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

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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

² See id.; see discussion infra Part III.
³ Friedman, supra note 1.
⁴ Id.
students; ninety percent of these students have reported to be a victim of bullying.\textsuperscript{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.\textsuperscript{12} In addition, Lesbian, Gay, Bisexual, and Transgender (LGBT) students are “two to three times . . . more likely to commit . . . suicide” than other students.\textsuperscript{13} Because “30 percent of all completed suicides have been related to sexual identity crisis,” LGBT students are the most vulnerable group of bullycide.\textsuperscript{14}

\section*{B. Current Problems in Texas}

Texas is lacking legislation that protects school districts against lawsuits for compliance to some state policies.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{18}

Texas also fails to ensure that any victim of bullying has protection against reprisal, retaliation, or false accusations.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{21} In addition, if the school district is going to

\begin{itemize}
\item \textsuperscript{11} Bullying Statistics 2010, supra note 7.
\item \textsuperscript{12} See generally Texas, BULLY POLICE USA, \url{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).
\item \textsuperscript{13} Gay Bullying Statistics, BULLYING STATISTICS, \url{http://www.bullyingstatistics.org/content/gay-bullying-statistics.html} (last visited Jan. 14, 2013).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Texas, supra note 12; Brenda High, Making the Grade, BULLYING POLICE USA, \url{http://www.bullypolice.org/grade.html} (last visited Jan. 14, 2013).
\item \textsuperscript{16} High, supra note 15.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Texas, supra note 12; High, supra note 15.
\item \textsuperscript{20} High, supra note 15.
\item \textsuperscript{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).}
\end{itemize}
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

23. Id.; Texas, supra note 12.
24. High, supra note 15.
26. See id. at 505–06.
28. Id.
30. Id. at 849.
31. Id. at 868, 895 (O’Connor, J., concurring in part and dissenting in part).
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for a violation of Title IX of the Education Amendments of 1972 (Title IX). 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.”

Additionally, there have been devastating events that have brought bullying to the front line, such as the 2010 suicides of Asher Brown, Phoebe Prince, and Tyler Clementi. 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. 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.

“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.” 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.

II. DISCUSSION OF SCHOOL BULLYING: CYBERBULLYING

When most people hear about kids bullying other kids, they think the bullying is happening face-to-face. 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.
37. See Friedman, supra note 1.
39. See id.
41. See Texas, supra note 12 (giving Texas an A++ rating because of the new additions to its anti-bullying laws in 2011).
form of bullying—cyberbullying. 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.

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. 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. The United States Second Circuit Court of Appeals upheld a punishment against a student who called school officials “douchebags” online from her home computer. 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.”

Another issue is whether searching students’ internet records at school is an illegal search and seizure protected under the Fourth Amendment. 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.”

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. The Texas legislature enacted H.B. 1942 and codified the bill into various sections of the Texas Education Code (TEC). State Representative Diane Patrick wrote H.B. 1942 to address changing issues relating to bullying.

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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)).
50. Id.
in public schools. 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.” In 2011, the Texas legislature passed H.B. 1942 along with other bills that addressed anti-bullying laws.

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. 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. 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.” H.B. 1942 includes in the definition of bullying expression through electronic means but does not directly call it cyberbullying. 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. 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. In addition, S.B. 242 expands on the procedures for training and reporting. 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.
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.
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.
68. Id.
69. Id.
70. Id.
71. Id.
74. Id.
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. 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. 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. “[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. 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.” S.B. 407 also requires school districts to make information about these programs available to both students in appropriate grade levels and their parents.

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. Asher’s parents said they complained to the school many times, but the school disregarded their concerns about their son. As “[c]ompared to their heterosexual peers,” young LGBT people “are at increased risk for bullying, teasing, harassment, physical assault, and suicide-related behaviors.” 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.”

76. Id.
77. Id.
79. Abbott, supra note 75.
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).
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.”

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 . . . student . . .

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.

B. House Bill 1386

Garnet Coleman also wrote H.B. 1386, which became effective on June 17, 2011. 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. However, the bill did not amend the TEC to prohibit discrimination based on sexual orientation or other minority groups. Texas, while still in the majority, has not included sexual orientation as a protected class of citizens against discrimination in its laws.

87. Id. (emphasis added).
88. See id.
92. See discussion infra Part VI.C.1.
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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: “[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.”\(^101\)

96. Id.
97. Id.
102. It Gets Better Video Transcript, supra note 101; White House, supra note 101.
“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.”\textsuperscript{103} The American Civil Liberties Union of Texas (ACLU) “is committed to fighting for real legislative solutions to ending bullying in our schools.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{106} In addition, “[e]xtending school authority over children’s off-campus speech violates their First Amendment rights.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{109} The ACLU opposed another bill in 2009 because of “the extreme latitude it gives [schools] to punish students.”\textsuperscript{110}

In contrast, some instances involving school bullying may be a civil rights violation.\textsuperscript{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.\textsuperscript{112} Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of

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\textsuperscript{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.R. 224, TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup?History.aspx?LegSess=82R&Bill=HB224 (last visited Jan. 15, 2013).

