Missouri Law Review

Volume 77
Issue 3 *Summer 2012*

Article 8

Summer 2012

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Daniel B. Weddle[*]

"He who can, does. He who cannot, teaches." George Bernard Shaw, *Man and Superman*[1]

Shaw's famous line about the ineptitude of teachers is fun, but it is not really accurate. A more accurate version would go something like this:

> He who can, does. He who can do it and explain it, teaches.
> He who can neither do it nor explain it, runs for public office and tells the rest of us how to do it and explain it.

A cheap shot, perhaps, but well deserved by most of the nation's legislators, and nothing demonstrates its truth so well as bullying prevention statutes. From New Jersey's exceptionally well-informed statutory scheme[2] to Missouri's near-mockery of bullying prevention,[3] all seem to suffer flaws that fatally undermine the very purposes for which they were ostensibly enacted. These statutes consistently and almost perversely fail to reflect what decades of research and experience have demonstrated to be true about bullying. They create fundamental obstacles to effective bullying prevention efforts because legislators are seemingly ignorant of the dynamics of bullying, the nature of school cultures in which bullying flourishes, the characteristics of those who bully, the day-to-day realities of schooling, and the multiple disincentives for schools to address bullying in demonstrably effective ways.[4] This well-meaning (and sometimes not so well-meaning) ignorance results in politically satisfying but ultimately empty gestures that do little to relieve the suffering significant numbers of children endure each day at the hands of their bullying peers.

This Article will offer a brief critique of current bullying legislation and suggest changes to the legislation designed to achieve the good intentions that usually motivate such legislative efforts. It will also briefly address some of

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1. GEORGE BERNARD SHAW, *Maxims for Revolutionists*, *in* MAN AND SUPERMAN (1903).

2. *See infra* Part II.

3. *See infra* Part IV for a discussion of the statute's weaknesses.

4. *See infra* Part I.

the less well-meaning legislative efforts and suggest that legislators duped by their uncharitable colleagues into passing counter-productive bullying legislation take the necessary steps to reverse the damage. Because of the brevity of this Article, I will focus primarily upon weaknesses that legislatures should address and will not discuss the strengths that can be found in a few legislative efforts to deal with bullying in schools.

Section I of the Article will examine the most serious and most common flaw in anti-bullying statutes – the failure to require schools to engage in whole-school processes to transform bullying cultures. Section II will consider the counter-productive effects of crushing reporting requirements contained in some statutes, and Section III will discuss the lack of required ongoing assessments. Section IV will describe the especially troubling obstacles some legislatures have placed in the paths of LGBT students seeking protection from their bullying peers. Section V will examine constitutionally suspect definitions of bullying that give schools too much authority and too much responsibility for bullying that occurs off-campus.

I. THE FAILURE TO REQUIRE WHOLE-SCHOOL PROCESSES

Bullying is an underground activity that thrives on silence to succeed.[5] The last people in the school to become aware of bullying are likely to be the teachers and administrators,[6] and the reason is fairly simple. Bullies are typically bright, confident students who are exceptionally good at avoiding detection, deflecting blame, and turning the tables on their targets.[7] Students are quite aware that "ratting out" a bully is likely to result in the bully escaping any real punishment, given administrators' lack of knowledge about bullying,

5. *See* Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 849-50 (2010); *see also* CATHERINE P. BRADSHAW ET AL., NAT'L EDUC. ASS'N, FINDINGS FROM THE NATIONAL EDUCATION ASSOCIATION'S NATIONWIDE STUDY OF BULLYING: TEACHERS' AND EDUCATION SUPPORT PROFESSIONALS' PERSPECTIVES 1 (2011) ("One study found that, while a large portion of staff (87%) thought that they had effective strategies for handling a bullying situation and 97 percent of staff reported that they would intervene if they witnessed bullying, only 21 percent of students involved in bullying had reported the event to a school staff member. Students were more likely to report bullying events to their friends and families than to an adult at school.") (internal citations omitted).

6. *See* BRADSHAW ET AL., *supra* note 5, at 1.

7. *See Kansas Safe School Resource Center*, KAN. DEP'T OF EDUC., http://www.ksde.org/Default.aspx?tabid=3913 (last visited Dec. 18, 2012) ("Aggressive bullies are the most common type of bully. Young people who fall into this category tend to be physically strong, impulsive, hot-tempered, belligerent, fearless, coercive, confident, and lacking in empathy for their victims. They have an aggressive personality and are motivated by power and the desire to dominate others.").

while the target and anyone who "ratted" will face the bully's retaliation.[8] In fact, the very notion of "ratting out" a fellow student is anathema to most school children, and the stigma of such an act is usually a sufficient deterrence against involving adults.[9] In addition, students are often not convinced that adults will handle the original bullying effectively and often fear that telling a teacher will ultimately make life harder on the target.[10]

