounds lighter than the previous year; he is afraid of his step-mother; he is hungry all the time; he never stays home even when he is sick; he appears to have poor nutrition. The Department of Health and Human Services (DHHS) did investigate physical abuse of the boy during the middle of the 2-year period but did not substantiate abuse. The educators were still discussing concerns including weight loss following this investigation but did not reach back out to DHHS (Sepic, 2017).

In August 2016, the student ran away from home and was found bruised, dehydrated, weighing 47 pounds (substantially below height and weight for a 12-year-old) with a cut lip and old cigarette burns. A physician confirmed that his condition was life threatening. The child described forced starvation and abuse. An investigation led to felony child abuse/torture charges against the Zemkes, the boy's father and step-mother, each of whom received a lengthy prison sentence (Sepic, 2017). State and federal statutes require educators to continue to call when there is reasonable suspicion that a child is being neglected or abused (National Child Abuse and Neglect Data Systems, 2014)

V. SUICIDE AND DISCIPLINE APPROACHES

Suicide is rarely the result of a single cause (Center for Disease Control, 2016), yet, we give pause when a growing number of discipline cases of seemingly well-adjusted, happy, future oriented students, are followed by suicides. Parents of these students are questioning if the discipline system is sometimes too lengthy and inflexible without consideration for

the record a model student has built over the course of their school years (George, 2011). Parents who have lost children to suicide following discipline are asking if discipline is intended to help their child self-correct and get back on track or is it instead simply punitive and creating despair (George, 2011). "The parents feel very often that they are in the middle of criminal prosecution - that there is no balance or context and the facts are skewed to the negative," said Bill Reichhardt, a Fairfax lawyer who handles school discipline hearings in Virginia (George, 2011, p.1). Some districts are moving toward restorative justice to reduce suspensions and move toward teaching lessons rather than punishing (O'Donnell, 2018).

In 2017, a family filed a lawsuit against a Chicago area school district after their son committed suicide following discipline in which the family claims school administrators scared their son to death when they said he would be a registered sex offender who possessed child pornography. The student had audio recorded on his phone a consensual sexual act with a girl. A lawsuit alleged that the school and the Naperville Police Department caused Corey Walgren, 16, "extreme, intolerable and excessive emotional and psychological distress" during questioning. Corey was left unsupervised and according to his family, thinking his life was over, he left school and fell or jumped off a five-story parking garage (St. Clair, 2017).

In 2018, the parents of a high school junior filed suit after their son committed suicide. Patrick McCalley was described as being excited about his future in the air force, had never had a discipline referral, was a member of the marching, concert, and jazz bands and was widely considered to be a positive contributing member of the school. Patrick contributed to an offensive, racist, snapchat that he later described as a "stupid and ignorant" act. Patrick was required to write a statement incriminating himself under what the district called "penalty of perjury" and after being escorted out of the building to either be expelled or suspended he killed himself. (Miller, 2018).

Nick Stuban's attendance record was almost flawless, he was on the football team, had good grades and in the words of his history teacher was a "model student," He was suspended after buying a capsule of JWH-018, a synthetic compound that is legal but not permitted on school campuses. Nick later researched the substance and said,

"I don't know what I was thinking." His mistake and the consequences spiraled downward for 11 weeks ending when Nick took his life. Two years earlier another football player in the district committed suicide the day before his disciplinary hearing. (George, 2011).

VI. EDUCATIONAL RECORDS

Kristja Falvo had three children enrolled in Owasso Independent School District when she filed a lawsuit to ban peer grading (Owasso v. Falvo, 2002). Ms. Owasso's children struggled in school and their low grades contributed to embarrassment and bullying because peer grading often meant peers called the grades aloud for all to hear as the teachers recorded them in their grade books. Ms. Falvo contended that the practice violated the Family Educational Rights and Privacy

Act (FERPA). In a summary judgment (a judge made decision not a jury decision) the school district won because the court determined that grades put on papers by another student are not “maintained” educational records. The Court of Appeals for the Tenth Circuit disagreed but the case ended up before the Supreme Court of the United States (SCOTUS) who had the last word and reversed again saying FERPA does not prohibit peer grading (Wilson, 2002). Following the SCOTUS’ decision the USDOE made changes in FERPA stating that grades on peer-graded papers are not education records until recorded in the grade book (U.S. Department of Education, 2008).

VII. CYBERBULLYING AND THE COURTS

The courts continue to offer disparate judgments and confusion in cases of cyber-speech (Cook, 2017). Cyber-bullying and free speech are not mutually exclusive making it very difficult for school administrators to parse out discipline without stepping on student rights (Cook, 2017). In January 2012, SCOTUS was presented with three cases *J.S. v. Blue Mountain School District*, *Layshock v. Hermitage School District* and *Kowalski v. Berkeley County School District* but announced it was unwilling to accept the cases and allowed the lower courts’ decisions to stand (Walsh, 2016). Six education associations led by the National School Boards Association filed a friendly brief (*amici curiae*) in hopes a Supreme Court ruling would result in a framework to follow when applying the substantial disruption standard to off-campus cyber-speech that affects the on-campus learning environment (National School Board Association (2014). The lower courts’ rulings are mixed, and the muddiness in what constitutes substantial disruption to the learning environment continues. School district officials are obligated under federal laws to seek to remedy bullying and harassment that is severe, pervasive and objectively offensive (National School Board Association, 2012). These statutes do not distinguish between whether bullying happened on or off campus. The responsibility to act is clear, yet substantial disruption is not clear or in any way standardized (National School Boards Association, 2011).

