

HAZING: A Practical Approach to an Ongoing Problem

R. Daniel Castille

M. Karen Kilgore

Laura M. Castille

February 10, 2018

NMSBA 2018 Board Member Institute



CUDDY & McCARTHY, LLP
Attorneys at Law

Main points to take away.

- Hazing, particularly by older athletes against younger athletes, will continue unless the school officials responsible for supervision change the culture and continuously and seriously train athletes about hazing and its consequences.
 - Students need to understand that they face life-changing consequences for hazing: criminal charges including as adults, registration as sex-offenders, expulsion or suspension from school, loss of athletic privileges, public disgrace.
- If hazing is suspected or known, school officials, including coaches, must take immediate steps to address it and prevent further occurrences.

You are required by law to supervise athletes

- D. Each licensed school employee shall:
- (3) exercise supervision over students on property belonging to the public school or state agency and while the students are under the control of the public school or state agency; and

NMSA 1978 § 22-10A-3

Liability for Bullying and Hazing (deliberate indifference)

- Violation of Constitutional Due Process Rights.
- Normally, state actors (public school employees) are not liable for the acts of third parties but...
- State actor may be liable when he or she affirmatively acts to create, or increase a victim's vulnerability to, or danger from private violence. (The "Danger Creation" exception).
- State actor liable if 1) he creates the danger or increases vulnerability to danger; 2) conduct puts victim at substantial risk of serious harm; 3) the risk is known or obvious; 4) state employee acts in reckless disregard of that risk and 5) the conduct shocks the conscience.

Liability for Bullying and Hazing (Title IX)

- Title IX is a source of hazing liability if the hazing or harassment is of a sexual nature or because of sex.
- District is liable if it 1) has actual knowledge of, and 2) is deliberately indifferent to, 3) harassment that is so severe, pervasive and objectively offensive as to 4) deprive access to the educational benefits or opportunities provided by the school.

State Law Negligence

- Did school officials know, or should they have known about a danger (i.e., hazing);
- Whether the danger was foreseeable; and
- Whether the district and its employees exercised ordinary care for the safety of students in the victim's situation.

2017 in U.S. high schools...

- **High school football players charged in hazing incident involving exposure of genitals**
 - November 3, 2017
- **Two Whitwell High School football players expelled Thursday after hazing incident**
 - September 28th, 2017
- **Six students claim sexual assaults in Hamilton High School hazing case**
 - Sep 18, 2017
- ***5 Wheaton College football players face felony charges in hazing incident***
 - October 23, 2017

New Mexico hazing cases

- **Horroric High School Football Hazing Case Shakes New Mexico Town**
- Published September 24, 2008 [Associated Press](#)
 - **\$5.25M Settles Hazing Lawsuit**
 - By [Phil Parker / Journal North Reporter](#)
 - Published: Friday, September 2nd, 2011 at 12:08am
- Six older football players accused of sodomizing younger players with broomsticks at preseason camp.
- Six older players convicted or plead guilty to criminal sexual penetration of minors. Ring-leader did two years in juvenile facility.
- Six football coaches lost their jobs.

Wait there's more...

- **2010 Valencia High School Hazing Case**
 - Younger player getting dressed after practice when three seniors snuck up and wrestled him to the floor.
 - One senior pulled his pant down and rubbed his bare buttocks in victim's face
 - One senior allegedly thrust his fingers through the victim's shorts and penetrated his anus.
 - Three seniors charged as adults with criminal sexual penetration, criminal sexual contact of a minor, conspiracy, and kidnapping.

Valencia High School cont'd

- Student sued Board of Education, superintendent, school principal, and six coaches.
- Federal court said that defendants had a duty to prevent foreseeable risk of older athletes hazing younger athletes.
- “Loose-running high school students, like loose-running dogs or roaming prison gangs, are capable of violence, and all three situations present a foreseeable danger.”
C.H. v. Los Lunas Sch. Bd. of Educ., (D.N.M. 2012).
- Cost district \$250,000 to settle civil claims.

And more...

- **Raton school district federal suit (2015).**
- Varsity and JV basketball teams returning on bus from away games.
- Complaint alleged that with bus lights dimmed and coaches listening to headphones and laying down, two older players held down various younger players and “tea-bagged” them and humped them wearing only compression shorts.
- Perpetrators allegedly the victims in similar incident the prior year.
- Coaches accused of being oblivious and taking no action to prevent the assaults.
- School Board, superintendent, ass’t. superintendent, and coaches sued.

