

PUSHING SCHOOLS AROUND: NEW JERSEY'S ANTI-BULLYING BILL OF RIGHTS ACT

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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 used a webcam to observe him 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. The New Jersey state legislators enacted the New Jersey Anti-Bullying Bill of Rights Act⁶ ("the Act") within weeks of Clementi's death. The Act came into effect on September 1, 2011, roughly a year after Clementi's suicide.⁷

The New Jersey legislature is not alone in its efforts to combat bullying. The Tyler Clementi Foundation⁸ is currently "pushing for

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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, *Tyler Clementi's Family Plans No Legal Action over Rutgers Webcam Spying Case*, THE STAR-LEDGER (Oct. 4, 2012, 8:00 PM), http://www.nj.com/news/index.ssf/2012/10/rutgers_webcam_spying_suicide.html.

³ Michael Muskal, *Rutgers Suicide: Tyler Clementi's Parents Won't Sue in Webcam Case*, L.A. TIMES (Oct. 5, 2010), <http://articles.latimes.com/2012/oct/05/nation/la-na-nn-clementi-parents-wont-sue-rutgers-20121005>.

⁴ Heyboer, *supra* note 2, at 1.

⁵ *Id.*

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

⁷ *Anti-bullying*, N. J. EDUC. ASS'N (Sept. 16, 2012, 11:46 AM), <http://www.njeda.org/issues-and-political-action/anti-bullying>.

⁸ The foundation's website can be found at www.tylerclementi.org. The

the passage of the “Tyler Clementi Higher Education Anti-Harassment Act,”⁹ federal legislation that would require colleges to strengthen policies and programs forbidding harassment on campus.¹⁰ This Comment, however, will solely focus on how the New Jersey Anti-Bullying Bill of Rights Act affects elementary, middle, and high schools.

The quick passage of the Act demonstrates the New Jersey legislature’s eagerness to respond to and prevent tragedies like Clementi’s and to address the underlying issue of bullying in the state.¹¹ This Comment will argue that the legislature was a bit *too* eager. 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 Act is not only “tough” on bullies but also on the schools that are expected to prevent them from acting out.¹³

Six months after the Act came into effect, a survey of twelve New Jersey school districts revealed 1,127 incidents of suspected bullying.¹⁴ Although only about 500 incidents were actually confirmed as bullying¹⁵—as opposed to those later classified as mere conflicts—this number indicates the high 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.¹⁶ 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-

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 FOUND. (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).

¹⁰ Heyboer, *supra* note 2 at 2.

¹¹ *Anti-bullying*, *supra* note 7.

¹² Jeanette Rundquist, *6 Months into N.J. Law to Halt Bullying, A Survey Takes A Look at How it’s Working*, THE STAR-LEDGER (Mar. 11, 2012, 1:00 PM), http://www.nj.com/news/index.ssf/2012/03/6_months_into_nj_law_to_halt_b.html.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

fold” when compared to the previous school year.¹⁷

Although this Comment argues that the Act’s provisions are overly strict, it recognizes that anti-bullying legislation is necessary. The mentality that ‘kids will be kids’ must no longer be accepted, for Tyler Clementi is not alone in his victimization.¹⁸ On the contrary, studies indicate that bullying is increasing at an alarming rate, and one way to address this problem is in fact to pass anti-bullying legislation.¹⁹

In addition, anti-bullying legislation is needed because federal and state laws often fail to provide “most victims [with] a remedy for [the] psychological or physical injuries” that result from bullying.²⁰ 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.”²¹ State law statutes pose similar barriers to remedying bullying based on characteristics other than race, nationality, sex, or disability, such as sexual orientation and gender identity. 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,”²² but even if bullied students obtain a legal remedy, the physical and emotional harm has already taken place. 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.²³

The Gay, Lesbian & Straight Education Network (GLSEN) agrees there is a need for anti-bullying legislation in general.²⁴

¹⁷ Jessica Calefati, *Bullying in N.J. Schools Spikes Over Previous School Year*, *New Stats Show*, THE STAR-LEDGER, Oct. 3, 2012, at 1, available at http://www.nj.com/news/index.ssf/2012/10/bullying_in_nj_schools_spikes.html.

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

¹⁹ See *id.*

²⁰ 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).

²¹ *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 EDUC. NETWORK (May 17, 2012), <http://glsen.org/press/glsen-lauds-passage-maine-anti-bullying-bill>.

²² Sacks & Salem, *supra* note 20, at 150.

²³ *Id.*

²⁴ Marra, *supra* note 21.

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.”²⁵ In celebrating recent anti-bullying legislation passed in Maine, Byard also focused on the fact that Maine passed legislation with bipartisan support.²⁶ 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.”²⁷

Another proponent of anti-bullying programs is the Olweus Bullying Prevention Program (“Olweus”).²⁸ 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.²⁹ Students may have difficulty learning, feel insecure, dislike school, and perceive that teachers and staff have little control.³⁰ These concerns motivate Olweus to conduct two-day trainings for schools informing teachers and administrators of the characteristics of students involved in bullying, risk factors for bullying behavior, and ways of effectively intervening with bullied students, bullies, and bystanders.³¹ With thirty-five years of research and worldwide implementation success, Olweus 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.”³² Thus, if schools take a proper approach, the Olweus approach’s results demonstrate that they can indeed succeed in reducing bullying.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *How Bullying Affects Children*, HAZELDEN FOUNDATION: HOME OF THE OLWEUS BULLYING PREVENTION PROGRAM (2013), http://www.violencepreventionworks.org/public/bullying_effects.page.

