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Pushing Schools Around: New Jersey's Anti-Bullying Bill of Rights Act
Holly Norgard*

I. Introduction

When the President publicly addresses a teen suicide, people pay attention.¹ In September 2010,² 18-year-old Rutgers University student Tyler Clementi committed suicide by jumping off the George Washington Bridge after discovering his college roommate had observed him with a webcam during an intimate encounter with another man.³ Clementi's roommate subsequently posted a description of what he had seen on his Twitter account.⁴ The suicide made international headlines,⁵ and, as a result, the problem of bullying was pushed to the forefront of New Jersey legislators' minds. They enacted the New Jersey Anti-Bullying Bill of Rights Act⁶ ("the Act") within weeks of Clementi's death, and the Act came into effect on September 1st, 2011, roughly a year after Clementi's suicide.⁷

The New Jersey legislature was not alone in its efforts to combat bullying. The Tyler Clementi Foundation⁸ is currently "pushing for the passage of the 'Tyler Clementi Higher Education Anti-Harassment Act,'⁹ a federal legislation that would require colleges to strengthen

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¹ *Tyler Clementi*, N.Y. TIMES (updated Mar. 16, 2012),

http://topics.nytimes.com/top/reference/timestopics/people/c/tyler_clementi/index.html.

² Kelly Heyboer, *Clementi family decides against suing Rutgers, Ravi*, STAR-LEDGER, Oct. 5, 2012 at 1, *available at* 2012 WL 21181555.

³ Michael Muskal, *Rutgers suicide: Tyler Clementi's parents won't sue in webcam case*, LOS ANGELES TIMES (Oct. 5, 2010), <http://www.latimes.com/news/nation/nationnow/la-an-nn-clementi-parents-wont-sue-rutgers-20121005,0,605615.story>.

⁴ Heyboer, *supra* note 2, at 1.

⁵ *Id.*

⁶ N.J. STAT. ANN. § 18A:37 (West 2011).

⁷ *Anti-bullying*, NEW JERSEY EDUCATION ASSOCIATION (Sept. 16, 2012, 11:46 AM), <http://www.njea.org/issues-and-political-action/anti-bullying>.

⁸ The foundation's website can be found at www.tylerclementi.org. The foundation's stated mission is to promote safe, inclusive, respectful social environments in places like homes, schools, and the digital world for vulnerable youth. *About Us*, THE TYLER CLEMENTI FOUNDATION (Jan. 6, 2013, 5:41 PM), www.tylerclementi.org/about/mission-and-vision.

⁹ Tyler Clementi Higher Education Anti-Harassment Act of 2011, H.R. 1048, 112th Cong. § 2 (2011).

policies and programs forbidding harassment on campus.”¹⁰ This comment, however, solely focuses on the effects the Act has on elementary, middle, and high schools.

The quick passage of the Act demonstrates the legislature’s eagerness to respond to and prevent tragedies like Clementi’s as well as to address the pressing issue of bullying in the state.¹¹ This comment will argue that the legislature was a bit too eager. Specifically, the Act’s strict requirements must be adjusted to better align with practices that schools are actually capable of implementing. It is unrealistic to expect every school in the state to compile the resources necessary to comply with legislation that has been deemed “the toughest [anti-bullying] measure in the country,”¹² as the law is not only “tough” on bullies but also on the schools that are expected to prevent them from acting out.

Six months after the Act came into effect, a survey of 12 New Jersey school districts revealed 1,127 incidents of suspected bullying.¹³ Although only about 500 incidents were actually confirmed,¹⁴ this number indicates the higher level of bullying reports in New Jersey schools, especially considering the small number of districts surveyed and the fact that only six months had passed between the Act’s implementation and the study.¹⁵ Indeed, because of the requirements of the “tough new anti-bullying law, the number of incidents reported during the 2011-12 school year increased four-fold” when compared to the previous school year.¹⁶

¹⁰ Heyboer, *supra* note 2 at 2.

¹¹ *Anti-bullying*, NEW JERSEY EDUCATION ASSOCIATION (Sept. 16, 2012, 11:46 AM), <http://www.njea.org/issues-and-political-action/anti-bullying>.

¹² Jeanette Rundquist, *6 months into N.J. law to halt bullying, a survey takes a look at how it’s working*, STAR-LEDGER (Mar. 11, 2012), http://www.nj.com/news/index.ssf/2012/03/6_months_into_nj_law_to_halt_b.html.

¹³ *Id.*

¹⁴ Confirmed incidents are those which, after investigation, were found to have actually involved some type of bullying, as opposed to being classified as mere conflict.

¹⁵ *Id.*

¹⁶ Jessica Calefati, *Report reveals extent of bullying accusations soar in wake of new law*, STAR-LEDGER, Oct. 3, 2012 at 1.

This comment will not argue that anti-bullying legislation is *unnecessary*. Rather, this comment argues that although the Act is necessary, its provisions are overly strict. The tragic case of Tyler Clementi demonstrates the true seriousness of the issue of bullying. The mentality that ‘kids will be kids’ must no longer be accepted, for Tyler is not alone in his victimization.¹⁷ On the contrary, studies indicate that bullying is increasing at an alarming rate.¹⁸

In addition, anti-bullying legislation is needed because federal and state laws often fail to provide “most victims a remedy for [the] psychological or physical injuries” that result from bullying.¹⁹ Federal laws such as the Civil Rights Act of 1964 generally offer “remedies for victims who are bullied on the basis of federally protected criteria: race, nationality, sex, or disability. The vast majority of victims, however, are bullied for reasons that do not fall under this civil rights umbrella.”²⁰ State law statutes similarly pose barriers to remedying bullying based on characteristics other than race, nationality, sex, or disability, such as sexual orientation and gender identity, as such statutes may “shield school employees from personal liability for ordinary negligence, making them liable only for misconduct that is reckless, malicious, in bad faith, or outside the scope of employment.”²¹ Even if bullied students obtain a legal remedy, the physical and emotional harm has already been done. What students truly need are anti-bullying policies that *protect* victims from such harm, as opposed to the legislature merely recognizing claims against the school after the fact.²²

¹⁷ See N.J. STAT. ANN. § 18A:37-13.1 (West 2011).

¹⁸ See *id.*

¹⁹ Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 149 (2009).

²⁰ *Id.* New Jersey, though, is one of the fifteen states with an anti-bullying law protecting sexual orientation and gender identity, two categories falling outside the “civil rights umbrella.” Andy Marra, *GLSEN Lauds Passage of Maine Anti-Bullying Bill*, GLSEN: GAY, LESBIAN & STRAIGHT EDUCATION NETWORK (May 17, 2012), <http://www.glsen.org/cgi-bin/iowa/all/news/record/2877.html>.

²¹ Sacks & Salem, *supra* note 19.

²² *Id.*

The Gay, Lesbian & Straight Education Network (“GLSEN”) agrees there is a need for anti-bullying legislation in general.²³ GLSEN National Executive Director Eliza Byard notes that “the somber reality is that youth in most states still do not have adequate protections from bias-based bullying.”²⁴ In celebrating recent anti-bullying legislation passed in Maine, Byard also focused on the fact that Maine’s legislation was passed with bipartisan support.²⁵ She noted that the “bipartisan support in Maine sends a strong message to Congress that politics should not stand in the way of swift, comprehensive action that ensures our young people are safe and treated with respect in school.”²⁶

Another proponent of anti-bullying programs is the Olweus Bullying Prevention Program (“Olweus”).²⁷ Olweus’s website lists several ways in which a school climate may be harmed when school administrators fail to take appropriate action in response to incidents of bullying, such as the potential for the school to develop an environment of fear and disrespect.²⁸ Students may have difficulty learning, feel insecure, dislike school, and perceive that teachers and staff have little control.²⁹ The numerous concerns in the realm of school bullying motivate the Olweus program to conduct two-day trainings for schools informing teachers and administrators of the following: the characteristics of students involved in bullying programs, risk factors for bullying behavior, and ways of effectively intervening with bullied students, bullies, and bystanders.³⁰ With thirty-five years of research and worldwide implementation success, Olweus

²³ Andy Marra, *GLSEN Lauds Passage of Maine Anti-Bullying Bill*, GLSEN: GAY, LESBIAN & STRAIGHT EDUCATION NETWORK (May 17, 2012), <http://www.glsen.org/cgi-bin/iowa/all/news/record/2877.html>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *How Bullying Affects Children*, HOME OF THE OLWEUS BULLYING PREVENTION PROGRAM (2011), http://www.violencepreventionworks.org/public/bullying_effects.page.

²⁹ *Id.*

³⁰ *A Foundation for Successful Program Implementation*, HOME OF THE OLWEUS BULLYING PREVENTION PROGRAM (2011), http://www.violencepreventionworks.org/public/bullying_prevention_training_info.page.

works to “prevent or reduce bullying throughout a school setting” and has yielded “fifty percent or more reductions in student reports of being bullied and bullying others.”³¹ Thus, if schools take a proper approach, they can indeed obtain success in reducing bullying in their districts.

