



**KNUTSON, FLYNN & DEANS, P.A.**  
1155 Centre Pointe Drive, Suite 10  
Mendota Heights, MN 55120  
(651) 222-2811

## **Understanding the Safe and Supportive Minnesota Schools Act And Its Implications for School Administrators**

By

**Stephen M. Knutson**  
[sknutson@kfdmn.com](mailto:sknutson@kfdmn.com)

**Katharine M. Saphner**  
[ksaphner@kfdmn.com](mailto:ksaphner@kfdmn.com)

The Safe and Supportive Minnesota Schools Act (“SSMSA”) was enacted in 2014 in an effort to prohibit and prevent bullying in Minnesota’s schools. *See* Minn. Stat. § 121A.031. In practice, the SSMSA affects schools and school administrators in three primary ways.

First, it imposes certain ongoing affirmative obligations on school districts, including the adoption of a policy with specific components, distribution and posting of the policy, and training of staff regarding bullying concerns. These requirements must be consistently met regardless of whether any bullying complaints are submitted. Second, the SSMSA dictates the appropriate manner of addressing bullying complaints. It sets forth a definition of bullying and requires that bullying complaints be promptly investigated and met with a remedial response if substantiated. Finally, the SSMSA provides for an administrative complaint process with the Minnesota Department of Education (“MDE”) if parents are dissatisfied with a school district’s handling of a bullying complaint.

### **I. ONGOING AFFIRMATIVE OBLIGATIONS UNDER THE SSMSA**

The SSMSA imposes several ongoing obligations that essentially seek to ensure that each Minnesota school district establishes a culture that does not permit bullying. For instance, the SSMSA requires that each school district adopt a policy prohibiting bullying and containing specific components outlined in the statute. (MSBA Model Policy 514 contains all of the required components.) Among other requirements, the policy must (1) designate a bullying report-taker who will receive and investigate reports, (2) require that bullying investigations begin within three school days of the report, and (3) implement an appropriate remedial response to any substantiated bullying.

The SSMSA also requires that school districts distribute and discuss the bullying prohibition policy and the SSMSA's requirements. The policy must be conspicuously posted at the administrative offices, given to each school district employee, included in the student handbook, and made available on the school's website. The policy must also be discussed with students, school personnel, and volunteers.

In addition, the SSMSA requires that school district employees who know of bullying make reasonable efforts to address and resolve the conduct. Accordingly, it imposes a training requirement. Each school district must provide appropriate training to all school personnel to prevent, identify, and respond to bullying. Each employee must receive this training at least once every three years. School districts are not required to document the training, but it is nevertheless advisable to document each time an employee receives this training, including the date and the contents of the training.

## **II. ADDRESSING BULLYING COMPLAINTS UNDER THE SSMSA**

It is crucial that school administrators keep in mind that not every negative interaction between students constitutes bullying. Some incidents may be more properly viewed as harassment to be addressed pursuant to Title IX, and some may be normal peer conflict to be analyzed under the student conduct code. Only incidents that meet the SSMSA's definition of bullying must be handled in manner described in the SSMSA.

At the outset, the SSMSA requires that bullying must be "intimidating, threatening, abusive, or harming conduct that is objectively offensive." This standard appears to be an objective standard, under which an administrator must determine whether a reasonable person would consider the conduct to be objectively offensive and intimidating, threatening, abusive, and/or harming. The SSMSA notes that such conduct might include causing physical harm to a student or a student's property, violating another student's expectation of privacy, defaming another student, intentionally inflicting emotional distress, or engaging in conduct based on actual or perceived race, ethnicity, color, creed, religion, national origin, immigration status, sex, marital status, familial status, socioeconomic status, physical appearance, sexual orientation or gender identity, academic status or student performance, disability, age, or status with regard to public assistance.

In addition, to constitute bullying, the conduct must either (1) materially and substantially interfere with a student's educational opportunities, performance, or ability to participate in school functions or activities or receive school benefits, services, or privileges, or (2) include an actual or perceived imbalance of power between the students as well as repeated conduct. The educational-opportunity test is subjective, measured by whether such an interference has been actually experienced by the alleged victim. The repeated-conduct, imbalance-of-power test appears to be more objective, and assesses whether the conduct recurred and whether there appears to be an imbalance of power (based on age, size, popularity, etc.) between the students. *See* Minn. Stat. § 121A.031, subd. 2(e).

The SSMSA also prohibits cyberbullying, which it defines as bullying using technology or other electronic communication, including a post on a social network. To qualify as cyberbullying, the conduct must either involve the use of school technology, occur at school or at

a school function, or substantially and materially disrupt the student's learning or the school environment.

