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April 4, 2012
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State-Tribal Relations Committee

62nd Montana Legislature

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To: State-Tribal Relations Committee Members

From: Dan Whyte, Legislative Attorney

Re: Legislation Prohibiting Bullying and Harassment

Date: February 24, 2012

The State-Tribal Relations Committee has asked that legislative staff review previous legislation related to the prohibition of bullying and harassment for the Committee's consideration. This memorandum discusses legislative efforts to prohibit these behaviors and provides commentary on other states' similar legislation. Copies of all bills introduced are attached for the Committee's convenience.

In 2003, then-Representative Tom Facey introduced HB 449, entitled: "An Act Requiring a School District to Adopt a Policy Prohibiting Harassment, Intimidation, or Bullying on School Property, at a School-Sponsored Function, or on a School Bus". The bill would have required the trustees of a school district to adopt a policy prohibiting harassment, intimidation, or bullying. The policy was a minimal requirement policy that would include formal investigation, disciplinary action, and statements prohibiting reprisals or retaliation. That bill was heard before the House Education Committee on February 5, 2003, but was tabled on February 13, 2003.

Representative Sam Kitzenberg introduced Senate Bill 198 during the 2005 Legislative Session. While the bill initially followed the language of Rep. Facey's HB 449, the bill was substantially amended to require the Board of Public Education to work with school districts on methods to address bullying and harassment and to develop a policy. The bill passed the Senate but failed on a 50/50 vote on third reading in the House.

Senate Bill 141 was introduced to the 2011 Legislature by Senator Kim Gillan. The initial committee hearing was before the Senate Education and Cultural Resources Committee and included numerous witnesses in favor of and in opposition to passage. Proponents included Montana Attorney General Steve Bullock and Superintendent of Public Instruction Denise Juneau, as well as numerous parents and students who were personally familiar with bullying in schools. Opponents included the Montana School Boards Association, Montana Rural Education Association, Montana Association of School Superintendents, and numerous individuals.

The purpose of SB 141 was to prevent bullying:

Section 3. Bullying of student prohibited. Bullying, harassment, or intimidation of a student enrolled in a public K-12 school or nonpublic accredited school by another student or an employee is strictly prohibited:

(1) in a classroom or other location on school premises;

(2) during any school-sponsored program, activity, or function where the school is responsible for the student, including on a school bus or other school-related vehicle; or

(3) through the use of electronic communication, as defined in 45-8-213, that substantially disrupts the orderly operation of a school or any school-sponsored program, activity, or function where the school is responsible for the student.

In the bill, "bullying" was defined as follows:

Section 2. Definitions. (1) "Bullying, harassment, or intimidation" means any threatening, insulting, or demeaning gesture or physical conduct or any intentional written, verbal, or electronic communication or threat directed against a student that a reasonable person under the circumstances should know will have the effect of:

(a) placing a student in reasonable fear of harm to the student or the student's property;

(b) substantially interfering with a student's educational performance or opportunities; or

(c) substantially disrupting the orderly operation of a school.

(2) The term includes retaliation against a victim or witness who reports information about an act of bullying, harassment, or intimidation.

The bill gave school districts discretion and control over the development of a policy related to prevention of bullying, harassment, or intimidation, but under Section 4 of the bill also required a school district to implement a district policy that accomplished, at a minimum, the following:

1) defining bullying, harassment, or intimidation;
2) a statement prohibiting bullying, harassment, or intimidation;
3) a procedure for reporting incidents of bullying;
4) a procedure for prompt investigation of all reports of bullying;
5) a procedure to determine whether the reported incident is outside the jurisdiction of the school or district;
6) a procedure for prompt notification of the parents of the victim and perpetrator;
7) a procedure to protect the victim in the future and refer the victim for counseling;
8) a procedure for establishing consequences and remedial action, including counseling, of persons who committed acts of bullying; and

9) a process for publicizing the policy.

SB 141 proponents testified that Montana is one of five states that has yet to adopt legislation prohibiting bullying, harassment, or intimidation. They also argued that the legislation was necessary to assist school districts in providing a uniform policy, while leaving local control of the policy with the school districts.

