

**BULLYING IS NO LONGER JUST ON THE
PLAYGROUND: HOW SCHOOL BULLYING IS
EVOLVING AND HOW STATE LEGISLATION IS
TRYING TO KEEP UP**

I.	INTRODUCTION.....	2
	A. <i>The Overall Problem</i>	2
	B. <i>Current Problems in Texas</i>	3
	C. <i>History of Cases and Events Involving Bullying and Schools’ Right to Prevent Bullying</i>	4
II.	DISCUSSION OF SCHOOL BULLYING: CYBERBULLYING.....	5
	A. <i>House Bill 1942</i>	6
	B. <i>Senate Bill 242</i>	7
	C. <i>Senate Bill 407</i>	8
III.	DISCUSSION OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER BULLYING IN SCHOOLS AND ITS CONNECTION WITH YOUTH SUICIDE	9
	A. <i>House Bill 2343</i>	10
	B. <i>House Bill 1386</i>	10
	C. <i>National Non-Profit Organizations</i>	11
	1. <i>The Trevor Project</i>	11
	2. <i>It Gets Better Project</i>	11
IV.	BALANCING THE CONSTITUTION AND CIVIL RIGHTS WITH NEW ANTI-BULLYING LAWS.....	12
V.	THE TEXAS EDUCATION AGENCY	14
	A. <i>Roles and Responsibilities</i>	14
VI.	RECOMMENDATIONS	15
	A. <i>Bullying Prevention Programs and Laws</i>	15
	1. <i>Model Laws in Other States</i>	16
	B. <i>Preventing Cyberbullying</i>	18
	1. <i>How Other State’s Legislation Address Cyberbullying</i>	18
	2. <i>Applying the Supreme Court’s Decision in Tinker to Conduct Performed Away from School</i>	20
	3. <i>Who Else Can Help</i>	20
	C. <i>Lesbian, Gay, Bisexual, and Transgender Bullying Help and Prevention</i>	21
	1. <i>Laws Directly Protecting Lesbian, Gay, Bisexual, and Transgender Students</i>	22
VII.	CONCLUSION	23

I. INTRODUCTION

A. *The Overall Problem*

On September 22, 2011, school bullying lead to the ultimate tragedy for a student as well as his family and friends—he committed suicide.¹ Tyler Clementi was a freshman at Rutgers University whose suicide was the result of cyberbullying and because of his sexual orientation.² Tyler’s college roommate secretly taped him in his dorm room during a sexual encounter with another man and posted the video online.³ Three days later Tyler posted on his Facebook page, “Jumping off the [George Washington] bridge sorry.”⁴ In 2010, Tyler was just one of at least fourteen students who committed suicide because of bullying at school.⁵

Each year organizations conduct statistics on the number, type, place, and causes of bullying, and each year the statistics show bullying is a growing problem.⁶ One in four students report being a victim of bullying at school on a regular basis, and every day 160,000 students skip school because they fear other students will bully them.⁷ Different types of bullying include physical, verbal, indirect (excluding people from social groups and spreading rumors about people), and the newest type of bullying—cyberbullying.⁸ While bullying used to take place almost exclusively at school, with the increasing availability of the internet and cell phones among students, bullying can take place anywhere at any time.⁹ Causes of bullying include feelings of insecurity or lack of control in the bullies’ lives, responses to stress and anxiety, and anger from others who have bullied them in the past.¹⁰ Although bullying can take place in any grade, the most susceptible are fourth through eighth grade

1. Emily Friedman, *Victim of Secret Dorm Room Sex Tape Posts Facebook Goodbye, Jumps to His Death*, ABC NEWS (Sept. 29, 2010), <http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716>.

2. *See id.*; *see* discussion *infra* Part III.

3. Friedman, *supra* note 1.

4. *Id.*

5. Jim Dubreuil & Eamon McNiff, *Bullied to Death in America’s Schools*, ABC NEWS (Oct. 15, 2010), <http://abcnews.go.com/2020/TheLaw/school-bullying-epidemic-turning-deadly/story?id=11880841>.

6. *Welcome to Bullying Statistics*, BULLYING STATISTICS, <http://www.bullyingstatistics.org> (last visited Jan. 14, 2013).

7. *School Bullying Statistics*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/school-bullying-statistics.html> (last visited Jan. 14, 2013); *Bullying Statistics 2010*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/bullying-statistics-2010.html> (last visited Jan. 14, 2013).

8. *Facts & Statistics*, MAKE BEATS NOT BEAT DOWNS, http://www.makebeatsnotbeatdowns.org/facts_new.html (last visited Jan. 14, 2013).

9. *See Cyber Bullying*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/cyber-bullying.html> (last visited Jan. 14, 2013).

10. *What Causes Bullying*, MASS. CITIZENS FOR CHILDREN, http://www.masskids.org/index.php?option=com_content&view=article&id=157&Itemid=159 (last visited Jan. 14, 2013).

students; ninety percent of these students have reported to be a victim of bullying.¹¹

Based on new legislation passed by the Texas legislature in 2011, cyberbullying and bullycide (e.g., bullying resulting in suicide) are two current concerns regarding bullying in Texas.¹² In addition, Lesbian, Gay, Bisexual, and Transgender (LGBT) students are “two to three times . . . more likely to commit . . . suicide” than other students.¹³ Because “30 percent of all completed suicides have been related to sexual identity crisis,” LGBT students are the most vulnerable group of bullycide.¹⁴

B. Current Problems in Texas

Texas is lacking legislation that protects school districts against lawsuits for compliance to some state policies.¹⁵ While this kind of legislation may sound contrary to preventing school bullying, “[i]f efforts by teachers and administrators are made to stop the bullying by reporting, documenting, punishing, expelling, or correcting the bullying situation, [then] no teacher or administrator should fear a lawsuit by a victim of bullying.”¹⁶ In addition, “[p]arents of bullies need to be put on notice that they can be personally sued for the behavior of their child, if they make no efforts to stop their child from bullying after notification of that bullying.”¹⁷ However, “[t]his can go the other way, . . . [and if] bullying is reported by parents and the school [does not] react or comply with policies, parents have every right to sue for damages.”¹⁸

Texas also fails to ensure that any victim of bullying has protection against reprisal, retaliation, or false accusations.¹⁹ Just as adults need not be fearful of taking affirmative acts to stop bullying, a victim should never fear becoming a repeat target for standing up and telling someone about his abuser.²⁰ For students to feel more comfortable in reporting bullying incidents they witness or experience firsthand, “[a]nonymous reporting procedures should be implemented in each school.”²¹ In addition, if the school district is going to

11. *Bullying Statistics 2010*, *supra* note 7.

12. *See generally Texas*, BULLY POLICE USA, http://www.bullypolice.org/tx_law.html (last visited Jan. 14, 2013) (listing four House and Senate Bills relating to cyberbullying and preventing suicide because of bullying).

13. *Gay Bullying Statistics*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/gay-bullying-statistics.html> (last visited Jan. 14, 2013).

14. *Id.*

15. *Texas*, *supra* note 12; Brenda High, *Making the Grade*, BULLYING POLICE USA, <http://www.bullypolice.org/grade.html> (last visited Jan. 14, 2013).

16. High, *supra* note 15.

17. *Id.*

18. *Id.*

19. *Texas*, *supra* note 12; High, *supra* note 15.