Perhaps the strongest argument for anti-bullying legislation stems from the relatively recent bullying case that reached the New Jersey Supreme Court.³² The Court set forth a totality of the circumstances test to determine the reasonableness of a school’s response to an incident of bullying.³³ This test is overly vague and renders school administrators unclear of their duties. In the case, the parents of a bullied student sued a school district for its alleged inadequate response to an instance of bullying based on the student’s perceived sexual orientation.³⁴

The court’s totality of the circumstances test lists relevant factors for consideration, such as the student’s age, school culture or atmosphere, frequency and duration of conduct, extent or severity of the conduct, presence of violence, and effectiveness and swiftness of the response.³⁵ After laying out this test, the court remanded the case for a determination of reasonableness.³⁶ This totality of the circumstances test is extremely malleable and fact-sensitive.³⁷ Thus, in its decision to recognize the plaintiff’s claim against the school, the New Jersey Supreme Court established liability when schools fail to take “reasonable” action in response to a complaint.³⁸ Such a test is incredibly vague because the term “reasonable” leaves both a school’s liability and obligations uncertain and thus allows lower courts utmost discretion in interpreting the holding

³¹ *The World’s Foremost Bullying Prevention Program*, HOME OF THE OLWEUS BULLYING PREVENTION PROGRAM (2011), http://www.violencepreventionworks.org/public/bullying_prevention_program.page?menuheader=9.

³² L.W. ex rel. L.G. v. Toms River Reg’l Sch. Bd. of Educ., 915 A.2d 535, 544 (N.J. 2007).

³³ *Id.* at 551.

³⁴ *Id.* at 544.

³⁵ *Id.*

³⁶ *Id.* at 553.

³⁷ *See, e.g.*, FED. R. CIV. P. 52 (stating that in “an action tried on the facts without a jury or with an advisory jury, *the court must find the facts specially and state its conclusions of law separately*”) (emphasis added).

³⁸ L.W. ex rel. L.G. v. Toms River Reg’l Sch. Bd. of Educ., 915 A.2d 535, 540 (N.J. 2007).

as they see fit. Such vagueness will lead to conflicting decisions in the lower courts, hindering uniformity and predictability for litigants.

That the New Jersey Supreme Court grants lower courts too much discretion underscores the need for anti-bullying legislation in general so that courts will have clearer guidance in determining whether a particular school acted reasonably. However, the Act lists extensive requirements with which schools must comply and takes away too much discretion from the lower courts, swinging the pendulum too far in the opposite direction. Because it specifies exactly how the schools must respond, the Act too harshly strips lower courts of leeway in analyzing the reasonableness of a school's response and instead lays out what the *legislature* believes would be reasonable, substituting its views for the courts'. Ideally, courts would be allowed to strike a balance between the New Jersey Supreme Court's overly vague approach and the Act's overly strict one. The Act provides courts with a pre-determined, general checklist to consult in order to determine if a particular school responded "reasonably" to an incident of harassment, intimidation, or bullying,³⁹ but does not explicitly allow courts to ignore any of the requirements, even if the court were to deem such a decision proper based on particular facts. Instead, the Act mandates a general response for all schools in every incidence of bullying.

At least one New Jersey lobbyist disagrees with the contention that the law is overreaching. Steven Goldstein, the chairman of Garden State Equality, a gay-rights group, supports a strict anti-bullying statute and views the statistics demonstrating higher incidences of reported bullying⁴⁰ as "prime evidence that the state's anti-bullying law is working."⁴¹ The accuracy of this statement, of course, depends on one's definition of "working" and on whether a higher number of reported incidents necessarily correlates with successful anti-bullying

³⁹ See N.J. STAT. ANN § 18A:37 (West 2011).

⁴⁰ See *supra* note 13 and accompanying text.

⁴¹ Calefati, *supra* note 16 at 3 (internal quotations omitted).

prevention. An increased number of reports may just as easily be explained as stemming from a fear of discipline if one fails to report⁴² or as a result of greater *awareness* of bullying.⁴³ Consequently, the statistics alone do not speak to whether the Act effectively addresses the issue of bullying.

Although both the New Jersey Supreme Court, in *L.W. ex rel. L.G. v. Toms River Regional School Board of Education*, and the New Jersey legislature, in the Act, recognize the seriousness of bullying in schools, neither sought to make bullying a criminal offense.⁴⁴ Indeed, anti-bullying advocates “warn that throwing bullies in jail might not be the best remedy.”⁴⁵ Whether bullying should be a criminal offense is a contested issue⁴⁶ for a number of reasons, including the typical parties’ younger ages and the focus on redemption and rehabilitation that is generally characteristic of juvenile justice. This comment, however, does not address this subtopic further.

As another aside, with technological advancements like Myspace, Facebook, and Twitter, cyber-bullying is a specific and growing area of the legal sphere.⁴⁷ This is not to say the law

⁴² See N.J. STAT. ANN § 18A:37-16 (West 2011).

⁴³ See, e.g., Calefati, *supra* note 16 at 1 (quoting Long Branch Superintendent Michael Salvatore: “I don’t think there’s more bullying happening now. I think people are educated on what bullying actually is Things that may have been classified as conflict or teasing before are now being qualified as bullying.”).

⁴⁴ See N.J. STAT. ANN § 18A:37 (West 2011); *L.W. ex rel. L.G. v. Toms River Reg’l Sch. Bd. of Educ.*, 915 A.2d 535 (N.J. 2007).

⁴⁵ Greg Toppo, *Should bullies be treated as criminals?* USA TODAY (last updated June 13, 2012, 5:24 PM), <http://usatoday30.usatoday.com/new/nation/story/2012-06-12/bullying-crime-schools-suicide/55554112/1>.

⁴⁶ For example, one Iowa state lawmaker proposed legislation in late 2011 requiring parents of both the bully and victim to go through a mediation process following a bullying report. *Id.* The law would allow prosecutors to pursue fines or criminal charges if the bully’s parents refused to cooperate. *Id.* This proposal did not reach the hearing stage, but this example serves to demonstrate the differing viewpoints among lawmakers regarding how bullying should be treated under state law. *Id.* Additionally, Tyler Clementi’s school, Rutgers University, sued his roommate for invasion of privacy, bias crimes and hindering prosecution; he was convicted on 15 counts and ultimately sentenced to 30 days in county jail and 300 hours of community service. Heyboer, *supra* note 2 at 2. The judge could have alternatively sentenced him for up to 10 years in prison. *Id.* Although Clementi’s roommate was 18 and someone younger may very well have been treated differently, this example demonstrates that at least in some circumstances, treating bullying as criminal seems appropriate to some.

⁴⁷ See, e.g., *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 574 (4th Cir. 2011) *cert. denied*, 132 S. Ct. 1095, 181 L. Ed. 2d 1009 (U.S. 2012) (holding that imposition of school discipline for a student creating a fake Myspace profile of another student from her home computer was appropriate because her speech caused “substantial disorder

does not reach conduct occurring off school grounds. It does.⁴⁸ This comment, however, focuses only on the incidents of harassment, intimidation, and bullying that schools are responsible for that occur *on campus*.

This comment will begin in Part II by giving an overview of the Act and will identify the relevant legislative findings that convinced the legislators to amend the state's prior anti-bullying legislation. Additionally, this Part will describe the Act's terms and the requirements it imposes upon schools. Part III will identify specific areas of the Act that are problematic and explain why these sections need redrafting. Part IV will suggest ways in which these sections may be amended to address such problems and will propose redrafted provisions that the legislature should consider for adoption. Part V will conclude by arguing that although the legislature correctly recognized the problem of bullying in New Jersey schools and thus the necessity for stronger anti-bullying legislation in general, the Act imposes overly strict requirements on school districts, thereby hindering the Act's underlying goals.

II. Overview of the New Jersey Anti-Bullying Bill of Rights Act

The state legislature implemented its original anti-bullying statute in 2002.⁴⁹ The statute was first amended in 2007 to include cyber-bullying and then again in 2008 to require schools to distribute their anti-bullying policy to parents and to post the policy on the school district website.⁵⁰ Although these amendments suggest that bullying legislation was already an important issue in the minds of New Jersey's legislators, with the 2007 amendment paying

and disruption in the school"); Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 848 (2010) (arguing that “[c]yberbullying is already too grave a problem to be ignored, and it is quickly escalating with the proliferation of Internet use and the popularity of social-networking websites”).

⁴⁸ See N.J. STAT. ANN. § 18A:37-15.3 (West 2011). (“The policy adopted by each school district . . . shall include provisions for appropriate responses to harassment, intimidation, or bullying . . . that occurs off school grounds”).