The reluctance of both targets and witnesses to come forward keeps the bully safely hidden from those who might force him to stop his behavior and, even when he is caught, makes it especially difficult for teachers and administrators to find the truth about what exactly happened. Although cafeteria workers and maintenance personnel probably have a very good idea about who is bullying whom,[11] they seldom feel it is their place to intervene or to speak to administrators about what they see.[12] As a result, a culture of secrecy keeps an otherwise open secret from teachers and administrators, who confidently believe they have a good handle on bullying because they see so little of it.[13]

In addition, it stands to reason that administrators are not looking for more disciplinary problems and are certainly not eager to believe or to report that, under their watches, significant numbers of their students are being tormented on a regular basis by other students. The illusion created by the un-

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8. *See* Tiziana Pozzoli & Gianluca Gini, *Active Defending and Passive Bystanding Behavior in Bullying: The Role of Personal Characteristics and Perceived Peer Pressure*, 38 J. ABNORMAL CHILD PSYCHOL. 815, 816 (2010).

9. *See* Colleen McLaughlin et al., *Bystanders in Schools: What Do They Do and What Do They Think? Factors Influencing the Behaviour of English Students as Bystanders*, 23 PASTORAL CARE EDUC. 17, 20-21 (2005) (noting that "the two main motivations" for ignoring bullying "were self-protection and non-involvement").

10. *See id.*

11. BRADSHAW ET AL., *supra* note 5, at 1-2 ("Although it appears that students are not actively seeking out help from [t]eachers when dealing with a bullying situation, it is possible that students may turn to ESPs (e.g., school nurses, transportation staff, teacher's aides) as a means of support. However, few studies have specifically examined ESPs' perceptions of bullying intervention. For instance, Leff, Power, Costigan, and Manz designed a measure that was explicitly intended to assess the bullying climate on the playground and the lunchroom (known as the Playground and Lunchroom Climate Questionnaire, or PLCQ). This measurement tool is among the first to highlight the importance of the perceptions of those personnel who oversee these high-risk areas. The authors also underscore the importance of collaboration between teaching and non-teaching staff. It appears that few ESPs are included in school-wide intervention and prevention efforts. An exploratory, qualitative study of transportation staff by deLara revealed that ESP workers not only notice a considerable amount of bullying, but most also feel that they were not included in the district's school safety planning efforts.") (internal citations omitted).

12. *See id.* at 15.

13. *See, e.g.*, *id.* at 12 (noting that ESPs and teachers are reluctant to intervene in cyberbullying and sexting because they are done in secret).

derground nature of bullying reinforces what many administrators hope is true about their schools, and it is human nature to avoid digging around to find evidence that contradicts that hope.

Legislatures must provide a strong set of incentives to counteract these strong disincentives for exposing bullying. The school's leadership must admit what decades of research demonstrate – that bullying exists in schools but is a hidden phenomenon if no one looks for it; the leadership must then decide that bullying will no longer remain underground and that the school's culture will no longer hide or tolerate it. To obtain this goal, most prevention experts recommend a whole-school approach to prevention that begins with a realistic and valid assessment of the current level of bullying, followed by a sustained process that brings the school community together to develop an anti-bullying policy.[14] Ideally, the school conducts an anonymous survey or other such approach to identify how many students undergo sustained bullying.[15] The results, along with the devastating effects that research has demonstrated will follow such abuse, are presented to the entire school community – students, parents, administrators, teachers, and support staff.[16]

Inevitably, the response of the community is outrage and a determined pledge to end bullying in the school.[17] The administration then initiates a year-long process to develop a bullying policy, ensuring that all members of the school community are as involved as possible in the discussions, through focus groups, classroom discussions, task forces, etc.[18] At the end of the year, a policy is produced that has deep buy-in from all aspects of the community.[19] Central to the policy is the responsibility of everyone to ensure a bullying-free environment.[20] When students observe bullying, they will report it to teachers and administrators and will stand up as witnesses if the bullying child denies the reports.[21] Support staff will no longer stand by as if

14. *See, e.g.*, DELBERT S. ELLIOT ET AL., SAFE COMMUNITIES – SAFE SCHOOLS PLANNING GUIDE: A TOOL FOR COMMUNITY VIOLENCE PREVENTION EFFORTS 9 (2000).

15. *See id.* at 12.

16. *Id.* at 13.

17. *See* King, *supra* note 5, at 857-65 (discussing legislative responses to incidences of bullying).

18. *See, e.g.*, ROBERT WOOD JOHNSON CLINICAL SCHOLARS, UNIV. PENN. SCH. MED., SCHOOL BULLYING: A CLOSER LOOK AND POSSIBLE INTERVENTIONS 6-7 (2011).