Horse-play or sexual assault?

- “Impossible sit-up” or “tea-bagging”
- § 30-9-13. Criminal sexual contact of a minor
 - A. Criminal sexual contact of a minor is the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts. For the purposes of this section, “intimate parts” means the primary genital area, groin, buttocks, anus or breast.

Hazing: More than harmless pranks

- Common among student groups
- Particularly athletic teams
- Danger of hazing
 - “Harmless pranks” escalate to injuries, accidents, and even death.
 - Often not taken seriously by school personnel, coaches, students, & parents.
 - Code of silence allows hazing to go undetected for years.
 - Freshman are particularly vulnerable.

Myths about Hazing

- ***Myth:*** Hazing is no more than foolish pranks that sometimes go awry.
- ***Fact: Hazing is an act of power and control over others – it is victimization. Hazing is pre-meditated and NOT accidental. Hazing is abusive, degrading and often life-threatening.***

Myths about Hazing

- **Myth:** If someone agrees to participate in an activity, it can't be considered hazing.
- **Fact:** *In states that have laws against hazing consent of the victim can't be used as a defense in a civil suit. This is because even if someone agrees to participate in a potentially hazardous action it may not be true consent when considering the peer pressure and desire to belong to the group.*

Laws on Hazing

- All but 6 states have adopted laws prohibiting hazing/bullying.
- New Mexico, Wyoming, South Dakota, Montana, Alaska, and Hawaii have no laws specific to hazing.

As a Result, School Policies are Necessary

- While NMAC 6.12.7
 - Defines “bullying” to include, but not be limited to, **hazing**, harassment, intimidation, or menacing acts of a student.
 - This conduct may, but need not be, based on the victim’s race, color, sex, ethnicity, national origin, religion, disability, age, or sexual orientation.
- School policies specific to the prohibition of hazing are important, so that there is no grey area when it comes to this type of conduct and the expectations of school staff when observing or receiving a report of such conduct.

Hazing Defined

- Includes but is not limited to
 - Engaging in any offensive or dangerous physical contact, restraint, or isolation of a student, or
 - Requiring or encouraging a student to perform any dangerous, painful, offensive, or demeaning physical or verbal act, including the ingestion of any substance, exposure to the elements, deprivation of sleep or rest or extensive isolation, or

Hazing Defined (cont.)

- Subjecting a student to any dangerous, painful, harmful, offensive, or demeaning conduct or to conduct reasonably likely to create extreme mental distress.
- Alcohol consumption, humiliation, isolation, sleep-deprivation, and sex acts are hazing practices common across student groups.

National Study on Hazing 2008

- Hazing is prevalent among HS students
 - 47% of students report being hazed in high school.
 - 51% male, 45% female
 - Hazing occurs across a range of co-curricular high school activities, but is highest on sports teams at 47%.
 - 16% of students experienced class hazing – an initiation for getting into high school
 - A significant amount of hazing occurs **in front** of an adult.
 - Only 8% of students experiencing hazing, labeled it as hazing at the time it occurred.

Alfred University Study on NCAA teams

- Physical & Emotional damage done
 - 71% of students subjected to hazing reported negative consequences, such as getting into fights, being injured, fighting with parents, doing poorly in school, hurting other people, having difficulty eating, sleeping, or concentrating, or feeling angry, confused, embarrassed or guilty.

School Staff must be aware and take action

- 36% of the students said they did not report hazing primarily because:
 - “There’s no one to tell.”
 - “Adults won’t handle it right”
 - “It’s not a problem.” (28%)
 - “Accidents just happen.” (28%)
 - “Other kids would make my life miserable.” (24%)
 - “I just wouldn’t tell on my friends no matter what.” (16%)

Education of Staff and Students Key:

- Between “Fun” and Hazing
 - Most students said they participated in humiliating, dangerous or potentially illegal activities as a part of joining a group because those activities are “fun and exciting.”
 - Hazing incidents thought to be “fun” often escalate into dangerous situations where students are hurt, injured, or even killed.

What Must Schools Do?