⁴⁹ N.J. STAT. ANN. § 18A:37-13.1 (West 2011).

⁵⁰ *Id.*

special attention to the more recently emerging problem of online bullying, the previous amendments were not nearly as substantial as those implemented by the current Act.

The legislature's decision to undertake its first *major* redrafting of the state's anti-bullying law was undoubtedly "[p]ropelled by public outcry over the suicide of . . . Tyler Clementi."⁵¹ While this particular incident may very well have been the "propelling" force behind the Act, the New Jersey legislature also made numerous findings in justification of its decision to impose stricter anti-bullying requirements.⁵² One relevant finding arose from a 2009 study.⁵³ The results demonstrated that 32% of students ages twelve through eighteen were bullied in the previous school year.⁵⁴ The same study related that one quarter of the schools reported bullying as a weekly or even daily issue.⁵⁵ A 2009 study by the United States Centers for Disease Control and Prevention also found the percentage of bullied New Jersey students to be one percentage point higher than the nation's median.⁵⁶

The legislature further found that school districts would benefit from clearer definitions of harassment, intimidation, and bullying as well as clearer standards explaining how to react to such incidents,⁵⁷ suggesting it viewed the previous legislation as too vague. The legislature acknowledged that the state has a responsibility to force schools to take a "smarter, clearer approach to fight school bullying by ensuring that existing resources are better managed" and used to make schools safer.⁵⁸

⁵¹ Winnie Hu, *Bullying law puts New Jersey schools on spot*, N.Y. TIMES Aug. 30, 2011, <http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html>.

⁵² N.J. STAT. ANN § 18A:37-13.1 (West 2011).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ N.J. STAT. ANN § 18A:37-13.1 (West 2011).

Implicitly invoking the Clementi case as justification for its amendment, the legislature also reported that the Act will reduce the risk of suicides.⁵⁹ Although the Act affects only public school districts, the legislature also kept its higher education institutions in mind in drafting the law.⁶⁰ It found that bullying poses a problem in the state's higher education institutions and that the Act will reduce such incidents.⁶¹

In an effort to make clear the definition of 'bullying,' the legislature amended the definition by creating the new term "harassment, intimidation or bullying" (also referred to as HIB).⁶² HIB is defined as

any gesture . . . [or act], or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic . . . that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that: a) a reasonable person should know . . . will have the effect of physically or emotionally harming a student or damaging the student's property or placing a student in reasonable fear of [such harm or damage] . . . b) has the effect of insulting or demeaning any student or group of students; or c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.⁶³

This new, expanded definition (1) acknowledges that electronic communication can be a source of bullying, (2) focuses on both the motivation behind the bullying as well as the bullying's effect, and (3) includes events occurring off school grounds if the bullying effects the school's operation. Examples of protected characteristics provided in the definition include race,

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ N.J. STAT. ANN § 18A:37-13.1 (West 2011).

⁶² N.J. STAT. ANN § 18A:37-14 (West 2011).

⁶³ *Id.*

religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, and mental, physical or sensory disabilities.⁶⁴

The amended definition of bullying states that an incident must either “substantially disrupt or interfere with the orderly operation of the school or the rights of other students.”⁶⁵ Thus, because behavior occurring off campus has the ability to bring both of these effects, incidents of harassing, intimidating, or bullying are not limited to behavior while on school grounds.⁶⁶ The definition also now describes harassing, intimidating, or bullying as gestures, acts, or communications that create a hostile educational environment “by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.”⁶⁷ The use of the phrase “severely *or* pervasively” is important because it allows even a single incident to qualify as harassing, intimidating, or bullying. The language suggests that behavior need not be pervasive or repeated as long as it is severe.

The Act also requires that each school district adopt a policy prohibiting incidents of harassment, intimidation, or bullying.⁶⁸ Under former legislation, school districts were only “encouraged” to establish bullying prevention programs.⁶⁹ While the Act grants the schools some flexibility in drafting their policies, it also mandates inclusion of certain items, thus setting minimum standards that schools must reach in order to comply with the Act.⁷⁰

The first stated minimum that each policy must contain is a general statement prohibiting harassment, intimidation, or bullying of a student.⁷¹ This requirement garners little debate, as, presumably, many schools would have already included such a basic statement on their own

⁶⁴ *Id.*

⁶⁵ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁶⁹ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

⁷⁰ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁷¹ *Id.*

even without the explicit requirement. Secondly, the district must also provide a description of the particular type of behavior expected from each student.⁷² This provision is similarly unproblematic, as its broad terms allow schools flexibility in describing how they expect their students to act. This flexibility is unproblematic as schools will likely already know which behaviors are most problematic at their school and will therefore target such areas in their descriptions.⁷³ In other words, the freedom in drafting descriptions of expected behavior has little potential to prove overwhelming for schools.

Thirdly, each policy must also list the possible consequences and the appropriate remedial action the school will take in order to discipline someone who commits an act of harassment, intimidation, or bullying.⁷⁴ While the Act's reporting mandate⁷⁵ gives educators *no* discretion in determining whether an incident of harassment, intimidation, or bullying should be reported, the requirement of listing consequences and remedial action⁷⁶ gives schools *too much* discretion. This is because the Act requires schools to take disciplinary action but fails to suggest possible consequences that should be attached to certain behaviors, leaving these decisions entirely up to schools.⁷⁷ This may lead to practices varying from district to district, which will be especially problematic for the judicial system in determining whether a school properly responded to an incident. If practices vary across districts, judges must familiarize

⁷² *Id.*

⁷³ Perhaps the provision designating a week in October as a "Week of Respect" where districts must provide "age-appropriate instruction focusing on preventing harassment, intimidation, or bullying" is the least problematic. N.J. STAT. ANN. § 18A:37-29 (West). This section is as an example of a provision that brings the issue of bullying to the minds of students and administrators alike (notably, it does so at the start of the school year, which would hopefully influence students and teachers alike to grow accustomed to treating this as an important issue for the remainder of the year) without imposing too many requirements on school districts. Thus, this article does not propose the Act in its entirety is overreaching but rather that certain provisions need be redrafted.

⁷⁴ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁷⁵ See *infra* notes 130 through 136 and accompanying text.

⁷⁶ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

⁷⁷ See N.J. STAT. ANN. § 18A:37-15 (West 2012).

themselves with a vast number of practices instead of a single, universally applied set of practices. This has the potential to hinder judicial efficiency.

A fourth requirement states that the policy must also explain the school's procedure for reporting an act.⁷⁸ This requirement is also problematic. Schools have little discretion regarding reporting procedure as the Act sets a minimum standard by mandating that all incidents first be reported verbally to the principal on the same day that the school employee witnessed or received reliable information about an incident and then again in writing within two school days of such incident.⁷⁹

Moreover, beyond setting the standards for reporting, the Act also requires districts to include in their policy their procedure for *investigating* the reports of such violations and complaints.⁸⁰ Again, the Act sets certain minimums. For example, the investigation must be initiated by the principal or a designee within one day of the report and must be conducted by a school anti-bullying specialist.⁸¹ Furthermore, the investigation must be finished within ten school days of the written report's filing.⁸² Next, the results must be reported to the superintendent within two school days of the investigation's completion, and the superintendent must then decide upon appropriate action.⁸³ Finally, the results must be reported to the board of education no later than the date of the board's next meeting following the investigation, and the board may affirm, reject, or modify the superintendent's decision.⁸⁴

⁷⁸ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* An anti-bullying specialist should be someone like a school guidance counselor, school psychologist, or another employee that has similar training. N.J. STAT. ANN. § 18A:37-20 (West 2011).

⁸² N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁸³ N.J. STAT. ANN. § 18A:37-15 (West 2011).

⁸⁴ *Id.*

Finally, the Act requires the district's policy to contain a list of ways in which a school will respond once an incident is identified.⁸⁵ Here, the Act is permissive. Rather than mandating certain responses, the Act suggests that the district may offer counseling, support services, or intervention services.⁸⁶ Rather than evaluating schools on their attempt to *identify* incidents of bullying, the amended legislation assesses schools on their effort to "implement policies and programs consistent with the [Act]."⁸⁷ In theory, this change is practicable, beneficial even, as asking whether a school *attempts* to handle incidents of bullying ignores the question of whether or not they actually *succeed*.

The Act also contains a mandatory reporting requirement with an accompanying threat of discipline for those who do not initiate or conduct an investigation following an incident, regardless of whether they had actual knowledge of such an incident.⁸⁸ Rather, the standard for reporting is negligence, as an employee and/or school may be liable if the employee "should have known" of the incident.⁸⁹ Notably, the Act fails to suggest appropriate methods of "discipline" that schools should impose when educators and administrators violate the reporting mandate.

