The Federal Government's Real – but Very Dangerous and Limited – Role in Confronting Bullying and Harassment

Testimony by Neal McCluskey, Associate Director
Center for Educational Freedom, Cato Institute
for the U.S. Commission on Civil Rights

Executive Summary

Blatant bullying and harassment in schools is behavior that educators should not tolerate. But that hardly makes a strong case that the federal government should get involved in combating such acts. While the federal government does have authority under the Constitution to ensure that all people receive equal protection under state law, there are myriad, major problems with the way that Washington has approached bullying and harassment, and the potential ways it could change its role.

Currently, the federal government furnishes inherently unequal protection – protection based on group identity. In addition, it encourages states and districts to trample students' speech rights, and to impose over-the-top "zero-tolerance" policies to prevent anything that could be construed as bullying, harassment, or fostering of a "hostile environment." This must change in order to protect the basic rights of all students and to allow for the creation of bullying policies that take into account the reality that what one person considers threatening, another might consider the free expression of an opinion. In addition, federal policy must be constructed with the understanding that the evidence that school officials have when they make decisions about incidents is often insufficient to foresee worse things that might eventually occur.

There are two solutions to these problems: One relatively short-term and within federal control, the other longer-term and outside of Washington's purview.

The first solution is to eliminate laws that offer federal protections based on group identity and instead give all individuals a route through which to seek federal relief for unequal protection by public schooling authorities. This should require that the federal government, with a presumption of innocence on the part of districts and states, determine that a district has indeed given unjustifiably unequal protection to an aggrieved student, and that the state has knowingly and unreasonably refused to step in to end discriminatory action by the district.

The second – and best – solution is to move from a system of government schools, to one in which parents control education funds and are free to choose options run by autonomous educators. This will end the unacceptable and avoidable dilemma we now face when public schools decide what speech is protected expression and what is bullying; will enable parents to choose schools with policies that fit their views on expression versus order; and will enable students to quickly escape schools where they are being mistreated by taking their money and going elsewhere.

Bullying and harassment are considerable problems in education. But much more than their odiousness must be considered before making them federal concerns.

Introduction

Under the 14th Amendment of the U.S. Constitution, the federal government has authority to ensure that no state denies any person "equal protection of the laws." As a result, Washington has legitimate authority to intervene when states or school districts intentionally fail to provide equal protection for students against behavior that defeats students' "ability to participate in or benefit from an educational program." But just because the federal government can do something does not mean that it should. Indeed, both current and proposed federal rules concerning bullying and harassment lead to *unequal* treatment of students under the law; unacceptably curtail free speech rights; strongly encourage excessive "zero-tolerance" policies; and prematurely quash state sovereignty. Moreover, the ultimate solution to the problem of bullying and harassment – if those problems are to be properly balanced against the imperative of protecting individual liberty – will only come from outside of government, by empowering parents and educators with full educational freedom.

Legal Authority for Federal Intervention

The first question that must be asked – but is all too often forgotten or glossed over – whenever federal action is contemplated is "would this action be constitutional." In order to answer that question in the affirmative, the authority to act must be explicit in the Constitution, which gives the federal government only specific, enumerated powers, and leaves all others, as is clear from the act of enumerating powers and is stated in the 10th Amendment, "to the States respectively, or to the people."

When it comes to bullying or harassment either by education officials or students, under the 14th Amendment the federal government does have legitimate authority to intervene if state governments are clearly providing unequal protection for some students and refusing to correct the situation. This is understood from the Amendment's requirement that no state "deny to any person within its jurisdiction the equal protection of the laws."

Group Protection is *Unequal* Protection

Ironically, in its often well-intentioned desire to combat unequal treatment under the law, Washington has set in legislative and regulatory stone just such unacceptable treatment. As the October 26, 2010 "Dear Colleague" letter from the U.S. Department of Education's Office of Civil Rights lays out succinctly but unintentionally, federal protection is currently only offered if victims of bullying have specific group identities:

> The statutes that OCR enforces include Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973 (Section 504); and Title II of the Americans with Disabilities Act of 1990 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.[1]

If you are bullied or harassed based on your race, color, national origin, sex, or disability, then your case is a federal concern. If you are bullied or harassed based on your weight, height, clothes, identity as a "nerd," or simply because on your way to and from school you walk by the house of older, aggressive children, the federal government will do nothing for you. By definition, that is unequal treatment under the law, and it leads to unequal treatment by the states and districts subject to federal regulations.