20. High, *supra* note 15.

21. *Id.* Pending Texas Senate Bill (S.B.) 242 would directly incorporate anonymous reporting into the Texas Education Code. Tex. S.B. 242, 82d Leg., R.S. (2011).

investigate bullying allegations seriously, the school district should take deliberate false accusations just as serious—possibly resulting in suspension or expulsion from school.²²

Texas lacks a strong accountability clause, which is another area where Texas legislation can improve.²³ “There must be accountability reports made to either [l]awmakers or the State Education Superintendent and there must be a consequence assigned to schools/districts who [do not] comply to the law. There should be mandatory posting and/or notification of policies and reporting-form-procedures for students and parents.”²⁴

C. History of Cases and Events Involving Bullying and Schools’ Right to Prevent Bullying

In 1965, a group of students wore armbands to school to protest the Vietnam War, and their principal suspended them.²⁵ The Court held the school *could* regulate students’ rights when their conduct either materially or substantially interferes with the operation of the school or when their conduct interferes with another student’s rights to feel safe at school.²⁶ While the Court in *Tinker v. Des Moines Independent Community School District* ruled in favor of the students and their First Amendment right of expression, the Court in *Bethel School District v. Fraser* ruled in favor of the school and its decision to impose sanctions on a student’s right of expression during a speech.²⁷ In *Fraser*, the Court held the First Amendment did not protect the student’s speech when he made an “offensively lewd and indecent speech” at a school assembly.²⁸

The Supreme Court makes the final determination of any law’s constitutionality, even laws meant to protect students.²⁹ For example, the Communications Decency Act’s purpose was “to protect minors from [harmful] communications on the Internet.”³⁰ However, the Supreme Court in *Reno v. American Civil Liberties Union* held the Act’s “content-based blanket restriction” was unconstitutional because it was “facially overbroad”³¹ Furthermore, the Supreme Court rules in all cases involving federal law.³² In *Davis v. Monroe County Board of Education*, a parent sued the school board

22. High, *supra* note 15.

23. *Id.*; Texas, *supra* note 12.

24. High, *supra* note 15.

25. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

26. *See id.* at 505–06.

27. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

28. *Id.*

29. *See, e.g.*, *Reno v. A.C.L.U.*, 521 U.S. 844 (1997).

30. *Id.* at 849.

31. *Id.* at 868, 895 (O’Connor, J., concurring in part and dissenting in part).

32. *See, e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

for a violation of Title IX of the Education Amendments of 1972 (Title IX).³³ The Court held because there is an implied private right to education under Title IX, damages might lie against a school that is “deliberately indifferent to sexual harassment . . . that is so severe . . . that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”³⁴

Additionally, there have been devastating events that have brought bullying to the front line, such as the 2010 suicides of Asher Brown,³⁵ Phoebe Prince,³⁶ and Tyler Clementi.³⁷ Another notable event of what bullying can lead to was the shootings at Columbine High School in 1999, where two teenagers killed thirteen students and then ultimately themselves.³⁸ While subsequent investigation reveals the two were not victims of bullies but instead were bullies, the unfortunate outcome caught everyone’s attention about the severity of bullying and how it can affect students.³⁹

“In 2005, the 79th Texas [l]egislature passed the first anti-bullying measure. Since then, the Texas legislature has failed to adopt modern language addressing the rapidly changing face of bullying in our schools.”⁴⁰ However, in 2011, the Texas legislature revamped its school bullying laws and because of its efforts is now one of the leading states with appropriate laws addressing new concerns regarding school bullying.⁴¹

II. DISCUSSION OF SCHOOL BULLYING: CYBERBULLYING

When most people hear about kids bullying other kids, they think the bullying is happening face-to-face.⁴² While this kind of bullying still exists today, new technology, such as computers and cell phones, has created a new

33. *Id.* at 632–33. Title IX states, “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C.A. § 1681 (West 2010).

34. *Davis*, 526 U.S. at 650.

35. Asher Brown committed suicide after students picked on him and accused him of being gay. Peggy O’Hare, *Parents: Bullying Drove Cy-Fair 8th-Grader to Suicide*, HOUS. CHRON. (Sept. 27, 2010), <http://www.chron.com/life/mom-houston/article/Parents-Bullying-drove-Cy-Fair-8th-grader-to-1698827.php>.

36. Phoebe Prince was a fifteen-year-old girl who committed suicide because of cyberbullying; students tormented her for three months through text messages and on Facebook. Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged Herself*, ABC NEWS (Mar. 29, 2010), <http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357>.

37. *See* Friedman, *supra* note 1.

38. Greg Toppo, *10 Years Later, the Real Story Behind Columbine*, USA TODAY, http://www.usatoday.com/news/nation/2009-04-13-columbine-myths_N.htm (last updated Apr. 14, 2009, 1:48 PM).

39. *See id.*

40. *CS HB 1942 by Patrick, Diane*, EQUALITY TEX., <http://www.equalitytexas.org/content.aspx?id=644> (last visited Jan. 15, 2013).

41. *See Texas*, *supra* note 12 (giving Texas an A++ rating because of the new additions to its anti-bullying laws in 2011).

42. Jennifer L. Thornhill & Bobbie Mixon, *Discovery: Recognizing a Cyberbully*, NAT’L SCI. FOUND. (Nov. 15, 2011), http://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=122271.

form of bullying—cyberbullying.⁴³ Because “bullies continue to find ways to manipulate these technologies for the destructive purpose of harming others,” the Texas legislature has to continuously make changes to state law.⁴⁴

Given the nature of cyberbullying, issues have emerged when students are using their own personal devices as opposed to devices owned by the school district to engage in cyberbullying.⁴⁵ In addition, cyberbullying has raised another issue resulting in conflicting court decisions because some anti-bullying laws regulate students’ conduct that takes place off school grounds.⁴⁶ The United States Second Circuit Court of Appeals upheld a punishment against a student who called school officials “douchebags” online from her home computer.⁴⁷ The Second Circuit later noted “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.’”⁴⁸ Another issue is whether searching students’ internet records at school is an illegal search and seizure protected under the Fourth Amendment.⁴⁹ However, as legal precedent has allowed searches of students’ desks and lockers, the likely outcome would be that searches of students’ internet records at school would not violate the Fourth Amendment, especially if the school has “reason to suspect content that either (a) is illegal or (b) may provide evidence of activities that are illegal or violate school rules.”⁵⁰

A. House Bill 1942

House Bill (H.B.) 1942 became effective on June 17, 2011, after the Governor signed the bill during the 82nd regular session of the Texas legislature.⁵¹ The Texas legislature enacted H.B. 1942 and codified the bill into various sections of the Texas Education Code (TEC).⁵² State Representative Diane Patrick wrote H.B. 1942 to address changing issues relating to bullying

43. See *Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/topics/cyberbullying/> (last visited Jan. 15, 2013).

44. Brian Heuberger, *Cyber-Bullying Laws in Texas*, EHOW, http://www.ehow.com/info_328386_cyberbullying-laws-texas.html (last visited Jan. 15, 2013).

45. Nancy Willard, *Cyberbullying Legislation and School Policies*, CTR. FOR SAFE AND RESPONSIBLE USE OF THE INTERNET (Mar. 2007), http://schoolnutrition.buc.k12.va.us/Site_2/School_Safety_files/cblegislation.pdf.

46. See Jacqueline Rabe Thomas, *New ‘Cyberbullying’ Law Poses Challenges as School Year Starts*, CONN. MIRROR (Aug. 30, 2011), <http://www.ctmirror.org/story/13722/school-bullying>.

47. *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

48. *Id.* at 346 (quoting *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008)).

49. *Litigation on Cyberbullying: Legal Issues for School Personnel*, OLWEUS, 1-2.3, http://www.olweus.org/public/document/legal_issues_regarding_cyber_bullying (last visited Jan. 15, 2013).

50. *Id.*

51. *History for HB 1942*, TEX. LEG. ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess82R&Bill=HB1942> (last visited Jan. 15, 2013).