One of the major changes the Act imposes on schools is a mandatory training requirement.⁹⁰ For employees and volunteers who have "significant contact" with students, districts must provide training on incidents of harassing, intimidating, or bullying.⁹¹ The district must also ensure that the training includes instruction on *preventing* bullying on the basis of the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

⁸⁸ N.J. STAT. ANN. § 18A:37-16 (West 2011).

⁸⁹ *Id.*

⁹⁰ N.J. STAT. ANN. § 18A:37-17 (West 2012).

⁹¹ N.J. STAT. ANN. § 18A:37-15 (West 2012).

protected categories enumerated in the definition of harassing, intimidating, or bullying.⁹² Finally, the district must develop a process for discussing its policy with students.⁹³

Beginning with the 2012-2013 school year, the Act also requires that candidates applying for teaching certification must complete a program on bullying prevention.⁹⁴ The Act mandates that the Department of Education “develop a guidance document for use by parents, students, and school districts to assist in resolving complaints . . . concerning the implementation by school districts of statutory requirements.”⁹⁵ Such a requirement evidences that the schools were not the legislators’ sole target; they also aimed to better inform parents and students of proper methods of handling incidents of bullying.⁹⁶

Lastly, the Act mandates the appointment of (1) a school safety team, (2) an anti-bullying specialist and (3) an anti-bullying coordinator.⁹⁷ The school safety team’s responsibilities are to receive complaints and reports of incidents of bullying, identify and address patterns of such incidents, strengthen the school climate in an effort to prevent and address incidents, educate the community regarding such incidents, and participate in the required training.⁹⁸ The anti-bullying specialist, appointed by the principal, must chair the school safety team, lead investigations, and serve as the primary school official responsible for preventing, identifying, and addressing incidents of harassment, intimidation, and bullying in the school.⁹⁹

In addition to the requirement that every school in the district appoint an anti-bullying specialist and a school safety team, each district must also have an anti-bullying coordinator.¹⁰⁰

⁹² *Id.* (emphasis added).

⁹³ *Id.*

⁹⁴ N.J. STAT. ANN. § 18A:37-22 (West 2011).

⁹⁵ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

⁹⁶ *See id.*

⁹⁷ N.J. STAT. ANN. §§ 18A:37-20, 18A:37-21 (West 2011).

⁹⁸ N.J. STAT. ANN. § 18A:37-21 (West 2011).

⁹⁹ N.J. STAT. ANN. § 18A:37-20 (West 2011).

¹⁰⁰ *Id.*

The district anti-bullying coordinator, who is appointed by the superintendent, shall be responsible for coordinating and strengthening the school district's policies to prevent, identify, and address incidents.¹⁰¹ Further, the coordinator will collaborate with the anti-bullying specialist, the board of education, and the superintendent to prevent, identify, and respond to incidents.¹⁰² Additionally, the coordinator will provide data, in collaboration with the superintendent, to the Department of Education regarding incidents.¹⁰³ Only some of the above-described provisions need be reworked, and if such redrafting is undertaken, New Jersey's legislation has the potential for great success.

III. Problematic Areas of the Act: Why Certain Provisions Go Too Far

This Part begins by addressing the various negative responses to the Act expressed by the public and the Allumuchy School District in Warren County. It then proceeds to explain the faults of three provisions of the Act: (1) the mandatory reporting requirement, (2), the provision allowing for disciplinary action for educators who "should have known" of an incident and failed to take "sufficient action," and (3) the mandatory appointment of a school safety team, anti-bullying specialist, and anti-bullying coordinator.

A. Negative Reactions to the Act

The Act and its requirements sparked commentary almost immediately after its implementation. One of the public's major complaints regards the Act's potential to turn counselors into disciplinarians.¹⁰⁴ The fear is that the Act will cause educators and administrators to focus on the punishment of bullies rather than on determining the underlying problem and working with the bully to effect a change in behavior through alternative means,

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See* Rundquist, *supra* note 12.

such as counseling sessions.¹⁰⁵ Given the mandatory reporting requirement,¹⁰⁶ this fear may be justified; if schools are forced to report every incident of bullying, the bully may gain a record and reputation of negative behavior without an opportunity to speak with counselors or the bullied student.

Another concern is that staff members will over-report due to the difficulty in distinguishing between “conflict” and “bullying.”¹⁰⁷ This fear of over-reporting may also stem from the threat of discipline imposed on those who fail to report.¹⁰⁸ Although the Act does not recommend types of appropriate punishment, the fear of the unknown—assuming the school policy similarly stands silent on this issue—may indeed lead to the over-reporting of incidents that would otherwise remain under the school administration’s radar.

Indeed, in describing the Act’s definition of “bullying” as “vague,” one reporter asks, “What exactly must schools report? They’re unsure, so they’re reporting everything, including events that may not meet the bullying criteria.”¹⁰⁹ For example, in the district of Long Branch, reports of bullying “ranged from ‘one student glaring at another’ to aggressive altercations.”¹¹⁰ Uncertainty as to what conduct constitutes “bullying” leads to such over-reporting tendencies (certainly, reporting a glare seems excessive), which in turn will result in educators preparing extra and unnecessary documentation, forcing them to take time away from their primary job of teaching.¹¹¹ The concern of over-reporting is supported by the study mentioned above,¹¹² which demonstrated that of 1,127 incident reports, less than half were actually confirmed and found to

¹⁰⁵ *Id.*

¹⁰⁶ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

¹⁰⁷ Rundquist, *supra* note 12.

¹⁰⁸ See N.J. STAT. ANN § 18A:37-16 (West 2011).

¹⁰⁹ Richard Bozza, *Opinion: N.J.’s new anti-bullying law has some flaws that need to be revisited*, N.J.COM (Nov. 1, 2011, 6:26 AM), http://www.nj.com/time-opinion/index.ssf/2011/11/opinion_njs_new_anti-bullying.html.

¹¹⁰ Calefati, *supra* note 16 at 2.

¹¹¹ Bozza, *supra* note 109.

¹¹² See *supra* note 13 and accompanying text.

fall under the description of “bullying.”¹¹³ Thus, it seems that one of the unintended effects of the Act is an increase in the *reporting* of alleged incidents, which may be a result of the confusion and vagueness that the Act engenders.

Perhaps the Act’s most obvious negative consequence is the excessive amount of resources it requires, including time and money. About one-third of New Jersey’s roughly 600 districts responded to a survey by the New Jersey School Board Association, the state’s school superintendents, and the state’s business administrators associations.¹¹⁴ Over 90% of surveyed schools reported that the Act increased costs, ranging up to \$80,000 solely for the mandatory training.¹¹⁵ Schools also revealed that compliance with the law required an average of around 200 hours per month of staff time.¹¹⁶ Schools noted that this time was taken away from areas such as substance abuse prevention and college and career counseling.¹¹⁷ Time is also taken away for (1) administrators who must file reports, (2) employees who must investigate them, and (3) boards who must affirm, reject, or modify a superintendent’s position.¹¹⁸ Yet another financial burden results from the fact that schools will also have to pay for attorneys’ fees to handle the various complaints brought against them.¹¹⁹

As a side note, responses to the Act have not only focused on the strict requirements it imposes on schools but have also considered the effects that formal reporting and investigation requirements have on victims of bullying and accused bullies.¹²⁰ One concern is that victims may be forced to repeatedly relive an incident throughout the reporting and investigation

¹¹³ Rundquist, *supra* note 12.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Bozza, *supra* note 109.

¹¹⁹ *Id.*

¹²⁰ *Id.*

processes.¹²¹ Additionally, a wrongly accused bully may, even if eventually found not to have misbehaved under the school's policy, gain a poor reputation with his or her peers and educators merely from being the subject of a reported incident and accompanying investigation.

The general public is not the only entity to have criticized the law. Only months after the Act went into effect, the Allumuchy School District in Warren County¹²² challenged the law as an unfunded mandate.¹²³ Similarly, critics had raised the concern that there is "no budget for . . . this unfunded mandate. As a result, schools have been forced to cut other trainings, such as how to improve as an educator, to fund anti-bullying education."¹²⁴ The Allumuchy School District claimed the Act unjustly imposed costs on the districts, and the State Council on Local Mandates agreed.¹²⁵ It struck the law down in a ruling in January 2012.¹²⁶

As a result of this ruling, New Jersey Governor Chris Christie signed legislation creating a \$1 million fund to pay for anti-bullying training programs.¹²⁷ The legislation creates a "special

¹²¹ *Id.*

¹²² Allumuchy School District has two schools and serves students from pre-kindergarten through eighth grade. *About Us*, ALLAMUCHY TOWNSHIP SCHOOL DISTRICT (Jan. 6, 2013, 6:56 PM), www.aes.k12.nj.us/domain/22).