Regrettably, recent legislation proposed in Congress would exacerbate this problem, not improve it, by extending more group-based protection. Versions of the "Student Non-Discrimination Act of 2011," for instance, have been introduced in both houses of Congress. The legislation would offer federal protections for students bullied or harassed based on sexual orientation or gender identity.[2] In addition, Sen. Frank Lautenberg (D-NJ) and Rep. Rush Holt (D-NJ) have sponsored the "Tyler Clementi Higher Education Anti-Harassment Act of 2011," which would punish group-based harassment or bullying perpetrated at the higher education level via "electronic communication."[3]

Again, this legislation is no-doubt well intentioned, spurred by high-profile and disturbing acts of bullying and harassment. But requiring unequal protection under the law is intolerable at a much more foundational level, and should be declared unacceptable by the USCCR.

This is not to say that new group identities should simply be added to the protection roster. That would be a limitless and futile endeavor, with new groups constantly appearing. The answer is to eliminate protection based on membership in specific groups, and instead create a system by which students could appeal for federal protections if they felt they were being intentionally and unjustifiably treated unequally by their public school districts. In addition, it would have to be clear that state authorities were refusing to try to correct a patently discriminatory situation. Essentially, federal action should only be taken following an analysis based on a presumption of innocence for districts and states, and truly rooted in the 14th Amendment's protection of "any person" against government discrimination.

Freedom of Expression Must Trump Vague Protections

In addition to forcing manifestly unequal legal protections, current federal policy put students' and adults' freedom of expression in far too much jeopardy. While much that is called bullying and harassment is no doubt behavior intended to threaten or intimidate, identifying motive can be very difficult, and empowering government-employed educators to decide what is behavior or speech intended to harass or intimidate, rather than to express and an opinion, is very dangerous.

Many cases of students being punished – or not punished – by schools for t-shirts they have worn to school expressing controversial opinions put this problem in stark relief. Consider the case of Tyler Chase Harper, who in 2004 wore a t-shirt to his Poway, CA high school that said "homosexuality is shameful" and "I will not accept what God has condemned." Harper wore the shirt in response to the "Day of Silence" in his school, in which students remain silent to protest intolerance of gays and lesbians. School officials removed Harper from class for wearing the shirt, and Harper sued the district in response for violating his speech and religious freedom rights. Caught in the middle was the District, which had recently lost a case brought by two homosexual students who had accused it of doing too little to combat harassment. Lamented Poway schools lawyer Jack Sleeth about impossible-to-delineate harassment, "we are being sued for stopping it and we are being sued for not stopping it."[4]

Harper's case was eventually turned down by the U.S. Supreme Court, but only because Harper had graduated and lost his standing.

Whether you agree or disagree with Harper's opinion, it is difficult to see his expressing it as anything other than protected speech. But the District, especially in light of litigation it had just faced, was given little choice but to curb it. Moreover, no matter what the District did, it was looking at protracted and expensive legal battles, and at choosing between either free speech rights and protecting students against what they felt was harassment. And this case is hardly an aberration – such battles are fought regularly in districts nationwide.[5]

Monday-Morning Quarterbacking and Zero-Tolerance

One of the scenarios offered in OCR's October 2010 "Dear Colleague" letter, though intended to clarify and explain the right way for schools to handle bullying and harassment, instead shows just what a minefield dealing with the problem is. Moreover, the guidance compels districts to overreact, potentially leading to nonsensical, "zero-tolerance" policies.

OCR's letter describes a scenario in which:

> Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.

Without defining how many students constituted "some," or indicating if racially driven incidents were pervasive enough to justify students' safety fears, OCR simply goes on to assert that school officials failed to "acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title IV." In addition, the letter states that "the nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities."