Opponents testified that the appropriate vehicle for providing a policy prohibiting bullying, harassment, or intimidation is through the Board of Public Education, that the Board already put a policy in place in 2006, and that every school was already required to have an implemented policy. In addition, proponents argued that such a policy should remain locally with the school districts, not with the Office of Public Instruction.

One of the main concerns of the opponents was the potential legal liability of a school district if a person considered the district's response to a report of bullying inappropriate or insufficient. Amendments adopted in the Senate included language that a school district may be held liable for bullying, harassment, or intimidation if it is shown by a preponderance of the evidence that the school district had actual knowledge of the bullying, that the bullying was so severe, pervasive, and objectively offensive that it effectively deprived a pupil of access to an educational opportunity or benefit, and that the school was deliberately indifferent to the bullying, harassment, or intimidation. The bill passed the Senate with this language.

Senate Bill 141 was heard before the House Education Committee on March 21, 2011, with many of the same proponents and opponents voicing the same arguments. The bill was tabled on March 26, 2011, and on March 30, 2011, a motion on the House floor to take the bill from the Committee and place it on second reading failed.

Several neighboring states have passed legislation prohibiting bullying in schools. Idaho prohibits "harassment, intimidation, or bullying" that will have the effect of harming a student, damaging the student's property, placing the student in reasonable fear of harm to his or her person, or reasonable fear of damage to his or her property. § 18-917A, Idaho Code (2006). Idaho's definition of bullying includes any act committed through a telephone or computer. Pursuant to § 33-205, Idaho Code, the superintendent of a district or a principal may temporarily suspend a pupil for harassment, intimidation, or bullying for up to 5 days.

The Idaho Legislature has not further defined how schools and school districts must deal with bullying, intimidation, or harassment, leaving that to school board trustees through the drafting of rules for disciplining unruly or insubordinate pupils. § 33-512, Idaho Code.

In 2009, the Wyoming Legislature passed Wyo. Stat., § 21-4-314, which requires each school district to adopt a policy prohibiting harassment, intimidation, or bullying in school. The Legislature legislated specific minimal requirements of the policy:

(i) A statement prohibiting harassment, intimidation or bullying of a student;

(ii) A definition of "harassment, intimidation or bullying" which includes at minimum the definition as provided in W.S. 21-4-312(a)(i);

(iii) Consequences and appropriate remedial actions for persons committing acts of harassment, intimidation or bullying or engaging in reprisal or retaliation;

(iv) Procedures for reporting and documenting acts of harassment, intimidation or bullying, including a provision for reporting anonymously. However, formal disciplinary action shall not be taken solely on the basis of an anonymous report. The procedures shall identify the appropriate school personnel responsible for receiving a report and investigating a complaint;

(v) Procedures for prompt investigation of reports or complaints of serious violations;

(vi) A statement that prohibits reprisal or retaliation against a person who reports or makes a complaint of harassment, intimidation or bullying;

(vii) A strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report;

(viii) Consequences and appropriate remedial action for a person who is found to have made a false accusation, report or complaint;

(ix) A process for discussing the district's harassment, intimidation or bullying policy with students; and

(x) A statement of how the policy is to be publicized, including notice that the policy applies to participation in functions sponsored by the school.

Development of the Wyoming policy requires the input of parents, teachers, school employees and administrators, students, and community members. The Wyoming Legislature's policy requirements are nearly identical to those in SB 141. Under Wyo. Stat., § 21-4-312, Wyoming defines "harassment, intimidation or bullying" as:

(i) "Harassment, intimidation or bullying" means any intentional gesture, any intentional electronic communication or any intentional written, verbal or physical act initiated, occurring or received at school that a reasonable person under the circumstances should know will have the effect of:

(A) Harming a student physically or emotionally, damaging a student's property or placing a student in reasonable fear of personal harm or property damage;

(B) Insulting or demeaning a student or group of students causing substantial disruption in, or substantial interference with, the orderly operation of the school; or

(C) Creating an intimidating, threatening or abusive educational environment for a student or group of students through sufficiently severe, persistent or pervasive behavior.