¹²³ *Anti-bullying law struck down by Council on Local Mandates*, NEW JERSEY EDUCATION ASSOCIATION (Feb. 27, 2012), <http://www.njea.org/news/2012/02/27/anti-bullying%20law%20struck%20down%20by%20council%20on%20local%20mandates>.

¹²⁴ Bozza, *supra* note 109.

¹²⁵ *Anti-bullying law struck down by Council on Local Mandates*, NEW JERSEY EDUCATION ASSOCIATION (Feb. 27, 2012), <http://www.njea.org/news/2012/02/27/anti-bullying%20law%20struck%20down%20by%20council%20on%20local%20mandates>.

¹²⁶ *Id.* The Council on Local Mandates' website may be found at www.state.nj.us/localmandates. The Council is a bipartisan body separate from the three branches of state government. *General Background*, STATE OF NEW JERSEY COUNCIL ON LOCAL MANDATES (Jan. 6, 2013, 7:06 PM), <http://www.state.nj.us/localmandates/general>. Council deliberations begin with the filing of a complaint by a county, municipality, or school board, or by a county executive or mayor who has been directly elected by voters. *Id.* If the Council determines a complaint meets the threshold requirements of the Council statute and the Rules, the Council circulates the Complaint to State officials and to the person who must file an answer to it. *Proceedings Before the Council*, STATE OF NEW JERSEY COUNCIL ON LOCAL MANDATES (Jan. 6, 2013, 7:16 PM), <http://www.state.nj.us/localmandates/proceedings/index.html>. Next, a summary of the Complaint is posted on the Council's website. *Id.* Those interested in participating in the case may apply to appear as amici curiae. *Id.* Claimants, Respondents, and amici curiae must include a "pleading summary" with their filings, which are then posted on this site in order that other interested groups or persons and the public will be informed of each party's basic position as the case progresses. *Id.* At the end of a case, the Council issues a written decision and circulates it to all the parties and amici who participated as well as to State officials. Council decisions are also posted on the website. *Id.*

¹²⁷ *Christie signs anti-bullying fix*, NEW JERSEY EDUCATION ASSOCIATION (Mar. 27, 2012), <http://www.njea.org/news/2012/03/27/christie%20signs%20anti-bullying%20fix>. The text of the bill can be found at

fund . . . designated the ‘Bullying Prevention Fund.’ The fund . . . shall be used to offer grants to school districts to provide training on harassment, intimidation, and bullying prevention and on the effective creation of positive school climates, and to help fund related personnel expenses.”¹²⁸ However, in order to even qualify for a grant from the fund, a school must first prove it has explored “all bullying prevention programs and approaches that are available at no cost.”¹²⁹ Further, one can imagine that the \$1 million will run out much faster than the time it takes each district to implement an anti-bullying policy in compliance with the Act; the lack of funding will undoubtedly remain a huge problem faced by districts across the state.

B. The Mandatory Reporting Requirement

One of the most problematic areas of the Act is its mandatory reporting requirement.¹³⁰ The Act requires that “a member of a board of education, school employee, contracted service provider, student or volunteer who has witnessed, or has reliable information that a student has been subject to, harassment, intimidation or bullying *shall* report the incident to . . . any school administrator.”¹³¹ Such a requirement leaves the reporter with no discretion. Thus, whether a reporter does not believe the incident merits reporting because, for example, it occurred in the context of extenuating circumstances, is irrelevant. A reporter will be forced to set aside his or her own judgment and opinion about an incident and report it anyway. Like juries and trial courts, who are the preferred fact-finders because they are at the “ground level,” so too are teachers better “fact-finders” due to their continuous interaction with the same students. Teachers are best able to adduce whether an incident is serious enough to be reported and should

http://www.njleg.state.nj.us/2012/Bills/S2000/1789_I1.PDF. See S. Budget and Appropriations Comm. S1789, 215th Leg. (N.J. 2012).

¹²⁸ N.J. STAT. ANN § 18A:37-28 (West 2012).

¹²⁹ *Christie signs anti-bullying fix*, NEW JERSEY EDUCATION ASSOCIATION (Mar. 27, 2012), <http://www.njea.org/news/2012/03/27/christie%20signs%20anti-bullying%20fix>.

¹³⁰ See N.J. STAT. ANN § 18A:37-16 (West 2011).

¹³¹ N.J. STAT. ANN. § 18A:37-16 (West 2011) (emphasis added).

be allowed to use their discretion. A mandatory reporting requirement conflicts with such fact-finding abilities because it renders irrelevant the teachers' background knowledge, which could help them form more appropriate decisions about whether the incident merits reporting. Those decisions, however, are taken away from such educators.

The mandatory reporting provision strips teachers of the ability to use their contextually-based opinions built from interacting with their students on a daily basis in deciding whether to report or let a would-be "incident" pass without involving the principal, board of education, and superintendent. The reporting requirement may prove even more problematic at the elementary school level, where students are only "just learning how to socialize with their peers" and for whom "name-calling or shoving on the playground could be handled on the spot as a teachable moment, with the teacher reinforcing the appropriate behavior."¹³² Even for older students, however, teachers have access to knowledge that would allow them to determine when an "incident" should be reported. The Act may allow for some leeway on part of reporters in deciding whether an incident has occurred in the first place, as it defines harassing, intimidating, or bullying as acts that are "reasonably perceived" as motivated by a particular characteristic,¹³³ but once a reporter makes such a determination, any leeway disappears; the employee *must* report. In short, granting permission to decide whether an incident has *occurred* is separate from discretion in whether to report, which New Jersey educators now lack.

That the legislature truly intended each "incident" of name-calling and like occurrences be reviewed and documented by a host of administrators, from the principal to the superintendent and board of education, is difficult to imagine, but that is precisely the Act's effect. As seen by the negative responses to the law, there is a strong and realistic fear that mandatory reporting will

¹³² Bozza, *supra* note 109.

¹³³ N.J. STAT. ANN. § 18A:37-14 (West 2011).

translate into *over*-reporting, and this seems especially likely when considering both the threat of punishment for a failure to report and the Act’s broad definition of bullying.¹³⁴

Another problem with the statute’s mandatory reporting requirement stems from the fact that the law does not define “reliable information” or suggest which sources will be categorized as such.¹³⁵ Instead, the mandate holds reporters responsible for making the distinction. Such vagueness may lead to over-reporting if reporters are concerned about disciplinary action against them for failure to report. A final serious problem with the mandatory reporting requirement is that it is not limited to administrators and educators but includes students within its reach.¹³⁶

C. The Standard of “Should Have Known” and the Provision for Disciplinary Action

A second major section that calls for redrafting concerns the potential for a school administrator “who should have known of an incident and fails to take sufficient action” to be subject to disciplinary action.¹³⁷ This provision is overly vague, as it fails to define “sufficient action.” That the legislature did not write “fails to report the incident” implies that it expects more from the would-be reporter. This begs the question of what exactly is required when a term as vague as “sufficient” is used. Nor does this section explain, limit, or provide examples of the appropriate disciplinary action for failure to report. This lack of explanation leaves administrators in fear of unknown punishment for failing to properly respond to an incident of which they may have had no actual knowledge. Moreover, a “should have known” standard is

¹³⁴ Bozza, *supra* note 109.

¹³⁵ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

¹³⁶ N.J. STAT. ANN. § 18A:37-16 (West 2011). The danger here is in turning students against each other and encouraging them to become “tattle-tales.” If students are told they must report bullying when they see it occur or else face punishment, many may choose to in fact report their peers, which may lead to tension among students and a negative school climate—precisely the effects the law hopes to *avoid*. While this article is concerned solely with the Act’s negative implications from the perspective of the schools, the effect the Act has on students as reporters would be a potential area of future research.

¹³⁷ N.J. STAT. ANN. § 18A:37-16 (West 2011).

problematic because the statute does not explain *how* the administrator should have known or what factors are relevant to such an analysis.

In larger schools with hundreds, or even thousands, of students, it may be harder for educators to “know” of an incident of bullying, and punishing them at the same level as those who fail to report and *did* know is unfair at best. This problem would be partially lessened if the court takes into consideration the school’s size when determining whether a response was reasonable, but this is only a remedy after the incident has occurred. The overall goal is not simply remedial actions but *preventative* ones.

Difficulty in “knowing” of an incident may also pose problems in older grades where students are more likely to switch classes and thus only spend a limited amount of time with a teacher each week, as compared to younger schools where students may remain with the same teacher, and the same students, all day. Consequently, the meaning of the “should have known” standard should differ with the school setting.

D. The Mandatory Appointment of School Safety Team, Anti-Bullying Specialist, and Anti-Bullying Coordinator

The third requirement that merits redrafting is the provision mandating the appointment of a school safety team, anti-bullying specialist, and anti-bullying coordinator.¹³⁸ The school safety team requirement, as implemented, presents at least two problems. First, the Act does not instruct how large the team should be.¹³⁹ The team must at the very least consist of the principal, a teacher, the anti-bullying specialist, and a parent, but the Act also allows for appointment of “other members to be determined by the principal.”¹⁴⁰

¹³⁸ N.J. STAT. ANN. §§ 18A:37-20, 21 (West 2011).