²⁹ *Id.*

³⁰ *Id.*

³¹ *A Foundation for Successful Program Implementation*, HAZELDEN FOUNDATION: HOME OF THE OLWEUS BULLYING PREVENTION PROGRAM (2013), http://www.violencepreventionworks.org/public/bullying_prevention_training_info.page.

³² *The World’s Foremost Bullying Prevention Program*, HAZELDEN FOUNDATION: HOME OF THE OLWEUS BULLYING PREVENTION PROGRAM (2013), http://www.violencepreventionworks.org/public/bullying_prevention_program.page?menuheader=9.

Perhaps the strongest argument for anti-bullying legislation stems from the relatively recent bullying case that reached the New Jersey Supreme Court.³³ In *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, the parents of a bullied student sued a school district for its allegedly inadequate response to an instance of bullying based on the student's perceived sexual orientation.³⁴ The court set forth a totality of the circumstances test to determine the reasonableness of a school's response to an incident of bullying.³⁵ This test is overly vague and leaves school administrators uncertain of what their legal duties entail.

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.³⁶ After setting forth this test, the court remanded the case for a determination of reasonableness.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 While the Act's provisions are overly strict, the test set forth by the New Jersey Supreme Court is too vague to apply successfully in the realm of school bullying.

Although the "reasonable" standard is often used in other areas of the law, this standard is only applied to reflect the single mindset of a reasonable *person*, not the collective decision or policy of an entire school. One can easily form a notion of a reasonable person and what he or she might do in given circumstances, but it is much harder to imagine a reasonable *school*; schools vary in size, allocation of resources, and population and are thus likely to have different notions of reasonableness under a particular circumstance. In other words, what is "reasonable" for one school may be *unreasonable* for another. Because what is "reasonable" will change from school to school, lower courts will likely reach conflicting decisions even when presented with similar fact patterns, which hinders uniformity and

³³ *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535 (N.J. 2007).

³⁴ *Id.* at 544.

³⁵ *Id.* at 551.

³⁶ *Id.* at 551.

³⁷ *Id.* at 553.

³⁸ *Id.* at 540.

predictability for litigants.

That the New Jersey Supreme Court grants lower courts too much discretion underscores the need for anti-bullying legislation. The current legislation gives courts clearer guidance in determining whether a particular school acted reasonably. The Act, however, 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. 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 and it does not allow courts to ignore any of the requirements, even if, based on particular facts, the court believes that doing so would be proper. Instead, the Act mandates a general response for all schools in every incidence of bullying. 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 view for that of the courts.

At least one New Jersey lobbyist disagrees with the view that the Act 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 prevention. An increased number of reports may just as easily be explained as stemming from a fear of discipline if one fails to report,⁴² (which might lead to over-reporting) or as a result of greater awareness of bullying.⁴³ Consequently, the statistics alone do not provide definitive evidence as to whether the Act effectively addresses

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

⁴⁰ See *supra* note 14 and accompanying text.

⁴¹ Calefati, *supra* note 17, at 3 (internal quotation marks omitted).

⁴² See N.J. STAT. ANN § 18A:37-16 (West 2011) (providing schools the option to subject administrators who receive a report of bullying and fail to initiate or conduct an investigation to “disciplinary action”).

⁴³ See, e.g., Calefati, *supra* note 17, 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.”).

bullying.

Although both the New Jersey Supreme Court, in *L.W.*, 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’ young ages and the focus on redemption and rehabilitation that is generally characteristic of the juvenile justice system. This Comment, however, will 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 While the Act does reach conduct occurring off school grounds,⁴⁸ this Comment will focus only on the incidents of harassment, intimidation, and bullying that schools are

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, <http://usatoday30.usatoday.com/news/nation/story/2012-06-12/bullying-crime-schools-suicide/55554112/1> (last updated June 13, 2012, 5:24 PM).

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 Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095, 181 L. Ed. 2d 1009 (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 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 . . .”).

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, suggest ways in which these sections might be amended to address such problems, and propose redrafted provisions that the legislature should consider for adoption. This section seeks to strike a balance between the New Jersey Supreme Court's overly broad approach and the Act's overly strict one. Part IV 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 legislature first amended the statute 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 special attention to the emerging problem of online bullying, the previous amendments were not nearly as substantial as those implemented by the current legislation.