52. Tex. H.B. 1942, 82d Leg., R.S. (2011); see TEX. EDUC. CODE ANN. chs. 21, 25, 28, 37 (West 2011).

in public schools.⁵³ The most important changes H.B. 1942 made to the TEC are (1) “[f]or the first time, includes the definition of bullying in” the TEC; (2) “[u]pdates the definition of bullying to include that through electronic means”; (3) “provides for the transfer of the student who engages in bullying”—previously the school district could only transfer the victim of bullying; (4) “[a]llows [schools] to include training on preventing, identifying, responding to, and reporting incidents of bullying”; and (5) “[m]andates that each board of trustees of each school district adopt a policy, including any necessary procedures, to address the prevention, investigation and reporting of incidents of bullying.”⁵⁴ In 2011, the Texas legislature passed H.B. 1942 along with other bills that addressed anti-bullying laws.⁵⁵

B. Senate Bill 242

State Senator Wendy Davis wrote Senate Bill (S.B.) 242 because “the Texas legislature has failed to adopt modern language addressing the rapidly changing face of bullying in our schools,” but the bill was left pending in the Texas legislature.⁵⁶ S.B. 242 includes much of the same changes to the TEC as H.B. 1942, but this bill more closely addresses the issue of cyberbullying.⁵⁷ One change S.B. 242 proposes to make that H.B. 1942 does not is S.B. 242 directly defines cyberbullying as “bullying that is done using electronic communication, including electronic media.”⁵⁸ H.B. 1942 includes in the definition of bullying expression through electronic means but does not directly call it cyberbullying.⁵⁹ S.B. 242 would also put the word cyberbullying in the section title (section 37.0832) of the TEC, which states the definition of bullying.⁶⁰

S.B. 242 is a more aggressive bill; it states schools *must* include training regarding bullying problems, whereas H.B. 1942 states schools *may* include such training.⁶¹ In addition, S.B. 242 expands on the procedures for training and reporting.⁶² The bill requires “annual training . . . for [school] district administrators[,] . . . employees[,] and volunteers who have significant contact with students”; training for students “regarding the elements of bullying”; and a

53. See *CS HB 1942 by Patrick, Diane*, *supra* note 40.

54. Chuck Smith, *TX House Passes Anti-Bullying HB 1942*, EQUALITY TEX. BLOG (May 4, 2011), <http://equalitytexas.typepad.com/blog/2011/05/tx-house-passes-anti-bullying-hb-1942.html>.

55. *Texas*, *supra* note 12. Some other Bills the Texas legislature passed in 2011 are S.B. 407 and House Bill (H.B.) 1386. See *infra* Parts II.C, III.B.

56. *CS SB 242 by Davis, Wendy*, EQUALITY TEX., <http://equalitytexas.org/content.aspx?id=619> (last visited Jan. 15, 2013).

57. See *Tex. H.B. 1942*, 82d Leg., R.S. (2011); *Tex. S.B. 242*, 82d Leg., R.S. (2011).

58. *Tex. H.B. 1942*, 82d Leg., R.S. (2011); *Tex. S.B. 242*, 82d Leg., R.S. (2011).

59. *Tex. H.B. 1942*, 82d Leg., R.S. (2011).

60. *Tex. S.B. 242*, 82d Leg., R.S. (2011).

61. See *Tex. H.B. 1942*, 82d Leg., R.S. (2011); *Tex. S.B. 242*, 82d Leg., R.S. (2011).

62. *Tex. S.B. 242*, 82d Leg., R.S. (2011).

bullying “educational program for . . . parents and guardians”⁶³ For reporting, the bill allows a school district to establish an anonymous reporting system.⁶⁴ Next, S.B. 242 would allow a parent of a bullied victim to request that the board of trustees transfer a student who engages in bullying.⁶⁵ On the other hand, H.B. 1942 does not allow a parent to request that the board of trustees transfer a student engaging in bullying; rather H.B. 1942 leaves that determination solely to the board of trustees.⁶⁶ Furthermore, S.B. 242 states the school district superintendent shall provide notice to both students’ parents within two days after the school’s principal learns of an incident of bullying.⁶⁷ Moreover, S.B. 242 requires each board of trustees to publish an annual report that would include “the number, rate, and type of incidents of bullying, including cyberbullying”⁶⁸ Also, S.B. 242 requires each school district to adopt a policy, among other specific requirements, that “addresses any other issue concerning bullying that the board of trustees determines to be appropriate.”⁶⁹ Finally, the “school district shall provide annual written notice of the policy” to each student, parent, and district employee.⁷⁰ The annual written notice must be available on the school district’s website and posted around the school.⁷¹ The additional and stricter requirements S.B. 242 would add to the TEC could be the reason the bill was left pending in the Texas legislature, while H.B. 1942 is now part of the TEC.⁷²

C. Senate Bill 407

S.B. 407 became effective on June 17, 2011, after the Governor signed the bill during the 82nd regular session of the Texas legislature.⁷³ State Senator Kirk Watson wrote S.B. 407 to address the “offense of electronic transmission of certain visual material depicting a minor and to certain educational programs concerning the prevention and awareness of that offense.”⁷⁴ As more students are getting cell phones, this new practice of sending “sexually explicit images of themselves to one another via text message,” (e.g., “sexting”) has become an increasing issue among teenagers that often leads to bullying or harassment.⁷⁵

63. *Id.*

64. *Id.*; see discussion *supra* Part I.B.

65. Tex. S.B. 242, 82d Leg., R.S. (2011).

66. Tex. H.B. 1942, 82d Leg., R.S. (2011).

67. Tex. S.B. 242, 82d Leg., R.S. (2011).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See Tex. H.B. 1942, 82d Leg., R.S. (2011); Tex. S.B. 242, 82d Leg., R.S. (2011).

73. *History for SB 407*, TEX. LEG. ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB407> (last visited Jan. 15, 2013).

74. *Id.*

75. Greg Abbott, *Sexting Bill Introduced To Texas Lawmakers*, ATT’Y GEN. OF TEX. (Mar. 2011), <https://www.oag.state.tx.us/agency/weeklyag/2011/0311sexting.pdf>.

Before the Texas legislature enacted S.B. 407, if the school district caught students sexting, the state could convict them of possession and distribution of child pornography, which is a felony—meaning the student could go to jail and have a lifetime registration as a sex offender.⁷⁶ S.B. 407 remedied this problem by “discourage[ing] children from sexting but not ruin[ing] their young lives” if the court imposed the maximum penalty.⁷⁷ While S.B. 407 mostly made changes to the Texas Penal Code, the Texas Code of Criminal Procedure, and the Texas Family Code, the bill did make changes to the TEC.⁷⁸ “[S.B.] 407 requires the Texas School Safety Center . . . to create a sexting educational program” that would “be available to all school districts” and authorizes the school district to offer programs to its students.⁷⁹ This bill amended the TEC by adding these school programs to address all the consequences of sexting and “the connection between bullying, cyberbullying, harassment, and a minor sharing visual material depicting a minor engaged in sexual conduct.”⁸⁰ S.B. 407 also requires school districts to make information about these programs available to both students in appropriate grade levels and their parents.⁸¹

III. DISCUSSION OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER BULLYING IN SCHOOLS AND ITS CONNECTION WITH YOUTH SUICIDE

Who can forget the devastating story of Asher Brown, a thirteen-year-old boy who committed suicide because other students bullied him and accused him of being gay at his school in the Cypress-Fairbanks Independent School District in Houston.⁸² Asher’s parents said they complained to the school many times, but the school disregarded their concerns about their son.⁸³

As “[c]ompared to their heterosexual peers,” young LGBT people “are at increased risk for bullying, teasing, harassment, physical assault, and suicide-related behaviors.”⁸⁴ A ten year study of 7,000 LGBT students showed that due to their sexual orientation, “[e]ight of ten students had been verbally harassed at school; [f]our of ten had been physically harassed at school; [s]ix of ten felt unsafe at school; and [o]ne of five had been the victim of a physical assault at school.”⁸⁵

76. *Id.*

77. *Id.*

78. Tex. S.B. 407, 82d Leg., R.S. (2011); TEX. EDUC. CODE ANN. § 37.218 (West Supp. 2012).

79. Abbott, *supra* note 75.

80. Tex. S.B. 407, 82d Leg., R.S. (2011); EDUC. § 37.218.

81. Tex. S.B. 407, 82d Leg., R.S. (2011); EDUC. § 37.218.

82. O’Hare, *supra* note 35.

83. *Id.*

84. *LGBT Bullying*, COMMUNITY UNIT SCH. DIST. 300, <http://oldwww.d300.org/Parents/Bullying%20Prevention/What%20is%20Bullying%3F/LGBT%20Bullying> (last visited Jan. 15, 2013).