Berkeley County School District in West Virginia disciplined Kara Kowalski for starting a MySpace page that encouraged other students to humiliate a student who was called a “slut” with “herpes.” The school disciplined Kowalski and the courts supported the discipline when parents sued claiming their daughter’s first amendment rights were violated. Yet, an almost exact set of circumstances in a parallel case in California had a very different result. In *J.C. v. Beverly Hill*, a student’s cyber-bullying was disciplined and her parents sued under the first amendment. The court sided with the bully and found the district violated the student’s rights by failing to meet the burden of establishing a substantial disruption (National School Board Association, 2014).

In *J.S. v. Blue Mountain School District*, a Pennsylvania middle school student created a spoof MySpace profile page on her home computer for her principal calling him a hairy slut. In *Layshock v. Hermitage School District*, a Pennsylvania high school student who created a profile of his principal on MySpace that was disrespectful and lewd. The courts found the

discipline of the students in both cases violated their first amendment rights. Court rulings are not consistent, creating a difficult situation for school administrators to manage as to when they are able to discipline off-campus speech and when discipline will infringe on a student’s freedom of speech (First Amendment Center, 2006; National School Board Association, 2014).

VIII. UNDEREDUCATED AND THE COURTS

- 1) In 2016, seven Detroit students filed a federal lawsuit saying that Michigan failed to provide them with access to literacy based on their race (Fontin, 2018; Higgins, 2018). Students said they were cheated out of a good education, taught by unqualified teachers in poor conditions. These students received a high school diploma but struggle academically in remedial classes at college in hopes gaining skills that will allow them to start earning college credits. At the heart of the suit is plaintiffs argument that the “state ran the city’s main district for much of the last two decades and created school funding and other policies that led to dysfunction in district and charter schools. The lawsuit was cited as the first lawsuit of its kind in the nation that seeks to secure students’ legal right to literacy under the 14th Amendment. The court ruled in favor of the state of Michigan. The judge wrote, “The Court is left to conclude that the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right. The judge wrote, “the court must therefore cautiously take up the task. . . . Although the Complaint clearly establishes that Plaintiffs’ schools predominantly serve children of color” (Higgins, 2018). The judge went on to explain that the complaint does not address how these students’ schools compared to other schools.

IX. CONCLUSION

Students experiencing stress and anxiety need the legal system and board policies that provide a safe school environment. Federal laws, state statutes, school board policies, and judge made laws may provide protection but it is often the ethical imperative of educators to meet the needs of students in schools (Alexander and Alexander, 2012). Students deserve to feel safe and connected to adults and peers in the school and the goal is to create a school-wide environment where all students can be successful (ASCA, 2016a, 2016b, 2016c). The law is the minimum standard society will tolerate (American Bar Association, 2004). Ethics are aspirational. (American School Counselor Association, 2016). When the law and courts fail to go far enough to protect students, the ethical educator can still exercise a higher standard of care than the minimal standard called law. As long as ethics and law do not contradict each other, ethics can stand.

REFERENCES

- [1] Alexander, K., & Alexander, M. D. (2012). *American public school law* (8th ed.). Belmont, CA: Thomson West.
- [2] American Bar Association. (2004). *Rights and responsibilities of parents*. In *American Bar Association family legal guide* (3rd ed.). Washington, DC: Author.
- [3] American School Counselor Association. (2016a). *ASCA position statement: The school counselor and LGBTQ youth*. Retrieved from