The New Jersey 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 other findings justifying its decision to impose

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

⁵⁰ *Id.*

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>.

stricter anti-bullying requirements.⁵² One arose from a 2009 study, the results of which demonstrated that 32% of students' ages twelve through eighteen were bullied in the previous school year.⁵³ The same study related that one quarter of the schools reported bullying as a weekly or even daily issue.⁵⁴

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 respond to such incidents,⁵⁵ 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" in order to make schools safer.⁵⁶

Implicitly invoking the Clementi case as justification for its amendment, the legislature also reported that the Act would reduce the risk of suicides.⁵⁷ Bob Barr, blogger for The Atlanta Journal-Constitution online, agrees that the Act was heavily influenced by Clementi's suicide: "New Jersey's Anti-Bullying Bill of Rights was passed as a reactionary measure nearly a year after [Clementi] tragically committed suicide."⁵⁸ Although the Act only targets public school districts, the legislature also kept its higher education institutions in mind in drafting the law.⁵⁹ It found that bullying poses a problem in the state's higher education institutions and that the Act would reduce such incidents.⁶⁰

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).⁶¹ HIB is defined as

any gesture . . . [or act], or any electronic communication,

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

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ N.J. STAT. ANN. § 18A:37-13.1 (West 2011).

⁵⁷ *Id.*

⁵⁸ Bob Barr, "Anti-bullying" Law Nonsense, THE BARR CODE (Sept. 2, 2011), <http://blogs.ajc.com/bob-barr-blog/2011/09/02/anti-bullying-law-nonsense/>. Barr is not a fan of recent anti-bullying laws in general and New Jersey's statute in particular: "New Jersey's effort may take the prize as the most ridiculous." *Id.*

⁵⁹ See N.J. STAT. ANN. § 18A:37-13.1 (West 2011).

⁶⁰ *Id.*

⁶¹ N.J. STAT. ANN. § 18A:37-14 (West 2011).

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.⁶²

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 its effect, and (3) includes events occurring off school grounds if the bullying affects the school's operation.⁶³ Examples of protected characteristics provided in the definition include race, 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 can lead to both disruption of the school's operation and students' rights, incidents of harassing, intimidating, or bullying are not limited to behavior occurring solely on school grounds.⁶⁶

The Act also requires each school district to adopt a policy prohibiting incidents of harassment, intimidation, or bullying.⁶⁷ Under former legislation, school districts were only "encouraged" to establish bullying prevention programs.⁶⁸ While the Act grants the

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *Id.*

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

⁶⁶ *Id.*

⁶⁷ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁶⁸ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

schools some flexibility in drafting their policies, it also mandates inclusion of certain items, thus setting minimum standards with which schools must comply.⁶⁹

The first stated minimum that each policy must contain is a general statement prohibiting harassment, intimidation, or bullying of a student.⁷⁰ This requirement garners little debate, as, presumably, many schools would have already included such a basic statement even without the explicit requirement. Secondly, the district must also provide a description of the particular type of behavior expected from each student.⁷¹ This provision poses no concern, 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 occur with the most frequency and will therefore target such areas in their descriptions.⁷² 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.⁷³ While the Act's reporting mandate⁷⁴ gives educators no discretion in determining whether an incident of harassment, intimidation, or bullying should be reported, the requirement of listing consequences and remedial action⁷⁵ 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.⁷⁶ This may lead to practices varying across districts, which in turn will require judges to familiarize themselves

⁶⁹ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 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 2011). 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.

⁷³ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁷⁴ See *infra* notes 124–148 and accompanying text.

⁷⁵ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

⁷⁶ See N.J. STAT. ANN. § 18A:37-15 (West 2012).

with a vast number of approaches, instead of a single, universally applied set of practices, in order to determine whether a school properly responded to an incident. This has the potential to hinder judicial efficiency.

A fourth requirement states that the policy must explain the school's procedure for reporting an act.⁷⁷ This requirement is also problematic. Here, 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.⁷⁸ While too much discretion may pose problems by withholding *any* guidance, too little discretion may similarly prevent schools from successfully combatting bullying if the Act denies them any flexibility in handling even the procedural aspects of a bullying incident; the legislature must aim to strike a balance. For example, in a situation where an incident occurs at the end of the school day, administrators may feel pressured to quickly report the occurrence, perhaps for fear of missing the reporting deadline, without taking the time to truly analyze whether the situation warrants reporting in the first place.

Beyond setting the standards for reporting, the Act also requires districts to include in their policy a procedure for *investigating* the reports of such violations and complaints.⁷⁹ Again, the Act sets certain minimums. 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.⁸⁰ Furthermore, the investigation must be finished within ten school days of the written report's filing.⁸¹ Next, the results of the investigation must be reported to the superintendent within two school days of the investigation's completion, and the superintendent must then decide upon appropriate action.⁸² 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,

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* An anti-bullying specialist should be someone like a school guidance counselor, school psychologist, or another employee who has similar training. N.J. STAT. ANN. § 18A:37-20 (West 2011).

⁸¹ N.J. STAT. ANN. § 18A:37-15 (West 2012).

⁸² *Id.*

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or modify the superintendent's decision.⁸³

Finally, the Act requires that the district's policy contain a list of ways in which a school will respond once an incident is identified.⁸⁴ Here, the Act is permissive. Rather than mandating certain responses, the Act suggests that the district may offer counseling, support services, or intervention services.⁸⁵ Instead of evaluating schools on their attempt to identify incidents of bullying, the amended legislation assesses schools based on their effort to "implement policies and programs consistent with the [Act]."⁸⁶ This change is practicable because the former approach of asking whether a school attempts to handle incidents of bullying ignored the more important question of whether or not schools actually succeeded in *handling* such incidents. Now, at least, the focus is on whether schools comply with what the legislature believes is a helpful guide to handling incidents of bullying.