19. *See generally id.*

20. *See, e.g.*, MO. REV. STAT. § 160.775 (Supp. 2011) ("Each district's antibullying policy shall be founded on the assumption that all students need a safe learning environment.").

21. *See* MICHIGAN STATE BOARD OF EDUCATION MODEL ANTI-BULLYING POLICY (2010), *available at* http://www.michigan.gov/documents/mde/Model_Anti-Bullying_Policy_with_Revisions_338592_7.pdf (including "[a]ll administrators, faculty, staff, [and] volunteers" in the model bullying prevention policy).

stopping peer-on-peer abuse is not in their job descriptions.[22] Parents will cooperate with school officials, even if their own children are the perpetrators.[23] Administrators will investigate thoroughly and responsibly, protect targets, and force bullies to change their behaviors.[24] Once the majority of the school community has committed itself to these responsibilities, bullying is no longer an unchallenged underground activity.

While educational research is clear about the need for such whole-school approaches,[25] legislatures either fail to require them, fail to provide resources to pursue them, or create options that allow schools to avoid them. As a result, no legal incentive to effectively prevent bullying exists in the bullying prevention statutes themselves.

For example, Wisconsin's bullying prevention statute requires the state's Department of Education to create a model bullying policy and even provides guidance on the policy's contents.[26] The statute does not require,

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22. *See id.*

23. *See id.*

24. *See id.* at 3-6.

25. *See* ROBERT WOOD JOHNSON CLINICAL SCHOLARS, *supra* note 18, at 11-12.

26. WIS. STAT. ANN. § 118.46 (West, Westlaw through 2011 Act 286) provides that by March 1, 2010, the department shall do all of the following:

> (a) Develop a model school policy on bullying by pupils. The policy shall include all of the following:
>
> 1. A definition of bullying.
>
> 2. A prohibition on bullying.
>
> 3. A procedure for reporting bullying that allows reports to be made confidentially.
>
> 4. A prohibition against a pupil retaliating against another pupil for reporting an incident of bullying.
>
> 5. A procedure for investigating reports of bullying. The procedure shall identify the school district employee in each school who is responsible for conducting the investigation and require that the parent or guardian of each pupil involved in a bullying incident be notified.
>
> 6. A requirement that school district officials and employees report incidents of bullying and identify the persons to whom the reports must be made.
>
> 7. A list of disciplinary alternatives for pupils that engage in bullying or who retaliate against a pupil who reports an incident of bullying.
>
> 8. An identification of the school-related events at which the policy applies.
>
> 9. An identification of the property owned, leased, or used by the school district on which the policy applies.
>
> 10. An identification of the vehicles used for pupil transportation on which the policy applies.
>
> (b) Develop a model education and awareness program on bullying.

however, that schools engage in a culture-changing process; rather schools can merely adopt the model policy developed at the state level.[27] Thus, the educational research demands of the whole-school approach discussed above are circumvented with a canned policy that will do little to stem the tide of bullying in any given school.

Further, while Ohio's bullying prevention statute requires consultation with the local school community, it does not specify what the consultation should look like.[28] The school board may simply convene a small, representative task force and crank out a policy based upon the state's model.[29] The meeting could be completed in a matter of minutes if the attendees conclude that they are unlikely to draft anything better than that created by the state board, and the whole-school approach could be circumvented once again.

While legislators are undoubtedly sincere in their efforts to prevent bullying in schools, their legislative efforts are too often plagued by ignorance of the research and ignorance of the day-to-day realities of schooling. That ignorance is typically fatal to the purposes of the anti-bullying statutes they create.

II. COUNTERPRODUCTIVE REPORTING REQUIREMENTS

Perhaps the most illustrative example of the disconnect between legislative best intentions and educational realities is contained in what is actually one of the best bullying prevention statutes in the country: New Jersey's extensive statutory scheme.[30] New Jersey's Anti-Bullying Bill of Rights Act seems to be founded upon a strong understanding of bullying prevention. For example, it actually requires school-wide initiatives.[31] However, its extensive

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(c) Post the model policy under par. (a) and the model program under par. (b) on its Internet site.

(2) By August 15, 2010, each school board shall adopt a policy prohibiting bullying by pupils. The school board may adopt the model policy under sub. (1)(a). The school board shall provide a copy of the policy to any person who requests it. Annually, the school board shall distribute the policy to all pupils enrolled in the school district and to their parents or guardians.

27. *See id.*

28. OHIO REV. CODE ANN. § 3313.666(B) (West, Westlaw though 2011) ("The board of education of each city, local, exempted village, and joint vocational school district shall establish a policy prohibiting harassment, intimidation, or bullying. The policy shall be developed in consultation with parents, school employees, school volunteers, students, and community members.").

29. See id. § 3301.22 ("The state board of education shall develop a model policy to prohibit harassment, intimidation, or bullying in order to assist school districts in developing their own policies under section 3313.666 of the Revised Code.").