¹³⁹ See N.J. STAT. ANN. § 18A:37-21 (West 2011).

¹⁴⁰ N.J. STAT. ANN. § 18A:37-21 (West 2011).

Presumably, principals can appoint as many interested persons as they like. A team that grows too large, however, poses administrative feasibility problems such as, for example, the inability to coordinate schedules. Moreover, the principal has the potential to create a team that is more heavily represented by administrators than parents, or vice versa. Each group has a strong interest in the prevention of bullying in schools. While the Act's grant of discretion to the principal is one example where it does not over-regulate, the Act should provide more guidance here and require that the number of administrators and parents serving on the team be relatively balanced.

A second problem posed by the school safety team is that the principal appoints every member, while the anti-bullying specialist must serve as its chair.¹⁴¹ Thus, the anti-bullying specialist is forced to work with whomever the principal feels should be a part of the team, without any sort of veto power. Any tension resulting from the appointment of members that do not respect or work well with the anti-bullying specialist may distract from the team's goal of addressing the issues of bullying. This is not to say the principal would ignore any concerns an anti-bullying specialist may have regarding the appointment of a certain member to the school safety team, but the potential for conflict remains if the law is not redrafted.

While the Act requires the principal to appoint a school guidance counselor, school psychologist, or similarly trained employee as the anti-bullying specialist, it also allows for *any* employee to fulfill this role regardless of whether he or she has relevant training.¹⁴² This effectively allows anyone to serve as the anti-bullying "specialist." Further, the Act does not

¹⁴¹ N.J. STAT. ANN. §§ 18A:37-20, 21 (West 2011).

¹⁴² N.J. STAT. ANN. § 18A:37-20 (West 2011).

require the anti-bullying coordinator to even be employed in the school district.¹⁴³ Thus, the same individual may serve as an anti-bullying coordinator for multiple districts.

Indeed, the Act does not forbid an employee of one school from serving as the anti-bullying coordinator for various districts.¹⁴⁴ In a state with a large number of closely located school districts such as New Jersey,¹⁴⁵ a situation where an employee of one district serves as the coordinator for multiple districts is far from unimaginable. One concern here is the risk of the anti-bullying coordinator feeling more attached and dedicated to the district in which he or she is connected while ignoring or donating less time and attention to other districts. Even if the anti-bullying specialist does not focus on a particular district and ignore the rest *consciously*, the risk of serving as multiple districts' anti-bullying coordinator remains high. Such an arrangement could lead to poorer performance compared to an anti-bullying coordinator who is only focused on one district. This performance concern would be especially relevant if an anti-bullying coordinator is assigned to multiple districts where one or more have a large number of schools and students.

In requiring that each *school* have both an anti-bullying coordinator and a school safety team and then that every *district* also employ an anti-bullying coordinator, the Act fails to differentiate between schools of different sizes. While the requirement of all three positions may be manageable in a larger school and even helpful and necessary in a middle or high school, smaller elementary schools may not need such a large level of management. The requirements of the school safety team, anti-bullying specialist, and anti-bullying coordinator may thus result in resources being wasted, especially in smaller school districts.

¹⁴³ *Id.*

¹⁴⁴ *See* N.J. STAT. ANN. § 18A:37-20 (West 2011).

¹⁴⁵ New Jersey has roughly 600 school districts. *See supra* note 114 and accompanying text.

IV. Proposed Changes to Especially Strict and Impractical Provisions of the Act

This Part will address the three specific areas of the Act that are most problematic and suggest ways in which these sections may be amended. This Part addresses the problems of and suggests alternative statutory approaches to the following three sections: (1) the mandatory reporting requirement, (2), the provision regarding disciplinary action for administrators who “should have known” of an incident and failed to take “sufficient action,” and (3) the mandatory appointment of a school safety team, anti-bullying specialist, and anti-bullying coordinator.

A. Suggested Changes to the Mandatory Reporting Requirement

To address the potential of over-reporting, the Act should not require mandatory reporting but rather give administrators discretion in whether to report an incident. This approach makes most sense for incidents involving students not previously deemed bullies. Discretion will not only reduce the amount of paperwork and time teachers and administrators spend in dealing with incidents, thereby allowing teachers to devote more time to other critical areas, such as teaching, career counseling, and substance abuse prevention.¹⁴⁶ It will also serve as a warning for would-be bullies and give them a chance to change their behavior without harsh consequences like suspension. One factor that administrators should be asked to consider is whether the student has previously been found to be a bully, with that particular student or another.

For educators to know which students have previously been found to be bullies, the school should provide a list of names, which shall be updated as names are added. The school should also provide a list of victims and track their experiences as well. Both lists should be kept confidential within the school, as their purpose should not be to embarrass either a bully or victim but to help prevent and control bullying. The Act may suggest that an administrator

¹⁴⁶ See Bozza, *supra* note 109.

should be more inclined to report an incident if the victim has been persistently and pervasively targeted in the past. The Act may also wish to provide guidelines as to what types of behavior count as persistent and pervasive. The Act should explain that educators are to consider both the number of incidents and severity of the bully's behavior so that a smaller incident does not go unreported when it happens repeatedly. Tracking victims in addition to bullies avoids this potential to overlook a particular victim who is persistently bullied by different aggressors.

Schools with the technology and resources should be encouraged to create a program where the educator would be able to look up a student's name and determine if a student has been the subject of a previous investigation and previously had been found to have been a bully. Such an option would be preferred over one involving a circulation of a list of names, which has the potential to be self-fulfilling; teachers may see a name first and subsequently look for or expect, and thus 'see' and report, bullying behavior from such individuals.

Discretion in whether to report would allow the administrator or teacher to take a student aside and have a discussion with him or her. The administrator should analyze the situation and be allowed to decide whether the incident resulted from peculiar circumstances and is unlikely to occur again. This would allow the student to avoid formal investigation. One relevant factor other than the would-be bully's attitude after such a discussion should be the reaction of the would-be victim and how affected he or she appears. After all, the concern of anti-bullying legislation is to protect and provide support for victims, and their experience an incident should be taken into consideration. Teachers may often be in the best position to determine whether reporting would be in the best interest of the victim.

That teachers may be particularly skilled in making determinations of the victim's mental state gains support from the fact that they interact with their students on a daily basis and will be

able to assess the incident in the overall context in which it occurred.¹⁴⁷ Mandated reporting renders irrelevant any such insight the teacher may have to offer. Further, allowing consideration of the victim's mental state to play a role does not transfer too much power to the victim, as it would be the *teacher's* estimation of what is best for the child that would control. In other words, the teacher, rather than the victim, should have the discretion in deciding whether to report an incident. Especially in a case of an isolated incident, teachers should be allowed to use their discretion in determining whether the would-be bully should be subjected to a formal investigation.

Eliminating the mandatory requirement to allow increased administrative discretion is especially important due to the right of parents to receive information about an investigation involving their child once an incident has been reported.¹⁴⁸ Giving teachers, other educators, and administrators discretion and thereby preventing some incidents from coming to parents' attention will prove especially beneficial for students bullied based on perceived sexual orientation. Because parents have a right to any information regarding a reported incident and its subsequent investigation,¹⁴⁹ students bullied because of perceived sexual orientation who have not previously discussed their sexuality with their parents will be forced to do so. Instead of coming out to their parents at a time and place of their own choosing, victims bullied because they are gay or lesbian are forced to prematurely discuss their sexuality in the context of a school-related bullying report and investigation.

In many instances, a mandatory reporting requirement combined with a notice requirement "will result in school officials essentially outing lesbian, gay, bisexual, and

¹⁴⁷ *See supra* Part III.B.

¹⁴⁸ *See* N.J. STAT. ANN § 18A:37-15 (West 2012).