85. *Lesbian, Gay, Bisexual, and Transgender Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/Lgbthealth/youth.htm> (last updated May 19, 2011).

A. House Bill 2343

As a result of Asher Brown's suicide, State Representative Garnet Coleman wrote H.B. 2343—known as Asher's Law—to address “youth suicide and . . . the prevention of associated discrimination, harassment, bullying, and cyberbullying.”⁸⁶

The bill would amend the [Texas] Health and Safety Code to require the Texas Department of Health, in coordination with the Texas Education Agency, to develop a comprehensive suicide prevention program for implementation in junior, middle, and high schools. The bill would also amend the [Texas] Education Code to prohibit discrimination, harassment, and retaliation against . . . a student enrolled in the school district on account of actual or perceived ethnicity, color, gender, gender identity or expression, *sexual orientation*, disability, religion, or national origin of the . . . student⁸⁷

Coleman filed this bill on March 7, 2011, but it has not made it through the process for enactment by the Texas legislature—the next step is to have a public hearing, then a vote in the house and the senate, and finally a signature by the Governor.⁸⁸

B. House Bill 1386

Garnet Coleman also wrote H.B. 1386, which became effective on June 17, 2011.⁸⁹ The bill is similar to H.B. 2343 in that it amended the Texas Health and Safety Code to require the Texas Department of Health, working with the Texas Education Agency (TEA), to provide suicide prevention programs in schools.⁹⁰ However, the bill did not amend the TEC to prohibit discrimination based on sexual orientation or other minority groups.⁹¹ Texas, while still in the majority, has not included sexual orientation as a protected class of citizens against discrimination in its laws.⁹²

86. *HB 2343 by Coleman*, EQUALITY TEX., <http://equalitytexas.org/content.aspx?id=641> (last visited Jan. 15, 2013).

87. *Id.* (emphasis added).

88. *See id.*

89. *HB 1386 by Coleman*, EQUALITY TEX., <http://www.equalitytexas.org/content.aspx?id=630> (last visited Jan. 15, 2013).

90. Tex. H.B. 1386, 82d Leg., R.S. (2011); TEX. HEALTH & SAFETY CODE ANN. § 161.325 (West 2011).

91. *See* Tex. H.B. 1386, 82d Leg., R.S. (2011); HEALTH & SAFETY § 161.325.

92. *See* discussion *infra* Part VI.C.1.

C. National Non-Profit Organizations

1. The Trevor Project

James Lecesne, Peggy Rajski, and Randy Stone founded The Trevor Project in 1998.⁹³ The organization's mission is to end LGBT youth suicide "by providing life-saving and life-affirming resources" and to establish "educational programs that create a safe, supportive and positive environment for everyone."⁹⁴ The founders and supporters believe parents and educators are instrumental in protecting the safety of young people "by understanding the warning signs of suicide and letting them know that support is always available to them."⁹⁵ The project's website provides parents and educators with a search engine "to find help and organizations to become involved in."⁹⁶ The Trevor Project is getting the word out to children that regardless of their sexual orientation, they should still be able to feel safe and accepted at school and at home, but it is the adults' job to ensure this mentality in our children.⁹⁷

2. It Gets Better Project

It Gets Better Project is a partner of The Trevor Project.⁹⁸ The organization's website allows people struggling with their sexual orientation to watch videos and hear stories of other LGBT people facing similar problems.⁹⁹ This website can help others picture what their lives can be like as an openly gay individual and give the security that they are not alone.¹⁰⁰ Recently, President Obama gave a speech for the It Gets Better Project where he said: "I was shocked and saddened by the deaths of several young people who were bullied and taunted for being gay, and who ultimately took their own lives."¹⁰¹ He then mentioned, "[w]e have an obligation to ensure that our schools are safe for all of our kids" and all young people "need to know that if you're in trouble, there are caring adults who can help."¹⁰²

93. *Who is Trevor?*, TREVOR PROJECT, <http://www.thetrevorproject.org/HistoryOfTrevor> (last visited Jan. 15, 2013).

94. *Organization*, TREVOR PROJECT, <http://www.thetrevorproject.org/organization> (last visited Jan. 15, 2013).

95. *Local Resources*, TREVOR PROJECT, <http://www.thetrevorproject.org/educatorslocalresources> (last visited Jan. 15, 2013).

96. *Id.*

97. *Id.*

98. *Get Help: Resource Center*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/get-help/> (last visited Jan. 15, 2013).

99. *See* IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/> (last visited Jan. 15, 2013).

100. *What Is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Jan. 15, 2013).

101. *It Gets Better Video Transcript*, WHITE HOUSE, <http://www.whitehouse.gov/it-gets-better-transcript> (last visited Jan. 15, 2013); White House, *President Obama: It Gets Better*, YOUTUBE (Oct. 21, 2010), <http://www.youtube.com/watch?v=geyAFbSDPVk>.

102. *It Gets Better Video Transcript*, *supra* note 101; White House, *supra* note 101.

IV. BALANCING THE CONSTITUTION AND CIVIL RIGHTS WITH NEW ANTI-BULLYING LAWS

“Although the Supreme Court decades ago announced that public school students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’ the full extent of those rights has never been entirely clear.”¹⁰³ The American Civil Liberties Union of Texas (ACLU) “is committed to fighting for real legislative solutions to ending bullying in our schools.”¹⁰⁴ However, the ACLU has opposed and questioned certain legislation, such as H.B. 224, because the bill “grants district officials broad discretionary authority to discipline children for actions committed off-campus, in addition to on-campus.”¹⁰⁵ The ACLU believes the bill would “infringe[] on the fundamental right of parents to direct the upbringing of their children free from government intervention.”¹⁰⁶ In addition, “[e]xtending school authority over children’s off-campus speech violates their First Amendment rights.”¹⁰⁷ The ACLU thinks that “[d]istrict officials already have the authority, and duty, to protect students from bullying and harassment” but are failing to enforce those laws.¹⁰⁸ Therefore, “[d]istrict officials must be held accountable for their failure to enforce existing law, rather than be given additional powers that fail to address the root problem.”¹⁰⁹ The ACLU opposed another bill in 2009 because of “the extreme latitude it gives [schools] to punish students.”¹¹⁰

In contrast, some instances involving school bullying may be a civil rights violation.¹¹¹ The Office of Civil Rights (OCR) is a division of the United States Department of Education that enforces federal laws prohibiting discrimination and has the authority to do so as long as the school receives federal funding from the Department of Education.¹¹² Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of

103. *Recent Cases*, 120 HARV. L. REV. 1691, 1691 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

104. *Oppose HB 224: The Wrong Solution to Combating Bullying in Texas Schools*, AM. CIV. LIBERTIES UNION, http://www.docstoc.com/docs/91384837/HB-224-_oppose_---ACLU-of-Texas (last updated Apr. 1, 2011).