30. Anti-Bullying Bill of Rights Act, N.J. STAT. ANN. §§ 18A:37-1 to -37 (West, Westlaw through 2012 Legis.).

31. *Id.* § 18A:37-17 provides that:

reporting and investigation requirements for teachers and administrators who know of bullying incidents[32] creates a significant disincentive for school officials to recognize, much less actively seek out, evidence of bullying:

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a. Schools and school districts shall annually establish, implement, document, and assess bullying prevention programs or approaches, and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members. The programs or approaches shall be designed to create school-wide conditions to prevent and address harassment, intimidation, and bullying. A school district may implement bullying prevention programs and approaches that may be available at no cost from the Department of Education, the New Jersey State Bar Foundation, or any other entity. A school district may, at its own discretion, implement bullying prevention programs and approaches which impose a cost on the district.

A school district may apply to the Department of Education for a grant to be used for programs, approaches, or personnel established pursuant to this act, to the extent funds are appropriated for these purposes or funds are made available through the "Bullying Prevention Fund" established pursuant to section 25 of P.L.2010, c. 122 (C.18A:37-28). A school district may make an application for a grant only after exploring bullying prevention programs and approaches that are available at no cost, and making an affirmative demonstration of that exploration in its grant application.

b. A school district shall: (1) provide training on the school district's harassment, intimidation, or bullying policies to school employees and volunteers who have significant contact with students; (2) ensure that the training includes instruction on preventing bullying on the basis of the protected categories enumerated in section 2 of P.L.2002, c. 83 (C.18A:37-14) and other distinguishing characteristics that may incite incidents of discrimination, harassment, intimidation, or bullying; and (3) develop a process for discussing the district's harassment, intimidation or bullying policy with students.

A school district may satisfy the training required pursuant to this subsection by utilizing training that may be provided at no cost by the Department of Education, the New Jersey State Bar Foundation, or any other entity. A school district may, at its own discretion, implement a training program which imposes a cost on the district.

c. Information regarding the school district policy against harassment, intimidation or bullying shall be incorporated into a school's employee training program and shall be provided to full-time and part-time staff, volunteers who have significant contact with students, and those persons contracted by the district to provide services to students.

32. *Id.* § 18A:37-15(b)(5)-(7).

b. A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:

. . . .

(5) a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report.

All acts of harassment, intimidation, or bullying shall be reported verbally to the school principal on the same day when the school employee or contracted service provider witnessed or received reliable information regarding any such incident.

The principal shall inform the parents or guardians of all students involved in the alleged incident, and may discuss, as appropriate, the availability of counseling and other intervention services. All acts of harassment, intimidation, or bullying shall be reported in writing to the school principal within two school days of when the school employee or contracted service provider witnessed or received reliable information that a student had been subject to harassment, intimidation, or bullying;

(6) a procedure for prompt investigation of reports of violations and complaints, which procedure shall at a minimum provide that:

(a) the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist. The principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation. The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the 10-day period, the school anti-bullying specialist may amend the original report of the results of the investigation to reflect the information;

(b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations

promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action;

(c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;

(d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;

(e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision; and

(f) a parent, student, guardian, or organization may file a complaint with the Division on Civil Rights within 180 days of the occurrence of any incident of harassment, intimidation, or bullying based on membership in a protected group as enumerated

> in the "Law Against Discrimination," P.L.1945, c. 169 (C.10:5-1 et seq.)[.][33]

The sheer volume of instructions is enough to make the most zealous anti-bullying administrator blanch. Actually attempting to comply with the requirements would make her consider changing professions. When faced with overly burdensome reporting requirements, the typical teacher or administrator cannot escape the temptation to look the other way rather than trigger those requirements.

In addition, New Jersey's statute requires that each school superintendent "must report to the board of education twice a year, rather than annually, at a public hearing all acts of violence, vandalism and harassment, intimidation, or bullying which occurred during the previous period."[34] This extensive report is to "be used to grade schools and districts in their efforts to implement policies and programs consistent with the [provisions of New Jersey's] 'Anti-Bullying Bill of Rights Act.'"[35] The grade each school receives is to be "posted on the homepage of the school's website,"[36] and the grade each district receives is to be "posted on the homepage of the district's website," along with a link to the report itself.[37]

While at first blush, the requirement seems to impose some needed accountability upon school districts, in reality it is much more likely to discourage the kind of processes that might guarantee bullying is exposed. Principals have a strong interest under this scheme to discourage reporting of bullying, lest they be seen by their superiors and their school community to be ineffective in preventing bullying. In addition, superintendents are unlikely to have any appetite for reporting to the legislature elevated levels of bullying in their schools. While administrators must technically insist that their teachers report bullying,[38] their tone and body language could send a very different message. Administrators' exasperation at another report can encourage teachers to avoid reporting or even intervening in a potential bullying situation. Further, because the sheer volume of reporting requirements may be overwhelming to administrators, there will be a strong temptation to tell teachers to report only those incidents that are very clearly bullying and to leave other incidents alone. Leaving a questionable incident alone is the best

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33. *Id.* § 18A:37-15(b)(5)-(6).