The SSMSA establishes a process for handling complaints of bullying and cyberbullying. This process includes the submission of a complaint, investigation of the allegations, and a determination made based on the evidence gathered in the investigation as to whether the allegations were substantiated and what appropriate remedial action the school district should implement.

## **1. Receiving and Recognizing Bullying Complaints**

The first step of addressing a bullying complaint is recognizing it as such. Of course, if the official designated as the report-taker in the bullying prohibition policy receives a formal bullying complaint, it is clear from the outset that the SSMSA applies. But even when a complaint of bullying is not submitted to the appropriate official, fails to include the word "bullying," or was not submitted on an official form, the SSMSA obligations nevertheless apply in full force. *See, e.g.*, MSBA Model Policy 514, IV.B. Accordingly, whenever a school district official receives a report of conduct that sounds as though it meets the definition of bullying described above, the report should be treated as a bullying complaint and referred to the report-taker identified by the bullying prohibition policy.

Though it is not required by the SSMSA, it is wise to ensure the complaint itself is documented as thoroughly as possible. In the event that the complaint is not initially made in writing, consider asking the person reporting the incident to write out and date their complaint for the school district's records. If they are unwilling to submit a written complaint, the school district official who receives the complaint should type up all of the information provided in the oral report. The official should make sure to include the date on which the report was made, as the timing of investigation and response is key to SSMSA compliance.

A school district may want to consider contacting legal counsel early in the process so that the school district's attorney can advise as to whether a complaint should be treated as a bullying complaint and either advise on how to conduct the investigation or step in and conduct the investigation independently.

## **2. Investigating a Bullying Complaint**

An investigation into bullying allegations must begin within three school days of when the school district receives the report. A thorough investigation, including multiple witnesses, is more likely to be a successful defense against liability than a scant investigation consisting of only interviews of the alleged victim and perpetrator. Before conducting interviews, the administrator investigating the complaint should review any information the school district has in its possession related to the incident (such as surveillance video, school district emails, and any documentation provided with the complaint). Then interviews should be conducted, ideally in the following order: (1) alleged victim, (2) any witnesses (identified by the victim, depicted in the security footage, nearby adults, students known to be trustworthy and reliable); (3) alleged perpetrator; and (4) any follow-up interviews to address new information offered by the alleged perpetrator.

Each interview should begin with a Tennessee Notice. Then questions should be asked about the alleged bullying incident, including questions related to imbalance of power and interference with educational opportunities. The interview should also seek to identify additional witnesses to the conduct. At the end of the interview, the interviewee should be directed not to discuss the interviews with others and told to report any retaliation to administration.

The interviewer should thoroughly document the interviews as soon as possible after conducting them by taking detailed notes of all interviews including the date of the interview. The notes should be typed for readability purposes and should include the school administrator's conclusions as to the credibility of each witness. Litigation can arise years after the events occurred, when memories of the events might have faded.

### **3. Substantiating the Complaint and Determining Remedial Action**

After the investigation has ended, the administrator should promptly review the complaint and all the other information that was gathered in the investigation. First, the administrator should determine what happened: if the conduct did not occur, the bullying complaint cannot be substantiated. The administrator should also consider whether there were any other relevant circumstances that the investigation turned up, such as an actual or perceived imbalance of power or conduct by the alleged victim.

Next, the administrator must determine whether the conduct constituted bullying under the SSMSA. Did the conduct constitute intimidating, threatening, abusive, or harming conduct that is objectively offensive? If not, the complaint cannot be substantiated. If so, consider whether the conduct caused material and substantial interference with the victim's educational opportunities. If not, the bullying complaint can only be substantiated if the conduct included both a pattern of conduct and an imbalance of power.

If the bullying is substantiated, the administrator must promptly determine an appropriate remedial response, which must be designed to "stop and correct" the conduct, prevent it from recurring, and protect, support, and intervene on behalf of the victim. The remedial response can be, but need not be disciplinary, but must be selected and tailored to the particular incident and nature of the conduct, as well as the student's age and behavioral history. If the administrator concludes that the conduct occurred but does not meet the definition of bullying, the school district can still address the conduct through the student conduct code.

The school district should be cognizant about thoroughly documenting the entire decision-making process. The administrator should write out a full description of the conclusions as to exactly what occurred and an analysis as to whether conduct met the definition of bullying and identify the appropriate remedial action the school district has selected and explain why it was selected. All documentation should contain notes. The written summary of conclusions should be stored in the same place as the interview notes, as well as documentation of all communication with the families of the alleged victim and alleged perpetrator (emails, voicemails, notes of conversations).