105. *Id.* H.B. 224 is another Bill addressing bullying and cyberbullying that was left pending in the 82nd regular session of the Texas legislature. *History of H.B. 224*, TEX. LEG. ONLINE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB224> (last visited Jan. 15, 2013).

106. *Oppose HB 224*, *supra* note 104. “[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

107. *Oppose HB 224*, *supra* note 104.

108. *Id.*

109. *Id.*

110. Morgan Smith, *Texas Lawmakers Debate How to Curb School Bullying*, TEX. TRIB. (Mar. 4, 2011), <http://www.texastribune.org/texas-education/public-education/texas-lawmakers-debate-how-to-curb-school-bullying/>.

111. *Federal Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/federal/index.html> (last visited Jan. 16, 2013).

112. *OCR Complaint Processing Procedures*, DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last modified Dec. 13, 2012).

1975, and Title II of the Americans with Disability Act of 1990, together prohibit discrimination based on race, color, national origin, sex, age, and disability.¹¹³ School districts may be in violation of these civil rights statutes “when peer harassment based on [one of those protected classes] is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”¹¹⁴ “[W]hile current laws enforced by the [OCR] do not protect against harassment based on religion or sexual orientation, they do include protection against harassment of members of religious groups based on shared ethnic characteristics as well as gender[-based] and sexual harassment of gay, lesbian, bi-sexual, and transgender individuals.”¹¹⁵ Therefore, when schools know or reasonably should have known about incidents of bullying, they are responsible for addressing these incidents and could be violating students’ civil rights if they do not intervene.¹¹⁶ However, even the OCR must abide by the Constitution, and “[n]o OCR regulation should be interpreted to impinge upon rights protected under the First Amendment . . . or to require recipients to enact or enforce codes that punish the exercise of such rights.”¹¹⁷

A student can file a complaint online with the OCR “within 180 days of the last act of discrimination.”¹¹⁸ If the OCR investigates the complaint and determines there has been a civil rights violation, it will attempt to negotiate a voluntary resolution agreement.¹¹⁹ After all attempts of negotiation have failed, the “OCR will either initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance to the recipient, or will refer the case to the Department of Justice.”¹²⁰ Even though federal civil rights only protect those mentioned groups of people, “many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil rights laws . . . to include . . . sexual orientation and religion.”¹²¹

113. *Id.*

114. Letter from Russlynn Ali, Assistant Secretary for Human Rights, U.S. Department of Education, to Colleague (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

115. Press Release, Dep’t of Educ., Guidance Targeting Harassment Outlines Local and Federal Responsibility (Oct. 26, 2010), <http://www.ed.gov/news/press-releases/guidance-targeting-harassment-outlines-local-and-federal-responsibility>.

116. Letter from Russlynn Ali, *supra* note 114.

117. Letter from Assistant Secretary, Department of Education, to Colleague (July 28, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (discussing the First Amendment).

118. *OCR Electronic Complaint Form*, DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/complaintintro.html> (last modified Nov. 30, 2011).

119. *OCR Complaint Processing Procedures*, DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last modified Dec. 13, 2012).

120. *Id.*

121. Letter from Russlynn Ali, *supra* note 114.

V. THE TEXAS EDUCATION AGENCY

The TEA is an administrative agency, established by the Texas legislature, responsible for the oversight of primary and secondary public education in Texas.¹²² The TEA also works with the State Board of Education to help run various programs related to public education.¹²³ The State Board of Education, an elected fifteen-member board, and the Commission on Education, who the Governor appoints, all oversee the TEA.¹²⁴ The TEA is responsible for public schools; it does not have jurisdiction over private schools or homeschooled students.¹²⁵

A. Roles and Responsibilities

One of the TEA's roles is to "[m]onitor[] for compliance with certain federal and state guidelines."¹²⁶ The TEC is a state statutory compilation that governs public education in Texas; it applies to all educational institutions receiving state tax funds.¹²⁷ "According to the TEC, the mission of public education is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation."¹²⁸ One of the federal guidelines the TEA monitors is the Safe and Drug-Free Schools and Communities Act.¹²⁹ This Act "provided state and local education agencies . . . with supplemental funding to develop and enhance education programs targeting violence prevention . . . for students and employees in elementary and secondary schools."¹³⁰ Another role of the TEA is to "administer[] billions of dollars in both state and federal funds that support a variety of programs to benefit public education."¹³¹ The major source of

122. *TEA Mission and Responsibilities*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/index4.aspx?id=150> (last modified Jan. 11, 2013).

123. *Id.*

124. *See State Board of Education*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/index3.aspx?id=1156> (last modified Jan. 17, 2013).

125. *See General Inquiry*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/index2.aspx?id=3036> (last modified Aug. 24, 2012) (specifically mentioning only public schools in regards to the authority to monitor and intervene).

126. *TEA Mission and Responsibilities*, *supra* note 122.

127. *Texas Education Code*, TEX. EDUC. AGENCY, <http://portals.tea.state.tx.us/page.aspx?id=920&bc=506> (last visited Jan. 18, 2013).

128. *Id.*

129. *See Safe and Drug-Free Schools and Communities Act*, 20 U.S.C.A. § 7102 (West 2003).

130. *Safe and Drug-Free Schools and Communities*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/index2.aspx?id=2822> (last modified Oct. 29, 2012). Congress is no longer funding SDFSC after the author wrote this paper.

131. *Funding*, TEX. EDUC. AGENCY, http://www.tea.state.tx.us/index.aspx?id=2147495409&menu_id=645&menu_id2=789&cid=2147483657 (last visited Jan. 18, 2013).

income for public education comes from the Permanent School Fund.¹³² In 1845, the Texas Constitution required “one-tenth of the annual state tax revenue be set aside as a perpetual fund to support free public schools,” and now the fund provides \$765 million a year to over 1,000 independent school districts in Texas, including 185 public charter schools.¹³³ However, in 2010, the state “asked each state agency to compile a list of state-funded programs that could be cut to produce a five percent budget reduction”; the proposed budget cuts for the TEA estimated \$135 million.¹³⁴ Later that year there was a ten percent budget reduction proposal for the 2012–2013 school year—doubling the TEA’s budget cut to \$260 million.¹³⁵ With these current and possible future budget cuts, the role of TEA may become more limited.¹³⁶

VI. RECOMMENDATIONS

A. Bullying Prevention Programs and Laws

Many groups of people are responsible for the safety of children in schools, including the courts, administrators, teachers, parents, and law enforcement.¹³⁷ “[T]he most successful . . . strategies or programs [relating to bullying] are school-wide and comprehensive.”¹³⁸ Successful laws and prevention programs often come when education specialists become involved at all levels.¹³⁹ A good law will not merely suggest anti-bullying programs but will mandate them.¹⁴⁰ “Making a ‘suggestion’ or ‘recommendation’ is weak and useless wording for any law”; “[t]he word, ‘SHALL’ is an excellent mandating word for an anti bullying policy or law. With all the free anti bullying programs and all the grant money currently being given to schools to start anti bullying programs, there is little excuse not to have a good anti bullying program.”¹⁴¹

The administrators are the ones responsible for implementing a bullying prevention program in their school district.¹⁴² Because teachers have day-to-

132. See *An Overview of the History of Public Education in Texas*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/index4.aspx?id=148> (last modified Dec. 2, 2010).

133. *Id.*

134. *TEA Legislative Appropriation Request*, TEX. EDUC. AGENCY, <http://ritter.tea.state.tx.us/lar> (last visited Jan. 18, 2013).