Utah prohibits any employee or student from engaging in bullying or harassing of any student or employee on school property, at a school-related event, on a school bus, at a school bus stop, or while a student or employee is traveling to or from a school-related event. Utah Code Ann. § 53A-11a-201. Utah requires that by September 1, 2012, each school district must adopt a "bullying, cyber-bullying, harassment, and hazing policy" with input from students, parents, teachers, school administrators, school staff, or local law enforcement. Utah Code Ann. § 53A-11a-301. The policy requirements placed on districts by the Utah Legislature are not quite as restrictive as Wyoming but are still mandated at the state level and still include minimal requirements:

> (3) The policy shall include the following components:
> (a) definitions of bullying, cyber-bullying, harassment, and hazing that are consistent with this chapter;
> (b) language prohibiting bullying, cyber-bullying, harassment, and hazing;
> (c) language prohibiting retaliation against an individual who reports conduct that is prohibited under this chapter; and
> (d) language prohibiting making a false report of bullying, cyber-bullying, harassment, hazing, or retaliation.
> (4) A copy of the policy shall be included in student conduct handbooks and employee handbooks.
> (5) A policy may not permit formal disciplinary action that is based solely on an anonymous report of bullying, cyber-bullying, harassment, hazing, or retaliation.
> (6) Nothing in this chapter is intended to infringe upon the right of a school employee or student to exercise their right of free speech.

Bullying is defined under Utah Code Ann., § 53A-11a-102(1). The expansive definition includes committing an act that:

> (i)(A) endangers the physical health or safety of a school employee or student;
> (B) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements;
> (C) involves consumption of any food, liquor, drug, or other substance;
> (D) involves other physical activity that endangers the physical health and safety of a school employee or student; or
> (E) involves physically obstructing a school employee's or student's freedom to move; and
> (ii) is done for the purpose of placing a school employee or student in fear of:
> (A) physical harm to the school employee or student; or
> (B) harm to property of the school employee or student.

(b) The conduct described in Subsection (1)(a) constitutes bullying, regardless of whether the person against whom the conduct is committed directed, consented to, or acquiesced in, the conduct.

Utah also extensively defines cyber-bullying, harassment, and hazing.

(3) "Cyber-bullying" means using the Internet, a cell phone, or another device to send or post text, video, or an image with the intent or knowledge, or with reckless disregard, that the text, video, or image will hurt, embarrass, or threaten an individual, regardless of whether the individual directed, consented to, or acquiesced in the conduct, or voluntarily accessed the electronic communication.

(4) "Harassment" means repeatedly communicating to another individual, in an objectively demeaning or disparaging manner, statements that contribute to a hostile learning or work environment for the individual.

(5) (a) "Hazing" means intentionally or knowingly committing an act that:

(i) (A) endangers the physical health or safety of a school employee or student;

(B) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements;

(C) involves consumption of any food, liquor, drug, or other substance;

(D) involves other physical activity that endangers the physical health and safety of a school employee or student; or

(E) involves physically obstructing a school employee's or student's freedom to move; and

(ii) (A) is done for the purpose of initiation or admission into, affiliation with, holding office in, or as a condition for, membership or acceptance, or continued membership or acceptance, in any school or school sponsored team, organization, program, or event; or

(B) if the person committing the act against a school employee or student knew that the school employee or student is a member of, or candidate for, membership with a school, or school sponsored team, organization, program, or event to which the person committing the act belongs to or participates in.

(b) The conduct described in Subsection (5)(a) constitutes hazing, regardless of whether the person against whom the conduct is committed directed, consented to, or acquiesced in, the conduct.

Utah also has provisions for retaliation and false allegations. Utah Code Ann § 53A-11a-202. Utah requires the state Board of Education to develop a model policy. Utah Code Ann § 53A-11a-302.

As indicated above, SB 141 would have limited liability of school districts for failure to

meet the bullying policy unless a school district had actual knowledge of the bullying, the bullying was so severe, pervasive, and objectively offensive that it effectively deprived a pupil of access to an educational opportunity or benefit, and the school was deliberately indifferent to the bullying, harassment, or intimidation. Wyoming, Utah, and Idaho do not have statutory language that limits liability for school districts who are alleged to have failed to follow the bullying policy.

Most states have determined that the prohibition and prevention of bullying is imperative and many have statutory language directing school districts to adopt policies. The Montana Board of Public Education requires each district to adopt a policy prohibiting bullying, but the Montana Legislature has not made passing legislation a priority. If the Committee or the Legislature decides to introduce legislation during the 63rd Legislative Session, substantial model language exists both in previously introduced legislation and in other states' statutes.