- https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf
- [4] American School Counselor Association. (2016b). ASCA position statement: The promotion of safe schools through conflict resolution and bullying/harassment prevention. Retrieved from https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_Bullying.pdf
- [5] American School Counselor Association. (2016c). ASCA position statement: The school counselor and transgender /gender nonconforming youth. Retrieved from https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_Transgender.pdf
- [6] Centers for Disease Control and Prevention. (2016). Youth risk behavior surveillance— United States, 2015. Surveillance Summaries. MMWR 65(SS-6). Retrieved from: https://www.cdc.gov/mmwr/volumes/65/ss/ss6506a1.htm?s_cid=ss6506_w
- [7] St. Clair, S. S. (2017, May 25). Family of Naperville teen who committed suicide sues school, police. Retrieved from <http://www.chicagotribune.com/news/local/breaking/ct-naperville-north-suicide-lawsuit-20170524-story.html>
- [8] Equal Access Act, 20 U.S.C. § 4071-74 (1984). Title 20-Education, Chapter 52-Education for economic security, Subchapter VIII—Equal access. Retrieved from www.justice.gov/crt/about/cor/byagency/ed4071.php
- [9] Equal Rights Advocates. (2012). Know your rights: Sexual harassment at school. Retrieved from <http://www.equalrights.org/legal-help/know-your-rights/sexual-harassment-atschool/>
- [10] Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1974).
- [11] First Amendment Center. (2006). 1st consensus guidelines offered for schools on sexual orientation news release: First Amendment framework suggested to help educators, parents, students find 'common ground. Retrieved from <http://www.glsen.org/cgi-bin/iowa/all/news/record/1912.html>
- [12] Fortin, J. (2018, July 04). 'Access to Literacy' Is Not a Constitutional Right, Judge in Detroit Rules. Retrieved from <https://www.nytimes.com/2018/07/04/education/detroit-public-schools-education.html>
- [13] G.G. v. Gloucester County School Board. Ct.App.Virginia. No. 15-2056 (4th Cir. 2016).
- [14] Green, E. L., Benner, K., & Pear, R. (2018, October 21). 'Transgender' Could Be Defined Out of Existence Under Trump Administration. Retrieved from <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>
- [15] George, D. (2011, February 20). Suicide turns attention to Fairfax discipline procedures. Retrieved from <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/19/AR2011021904141.html?noredirect=on>
- [16] Higgins, L. (2018, November 29). In their words: Read why experts and advocates are backing Detroit's right to literacy lawsuit. Retrieved from <https://chalkbeat.org/posts/detroit/2018/11/29/in-their-words-read-why-experts-and-advocates-are-backing-detroits-right-to-literacy-lawsuit/>
- [17] Lhamon, E. C., & Gupta, V. (2016, May 13). Dear Colleague Letter on Transgender Students: Notice of Language Assistance [PDF File]. Retrieved from <https://search.usa.gov/search?utf8=%E2%9C%93&affiliate=ed.gov&query=Dear+Colleague+Letter+on+Transgender+Students>
- [18] Miller, J. R. (2018, November 28). 'Excessive fear' after in-school suspension drove Air Force hopeful to kill self: Suit. Retrieved from <https://nypost.com/2018/11/28/excessive-fear-after-in-school-suspension-drove-air-force-hopeful-to-kill-self-suit/>
- [19] National Child Abuse and Neglect Data System (NCANDS) Child File, FFY 2014 [Dataset]. Retrieved from: <http://www.ndacan.cornell.edu>
- [20] National School Boards Association. (n.d.). Dealing with legal matters surrounding students' sexual orientation and gender identity. Retrieved from <http://www.nsba.org/cosa/sexualorientation>
- [21] National School Boards Association. (2011, November 10). Sua Sponte: NSBA files amicus brief urging Supreme Court to provide guidance on off-campus online speech. Retrieved from <http://legalclips.nsba.org/?p=10079>
- [22] National School Boards Association. (2012, January 19). Supreme Court declines to hear student Internet speech cases. Retrieved from <http://legalclips.nsba.org/?p=11474>
- [23] National School Boards Association. (2014, January 06). Leading Education Groups Urge Supreme Court to Review Errant Ruling in Student Speech Case. Retrieved from <https://www.nsba.org/newsroom/press-releases/leading-education-groups-urge-supreme-court-review-errant-ruling-student>
- [24] O'Donnell, P. (2018, April 12). The Ins and Outs of 'Restorative Justice' in Schools. Retrieved from <https://www.ewa.org/blog-educated-reporter/ins-and-outs-restorative-justice-schools>
- [25] *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002) 233 F.3d 1203.
- [26] Remley, T. P., Jr., & Herlihy, B. (2016). Ethical, legal, and professional issues in counseling (5th ed.). Upper Saddle River, NJ: Merrill Prentice Hall.
- [27] Sepic, M. J. (2017, November 16). Three Oaks educators sentenced for failing to report suspected child abuse. Retrieved from <https://www.wndu.com/content/news/Three-Oaks-educators-sentenced-for-failing-to-report-suspected-child-abuse-458014383.html>
- [28] Stone, C. (2017, 2013, 2009, 2005). School counseling principles: Ethics and law (4th ed.). Alexandria, VA: American School Counselor Association.
- [29] U.S. Department of Education and U.S. Department of Justice. (2017, February 22). Dear colleague withdraw of statements of policy and guidance reflected in "dear colleague letter on transgender students". Retrieved from <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf>
- [30] U.S. Department of Education. (2017, September 22). Department of Education Issues New Interim Guidance on Campus Sexual Misconduct. Retrieved from <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>
- [31] U.S. Department of Education. (2018, September 25). Title IX and Sex Discrimination. Retrieved from https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
- [32] U.S. Department of Education. (2008, December). Family Educational Rights and Privacy Act (FERPA): Section-by-Section Analysis [PDF File].
- [33] Walsh, M. (2016). Supreme court declines to take up case on mandatory reporters of child abuse. Retrieved from: http://blogs.edweek.org/edweek/school_law/2016/01/supreme_court_declines_to_take_2.html
- [34] Wilson, D. P. (2002, March). Paper Swapping After *Owasso v. Falvo*. Retrieved December 20, 2018, from <https://www.nais.org/articles/pages/member/paper-swapping-after-owasso-v-falvo/>