- Adopt and publish clear policies prohibiting hazing.
- Clearly publish sanctions for hazing in student handbook and discipline matrices.
- Hold meetings with students, coaches, sponsors, parents and administrators to review policies, consequences and emphasize the dangers of hazing.
- Use Anti-Hazing Contracts with all students belonging to student organizations.
- Enforce the policies with strict sanctions.
- Pay attention

Change in Culture Needed

- Hazing and bullying becomes part of tradition and culture.
- Students must be educated on hazing, how to report and the consequences for participation.
- Staff must be educated on hazing and what to do when they see it.
- All parts of the school community must commit to civility, equality and respect.
- Constantly encourage older players to be role models for younger players. That's part of their job.
- Discourage all types of unfavorable treatment of younger player regardless of seeming harmlessness.
- Awareness is the key – **cannot be a one and done training.**
- Parents must be part of the training and education.

Break the Code of Silence

- Break the taboo and communicate openly about the issue.
- NEVER downplay the situation.
 - Treating the issue as a serious situation is crucial, and will determine how the coaches, students, and community react to the situation.
- NEVER assume you have an isolated incident.
- NEVER subject the victim to further victimization.

When You Receive Allegations of Hazing

- Take immediate action
- Investigate
 - Decide who will investigate
 - Do not wait for the police.
- Notify Police when a potential crime has been committed
 - Conduct a separate and independent school investigation for school discipline process and let law enforcement conduct its own criminal investigation
 - Do not delay if crimes are suspected
- Follow your policies strictly
- Be prepared to deal with the media

Prepare to Thoroughly Investigate

- Interview the victims and students who were accused of perpetrating the hazing.
- Strict consequences for perpetrators are essential to make a statement to other students that this will not be acceptable behavior.
 - Cannot be a slap on the wrist for this type of conduct.
- Meet with parents of both groups to let them know what is being done to address the issue and enlist their support.
 - Remember to strictly enforce FERPA confidentiality.

Investigate (cont.)

- Provide counseling with the school psychologist for both the victims and perpetrators.
 - Bring in help from other schools if necessary.
- Allow players to give answers in writing. Ask specific questions.
 - What is hazing?
 - Have you ever been hazed?
 - Have you ever been involved in hazing others?
 - If you have, what part did you play?

Investigate (cont.)

- Make sure to make students aware that they could be subject to disciplinary action.
- Broaden the investigation to other teams and organizations.
- Speak with former players to find out how long it has been going on. They have no reasons not to be honest with you.

Decide on Appropriate Action and Take Action

- Take student disciplinary action when there is evidence of student hazing.
- Take employee disciplinary action when there is evidence that employees failed to take the appropriate steps to prevent or address hazing.

You Must Take Action

- Remember:
 - Failure to act may be considered deliberate indifference
- NMPSIA could refuse to pay a judgement against the school district.
- Investigate and keep complete records of the investigation.

Be prepared for a lawsuit

- As a result of hazing incidents, the District may be sued by
 - Victims – allegations of injuries/damages
 - Perpetrators – allegations of due process or equal protection violations in discipline process and hazing condoned by staff
 - Employees – allegations of due process violations or assertions of no “just cause” in statutory termination or discharge procedures
 - Make sure that your investigation report will make sense in two or three years when employees have to testify.

Policy Enforcement + Education

- Both needed to help prevent the dangers of hazing
- Focus on
 - Breaking the Cycle
 - Changing the Culture

Other Education/Information Sources on Hazing

- NMAA Presentations for coaches, athletes, parents, others
 - “Pursuing Victory with Honor”
- Books
 - *Preventing Hazing: How Parents, Teachers, and Coaches can Stop the Violence, Harassment, and Humiliation*, Susan Lipkins
 - *The Hazing Reader*, Hank Nuwer
 - *Wrongs of Passage*, Hank Nuwer

HAZING

- *“Hazing is an extraordinary activity that, when it occurs enough, becomes pervasively ordinary as those who engage in it grow desensitized to its inhumanity.”*

Hank Nuwer, author

Wrongs of Passage, p.31

Got Questions?

R. Daniel Castille

dcastille@cuddymccarthy.com

M. Karen Kilgore

kkilgore@cuddymccarthy.com

Laura M. Castille

lcastille@cuddymccarthy.com

505-888-1335 Albuquerque

505-988-4476 Santa Fe



CUDDY & McCARTHY, LLP
Attorneys at Law