135. See *id.*

136. See *id.*

137. See *Violence Prevention Works!*, HAZELDEN, <http://www.violencepreventionworks.org/public/index.page> (last visited Jan. 18, 2013).

138. *Bullying and Safe Schools*, MINN. DEP’T OF EDUC., <http://education.state.mn.us/MDE/JustParent/BullySafeSch/index.html> (last visited Jan. 18, 2013).

139. High, *supra* note 15.

140. See *id.*; see discussion *supra* Part II.A–B.

141. High, *supra* note 15; *Washington State Anti Bullying Law*, BULLY POLICE USA, http://www.bullypolice.org/wa_law.html (last visited Jan. 18, 2013).

142. See *Ten Tips for Administrators to Address Bullying in School*, HAZELDEN, http://www.violencepreventionworks.org/public/bullying_tips_for_administrators.page (last visited Jan. 18, 2013).

day contact with students, they must be trained and ready to address school bullying behaviors whenever they see it.¹⁴³ Teachers must be able to initially spot bullying when it is happening, be able to recognize the warning signs of bullying, and be able to effectively “intervene when [they] suspect or observe a bullying incident.”¹⁴⁴ Once a bullying incident takes place, the teacher’s next step is to “report the incident, so the school can track its responses to bullying incidents.”¹⁴⁵

Parents can advocate for a bullying prevention program in their child’s school if one is not already in place.¹⁴⁶ Additionally, “[i]t is often parents who bring the issue of bullying to the attention of schools, and parents can be a strong motivator for schools to address the issue.”¹⁴⁷ Because children are reluctant to “tell their parents that they are being bullied because they are embarrassed [or] frightened,” it is the parents’ job to take action if they suspect their child is a victim of bullying.¹⁴⁸ It is equally as important for parents to be on the lookout if they suspect their child is bullying others because “children who bully are at high risk for engaging in risky or even criminal behaviors.”¹⁴⁹

1. Model Laws in Other States

Delaware’s H.B. 7 states, “[e]ach school district and charter school shall prohibit bullying and reprisal, retaliation or false accusation against a target, witness or one with reliable information about an act of bullying,” and requires in each school district’s bullying policy “[a] statement prohibiting retaliation following a report of bullying.”¹⁵⁰ Kentucky has a similar provision in its Education Code that provides “[a] strategy or method of protecting from retaliation a complainant or person reporting a violation of the code or an incident for which reporting is required”¹⁵¹

The state superintendent’s office should play an active role by posting model programs, rules, and policies.¹⁵² For example, Washington state law mandates in H.B. Report 1444,

143. *See id.*

144. *Immediate Intervention*, LEARNING BY GRACE, <http://cyberbullying.learningbygrace.org/educators/immediate-intervention> (last visited Jan. 18, 2013).

145. *Monitor & Report*, LEARNING BY GRACE, <http://cyberbullying.learningbygrace.org/educators/monitor/> (last visited Jan. 18, 2013).

146. *See Protect Your Children from Bullying and Support Safe Schools*, MESPA, http://www.mespa.net/parent_tool_kit.html (last visited Jan. 18, 2013).

147. *Id.*

148. *Tips for Parents*, P.A.V.E., <http://www.partnershiptoaddressviolence.com/tipsforparents.htm> (last visited Jan. 18, 2013).

149. *Parents’ Involvement Prevents Bullying*, CYBER BULLYING & SCH. BULLYING (Oct. 7, 2011), <http://www.bullyingtalk.com/parents-involvement-prevents-bullying/>.

150. De. H.R. 7, 144th Gen. Assemb. (2007); *see discussion supra* Part I.B.

151. KY. REV. STAT. ANN. § 158.148(4)(c)(4) (West 2011).

152. High, *supra* note 15; *Washington State Anti Bullying Law*, *supra* note 141.

the superintendent of public instruction, in consultation with representatives of parents, school personnel, and other interested parties, shall provide to school districts and educational service districts a model harassment, intimidation, and bullying prevention policy and training materials on the components that should be included in any district policy. Training materials shall be disseminated in a variety of ways, including workshops and other staff developmental activities, and through the office of the superintendent of public instruction's web sites, with a link to the safety center web page.¹⁵³

In addition to requiring a bullying policy, the state superintendent's office needs to make recommendations regarding how to create a policy and what that policy should be because school districts need to have instructions on how to implement these new guidelines.¹⁵⁴ Again, the Washington legislation included in the same bill that it recommends,

[t]he policy should be adopted or amended through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives. It is recommended that each such policy emphasize positive character traits and values, including the importance of civil and respectful speech and conduct, and the responsibility of students to comply with the district's policy prohibiting harassment, intimidation, or bullying.¹⁵⁵

Another common characteristic to successful bullying prevention programs and laws is a strong emphasis on the victims of bullying, such as providing counseling for students who have suffered years of mistreatment from their peers.¹⁵⁶ According to an FBI report, victims of bullying, who then end up becoming bullies themselves due to their past experiences, are responsible for three out of four school shootings; therefore, victims of bullying should take top priority—in whatever means that help may come in—when it comes to these prevention programs.¹⁵⁷ Florida's H.B. 669 includes an example of this kind of counseling legislation; the bill requires each school district to adopt a bullying policy that contains "[a] procedure to refer victims and perpetrators of bullying or harassment for counseling."¹⁵⁸ Florida has also made provisions to its anti-bullying laws for specifications of prohibited bullying related conduct.¹⁵⁹ Florida's Education Code states:

153. Wa. H.B. 1444, 57th Leg., R.S. (2002) (codified as WASH. REV. CODE ANN. § 28A.300.285 (West 2012)).

154. High, *supra* note 15.

155. Wa. H.B. 1444, 57th Leg., R.S. (2002) (codified as § 28A.300.285).

156. High, *supra* note 15.

157. *Id.*

158. Fla. H.B. 669, 2008 Leg., R.S. (2008).

159. *See, e.g.*, FLA. STAT. ANN. § 1006.147 (West 2011).

“Bullying” means systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve: (1) Teasing; (2) Social exclusion; (3) Threat; (4) Intimidation; (5) Stalking; (6) Physical violence; (7) Theft; (8) Sexual, religious, or racial harassment; (9) Public humiliation; or (10) Destruction of property. . . . The definitions of “bullying” and “harassment” include: (1) Retaliation against a student or school employee by another student or school employee for asserting or alleging an act of bullying or harassment. . . . [and] (2) Perpetuation of [bullying or harassing] conduct . . . by an individual or group with intent to demean, dehumanize, embarrass, or cause physical harm to a student¹⁶⁰

In 2010, the Governor of Illinois signed an act that “amended Illinois’ bullying prevention law to broadly define bullying, name the categories of students particularly vulnerable to bullying and school violence in our schools, expand the reach of the law to non-sectarian private schools, and create the Illinois School Bullying Prevention Task Force”¹⁶¹

B. Preventing Cyberbullying

1. How Other State’s Legislation Address Cyberbullying

With today’s advanced and widely accessible means to connect to the internet, having a law against cyberbullying is essential, as cyberbullying is becoming a chronic social issue.¹⁶² “Although state laws [cannot] address harassment on the internet from state to state, they can address it from school to school within their state [and] require that the school districts themselves keep a tight lid on what’s going on inside their schools.”¹⁶³ Kentucky has addressed cyberbullying prevention in its Education Code and in its Penal Code.¹⁶⁴

A person is guilty of harassing communications when, with intent to intimidate, harass, annoy, or alarm another person, he or she:

- (a) Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written communication in a manner which causes annoyance or alarm and serves no purpose of legitimate communication;
- (b) Makes a telephone call, whether or not conversation ensues, with no purpose of legitimate communication; or
- (c) Communicates, while enrolled as a student in a local school district, with or about another school student, anonymously or otherwise, by telephone, the Internet, telegraph, mail, or any other form of electronic or written

160. *Id.* § 1006.147(2)(a)(1)–(10), (d)(1)–(2).