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.⁸⁷ Rather, the standard for reporting is negligence; an employee and/or school may be liable if the employee "should have known" of the incident.⁸⁸ 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.⁸⁹ For employees and volunteers who have "significant contact" with students, districts must provide training on incidents of harassing, intimidating, or bullying.⁹⁰ The district must also ensure that the training includes instruction on preventing bullying on the basis of the protected categories enumerated in the definition of harassing, intimidating, or bullying.⁹¹ Finally, the district must develop a process for discussing its policy

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

⁸⁷ N.J. STAT. ANN. § 18A:37-16 (West 2011).

⁸⁸ *Id.*

⁸⁹ N.J. STAT. ANN. § 18A:37-17 (West 2012).

⁹⁰ *Id.*

⁹¹ *Id.* (emphasis added).

with students.⁹²

Beginning with the 2012–2013 school year, the Act also requires that candidates applying for teaching certification complete a program on bullying prevention.⁹³ 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.”⁹⁴ 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.⁹⁵

Lastly, the Act mandates the appointment of (1) a school safety team, (2) an anti-bullying specialist, and (3) an anti-bullying coordinator.⁹⁶ The school safety team’s responsibilities are to (1) receive complaints and reports of incidents of bullying, (2) identify and address patterns of such incidents, (3) strengthen the school climate in an effort to prevent and address incidents, (4) educate the community regarding such incidents, and (5) participate in the required training.⁹⁷ 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.⁹⁸

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.⁹⁹ The anti-bullying coordinator is appointed by the superintendent and is responsible for coordinating and strengthening the school district’s policies to prevent, identify, and address incidents of alleged bullying.¹⁰⁰ The coordinator will collaborate with the anti-bullying specialist, the board of education, and the superintendent to address and prevent incidents.¹⁰¹ Additionally, the coordinator, in

⁹² *Id.*

⁹³ N.J. STAT. ANN. § 18A:37-22 (West 2011).

⁹⁴ N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

⁹⁵ *See id.*

⁹⁶ N.J. STAT. ANN. §§ 18A:37-20, 18A:37-21 (West 2011).

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

⁹⁸ N.J. STAT. ANN. § 18A:37-20 (West 2011).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

collaboration with the superintendent, will provide data to the Department of Education regarding incidents.¹⁰² Only some of the above-described provisions need to be reworked, and if such redrafting is undertaken, New Jersey's legislation has the potential for great success.

III. PROBLEMATIC PROVISIONS AND PROPOSED CHANGES

This Part will begin by addressing the various negative responses to the Act expressed by the public and the Allumuchy School District in Warren County. It will then explain the faults of three provisions of the Act and suggest ways they might be redrafted. The problematic sections are: (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. Bob Barr accused state governments like those of Georgia and New Jersey of "feverishly overreacting" in implementing anti-bullying statutes.¹⁰³ One of the public's major complaints concerns 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 create a behavioral change through alternative means, such as counseling.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 both a record and a reputation of negative behavior without first having an opportunity to speak with counselors or the bullied student.

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 Boards Association, the state's school

¹⁰² *Id.*

¹⁰³ Barr, *supra* note 58.

¹⁰⁴ See Rundquist, *supra* note 12.

¹⁰⁵ *Id.*

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

superintendents, and the state's business administrators associations.¹⁰⁷ Over 90% of surveyed schools reported that the Act increased costs.¹⁰⁸ Costs for some were as high as \$80,000 solely for the mandatory training.¹⁰⁹ Schools also revealed that compliance with the law required an average of around 200 hours per month of staff time.¹¹⁰ This time was taken away from areas such as substance abuse prevention and college and career counseling.¹¹¹ 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.¹¹² Yet another burden results from the fact that schools will also have to pay for attorneys' fees to handle the various complaints brought against them.¹¹³

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.¹¹⁴ One concern is that victims may be forced to repeatedly relive an incident throughout the extensive reporting and investigation processes.¹¹⁵ 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 County¹¹⁶ challenged the law as an unfunded mandate.¹¹⁷ Similarly, critics had raised the concern that

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 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/times-opinion/index.ssf/2011/11/opinion_njs_new_anti-bullying.html.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Allumuchy School District has two schools and serves students from pre-kindergarten through eighth grade. *About Us*, ALLAMUCHY TWP. SCH. DIST. (Jan. 6, 2013, 6:56 PM), www.aes.k12.nj.us/domain/22.

¹¹⁷ *Anti-bullying law struck down by Council on Local Mandates*, N.J. EDUC. ASS'N (Feb. 27, 2012), <http://www.njea.org/news/2012/02/27/anti-bullying%20law%20struck%20down%20by%20council%20on%20local%20mandates>.

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.”¹¹⁸ The Allumuchy School District claimed the Act unjustly imposed costs on the districts, and the State Council on Local Mandates agreed.¹¹⁹ It struck the law down in a ruling in January 2012.¹²⁰

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.¹²¹ The legislation creates a “special 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.”¹²² However, in order to even qualify for a grant from the fund, a district must first prove it has explored “all bullying prevention programs and approaches that are available at no cost.”¹²³ 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

¹¹⁸ Bozza, *supra* note 112.

¹¹⁹ *Anti-bullying law struck down by Council on Local Mandates*, *supra* note 117.