34. NOVEMBER 15, 2010, ASSEMBLY COMMITTEE STATEMENT, Assemb. Educ. Comm. 214-S.B. 3466, 11/15/2010; *see* N.J. STAT. ANN. § 18A:37-13.2.

35. NOVEMBER 15, 2010, ASSEMBLY COMMITTEE STATEMENT, Assemb. Educ. Comm. 214-S.B. 3466, 11/15/2010; N.J. STAT. ANN. § 18A:37-13.2.

36. DEP'T OF EDUC., STATE OF N.J., AN OVERVIEW OF AMENDMENTS TO LAWS ON HARASSMENT, INTIMIDATION AND BULLYING 60, *available at* http://www.state.nj.us/education/students/safety/behavior/hib/overview.pdf; *see also* N.J. STAT. ANN. § 18A:37-15(b)(11).

37. *Id.* at 57.

38. *See* N.J. STAT. ANN. § 18A:37-15(b)(5).

way to miss important teachable moments, when a developing bullying dynamic could be thwarted or an existing dynamic could be discovered.

An administrator who actively works to break the dynamics of underground bullying will find a significant increase in reports of bullying as students and support staff start feeling an obligation to report that a child is being bullied. The bullying grade for the school will likely go down as reports go up, so the principal's reward for implementing solid approaches will be a poorer grade than those received by colleagues who allow the behavior to remain underground. The superintendent can also use this data to remove a principal who reports bullying, and the legislature can use it to punish the district with reductions in state dollars.

III. FAILURE TO REQUIRE ONGOING ASSESSMENT

While schools need some sort of accountability regarding their prevention efforts, that accountability has to be designed to reward the discovery of bullying – or more specifically, the implementation of programs likely to expose bullying. The New Jersey statute, in fact, does impose such a requirement:

> Schools and school districts shall annually establish, implement, document, and assess bullying prevention programs or approaches, and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members. The programs or approaches shall be designed to create school-wide conditions to prevent and address harassment, intimidation, and bullying. A school district may implement bullying prevention programs and approaches that may be available at no cost from the Department of Education, the New Jersey State Bar Foundation, or any other entity. A school district may, at its own discretion, implement bullying prevention programs and approaches which impose a cost on the district.[39]

That accountability, especially if it were coupled with annual surveys to determine the prevalence of bullying, is a much more productive approach. First, the focus is on implementation of effective prevention approaches, where it should be. Second, annual surveys would keep everyone's attention on valid measures of progress and appropriate, data-driven responses.

A focus upon student-reported bullying is the best way to know what is really happening on the ground and avoids the temptation to find what is most flattering to the image of the school. It also avoids the abuse of information that typical reporting requirements foster. When administrators are implementing successful approaches, they will inevitably report more bullying

39. *Id.* § 18A:37-17(a).

incidents than those who are looking the other way as the bullying continues unabated underground. Using increased reports of discipline against schools perversely punishes those schools doing the most effective job of discovering and responding to bullying situations and rewards the schools that remain in the dark about what is happening in their schools. Focusing instead upon student-reported bullying, however, places the attention on true reductions if they are occurring, even as discipline reports rise. Because reduction is the goal, reduction should be the measure.

In addition, the pressure to ensure a reduction in student-reported bullying would spur administrators to work hard to implement effective prevention programs and to adjust as necessary until unflattering numbers go down. Reporting those results on school and district websites would also serve to inspire the school community to redouble its efforts if its approach is failing and to maintain its commitment if the approach is working. The data generated would also be immensely helpful to researchers, as pre-, mid- and post-implementation results in multiple schools and multiple districts could be used to evaluate the effectiveness of various programs and approaches. The data would also allow legislators to recognize effective programs, reward competent implementation, and encourage implementation of the best approaches.

IV. EXPLICIT OBSTRUCTIONS TO PROTECTION OF LGBT STUDENTS

Among the most malicious enactments are those designed to strip lesbian, gay, bisexual, and transgender (LGBT) students of protection from bullies. Couched in other justifications, these enactments perversely target gay students in an attempt to thwart any efforts to make alternative sexual orientations acceptable.