¹⁴⁹ N.J. STAT. ANN. § 18A:37-15 (West 2012).

transgender (LGBT) youth to their parents.”¹⁵⁰ This author’s arguments focus primarily on the parental notification requirement adopted by the Massachusetts legislature in 2010,¹⁵¹ but the rationales also apply to effects of the mandatory requirement in New Jersey’s Act. The rationale behind a parental notification requirement—alerting the parents as quickly as possible in order to provide the bullied student with support at home—is “certainly commendable,” but a mandatory reporting requirement can have “detrimental consequences,” such as outing the student to his or her parents, “for students whom it was originally designed to protect.”¹⁵²

Indeed, a parental notification mandate either “assumes that the parents of the target are already aware of their son or daughter’s sexuality or completely disregards the consequence of outing a student as incidental.”¹⁵³ The assumption that parents are aware of their children’s sexuality often proves untrue. For example, in *Gillman ex re. Gillman v. Sch. Bd. for Holmes County, Fla.*, a school principal called a student’s parents to inform them of the student’s homosexuality,¹⁵⁴ and testimony at trial “revealed that Jane’s father threatened to kick Jane out of the house” after receiving the call.¹⁵⁵ Thus, when the assumption that parents have knowledge of their children’s sexuality is incorrect, students may be “subjected to the possibility of an unsafe home environment where they are ‘bullied’ by their parents.”¹⁵⁶ The reporting mandate coupled with the notification requirement thus gives LGBT students a “strong disincentive” to report the very bullying the mandate is designed to prevent and protect against.¹⁵⁷

¹⁵⁰ Michael Stefanilo, Jr., *Identity, Interrupted: The Parental Notification Requirement of the Massachusetts Anti-Bullying Law*, 21 TUL. J.L. & SEXUALITY 125, 126 (2012).

¹⁵¹ See generally Stefanilo, Jr., *supra* note 150 at 125.

¹⁵² Stefanilo, Jr., *supra* note 150 at 126.

¹⁵³ *Id.* at 126.

¹⁵⁴ *Gillman ex rel. Gillman v. Sch. Bd. for Holmes County, Fla.*, 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008).

¹⁵⁵ *Id.* at 1362 n.1.

¹⁵⁶ Stefanilo, Jr., *supra* note 150 at 127.

¹⁵⁷ *Id.* at 126.

This concerns of outing the child to his or her parents and setting him or her up for ‘bullying’ in the home are ignored by approaches arguing *for* a mandatory reporting requirement.¹⁵⁸ One such approach argues not only for a mandatory notification requirement but also for a requirement to make the reports public.¹⁵⁹ While acknowledging that “certain students are often reluctant to self-report discriminatory practices,”¹⁶⁰ the author here fails to address *why* a particular victim may not wish to report. In stating that some victims “may be afraid to report when it is optional,”¹⁶¹ Yariv Pierce proposes substituting the legislators’ judgment for that of the student (or third-party observer such as a teacher) and, moreover, fails to recognize that a victim’s fear in reporting may, as the *Gillman* case demonstrates, in fact be reasonable. Requiring employees to publish reports about “the occurrences of all bullying”¹⁶² has the potential to not only out the student to his or her parents but to the entire community.

Indeed, a related concern ignored by an approach mandating reporting (not to mention public notification) stems from the fact that a “notice requirement serves as an apparatus of power for the bully” in that the bully is given the power to out the victim.¹⁶³ One can imagine how New Jersey’s parental notification mandate “provides the bully with the mechanism to extend his control beyond the walls of the school and into the victim’s home,”¹⁶⁴ and, if Pierce had his way, the victim’s community. While one solution for the New Jersey legislature would be to make reporting optional, another option would of course be to eliminate the parental notification requirement altogether. A third, and most ideal, would be for administrators to work

¹⁵⁸ See, e.g., Yariv Pierce, *Put the Town on Notice: School District Liability and LGBT Bullying Notification Laws*, 46 U. MICH. J.L. REFORM 303 (2012).

¹⁵⁹ See *id.* at 342-43.

¹⁶⁰ Pierce, *supra* note 158 at 337.

¹⁶¹ *Id.* at 338.

¹⁶² *Id.* at 343.

¹⁶³ Stefanilo, Jr., *supra* note 150 at 135.

¹⁶⁴ *Id.* at 128.

with the victim in deciding whether certain information should be disclosed to the victim's parents such that the victim feels he or she is a part of the decision process and in control.

Such a concern for students bullied based on sexual orientation is indeed warranted, as case law suggests and numerous studies show that “bullies commonly target victims on the basis of perceived or actual sexual orientation.”¹⁶⁵ While the Act attempts to protect students' privacy rights by “limiting the participation of parent members of school safety teams to the activities of the team which do not involve confidential matters involving students,”¹⁶⁶ this only protects students' privacy from parents *other than their own*. Such protection proves meaningless for bullied students forced to discuss their sexual orientation with their parents sooner than they would like due to the parental notification requirement.

Keeping these considerations in mind, if teachers feel a one-time incident of bullying has not affected the bullied student in a significant way and is not a continuing problem, they should be entitled to use discretion in deciding whether to report such an occurrence. The school may wish to list factors designed to help an administrator decide whether or not to report an incident. One relevant factor should be the nature or subject matter of the bullying. For example, a school may wish to impose mandatory reporting for bullying based on race, at least for certain ages, regardless of whether the bully has a history of bullying or not. When faced with the decision of whether to report an incident, the Act should require that school districts' policies list alternatives to reporting, such as mandated counseling with a school psychologist or guidance counselor for both the bully and victim. Such a change would avoid premature parental notification.

¹⁶⁵ Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. at 189 (2009).

¹⁶⁶ N.J. STAT. ANN § 18A:37-13.2 (West 2011).

A possible revised version of the current mandatory reporting provision might read as follows:

A member of a board of education, school employee, contracted service provider or volunteer who has witnessed a student being subject to harassment, intimidation, or bullying shall consult the school's list of prior confirmed bullies. The educator shall use discretion in deciding whether to report the incident. One relevant factor for consideration is whether the subject has a record of confirmed bullying behavior. If possible, the school will create a program where the educator would be able to look up a student's name and determine if a student has been the subject of a previous investigation and found to have been a bully. Further considerations shall be the potential bully's remorse and the reaction of the purported victim. The school district's anti-bullying policy shall list alternatives to reporting, such as mandated counseling for both the bully and victim.

B. Suggested Changes to the Provision Allowing for Disciplinary Action for Those who "Should Have Known" of Incidents and Subsequently Failed to take "Sufficient Action"

A second section of the Act that requires redrafting is the provision that allows administrators to be disciplined when they "should have known" of a particular incident and subsequently fail to act properly.¹⁶⁷ The legislature fails to provide schools with a means of determining whether an employee "should have known" about a suspected incident. The Act should provide relevant considerations for how an employee "should have known" of an incident, such as evidence that an employee was in the same vicinity of a harassing, intimidating, or bullying incident. Two other relevant factors would be whether the employee had knowledge that the purported bully was in the school's database as a previously confirmed bully and whether the employee has dealt with this student in the past in similar situations. Both factors would put the employee on notice that he or she should pay extra attention to this particular student's actions. The Act should also provide a list of examples from which "reliable"

¹⁶⁷ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

information may come, as this too will aid both disciplinarians and courts in determining whether an employee truly “should have known” of an incident.

One relevant consideration may be the source of the information. If the incident is not viewed firsthand by a would-be reporter and is told to him or her by another administrator, the Act may state that the would-be reporter is more likely to have known. If the incident is related from a student, the Act might suggest that information becomes “reliable” only after discussions of the incident with the bully, victim, and student who witnessed the incident. Finally, in order for disciplinarians and courts to determine whether an employee truly “should have known” of an incident, the employee should be able to explain why he or she did not know.

A related issue regards the fact that the legislature failed to define “sufficient action.”¹⁶⁸ If, in using such vague terminology, the legislature meant to require more than simply reporting the incident, it should have been clearer and given concrete examples of what type of behavior is expected. Any such listing, however, would actually be counter-intuitive to the “should have known” standard, which, after all, implies that the employee *did not know* and therefore did not take *any* action due to that lack of knowledge. Thus, one solution to the confusion and vagueness this provision causes is to change “fails to take sufficient action” to “fails to act according to the school district’s policy” because the policy will clearly lay out what the district considers to be an appropriate, or sufficient, response. The guidance of a school’s policy will render courts’ determinations easier than if they were forced to decide whether a response was “sufficient,” and this will lead to more predictable outcomes.

The legislature also neglected to include a list of possible disciplinary actions the school might take depending on the severity of the employee’s wrongdoing. The Act should propose responses a school may take in order to discipline an educator who failed to act properly under

¹⁶⁸ *Id.*

the policy. The Act should provide examples of which types of behavior would be associated with each punishment with the use of a “sliding scale.” For example, if an educator fails to report a verbal comment, a possible punishment might be a warning, especially if the educator has not been previously disciplined. If the educator is a repeat offender and fails to report a physical altercation, such as a shove into a locker, the punishment may be more severe such as requiring additional training sessions on the school’s bullying practices.

The Act might also consider giving schools discretion to punish an employee failing to act at a higher “step” in the scale if the failure is repeated, even if the failure involved an act listed at a lower spot on the scale. The legislature should also mandate that there be different maximum punishments for those who did know and failed to act properly than for those who only “should have known.”