¹²⁰ *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*, ST. N.J. COUNS. LOC. 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*, ST. N.J. COUNS. LOC. 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 to inform other interested groups or persons and the public 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.*

¹²¹ *Christie signs anti-bullying fix*, N.J. EDUC. ASS’N (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 http://www.njleg.state.nj.us/2012/Bills/S2000/1789_I1.PDF. See S. Budget and Appropriations Comm. S1789, 215th Leg. (N.J. 2012).

¹²² N.J. STAT. ANN § 18A:37-28 (West 2012).

¹²³ *Christie signs anti-bullying fix*, N.J. EDUC. ASS’N (Mar. 27, 2012), <http://www.njea.org/news/2012/03/27/christie%20signs%20anti-bullying%20fix>.

policy in compliance with the Act; the lack of funding will undoubtedly remain a huge problem for districts across the state.

B. The Mandatory Reporting Requirement

One of the most problematic areas of the Act is its mandatory reporting requirement.¹²⁴ 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”¹²⁵ Such a requirement leaves the reporter with no discretion. Thus, it is irrelevant whether a reporter believes an incident does not merit reporting because, for example, it occurred in the context of extenuating circumstances. Like juries and trial courts, who serve as fact-finders because they see and hear witnesses tell their stories first-hand, so, too, are teachers better fact-finders due to their continuous interaction with students. They are best able to deduce whether an incident is serious enough to be reported, and they should be allowed to use their discretion. Specifically, the mandatory reporting requirement may prove especially 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.”¹²⁶

The Act may allow for some leeway on the part of reporters in deciding whether an incident has occurred in the first place because it defines harassing, intimidating, or bullying as acts that are “reasonably perceived” as motivated by a particular characteristic.¹²⁷ But as soon as a reporter makes such a determination, any leeway disappears; the employee *must* report.¹²⁸ 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.

Further, that the legislature truly intended each “incident” of name-calling and like occurrences to be reviewed and documented

¹²⁴ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

¹²⁵ *Id.* (emphasis added).

¹²⁶ Bozza, *supra* note 112.

¹²⁷ N.J. STAT. ANN. § 18A:37-14 (West 2011).

¹²⁸ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

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. There exists a strong and realistic fear that mandatory reporting will translate into over-reporting; the concern is that staff members will over-report due to the difficulty in distinguishing between "conflict" and "bullying."¹²⁹ Such over-reporting may also stem from the threat of discipline imposed on those who fail to report; in other words, the fear of punishment may lead to reporting incidents that would otherwise remain unreported.¹³⁰

Over-reporting seems especially likely when the Act's broad definition of bullying.¹³¹ Indeed, in describing the Act's definition of bullying as "vague," one reporter asks, "[w]hat exactly must schools report? They're unsure, so they're reporting everything, including events that may not meet the bullying criteria."¹³² For example, in the district of Long Branch, reports of bullying "ranged from 'one student glaring at another' to aggressive altercations."¹³³ 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.¹³⁴ The concern of over-reporting is supported by the study mentioned above,¹³⁵ which demonstrated that of 1,127 incident reports, less than half were actually confirmed and found to fall under the description of "bullying."¹³⁶ 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. Finally, that the statute does not define "reliable information" or suggest which sources will be categorized as such, but rather holds reporters responsible for making the distinction,¹³⁷ may also lead to over-reporting if reporters are concerned about the disciplinary action that can follow a failure to report.

¹²⁹ Rundquist, *supra* note 12.

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

¹³¹ Bozza, *supra* note 112.

¹³² *Id.*

¹³³ Calefati, *supra* note 17, at 2.

¹³⁴ Bozza, *supra* note 112.

¹³⁵ See *supra* note 14 and accompanying text.

¹³⁶ Rundquist, *supra* note 12.

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

To address the potential of over-reporting, the Act should sometimes give administrators discretion in determining whether to report an incident. In January of 2011, after “conducting surveys and focus groups with hundreds of school officials,” a task force “examining the impact of [the Act] concluded . . . that administrators should have more discretion in deciding when to launch full-scale inquiries into allegations of harassment.”¹³⁸ The task force specifically stated that *principals* should have discretion to “determine whether a reported incident met the minimum standard of the bullying definition before referring the case to the school’s anti-bullying specialist for more thorough scrutiny,”¹³⁹ but teachers should also be included in the list of educators that should be able to exercise discretion.

Discretion will reduce the amount of paperwork and time teachers and administrators spend in dealing with incidents.¹⁴⁰ The task force found that “too many incidents were being investigated . . . which drained excessive time from administrators.”¹⁴¹ Spending less time reporting would-be incidents will allow them to devote more time to other critical areas, such as teaching, career counseling, and substance abuse prevention.¹⁴² Discretion will also serve as a warning for would-be bullies and will give them an opportunity to change their behavior without harsh consequences like suspension. One factor administrators should consider is whether the student has previously been found to be a bully, either with that particular student or another.