161. *Recommendations of the Illinois Bullying Prevention Task Force Executive Summary*, ILL. STATE BD. OF EDUC., http://www.isbe.net/SBPTF/pdf/sbptf_rec_exec_smry0511.pdf (last visited Jan. 18, 2013).

162. High, *supra* note 15.

163. *Id.*

164. *Kentucky*, BULLY POLICE USA, http://www.bullypolice.org/ky_law.html (last visited Jan. 18, 2013).

communication in a manner which a reasonable person under the circumstances should know would cause the other student to suffer fear of physical harm, intimidation, humiliation, or embarrassment and which serves no purpose of legitimate communication.¹⁶⁵

Idaho, Iowa, and Washington all have taken affirmative steps in making sure cyberbullying in particular is part of their states' legislation.¹⁶⁶ In 2006, Idaho expanded the scope of its anti-bullying legislation to include "[a]n act of harassment, intimidation or bullying may also be committed through the use of a land line, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network."¹⁶⁷ In 2007, the Iowa State Senate passed a similar law explaining what "electronic communication" means in its section prohibiting school harassment and bullying.¹⁶⁸

"Electronic" means any communication involving the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic" includes but is not limited to communication via electronic mail, internet-based communications, pager service, cell phones, and electronic text messaging.¹⁶⁹

However, Iowa's statute continues to state, "students in school, on school property, or at any school function or school-sponsored activity shall not engage in harassing and bullying behavior."¹⁷⁰ Both Idaho's and Iowa's legislation have language that indicates that the prohibited action has to take place on school property or at a school related event, which may not include cyberbullying that originates elsewhere, but nonetheless affects students in the same way.¹⁷¹ A research study done in March of 2011 reported although "45 states have bullying laws, 44 require school policies, . . . and 6 . . . include cyber-bullying specifically. . . . Washington State has the only legislation that proposes to extend punishment for cyber-bullying that occurs off-campus, yet threatens a student and impairs his or her capacity to learn at school."¹⁷²

165. KY. REV. STAT. ANN. § 525.080(1)(a)–(c) (West 2011).

166. See generally Ashley Surdin, *States Passing Laws to Combat Cyber-Bullying*, WASH. POST (Jan. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/31/AR2008123103067.html>.

167. IDAHO CODE ANN. § 18-917A (West 2011).

168. Surdin, *supra* note 166; IOWA CODE ANN. § 280.28(2)(a) (West 2011).

169. IOWA CODE ANN. § 280.28(2)(a).

170. *Id.*

171. Surdin, *supra* note 166.

172. *Staff Measure Summary*, OR. STATE LEG., available at <http://www.leg.state.or.us/comm/sms/sms11/sb0240asewd04-19-2011.pdf> (last visited Jan. 18, 2013).

2. *Applying the Supreme Court’s Decision in Tinker to Conduct Performed Away from School*

While some cyberbullying occurs entirely at school, “[m]ore frequently, students are engaging in cyberbullying activities off-campus—but the harmful impact is being felt at school.”¹⁷³ The Supreme Court has already ruled, even though off-campus, if certain conduct that meets the *Tinker* standard occurs at a “school-supervised event,” students have limited rights.¹⁷⁴ In order to deter cyberbullying that takes place away from school and not at a school-supervised event, legislatures can pass laws that would expand the *Tinker* standard to apply both on and off school grounds.¹⁷⁵ If a legislature were to pass a new law expanding the *Tinker* standard, the new law would be helpful to “further provide[] legislative guidelines on the kinds of activities that were considered to meet the standard of ‘substantial disruption’” as set forth in *Tinker*.¹⁷⁶ However, if the legislature includes examples to give guidance, the examples “should be prefaced by language that states: ‘including, but not limited to,’” in order to make clear the examples are not an exhaustive list.¹⁷⁷ If existing legislation limits the reach of *Tinker*, then the existing law limits the school’s ability to respond effectively to this new concern.¹⁷⁸ The *Tinker* standard is a fair balance between students’ constitutional rights and the school’s responsibility to ensure student safety by allowing schools to limit students’ rights but only under certain circumstances.¹⁷⁹

3. *Who Else Can Help*

Students can help prevent cyberbullying by thinking about what they post online and what they say when sending text messages and by being aware of privacy settings on their social network accounts.¹⁸⁰ Parents can help prevent cyberbullying by communicating with their children about “their online activities,” by “ask[ing] where they’re going, what they’re doing, and who

173. Willard, *supra* note 45.

174. *See Morse v. Fredrick*, 551 U.S. 393, 393 (2007).

175. *See supra* note 12 and accompanying text; Willard, *supra* note 45, at 3. However, some states that have applied the *Tinker* standard to off-campus speech and found that the school’s “suspension violates the First Amendment because defendants failed to satisfy *Tinker*’s substantial disruption test.” *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

176. Willard, *supra* note 45, at 4; *see, e.g.*, Ar. H.B. 1072, 86th Gen. Assemb., R.S. (2007).

177. Willard, *supra* note 45, at 4.

178. *Id.*; *see, e.g.*, OR. REV. STAT. ANN. § 339.351 (West 2011) (limiting the definition of bullying to an act that “[t]akes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop”); WASH. REV. CODE ANN. § 28A.300.285 (West 2011) (limiting cyberbullying to acts “conducted via electronic means by a student while on school grounds and during the school day”).

179. Willard, *supra* note 45.

180. *Prevent Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/prevention/index.html> (last visited Jan. 18, 2013).

they're doing it with," and by developing and enforcing "rules about appropriate use of computers, cell phones, and other technology."¹⁸¹

Schools can help prevent cyberbullying by making sure the "school's rules and policies address cyberbullying" and by "[c]losely monitor[ing] students' use of computers at school."¹⁸² In addition, schools can help

to educate the school community about responsible Internet use. Students need to know that all forms of bullying are wrong and that those who engage in harassing or threatening behaviors will be subject to discipline. It is therefore important to discuss issues related to the appropriate use of online communications technology in various areas of the general curriculum. To be sure, these messages should be reinforced in classes that regularly utilize technology. Signage also should be posted in the [school's] computer lab . . . to remind students of the rules of acceptable use.¹⁸³

Law enforcement officers can also play a vital role in responding to and preventing cyberbullying, but officers first need to become familiar with their state's recent laws on the issue and know how and when to intervene.¹⁸⁴ Like many schools that participate in programs such as Drug Abuse Resistance Education, something as simple as coming to speak to students in their "classrooms about cyberbullying and online safety issues . . . [can] discourage them from engaging in risky or unacceptable actions and interactions."¹⁸⁵ "Officers might also talk to parents about their child's conduct and express to them the seriousness of online harassment" and "about local and state laws, so that they are informed and can properly respond if their child is involved in an incident."¹⁸⁶

C. Lesbian, Gay, Bisexual, and Transgender Bullying Help and Prevention

A study in 2010 highlighted four practice areas that promoted safety and comfort for LGBT students while at school: (1) "[s]chool nondiscrimination and anti-bullying policies that specifically include actual or perceived sexual orientation or gender identity or expression"; (2) "[t]eachers receive training and ongoing professional development on how to intervene when homophobic teasing occurs"; (3) "[p]resence of school-based support groups or clubs . . ."; and (4) "[i]nclusion of LGBT[] role models or issues in school curricula, including bullying-prevention programming, and access to information and

181. *Id.*

182. *What Schools Can Do*, STATE OF CAL., OFFICE OF ATT'Y GEN., <http://oag.ca.gov/cybersafety/online/educators-schools> (last visited Jan. 18, 2013).