Missouri legislators, for example, boiled a seven-page bullying prevention bill to four paragraphs,[40] eviscerating it. Not content to merely destroy

40. MO. REV. STAT. § 160.775 (Supp. 2011) provides that:

1. Every district shall adopt an antibullying policy by September 1, 2007.

2. "Bullying" means intimidation or harassment that causes a reasonable student to fear for his or her physical safety or property. Bullying may consist of physical actions, including gestures, or oral, cyberbullying, electronic, or written communication, and any threat of retaliation for reporting of such acts.

3. Each district's antibullying policy shall be founded on the assumption that all students need a safe learning environment. Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment. Policies may include age-appropriate differences for schools based on the grade levels at the school.

the bill's power, these legislators added an insidious provision that prohibits schools from enumerating any categories of students who may be especially subject to bullying and harassment.[41] The alleged motivation was to ensure all students would be protected from bullying and not just those in the enumerated categories.[42] The real motivation was less egalitarian.

The chair of the Missouri House education committee, Representative Cunningham, explained the true motivation:

> Speaking before the Eagle Forum in January of 2007, Representative Cunningham lamented the presence of Gay-Straight Alliance clubs in Missouri schools, finding it "weird" to have to even speak the words lesbian, gay, bisexual, and transgender in the context of schooling. She told the audience that the legislature needed to step in to protect children from anti-bullying programs that specifically mentioned LGBT students. She also claimed that schools that "passed these types of policies giving special protections to certain groups" would be exposed to legal liability and that, as a result of such comprehensive or enumerated policies, schools' insurance costs would rise.[43]

The reality is that LGBT students are bullied at two to three times the rates of other students,[44] and administrators respond to *known* bullying of gays as little as ten percent of the time.[45] Often, the response is to tell the target to quit "being so gay" and to accept that if he wishes to be gay, he can

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Each such policy shall contain a statement of the consequences of bullying.

4. Each district's antibullying policy shall require district employees to report any instance of bullying of which the employee has firsthand knowledge. The district policy shall address training of employees in the requirements of the district policy.

41. Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 325, 327 (2011) (recounting Missouri Representative Jane Cunningham's boast that she "reworded [a proposed bill] from a seven-page specific gay and lesbian promotion bullying policy to two paragraphs").

42. *Id.* at 326. Rep. Cunningham "argued that a successful anti-bullying program must target all students and that an enumerated list would focus efforts on specially protected students[.]" *Id.*

43. *Id.* at 326-27 (citations omitted).

44. *See* Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 396 (2012).

45. Weddle & New, *supra* note 41, at 330.

expect such treatment.[46] Those responses, of course, suggest to bullying students that they have a license to bully gays and that doing so is apparently justified.

The Missouri legislature, ostensibly accepting the no special treatment argument, has left administrators with no legal incentive to protect LGBT students. Research demonstrates, however, that an enumerated list that includes prohibitions against bullying on the basis of sexual orientation boosts administrative responses to just over twenty-five percent.[47] While twenty-five percent is still a shamefully low response rate to known acts of bullying against gays, it is two and a half times better than ten percent. The Missouri statute, nevertheless, ensures the lower response rate.

If it were true that bullying is truly random and never inspired by identity characteristics such as race, ethnicity, religion, gender, sexual orientation, etc., and if it were true that teachers and administrators respond with equal vigor to all bullying, a general focus without enumerated categories would be a sufficient hedge against all forms of harassment. Neither of those propositions is true, however.[48] In addition, the typically enumerated categories are those categories historically viewed as containing people who should be fair game for persecution and harassment.[49] That dynamic makes it doubly important that policies clearly and explicitly discourage bullying against people falling into those categories. For example, the enduring messages from popular culture that women are sexual objects or that LGBT students deserve to be persecuted require targeted prevention methods and strong counter-messages if students and school officials are going to resist those cultural influences.

In fact, the tactics used by the anti-gay elements of the Missouri legislature reflect a clear understanding of those dynamics. They knew that stripping the statute and all public school bullying prevention policies of prohibitions against bullying of gays would thwart a "gay agenda" of acceptance and tolerance; the logical alternative was perpetuation of rejection and intolerance. That intolerance, of course, includes bullying and harassment of gay students.

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46. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 452 (7th Cir. 1996) (principal told a gay student that "'boys will be boys' and . . . that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students.").

47. *See* Weddle & New, *supra* note 41, at 333-34.

48. *See generally id.* at 329-32 (describing bullying of LBGT students in schools).

49. *See id.* at 332-34 (describing different approaches to enumeration in state statutes).

V. CONSTITUTIONALLY SUSPECT DEFINITIONS OF BULLYING AND HARASSMENT

Some well-meaning legislatures have tried to develop definitions of bullying that will sweep in as much peer-on-peer abuse as possible, but have done so in ways that are not likely to withstand constitutional scrutiny because they reach too far. Their definitions of what constitutes bullying and requires a disciplinary response transgress established First Amendment protections that extend to school children. As evil as the act of bullying is, a greater evil lurks beneath prevention measures that trample on students' rights by incorrectly labeling controversial expression as bullying, or by granting school districts authority over off-campus speech that should enjoy full First Amendment protection rather than the reduced protection generally applicable to student speech that occurs within the "special characteristics"[50] of the school environment.