To help educators know which students have previously been found to be bullies, the school should maintain a list of names, which would be updated as incidents occur. The school should also maintain a list of victims and track their experiences as well. The Act may suggest that an administrator 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, as the

¹³⁸ Leslie Brody, *Anti-bullying Task Force Says Principals Need More Leeway*, THE RECORD (Feb. 1, 2011), http://www.northjersey.com/news/189330121_Anti-bullying_task_force_says_principals_need_more_leeway.html. The task force is responsible for issuing reports every six months, and an area of future research would be how results of such reports influence legislators. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *See Bozza, supra* note 112.

current version lacks any such guidelines.¹⁴³ The Act should explain that educators are to consider both the number of incidents and severity of the bully's behavior so that a similar incident does not go unreported when it happens repeatedly.¹⁴⁴ Tracking victims in addition to bullies eliminates the potential to overlook a particular victim who is persistently bullied by different aggressors.

Schools with capable technology should be encouraged to create a program where the educator would be able to look up a student's name to determine if that student been found to be a bully. This option is preferable to one involving a circulation of a list of names, which allows the educator to view each name when only looking for one and thus has the potential to be self-fulfilling.

Especially in a case of an isolated incident, discretion in whether to report would allow the administrator or teacher to decide whether the incident resulted from peculiar circumstances and is unlikely to occur again. This would allow the student to avoid the formal investigation required by the Act.¹⁴⁵ Relevant considerations might include the would-be bully's attitude after a discussion with the administrator or teacher and the would-be victim's reaction. After all, the concern of anti-bullying legislation is to protect and provide support for victims, so their experiences should be taken into consideration. Allowing consideration of the victim's mental state 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.

The school may also wish to list factors designed to help an administrator decide whether or not to report an incident. One relevant factor, completely unacknowledged by the legislature, should be the nature or subject matter of the bullying.¹⁴⁶ 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 be altered to require that school districts' policies list alternatives to reporting, such as mandated counseling with a school psychologist or guidance

¹⁴³ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See N.J. STAT. ANN. § 18A:37-16 (West 2011).

counselor for both the bully and victim.¹⁴⁷

Another serious problem with the mandatory reporting requirement is that it is not limited to administrators and educators but includes students.¹⁴⁸ If students are told they must report bullying when they see it occur or else face punishment, many may choose to report their peers, which may lead to a negative school climate and extreme tension and animosity among students, precisely the effects the law aims to *avoid*. Bob Barr agrees: “These . . . laws teach kids to snitch on each other and to interject themselves into situations that may wind up getting themselves injured.”¹⁴⁹ Further, a school may have an avenue for anonymous reporting, which can “be used as a way for children to target students they dislike.”¹⁵⁰ While this Comment is concerned solely with the Act’s negative implications for schools, the Act’s effect on students as reporters is a potential area for future research.

Eliminating the mandatory requirement to report is especially important due to the right of parents to receive information about an investigation involving their child once an incident has been reported.¹⁵¹ Giving teachers, other educators, and administrators discretion—thereby preventing some would-be 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,¹⁵² students bullied because of perceived sexual orientation who have not previously discussed their sexuality with their parents will be forced to do so in the context of a school-related bullying report and investigation instead of at a time and place of their own choosing.

In many instances, a mandatory reporting requirement combined with a notice requirement “will result in school officials essentially outing lesbian, gay, bisexual, and transgender (LGBT) youth to their parents.”¹⁵³ The author of the article entitled “Identity, Interrupted: The Parental Notification Requirement of the

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ Barr, *supra* note 58.

¹⁵⁰ *Id.*

¹⁵¹ *See* N.J. STAT. ANN. § 18A:37-15 (West 2012).

¹⁵² *Id.*

¹⁵³ Michael Stefanilo, Jr., Note, *Identity, Interrupted: The Parental Notification Requirement of the Massachusetts Anti-Bullying Law*, 21 TUL. J.L. & SEXUALITY 125–26 (2012).

Massachusetts Anti-Bullying Law” focuses primarily on the parental notification requirement adopted by the Massachusetts legislature in 2010,¹⁵⁴ but his arguments 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.”¹⁵⁵ While this may not be the case for all gay students, the parental notification requirement will ultimately harm some gay New Jersey students—just as the Massachusetts’ statute did—by taking away the student’s ability to come out to his or her parents at a time of his or her choosing.

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.”¹⁵⁶ The assumption that parents are aware of their children’s sexuality may be false. For example, in *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, a school principal called a student’s parents to inform them of the student’s homosexuality,¹⁵⁷ and testimony at trial “revealed that Jane’s father threatened to kick Jane out of the house” after receiving the call.¹⁵⁸ Thus, when the assumption that parents have knowledge of their children’s sexuality is incorrect, students might be “subjected to the possibility of an unsafe home environment where they are ‘bullied’ by their parents.”¹⁵⁹ The reporting mandate, coupled with the notification requirement, thus gives these students a “strong disincentive” to report the very bullying the mandate is designed to prevent and protect against.¹⁶⁰

The concerns of outing the child to his or her parents and

¹⁵⁴ See generally, *id.* at 125.

¹⁵⁵ *Id.* at 126.

¹⁵⁶ *Id.* at 126. Here, the author assumes that the bullying is based on actual, as opposed to perceived, sexual orientation, but it is not untenable to imagine a child becoming upset, ashamed, or embarrassed if his or her parents were to find out about such bullying, whether or not it is based on actual characteristic.

¹⁵⁷ *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008).