183. Sameer Hinduja & Justin Patchin, *Fact Sheet: Cyberbullying Identification, Prevention, and Response*, CYBERBULLYING RES. CTR., http://www.cyberbullying.us/cyberbullying_identification_prevention_response.php (last visited Jan. 18, 2013).

184. *See id.*

185. *Id.*

186. *Id.*

resources through the library, school-based health centers, and other avenues.”¹⁸⁷ There are many other ways for anyone to help reduce school bullying in the LGBT community, such as “[s]upport[ing] legislation that provides funding to implement anti-bullying policies and that specifically include protections based on students’ actual or perceived sexual orientation and gender identity” and by “[s]upport[ing] research on bullying among LGBT[] students.”¹⁸⁸

In addition, legislatures must address the unparalleled type of bullying a LGBT student bears when drafting anti bullying policies.¹⁸⁹ As an article from the LGBT Policy Journal at the Harvard Kennedy School put it:

As important as it is to create safe spaces for gay and transgender students in schools and to push for the inclusion of anti-bullying policies, it’s not enough to merely add sexual orientation and gender identity as enumerated groups to already in-place anti-bullying policies or to merely erect policies that simply outlaw bullying gay and transgender students. To effectively address the anti-gay bullying epidemic and ultimately curb anti-gay bullying in schools, legislation addressing anti-gay bullying must also include proactive elements that prevent bullying outright.¹⁹⁰

LGBT students, like all students, tend to do better in school when they feel accepted and supported because many students may be isolated from or even rejected by people who are important to them.¹⁹¹ Talking to someone the student trusts, whether it is a family member, friends, teacher, or a counselor, can provide productive ways to channel any frustrations or fears they may be having.¹⁹² Other online resources such as the Trevor Project and It Gets Better can be valuable for students looking for information and support but may be afraid to talk with someone in person.¹⁹³

1. Laws Directly Protecting Lesbian, Gay, Bisexual, and Transgender Students

Although federal laws do “not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including . . . [LGBT]”

187. Dorthy L. Espelage, *Bullying & the Lesbian, Gay, Bisexual, Transgender, Questioning (LGBTQ) Community*, STOPBULLYING.GOV, 67–68, http://www.stopbullying.gov/at-risk/groups/lgbt/white_house_conference_materials.pdf (last visited Jan. 18, 2013).

188. *Id.* at 68 (all caps removed).

189. Daryl Hannah, *Shutting LGBT Students Out: How Current Anti-Bullying Policies Fail America’s Youth*, LGBTQ POLICY JOURNAL, <http://isites.harvard.edu/icb/icb.do?keyword=k78405&pageid=icb.page414495> (last visited Jan. 18, 2013).

190. *Id.*

191. *See Build a Safe Environment*, STOPBULLYING.GOV, <http://www.stopbullying.gov/prevention/at-school/build-safe-environment/index.html> (last visited Jan. 18, 2013).

192. *See id.*

193. *See id.*; *see discussion infra* Part III.C.1–2.

students, from sex discrimination.”¹⁹⁴ “The fact that the harassment includes anti-LGBT comments or is partly based on the target’s actual or perceived sexual orientation does not relieve the school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment.”¹⁹⁵ Even though federal law has not provided the amount of protection for LGBT people as it has for people of different races, colors, national origin, genders, and disabilities, state and local laws may impose additional obligations on schools.¹⁹⁶ Although Texas state law does not explicitly protect discrimination based on sexual orientation, other states have enacted laws specifically prohibiting discrimination based on sexual orientation.¹⁹⁷

As a result of the suicide of thirteen-year-old Seth Walsh, California passed legislation directly prohibiting bullying based on sexual orientation.¹⁹⁸ Amended Bill 9 rewrote California’s Education Code to read “[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, [and] sexual orientation”¹⁹⁹ The bill requires that each school district have a discrimination policy against bullying on the bases already prohibited under existing law, which in California includes actual or perceived gender, “gender identity expression, race or ethnicity, nationality, religion, disability, . . .” and sexual orientation.²⁰⁰ In addition, the bill requires schools to have a procedure for receiving and investigating complaints involving discrimination quickly, requires school personnel to intervene when they see bullying, and that the superintendent to periodically update the California Department of Education’s website to include a list of school bullying resources.²⁰¹

VII. CONCLUSION

Regrettably, all types of bullying are still on the rise among school-aged youth.²⁰² In particular, the emergence of cyberbullying has received vast

194. Letter from Russlynn Ali, *supra* note 114.

195. *Id.*

196. *Id.*

197. *See, e.g.*, Ca. A.B. 9, 2011–2012 Leg., R.S. (2011).

198. Lucas Grindley, “Seth’s Law” Passes, Seeks Schools’ Protection for LGBT Students, *ADVOCATE* (Sept. 3, 2011, 10:26 AM), http://www.advocate.com/News/Daily_News/2011/09/03/Seth_s_Law_Passes_Seeks_Schools_Protection_for_LGBT_Students/.

199. CAL. EDUC. CODE § 66270 (West 2012).

200. Memorandum from Kristen Barlow, Associate Director, Legislation and Public Policy, California Mental Health Directors Association, to CMHDA Members (Oct. 24, 2011), *available at* http://www.cmhda.org/go/portals/0/cmhda%20files/public%20policy/state%20leg/ab%201297%20signed%20memo%20to%20members_final%20oct%2024%202011.pdf.

201. *Id.*

202. Gender also plays a role in bullying with boys generally being more physically aggressive and girls tending to use more indirect methods to bully. Although bullying tends to decrease as students get older and enter high school, bullying and its effects can last into adulthood. Tanya Beran, *Bullying: What Are the*

media attention in recent years and caused a rise in both the number of bullying incidents and youth suicide.²⁰³ “[S]tudies have found that physical assaults have been replaced with constant cyber assaults in the form of bashing, rumors and other hazing content targeted at a single student or group of students.”²⁰⁴

While bullying has been around for a while, advancements in technology have provided bullies with a new platform that did not exist before.²⁰⁵ Despite the change in platform, the causes of bullying—feeling of entitlement and superiority over others or insecurity, stress, anxiety, and anger—remain the same.²⁰⁶ In response to the changes in today’s society, Texas legislators have finally recognized and approved new anti-bullying legislation, but there is still room for improvement.²⁰⁷ As far as the higher risks of bullying for LGBT students, the simple answer is for all current and future anti-bullying legislation to protect *all* students.²⁰⁸ However, if legislation is going to specifically list classes of students that get protection, that legislation must include LGBT students on the list.²⁰⁹ Over the past forty years this country has come a long way in adapting to school’s ever-changing problems, while at the same time staying true to this nation’s most basic philosophies.²¹⁰

Hopefully, tragedies like Tyler Clementi’s suicide challenge Texas to change the way its citizens deal with bullying and take responsibility so this never happens again. Without anti-bullying legislation, trained educators, and informed parents, bullying will continue to get worse. Should the Texas community tolerate acts of indifference toward bullying and cyberbullying and fail to provide a child with a safe environment that could ultimately obstruct students from acquiring their right to an education?

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Differences Between Boys and Girls?, EDUCATION.COM, http://www.education.com/reference/article/Ref_Bullying_Differences/ (last visited Jan. 18, 2013).

203. See *supra* Part I.A.; *School Bullying Statistics*, *supra* note 7.

204. *School Bullying Statistics*, *supra* note 7.

205. See *supra* Part I.A.

206. See *supra* Part I.A.

207. See *supra* Parts II–III, VI.

208. See *supra* Part III.

209. See *supra* Part VI.D.

210. See *supra* Parts I.B., IV.