A. Faulty Definitions

An example of a faulty definition of bullying is New Hampshire's definition:

> [A] single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
>
> (1) Physically harms a pupil or damages the pupil's property;
>
> (2) Causes emotional distress to a pupil;
>
> (3) Interferes with a pupil's educational opportunities;
>
> (4) Creates a hostile educational environment; or
>
> (5) Substantially disrupts the orderly operation of the school.
>
> (b) "Bullying" shall include actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's

> association with another person and based on the other person's characteristics, behaviors, or beliefs.[51]

While the legislature has admirably attempted to create a broad definition that sweeps in most bullying behavior, speech that "causes emotional distress to a pupil"[52] could easily cover far too much protected speech. As one court pointed out, a t-shirt with the slogan "Be Happy, Not Gay" can hardly be considered so offensive and hurtful that school officials have the authority to forbid a student from wearing the shirt to school.[53] As Judge Posner explained,

> "Be Happy, Not Gay" is only tepidly negative; "derogatory" or "demeaning" seems too strong a characterization. As one would expect in a school the size of Neuqua Valley High School, there have been incidents of harassment of homosexual students. But it is highly speculative that allowing the plaintiff to wear a T-shirt that says "Be Happy, Not Gay" would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere. Speculation that it might is, under the ruling precedents, and on the scanty record compiled thus far in the litigation, too thin a reed on which to hang a prohibition of the exercise of a student's free speech.[54]

Under the New Hampshire definition, however, "Be Happy, Not Gay" could easily be considered bullying if school officials determined that it was directed at LGBT students and that it caused emotional distress for some of those students. When tied with "actions motivated by an imbalance of power based on a pupil's actual or perceived . . . beliefs,"[55] the prohibition on causing "emotional distress"[56] makes classroom discussion of controversial topics particularly treacherous for students who feel strongly about their positions. One can hope that, as applied, the New Hampshire definition would not be abused by over-zealous teachers and administrators; but one would hope a school administrator would not expel a child for handing out lemon drops in the name of preventing drug abuse.[57]

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51. N.H. REV. STAT. ANN. § 193-F:3(I)(a)(1)-(6) (West, Westlaw through Ch. 290 of the 2012 Reg. Sess.).

52. *Id.* § 193-F:3(I)(a)(2).

53. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 676 (7th Cir. 2008).

54. *Id.*

55. N.H. REV. STAT. ANN. §193-F:3(I)(b).

56. *Id.* § 193-F:3(I)(a)(2).

57. *See Illicit Lemon Drops Get Boy a School Suspension*, L.A. TIMES (Nov. 20, 1997), http://articles.latimes.com/1997/nov/20/news/mn-55774.

B. Overreaching Authority

Cyberbullying provisions can be even more constitutionally problematic. While students do not shed their First Amendment rights "at the schoolhouse gate[,]"[58] neither do they shed them at enrollment. The mere fact that a child is enrolled in a public school does not grant the school authority over the child's speech simply because it is posted on the Internet and can therefore be accessed at school,[59] even if that speech could foreseeably cause a material or substantial disruption. [60] That schools should have virtually infinite jurisdiction over students speech is a dangerous notion that cannot square with the protections afforded by the First Amendment.

The dilemma is difficult to be sure. Schools should not have to sit passively by as students deliberately access the school environment from home in order to savage other students online. On the other hand, schools should not have blanket authority to reach into a student's bedroom and discipline his private speech simply because it would fail the material and substantial disruption test had it occurred at school. In other words, what takes place outside the schoolhouse gate must be treated as beyond the reach of school officials unless a clearly defined nexus between the speech and school exists that essentially transforms private speech into student speech.[61] Statutes that

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58. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

59. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012) ("Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.").

60. *See Tinker*, 393 U.S. at 512-13 ("[C]onduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – *materially* disrupts classwork or involves *substantial* disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.") (emphasis added). A number of courts have applied the *Tinker* substantial disruption test to find a nexus between the speech and the school. *See, e.g.*, Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) ("The Supreme Court has yet to speak on the scope of a school's authority to regulate expression that . . . does not occur on school grounds or at a school-sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus." (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007))). That approach, however, effectively grants schools the same authority over off-campus speech as they have over on-campus speech. The school house gate is obliterated.

61. For an excellent discussion of the need to view on-campus speech and off-campus speech as student speech and non-student speech, respectively, see Kyle W. Brenton, Note, *Bonghits4jesus.com? Scrutinizing Public School Authority over Stu-*

grant schools authority to discipline off-campus online speech if it causes a material or substantial disruption in school ignore the threshold question: is it student speech to begin with?[62] If it is not, *Tinker*'s material and substantial disruption standard – simply does not apply. The student's speech is that of a private citizen, subject to the full protection of the First Amendment.