¹⁵⁸ *Id.* at 1362 n.1.

¹⁵⁹ Stefanilo, Jr., *supra* note 153, at 127.

¹⁶⁰ *Id.* at 126.

setting him or her up for ‘bullying’ in the home are ignored by approaches that support a mandatory reporting requirement.¹⁶¹ One such approach argues not only for a mandatory notification requirement but also for a requirement to make the reports public.¹⁶² While acknowledging that “certain students are often reluctant to self-report discriminatory practices,”¹⁶³ Yariv Pierce, author of the article *Put the Town on Notice: School District Liability and LGBT Bullying Notification Laws*, 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,”¹⁶⁴ Pierce proposes substituting the legislators’ judgment for that of the student (or third-party observer, such as a teacher), but this suggestion fails to recognize that a victim’s fear in reporting may in fact be reasonable, as the *Gillman* case demonstrates. Requiring employees to publish reports about “the occurrences of all bullying”¹⁶⁵ has the potential to both out the student to his or her parents and to any community members that read such reports.

Indeed, a related concern 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.¹⁶⁶ 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,”¹⁶⁷ and, if Pierce had his way, the victim’s community. One solution for the New Jersey legislature would be to make reporting optional. An additional possibility would be to eliminate the parental notification requirement altogether. A third, and most ideal, option would be for administrators to work with the victim in deciding whether certain information should be disclosed to the victim’s parents, as this would allow the victim to feel that he or she is a part of the decision process and in control.

Concern for students bullied based on sexual orientation is indeed warranted, as case law and numerous studies suggest that “bullies commonly target victims on the basis of perceived or actual

¹⁶¹ See, e.g., Yariv Pierce, Note, *Put the Town on Notice: School District Liability and LGBT Bullying Notification Laws*, 46 U. MICH. J.L. REFORM 303 (2012).

¹⁶² See *id.* at 342–43.

¹⁶³ Pierce, *supra* note 161, at 337.

¹⁶⁴ *Id.* at 338.

¹⁶⁵ *Id.* at 343.

¹⁶⁶ Stefanilo, Jr., *supra* note 153, at 135.

¹⁶⁷ *Id.*

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sexual orientation.”¹⁶⁸ 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,”¹⁶⁹ this only protects students’ privacy from parents other than their own. Such protection proves meaningless for students forced to discuss their sexual orientation with their parents sooner than they would like. Keeping these considerations in mind, teachers should be entitled to use discretion in deciding whether to report an occurrence.

A possible revised version proposed by this author 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. The school should 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.

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.¹⁷⁰ In failing to define “sufficient action,” this provision is overly vague. If 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.

One solution to the confusion caused by this vague provision is

¹⁶⁸ Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 189 (2009).

¹⁶⁹ N.J. STAT. ANN § 18A:37-13.2 (West 2011).

¹⁷⁰ *Id.*

to change “fails to take sufficient action” to “fails to act according to the school district’s policy.” This change would direct an administrator to the school’s policy, which will clearly explain the action the district considers an appropriate, or sufficient, response.¹⁷¹ This type of guidance will render courts’ determinations easier and lead to more predictable outcomes.

Further, the “should have known” provision provides no criteria for how third parties are to determine whether the school employee “should have known.” Allowing this third party to decide whether the employee “should have known” of an incident introduces hindsight bias, and it may be difficult for the third party to ignore the fact that there *was* an incident in analyzing the situation and determining what facts were available to the school employee at the time he or she “should have known.” The “should have known” standard also fails to explain, limit, or provide examples of appropriate disciplinary action.

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. The legislature might wish to include a list of possible disciplinary actions and should provide examples of which types of behavior will be associated with a particular punishment with the use of a “sliding scale” as opposed to merely providing for generalized punishment for any failure to comply with the Act’s reporting requirements.¹⁷² For example, if an educator fails to report a one-time 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, for example, a physical altercation, the punishment might require additional training sessions about 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,” instead of leaving this decision up to school districts.¹⁷³

Finally, a “should have known” standard is problematic because

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See* N.J. STAT. ANN. § 18A:37-16 (West 2011).

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the Act does not explain how the administrator should have known.¹⁷⁴ 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 an 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. Both factors would put the employee on notice that he or she should pay special attention to this particular student's actions.

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 in the same way as those who fail to report and did know is unfair at best. This problem would be partially lessened if the court considers the school's size in determining whether a response was reasonable. Difficulty in "knowing" of an incident may also pose problems in high schools or perhaps even middle schools, where students are more likely to switch classes and spend less time with each teacher, as compared to elementary students who may remain with the same teacher and the same students all day. Both teachers and students in the latter group are more likely to "know" of an incident that might merit reporting. Consequently, the meaning of the "should have known" standard should vary with the school setting.

The Act should also provide a list of examples from which "reliable"¹⁷⁵ 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, the Act might state that the would-be reporter is less likely to have known. If a student relays the incident, the Act might suggest that information becomes "reliable" only after discussions of the incident with the bully, victim, and student who witnessed the incident, instead of leaving the term "reliable" undefined.¹⁷⁶

A proposed version of the provision subjecting would-be reporters who "should have known" of an incident to disciplinary action might read as follows:

¹⁷⁴ *Id.*

¹⁷⁵ *See* N.J. STAT. ANN. § 18A:37-16 (West 2011).