A proposed version of the provision subjecting would-be reporters who “should have known” of an incident of harassment, intimidation, or bullying to disciplinary action might read as follows:

A school administrator who receives a reliable report of harassment, intimidation, or bullying from a district employee and fails to initiate or conduct an investigation or who should have known of an incident of harassment, intimidation, or bullying and fails to act in accordance with the school district’s policy may be subject to disciplinary action. Relevant considerations for determining how an employee “should have known” of an incident include: evidence that an employee was in the same vicinity as the purported bully while he or she was harassing, intimidating, or bullying the purported victim; whether the employee had knowledge that the purported bully was in the school’s database as a previously confirmed bully; and whether the employee has previously dealt with this student in similar situations. For example, an employee shall be presumed to have had constructive knowledge when conduct is videotaped or seen by another administrator and then discussed with the would-be reporter. When related from a student, information may become “reliable” only after discussions of the purported incident with the bully and

victim. If an employee does not report an incident of harassment, intimidation, or bullying that he or she should have known about, such employee shall have the opportunity to explain why he or she did not know about the incident. Extra training in anti-bullying shall be the maximum punishment for an employee failing to report an incident if the employee lacked actual knowledge and had never previously been disciplined for such a failure, but a mere verbal warning may also suffice. Untenured employees should be made aware that if they repeatedly fail to report incidents over time, whether they had actual or constructive knowledge, they may be subject to a hearing to determine whether they are allowed to continue as a district employee. The school district shall list possible punishments in its policy.

C. Suggested Changes to the Required Appointment of a School Safety Team, Anti-Bullying Specialist, and Anti-Bullying Coordinator

Instead of mandating the appointment of all three positions, the Act should allow a school to choose some combination based on its size and level of schooling. Indeed, there is reason to treat middle schools differently than elementary and high schools. For example, according to a study by the Department of Education released in October of 2012, bullying is “most pervasive in [New Jersey’s] middle schools Half the 13,101 bullies last school year were in grades 5 to 8, though students in those grades account for just 30 percent of the public school population.”¹⁶⁹ One approach might be to advise a district to be most concerned with having a strong school safety team in its middle schools and have the anti-bullying coordinator pay special attention to this particular school. Perhaps the middle schools, as opposed to the elementary or high schools, should be more strongly encouraged to have an anti-bullying specialist.

Smaller schools may not benefit from having all three positions any more than they would benefit from only having an anti-bullying coordinator and one of the two remaining positions. Similarly, the Act should allow schools of any size, but in particular larger ones, to have more than one anti-bullying specialist per school. The law sets a minimum in requiring all

¹⁶⁹ Calefati, *supra* note 16 at 2.

three appointments,¹⁷⁰ implicitly suggesting schools may surpass the requirements. Despite this, it may be beneficial for the Act to give a clear example of exactly how larger schools may wish to do so.

As there is only one anti-bullying coordinator per *district*, as opposed to school,¹⁷¹ this position should not be cut. Rather, each school may not need both an anti-bullying specialist and school safety team depending on its level of education and size. As the law stands, if a school has no guidance counselor, school psychologist, or other individual similarly trained, the principal may simply appoint any other currently employed school personnel, even one lacking relevant training, as the anti-bullying specialist.¹⁷² The law might suggest schools should keep both the anti-bullying specialist and the school safety team if neither the specialist nor coordinator has relevant training or experience.

If the elected anti-bullying coordinator has relevant background experience, the law might suggest the anti-bullying specialist position be waived. In such a case, a broader description of the anti-bullying coordinator position may be used. The Act should also set a maximum number of districts for which an employee may serve as the anti-bullying coordinator. This will address the concern that a single employee serving as the anti-bullying coordinator in too many districts will result in poorer performance. Further, if a school elects to keep the anti-bullying specialist position, this employee should be given a veto power over the principal's designations to the school safety team to avoid any tension that may thwart the team's anti-bullying goals.

Alternatively, the Act could still require all three positions be filled but allow schools to petition the board of education for a change in the combination required at the end of each school

¹⁷⁰ N.J. STAT. ANN. §§ 18A:37-20, 21 (West 2011).

¹⁷¹ See N.J. STAT. ANN. § 18A:37-20 (West 2011).

¹⁷² *Id.*

year. Schools with low incidence reports may apply for a less stringent program by demonstrating evidence of their low number of incidents and the successful handling of incidents that did arise. One counter-argument here is that this alteration will incentivize people to under-report. This change, however, must be read alongside the suggestion that schools more clearly define possible disciplinary action that will be taken against those who “should have known” of an incident and fail to report.¹⁷³ The suggested change is not to *remove* the punishment but merely to require schools to create a list of possible disciplinary action for administrators who do not report, or otherwise fail to handle, incidents in accordance with the district policy. With the threat of more carefully-defined discipline intact, the risk of under-reporting will be minimal.

Another justification for cutting the anti-bullying specialist position relates to the fact that this employee is typically the school’s guidance counselor.¹⁷⁴ The concern here regards the notion that the person conducting the investigation may be the “very person students are supposed to trust,” creating “an antagonistic relationship” between the student and counselor.¹⁷⁵ While correctly recognizing that there exists a potential problem for students who are investigated by their own guidance counselor, the author does not suggest an appropriate solution. Although he might approve of an educator other than the guidance counselor serving as the anti-bullying specialist, better solutions would be to give schools the option to eliminate the position altogether or to allow larger schools to have more than one specialist so that the non-counselor employee can conduct the investigation.

One possible revised version of the current provision mandating the appointment of a school safety team, anti-bullying specialist, and anti-bullying coordinator might read as follows:

¹⁷³ See *supra* Part IV.B.

¹⁷⁴ Recall the requirement that the principal appoint the “guidance counselor . . . or similarly trained employee” as the specialist if such an employee indeed exists. N.J. STAT. ANN § 18A:37-20 (West 2011).

¹⁷⁵ Bozza, *supra* note 109.

The principal of each school may appoint an anti-bullying specialist. When a school guidance counselor, school psychologist, or another individual similarly trained is currently employed in the school, the principal shall appoint that individual to be the anti-bullying specialist. If no such individual exists, the principal may refrain from appointing an anti-bullying specialist. If no anti-bullying specialist is appointed, the superintendent of the district shall appoint an anti-bullying coordinator. If an anti-bullying specialist is appointed, the appointment of an anti-bullying coordinator is optional. One consideration in deciding whether to appoint an anti-bullying specialist shall be whether the anti-bullying coordinator has relevant background experience. If so, this supports the elimination of the anti-bullying specialist. If neither individual would have relevant experience, a school should consider keeping both positions unless it has good reason to eliminate one, such as financial hardship. A single individual may not serve as the anti-bullying coordinator for more than three districts. If a principal feels the school would benefit from a school safety team, he or she shall appoint one with at least one parent and one teacher serving as members. If the principal chooses to appoint an anti-bullying specialist, this employee shall chair the team and have veto power over any suggested appointee. If there is no anti-bullying specialist, the principal shall designate the chair of the team; such individual will have the same veto-power an anti-bullying specialist would have had. The ratio of the number of parents to the number of administrators appointed to the team shall be relatively balanced. In sum, a school may use discretion in choosing its combination of appointing a school safety team, anti-bullying specialist, and anti-bullying coordinator, but at least one of the three must be appointed. Schools shall have discretion to appoint more than these three suggested positions based on their size and self-determined need.

V. Conclusion

Although it addresses the important topic of bullying in schools and recognizes the need for improved anti-bullying legislation in general, the recently implemented New Jersey Anti-Bullying Bill of Rights Act imposes overly strict burdens on school districts. While many provisions of the Act do not require any modification, there are three major sections which the legislature should revise: (1) the mandatory reporting requirement, especially considering its potential negative implications for victims of bullying based on perceived sexual orientation, (2)

the Act's vague provision that punishes educators who "should have known" of an incident and fail to take "sufficient action," and (3) the universal requirement of appointing a school safety team, anti-bullying specialist, and anti-bullying coordinator without regard to school size or education level.

This comment proposes ways in which each section should be redrafted to address the problems it currently poses. The proposed changes include allowing educators discretion in reporting, listing possible punishments and factors to help determine when information becomes "reliable," and allowing a district to decide whether it truly needs all three positions of a school safety team, anti-bullying specialist, and anti-bullying coordinator. Judicial interpretation and risk of unpredictability are especially poignant concerns because the Act has already increased the number of reports of bullying.¹⁷⁶ Such an increase presents more opportunities for parents to claim school districts have reacted inappropriately and may result in more litigation in this area than ever before. In handling these cases, the courts need more discretion than the strict terms of the Act currently allow. The Act, while stemming from admirable goals, would benefit from major revision. If such redrafting is carried out in accordance with the above suggestions, the Act has the potential to be hailed as the *best* anti-bullying law in the country, as opposed to the *toughest*.¹⁷⁷

¹⁷⁶ See *supra* note 13 and accompanying text.

¹⁷⁷ See Rundquist, *supra* note 12.