\textsuperscript{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).

\textsuperscript{107} Oppose HB 224, supra note 104.

\textsuperscript{108} Id.

\textsuperscript{109} Id.


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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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{117}

A student can file a complaint online with the OCR “within 180 days of the last act of discrimination.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{121}

\textsuperscript{113} Id.
\textsuperscript{116} Letter from Russlynn Ali, supra note 114.
\textsuperscript{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).
\textsuperscript{118} OCR Electronic Complaint Form, DEP’T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/complaintintro.html (last modified Nov. 30, 2011).
\textsuperscript{120} Id.
\textsuperscript{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. The TEA also works with the State Board of Education to help run various programs related to public education. The State Board of Education, an elected fifteen-member board, and the Commission on Education, who the Governor appoints, all oversee the TEA. The TEA is responsible for public schools; it does not have jurisdiction over private schools or homeschooled students.

A. Roles and Responsibilities

One of the TEA’s roles is to “[m]onitor[] for compliance with certain federal and state guidelines.” The TEC is a state statutory compilation that governs public education in Texas; it applies to all educational institutions receiving state tax funds. “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.” One of the federal guidelines the TEA monitors is the Safe and Drug-Free Schools and Communities Act. 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.” 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.” The major source of

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123. Id.
126. TEA Mission and Responsibilities, supra note 122.
128. Id.
income for public education comes from the Permanent School Fund.  

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. 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. 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. With these current and possible future budget cuts, the role of TEA may become more limited.

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. “[T]he most successful . . . strategies or programs [relating to bullying] are school-wide and comprehensive.” Successful laws and prevention programs often come when education specialists become involved at all levels. A good law will not merely suggest anti-bullying programs but will mandate them. “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.”

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


133. Id.


135. See id.

136. See id.


139. High, supra note 15.

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


day contact with students, they must be trained and ready to address school bullying behaviors whenever they see it. 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.” 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.”

Parents can advocate for a bullying prevention program in their child’s school if one is not already in place. 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.” 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. 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.”

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

143. See id.
147. Id.
150. De. H.R. 7, 144th Gen. Assemb. (2007); see discussion supra Part I.B.
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,
imidation, 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:

2012)).
156. High, supra note 15.
157. Id.
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 student . . . .

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 . . . .”

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. “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.” Kentucky has addressed cyberbullying prevention in its Education Code and in its Penal Code.

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

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160. Id. § 1006.147(2)(a)(1)-(10), (d)(1)-(2).
162. High, supra note 15.
163. Id.
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.\footnote{165. KY. REV. STAT. ANN. § 525.080(1)(a)–(c) (West 2011).}

Idaho, Iowa, and Washington all have taken affirmative steps in making sure cyberbullying in particular is part of their states’ legislation.\footnote{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.} 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.”\footnote{167. IDAHO CODE ANN. § 18-917A (West 2011).} In 2007, the Iowa State Senate passed a similar law explaining what “electronic communication” means in its section prohibiting school harassment and bullying.\footnote{168. Surdin, supra note 166; IOWA CODE ANN. § 280.28(2)(a) (West 2011).}

“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.\footnote{169. Id.}

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.”\footnote{170. Id.} 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.\footnote{171. Surdin, supra note 166.} 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.”\footnote{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.” 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. 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. 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. 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. If existing legislation limits the reach of Tinker, then the existing law limits the school’s ability to respond effectively to this new concern. 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.

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. 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

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173. Willard, supra note 45.
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).
177. Willard, supra note 45, at 4.
179. Willard, supra note 45.
BULLYING IS NO LONGER JUST ON THE PLAYGROUND

they’re doing it with,” and by developing and enforcing “rules about appropriate use of computers, cell phones, and other technology.”

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.” 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.

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. 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.” “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.

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.
184. See id.
185. Id.
186. Id.
resources through the library, school-based health centers, and other avenues.”

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.”

In addition, legislatures must address the unparalleled type of bullying a LGBT student bears when drafting anti-bullying policies. 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.

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. 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. 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.

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[]

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


190. **Id.**


192. **See id.**

193. **See id.; see discussion infra Part III.C.1–2.**
students, from sex discrimination.” 4 “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.” 5 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. 6 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. 7

As a result of the suicide of thirteen-year-old Seth Walsh, California passed legislation directly prohibiting bullying based on sexual orientation. 8 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 . . . .” 9 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. 10 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. 11

VII. CONCLUSION

Regrettably, all types of bullying are still on the rise among school-aged youth. 12 In particularly, the emergence of cyberbullying has received vast

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195. Id.
196. Id.
199. CAL. EDUC. CODE § 66270 (West 2012).
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?

*by Jonathan Andring*

\(^{203}\) 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.