### **III. RESPONDING TO POTENTIAL ENFORCEMENT ACTIONS**

The SSMSA provides for an administrative complaint process through MDE that parents may utilize if they feel that a school district has not adequately or appropriately responded to bullying complaints. While the MDE does not have the authority to enforce its rulings or penalize a school district for failure to comply with the SSMSA, a favorable MDE decision may embolden parents to file a lawsuit in state court. Accordingly, a school district's response to any administrative complaint should be undertaken with care.

### **1. Administrative Complaint with MDE**

The SSMSA allows students and parents to file a complaint of noncompliance with MDE, which is responsible for "investigating, reporting, and responding to noncompliance" with the SSMSA. MDE's investigations generally focus on compliance with the statute, rather than on the facts of occurred during the incident. Accordingly, the focus of MDE's investigation of a complaint tends to be on the contents of the school district's policy, whether training and distribution of the policy occurred as required by the SSMSA, and whether an investigation and remedial action were timely.

MDE's investigation of a complaint generally centers on the review of written submissions by the parents and the school district. After reviewing the complaint and any other information provided by MDE, the school district should timely respond to the complaint. The school district's response should include a written letter from the school district that explains the process the school district used to evaluate the bullying complaints as well as copies of all relevant documents (including administrator notes, interview notes, emails, discipline records, etc.), which the letter may cite and quote as necessary. In doing so, the documents will need to be appropriately redacted to remove data classified as private under the Minnesota Government Data Practices Act and/or the Family Educational Rights and Privacy Act.

MDE's investigation may not necessarily include any interviews of school district staff. Accordingly, the school district's written response to the MDE complaint may be its only true opportunity to demonstrate that it complied with the statute. A school district that is notified about such a complaint might therefore want to consider seeking assistance from legal counsel, who may be more experienced at effectively explaining the school district's compliance with the SSMSA and who will be able to assist the school district in complying with data privacy laws regarding the documents being provided to MDE.

After reviewing the submissions of the parents and the school district, MDE will issue a written decision determining whether the school district complied with or violated the SSMSA. This decision will be sent to both the parents and the school district.

### **2. Appeal of MDE Decision to MDE Commissioner**

Though MDE does not have enforcement authority, parents who receive a successful outcome at MDE may be motivated to take further action against the school district. Accordingly, a school district that receives an unfavorable decision may want to seek an appeal. Though there is no guaranteed right to appeal, MDE may allow an appeal of an unfavorable decision upon request. There are no formal rules of the appeal process, but it tends to include an opportunity for the school district to submit additional written documentation, an opportunity for the parents to

respond, and an invitation for the parties to meet with the Commissioner to answer questions. The Commissioner will then issue a written decision on the appeal.

Be aware, however, that succeeding in an appeal of an MDE decision is difficult, as the process is fairly cursory. A school district's greatest chance of success in an administrative complaint process is a vigorous response to the complaint in the first instance.

### **3. Civil Litigation**

Finally, parents may also initiate a lawsuit in state court. An MDE decision is not a prerequisite to filing a lawsuit, but a parent who receives a favorable outcome at MDE may be more likely to file a lawsuit, and to heavily reference the MDE decision in the complaint. However, direct claims under the SSMSA are not allowed. *See* Minn. Stat. § 121A.031, subd. 7(1). Likewise, a court is unlikely to allow parents to premise any common law claim on a violation of the SSMSA or the school district policy that the SSMSA requires. Accordingly, an MDE decision on an SSMSA complaint would likely be inadmissible as evidence in court.

The most likely basis for a lawsuit against a school district related to bullying would be a negligence lawsuit. To establish liability in a negligence claim, parents must prove that the school district had a duty to the student, that the school district breached that duty, and that the breach caused harm to the student. Case law in Minnesota establishes that because of the special relationship between schools and students, Minnesota school districts have a duty to protect students from foreseeable harm. Accordingly, the key question is likely to be whether the harm the student experienced was foreseeable to the school district. This inquiry would include whether the school was aware of a pre-existing pattern of this behavior between the students and whether the school district took timely and appropriate action to prevent harm. Proving appropriate action was taken will likely be easier if discipline was progressively stricter as time went on.

A school district may also be immune to claims regarding its handling of bullying under the doctrines of statutory or official immunity. Statutory immunity protects the policy decisions of the school district itself, while official immunity protects the discretionary decisions made by school district officials, including administrators. The core issue in an immunity analysis is whether the actions identified in the complaint required the exercise of discretion. Arguably, several steps of a school district's response to bullying involve significant discretion, including identifying the complaint as a bullying complaint, performing the investigation, drawing conclusions at the end of the investigation, and deciding what remedial action to take. Immunity defenses are generally raised at the summary judgment stage of litigation, and if a court determines a school district is entitled to immunity, the case will be dismissed prior to a trial.