Everyday Bias and Liability

Microaggressions may be brief and commonplace, but they are damaging and pose a liability risk in independent schools.

Though increasingly familiar, “microaggression” is not — yet — a legal term that you will find in case law, statutes or contracts. But it is an important behavioral concept that allows us to talk about bias, its place in the American psyche, and its legal implication for independent schools.

Chester Pierce, a professor of education and psychiatry at Harvard Medical School, first introduced this concept in the 1970s when analyzing modern racism and its psychological impacts. Pierce recognized that Black Americans were experiencing subtle, cumulative mini assaults. Later research recognized that any marginalized group (including sexual orientation, socio-economic status or physical and cognitive abilities) could be subject to these derogations.

RECOGNIZING MICROAGGRESSIONS

Microaggressions are brief and commonplace verbal, behavioral and environmental indignities, according to Derald Wing Sue, a professor at Columbia University who has published extensively on the topic. Whether intentional or unintentional, they communicate hostile, derogatory or negative slights and insults to the target person or group.

Microaggressions are generally recognized as falling into three categories:

• Microassaults: These are more explicit derogations using name-calling and avoidant behavior, but expressed in private or situations where the speaker feels safe to express them.
  Example: Making inappropriate comments and then saying, “You’re a cool girl — I can tell you this,” thereby pressuring the listener to accept the comments.

• Microinsults: These are rude or insensitive communications that demean heritage or identity.
  Example: “Did you get admitted here on affirmative action?”

• Microinvalidations: These communications exclude, negate or nullify thoughts or feelings.
  Example: “All lives matter.”

As stated above, there is no single actionable theory of microaggression liability. In fact, some would argue that even the term “microaggression” communicates that the conduct is so insignificant that there is no real liability risk. Microaggressions can provide real risk in several areas, however, which usually involve discrimination laws, tort theories and breach of contract.

DISCRIMINATION LAWS

An environment hostile to a protected class (most commonly race, gender, national origin, religion and disability) can trigger liability for illegal discrimination, according to federal discrimination law. Yet these laws typically do not play a direct role with independent school students. Title IX, which prohibits discrimination on the basis of sex, does not apply unless a school accepts federal funding. Title VII, encompassing many other forms of discrimination, is an employment statute, and does not protect students.

If the complainant is alleging a number of more subtle acts, there is an argument that the acts are pervasive enough to create a hostile environment.

However, Title III of the Americans with Disabilities Act (ADA) does apply to places of public accommodation, including independent schools. Schools should be aware that several federal courts have recently ruled that the ADA does provide for liability based on a hostile environment. More directly, a number of states have discrimination laws that also recognize independent schools as places of public accommodation, and thus could recognize a hostile environment liability for students.

The basic components of hostile environment claims are that the complainant was subjected to some form of unwelcome conduct based on a protected class, and that the conduct was sufficiently severe or pervasive enough to alter the conditions of the environment. Notice the conjunction — severe OR pervasive, not severe AND pervasive.

Can a single, major act of discrimination subject a student to a hostile school environment? Absolutely. And that’s normally what we think of in evaluating whether a hostile environment exists — the magnitude or severity of an act. But if the complainant is alleging a number of more subtle acts, there is an argument that the acts are pervasive enough to create a hostile environment.
How many small acts, or microaggressions, would it take to create a hostile environment? There is no precise number or formula, e.g., \( x + y = \text{hostile environment}\). It is therefore important not to overlook even subtle manifestations of aggressions. For example, misgendering a student once a week for an academic quarter may be enough for a judge or jury to find the conduct so pervasive that it altered the conditions of that student’s educational environment.

**TORT LAW**

State law would be the place to look for potential tort theories where microaggressions can come into play. This would involve claims that the school failed to take reasonable care to avoid harm to students or inflicted emotional distress.

In evaluating the strength of such a claim, a lawyer would consider whether there was evidence that a school had notice, or should have known, about a pattern of past discriminatory acts. Should the school have known that all these small acts create a problem and failed to correct it? The longer the period in which a plaintiff is allowed to look back at prior acts to find evidence of notice, the more likely there is going to be some report (or reports) of acts that were never corrected.

Microaggressions can also take on magnitude when dealing with a larger group of plaintiffs. What jurors might have considered a “weak” claim in isolation becomes considerably more compelling when the group of plaintiffs grows to three or four individuals. For example, in a case with one claimant with a clearer claim of improper conduct and several more claimants with complaints of microaggressions, those microaggressions can take on a much greater magnitude in court than they seemed at the time.

**MITIGATING MICROAGGRESSIONS**

Implementing a consistent and complete anti-bias program is not an easy task. We also have to acknowledge that a significant group of people have the attitude that any anti-microaggression program imposes on their identity. Despite these challenges, there are steps you can and should take to deal with these “thousand cuts” of microaggressions.

*Make your civility standards clear and enforce them consistently, without exceptions.*

This does not mean every instance of an expressed bias requires an expulsion or a “cancel culture” boycott, where a speaker is pointed out as evil and shunned. But consistently imposing consequences appropriate to the transgression is possible.

*Educate your faculty and staff.* Train your faculty and staff to identify microaggressions. In keeping with revised state and federal expectations, more schools are moving to live and more frequent trainings on discrimination, harassment and bias. Be sure your entire organization is educated on how to identify a microaggression so that employees can then appropriately report.

*Make reporting easy.* Make sure everyone knows when and how to make a report and that there will be no retaliation. You cannot handle an issue you do not know about, but you can be faulted for not knowing about an issue. This means you have a duty to take proactive steps to educate, and to see what is there to be seen.

**BREACH OF CONTRACT**

Does your school promise to “create a place where every child is unique, safe and fully accepted?” Plaintiffs have started to look not only at handbooks but also promotional materials, mission statements and philosophical statements as bases for contract claims. If a school has promised a “safe,” “just” and “inclusive” environment, is that a contract? And if it is, how many microaggressions can occur before the school has breached that contractual promise?

One way to prevent this risk is to include “this is not a contract” disclaimer language in your handbook and other such documents. Many law firms are recommending stronger and stronger language in this regard. But how many disclaimers can you have and still credibly promote an inclusive and just program?

Each school needs to find its own balance, and risk management and legal liability concerns cannot rest on disclaimers alone.

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