Tinker recognized that the rights of students are not coextensive with the rights of adults because of the "special characteristics of the school environment."[63] If the *Tinker* standard serves as the test for granting schools authority to discipline off-campus speech, all off-campus speech has become the

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dent Cyberspeech Through the Lens of Personal Jurisdiction, 92 MINN. L. REV. 1206, 1222-30 (2008).

62. *See, e.g.*, R.I. GEN. LAWS ANN. § 16-21-33 (West, Westlaw through amendments through ch. 491 of 2012 Reg. Sess.), which provides that:

> (2) "Cyber-bullying" means bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data, texting or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, Internet communications, instant messages or facsimile communications. For purposes of this section, cyber-bullying shall also include:
>
> (i) The creation of a web page or blog in which the creator assumes the identity of another person;
>
> (ii) The knowing impersonation of another person as the author of posted content or messages; or
>
> (iii) The distribution by electronic means of a communication to more than one person or the posting of materials on an electronic medium that may be accessed by one or more persons, if the creation, impersonation, or distribution results in any of the conditions enumerated in clauses (i) to (v) of the definition of bullying herein.
>
> (3) "At school" means on school premises, at any school-sponsored activity or event whether or not it is held on school premises, on a school-transportation vehicle, at an official school bus stop, using property or equipment provided by the school, or creates a material and substantial disruption of the education process or the orderly operation of the school.

The disjunctive list in the definition of "at school" sweeps under the school's authority any speech, whether on or off campus, that "creates a material and substantial disruption of the education process or the orderly operation of the school."

63. *Tinker*, 393 U.S. at 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

same as on-campus speech – i.e., subject to discipline if it is disruptive to the school environment – even if it occurs where the special characteristics of the school environment do not exist. The only apparent constraint is that the speaker be enrolled in the school.

In his concurrence in *Fraser*, however, Justice Brennan made clear that had the student's lewd speech occurred off-campus, it would not have been subject to discipline.[64] Chief Justice Roberts reiterated Justice Brennan's position in *Morse*.[65] In other words, the schoolhouse gate matters. The Internet may provide a way to reach across it and affect the school, but the gate has not vanished. It still serves as a barrier to the authority of schools because it is the metaphorical entrance into the "special characteristics of the school environment" necessary for application of the *Tinker* standard.[66] The gate is not a prison gate that swings shut and opens again only upon graduation. It is a gate that swings both directions each day, allowing those who enter it to exit each afternoon and regain the full First Amendment protections they enjoyed before entering. Until legislatures, along with the courts, define more carefully what it takes for a private speaker to breach that barrier and subject himself to the authority of the school, mere recitation of school-based tests cannot supplant, consistently with the First Amendment, the protections afforded to private speech outside the school.

Schools themselves cannot want the sort of responsibility that infinite jurisdiction creates. After all, if simply enrolling places the child under the authority of the school, the school has arguably accepted responsibility for the child's speech even when it occurs off-campus, beyond the watchful eyes of school officials. Schools could easily find themselves subject to liability for injuries caused by off-campus cyber speech if they knew or should have known of the speech and its potential for injury. Standing *in loco parentis* during the school day is difficult enough; what school official wants to find herself in the "special relationship" that can give rise to a duty under negligence law to protect third persons when her students are at home under the care of their parents?

Some legislatures have looked past those questions and have granted schools both the authority and, intentionally or not, the responsibility that goes with it. The First Amendment does not countenance such a result.

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64. As Justice Brennan explained in his concurrence,

> The Court today reaffirms the unimpeachable proposition that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest otherwise.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J. concurring) (citations omitted) (internal quotations omitted).

65. Morse v. Frederick, 551 U.S. 393, 405 (2007).

66. *Tinker*, 393 U.S. at 506 (1969).

VI. CONCLUSION

Legislatures need to take seriously the thirty years of research that informs best practices in bullying prevention and ensure statutory measures require those best practices. Too many disincentives exist for school administrators to implement appropriate and effective prevention programs; the legislatures must provide irresistible incentives to do what is right to protect children from the abuse of their peers. In doing so, the legislatures must also take seriously the constitutional constraints on school authority, not only to protect students' rights to free expression when they are not at school but also to protect school officials from becoming round-the-clock supervisors of children's speech.

The time is long past for blindness in the legislatures or in the schools. What was news about bullying thirty years ago is news no longer, and disconnects between research and school practices can no longer be justified. After all, while legislators and educators craft statutes and plans based on educational fiction, school children live in the real world, where bullying does real damage. It is time for the adults to address that world and put their fictions aside.