This is textbook Monday-morning quarterbacking, in the form of a hypothetical – and therefore very simplified – example. According to the scenario, prior to the fights, which appear to be OCR's proof that the school failed to miss a pervasive problem, all school officials had to work with were "some students" – we don't know how many – saying and writing racially insulting things, and "some" African-American students – who might just be a small number who had had run-ins with a very few bigots – saying they did not feel safe at school. In a school of, say, 1000 students, having perhaps as few as three victims and three violators does not make it at all clear that a school has an overall "racially hostile environment" on its hands.

Unfortunately, based on this example, the evidence as school officials are actually presented with it doesn't seem to matter to OCR. If, using twenty-twenty hindsight, it is discovered that school officials missed a problem that turned out to be bigger than they reasonably concluded it was based on the evidence they had, then they have violated federal regulations and, presumably, can be subjected to federal punishments. There is no room for professional judgment or considering potential subtleties – if things don't end up right, officials are condemned.

The major problem stemming from such after-the-fact governance is clear: The strong incentive it gives school officials is to overreact to incidents that could even remotely be connected to group-based harassment or bullying, even if they are not. Indeed, to fully protect themselves, schools would have to set rules that prohibit any behavior that could ever be construed as contributing to a hostile environment, right down to mandating random selection for kickball teams and prohibiting any mentions of race, sex, or ethnicity by students whatsoever. In other words, schools are strongly encouraged to impose "zero-tolerance" bludgeons for speech and student actions along the same lines as oft-pilloried disciplinary policies that result in students being suspended for accidentally bringing butter knives,[6] or ibuprofen,[7] or lacrosse stick repair tools to school.[8]

Federalism Requires Restraint

While the 14th Amendment gives Washington authority to prohibit discrimination by states and local districts, education otherwise remains an area left to "the States" or "the people." At the very least, that means the federal government under the 14th Amendment should only interfere with the operation of public schools if it is clear that discrimination is intentionally abetted or perpetrated by states. But the federal government does not take that position; it subjects states and districts to its rules as a matter of course, often as a requirement to receive federal funds which, importantly, came from state and local taxpayers to begin with. In addition, federal legislators often seek federal remedies for bullying or harassment regardless of whether or not states are guilty of perpetrating or abetting systematic discrimination, or are taking their own steps to address discrimination.

There is, in fact, considerable evidence that states are addressing bullying on their own. In response to the bullying and subsequent suicide of Phoebe Prince, in 2010 Massachusetts passed legislation banning bullying in all school activities and requiring that every incident be investigated and reported to the parents of the students involved. Last week the Colorado Senate passed anti-bullying legislation, sending it to the Governor's desk. The Texas House also just passed such legislation.

Of course, there will be disagreement over whether any given state's legislation does too much, too little, or is just right. But that is because what is the "right" way to handle bullying – especially in light of free speech and equal protection concerns – is far from a settled matter, which is all the more reason that the federal government should be very reticent about acting even if it has the authority to do so. In keeping with the genius of the American federal design, it is better to let fifty states experiment with different remedies than to impose one on all Americans. That allows numerous potential remedies to be tried, and prevents a poor – or even dangerous – one from being imposed on the entire nation.

The Solution Isn't Centralized Control, It is Major Decentralization

Just as it is better that 50 states – or 14,000 school districts – be able to set their own policies than have one federal "solution," best of all would be, at the state and local level, to give all parents the ability to choose any school they wish, public or private, without having to sacrifice the taxes they have paid to support education. As a corollary, educators and schools should be given the freedom to set their own bullying and harassment policies in order to try new arrangements and maximize options for parents and students.

The primary benefit of this is it would allow substantial movement within the great gray area that exists between bullying and freedom of expression, while also letting the proverbial thousand flowers bloom. To illustrate the importance of this, while some students might very well have felt uncomfortable, even threatened, by Tyler Chase Harper's t-shirt, others might have fully supported his point of view. Still others might have just supported his right to express that view. Under the current system, however, one side had to lose: Either Harper's speech rights had to be compromised by the Poway schools, or those who felt intimidated had to have their learning compromised by an environment they found threatening.

With full choice, such a win-lose outcome would almost certainly have been avoided: There would likely have been a multiplicity of schools to choose from, and each school would likely have stated its speech and bullying rules. Students and their parents, then, who favored expansive student expression could have chosen schools that embrace that; parents and students who disliked intolerant speech could have chosen institutions that curbed it; and government, critically, would not have been in the ultimately intolerable position of deciding whose rights are upheld and whose aren't.

Interestingly, not only would greater choice allow people to decide where they want a school to draw the line between expression and harassment, it appears that private schools might be better able – or more willing – to control bullying. According to the most recent federal study of school crime and safety, "a higher percentage of public school students than private school students reported being called a hate-related word (10 vs. 6 percent) and seeing hate-related graffiti (36 vs. 19 percent)."[9]

There are many possible explanations for these numbers, but three stand out.

The first is that because private schools can punish students without regard to students' free speech rights – parents choose private schools and the schools are not government entities – they can set very clear, definitive rules on bullying, and punish violators swiftly. In addition, parents often choose such schools knowing what the rules are and accepting – often wanting – them, which ultimately renders discipline much less contentious than it would be if "imposed" by government authorities.

The second possible explanation is that private schools are often chosen by people with similar backgrounds or values, and hence the student bodies contain much less potential for conflict than in many public schools.

Finally, it is quite possible that private schools are less infected with bullying and harassment because they need to earn the business of parents – unlike public schools, they don't get paid no matter what – which gives them powerful incentives to nip abuse in the bud.

Critically, because outside of jurisdiction over the District of Columbia and federal installations the Constitution gives Washington no authority to govern education, Washington cannot impose or materially encourage private school choice in states or districts. It can, however, cease funding public schooling, which reinforces the government system that is inherently one-size-fits-all, and that is congenitally unable to balance competing values like speech rights and school safety. The USCCR, as a result, should encourage removal of the federal government from funding and regulation of education, and should advise states to implement universal school choice as the primary means to combat bullying and harassment while upholding speech rights.

Conclusion

Bullying and harassment in school is ugly and unacceptable. But treating people unequally under the law, or quashing free speech rights, in the name of combating these evils is even more repugnant, violating the most basic of individual rights. Unfortunately, that is what the federal government has been doing and appears poised to continue to do. If the Commission values individual liberty – the very bedrock of American society – it will recommend against continuing these policies and instead champion educational freedom for all.

---

[1] U.S. Department of Education, Office of Civil Rights, "Dear Colleague Letter: Harassment and Bullying," October 26, 2010, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[2] H.R. 998, 212th Cong., 1st sess.

[3] S. 540, 212th Cong., 1st sess.

[4] Onell R. Soto, "U.S. judge is pressed for ruling on T-shirt," *San Diego Union-Tribune*, May 27, 2006.

[5] Several similar conflicts were being fought in just the 2005-06 academic year, as itemized in Neal McCluskey, "Why We Fight: How Public Schools Cause Social Conflict," *Cato Institute Policy Analysis* no. 587, January 23, 2007.

[6] Chris Francescani, "Expelled for Possession of a Butter Knife," ABC News, October 22, 2010, http://abcnews.go.com/TheLaw/story?id=3758286.

[7] Maia Szalavitz, "Mother and Daughter Arrested for 'Dangerous Drug' Ibuprofen," *Time*, December 16, 2010, http://healthland.time.com/2010/12/16/mother-and-daughter-arrested-for-dangerous-drug-ibuprofen/.

[8] Liz Bowie, "Two Easton lacrosse players suspended under zero-tolerance policies," *Baltimore Sun*, May 10, 2011, http://articles.baltimoresun.com/2011-05-10/news/bs-md-co-lacrosse-discipline-20110509_1_zero-tolerance-policies-lacrosse-players-school-board.

[9] U.S. Department of Education and U.S. Department of Justice, Office of Justice Programs, *Indicators of School Crime and Safety: 2010*, November 2010, p. 38, http://nces.ed.gov/pubs2011/2011002.pdf.