¹⁷⁶ *Id.*

A school administrator or employee who receives a reliable report of harassment, intimidation, or bullying from a fellow district administrator or 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 whether a report is "reliable" include the source of the report and whether there are any witnesses. Relevant considerations for determining whether an administrator or employee "should have known" of an incident include: evidence that the administrator or employee was in the same vicinity as the purported bully while he or she was harassing, intimidating, or bullying the purported victim; whether the administrator or employee had knowledge that the purported bully was in the school's database as a previously confirmed bully; and whether the administrator or employee has previously dealt with this student in similar situations. For example, an administrator or employee shall be presumed to have had constructive knowledge when conduct is videotaped or seen by another administrator or employee and then discussed with the would-be reporter.

When relayed by a student, information may become "reliable" only after discussions of the purported incident with the bully and victim. If an administrator or employee does not report an incident of harassment, intimidation, or bullying that he or she should have known about, such administrator or 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 administrator or employee failing to report an incident if the administrator or employee lacked actual knowledge and had never previously been disciplined for such a failure, but a verbal warning may also suffice. Untenured administrators and 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 administrator or employee. The school district shall list possible punishments in its policy.

D. The Mandatory Appointment of a School Safety Team, an Anti-Bullying Specialist, and an 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.¹⁷⁷ The school safety team requirement currently presents at least two problems. First, the Act does not instruct how large the team should be.¹⁷⁸ At a minimum, the team must 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.”¹⁷⁹

Presumably, principals can appoint as many interested persons as they wish. A team that grows too large, however, poses administrative feasibility problems such as, for example, the inability to coordinate schedules or difficulty reconciling too many opinions. 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 serves as its chair.¹⁸⁰ Thus, the anti-bullying specialist is without any sort of veto power and is therefore forced to work with whomever the principal feels should be a part of the team. Any tension resulting from the appointment of members who do not respect or work well with the anti-bullying specialist may detract from the team’s goal of addressing bullying.

While the Act requires the principal to appoint a school guidance counselor, school psychologist, or similarly trained employee as the anti-bullying specialist, if no such individual exists, the Act also allows any employee to fulfill this role regardless of whether he or she has relevant training.¹⁸¹ Such a provision effectively allows anyone, as long as he or she is a school employee, to serve as a “specialist.” The Act does not require the anti-bullying

¹⁷⁷ N.J. STAT. ANN. §§ 18A:37-20, 21 (West 2011).

¹⁷⁸ See N.J. STAT. ANN. § 18A:37-21 (West 2011).

¹⁷⁹ *Id.*

¹⁸⁰ N.J. STAT. ANN. §§ 18A:37-20, 21.

¹⁸¹ N.J. STAT. ANN. § 18A:37-20.

coordinator to even be employed in the school district.¹⁸² Thus, the Act allows the same individual to serve as an anti-bullying coordinator for multiple districts.¹⁸³

In a state with a large number of closely located school districts such as New Jersey,¹⁸⁴ a situation where an employee serves as the coordinator for multiple districts is easy to imagine. A major concern here relates to performance; an anti-bullying coordinator in charge of many districts may not have enough time to properly address bullying in every district. This concern may be exacerbated if the anti-bullying coordinator does not fully understand the culture of an unfamiliar district or if he or she is assigned to multiple districts with a large number of schools and students. To address this performance concern, the Act should set a maximum number of districts for which an employee may serve as the anti-bullying coordinator.

By 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.¹⁸⁵ 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 system, which Bob Barr describes as an “extensive bureaucracy” that schools are forced to establish.¹⁸⁶

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. Elementary, middle, and high schools should be treated differently from one another because, 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.”¹⁸⁷ 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 school.

¹⁸² *Id.*

¹⁸³ *See id.*

¹⁸⁴ New Jersey has roughly 600 school districts. *See supra* note 107 and accompanying text.

¹⁸⁵ *See* N.J. STAT. ANN. §§ 18A:37-20, 21 (West 2011).

¹⁸⁶ Barr, *supra* note 58.

¹⁸⁷ Calefati, *supra* note 17, at 2.

Smaller schools may not derive any additional benefit from having all three positions filled than if they had only an anti-bullying coordinator and one of the two remaining positions. Similarly, the Act should allow schools of any size, but larger ones in particular, to have more than one anti-bullying specialist per school. The law sets a minimum in requiring all three appointments,¹⁸⁸ implicitly suggesting schools may surpass the requirements.

As there is only one anti-bullying coordinator per *district*, as opposed as one per school,¹⁸⁹ this position should not be cut. Rather, depending on size and level of education, an individual school may not need both an anti-bullying specialist and a school safety team. Currently, if a school has no guidance counselor, school psychologist, or other similarly trained individual, the principal may simply appoint any other current school employee, even one lacking relevant training, as the anti-bullying specialist.¹⁹⁰ The law might suggest that schools 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 Act might suggest the anti-bullying specialist position be waived and expand the duties of the anti-bullying coordinator to encompass those the anti-bullying specialist would have fulfilled. 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. If the anti-bullying specialist has such control, the school safety team would likely be a more coherent, cooperative group that is both productive and efficient.

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 year. Schools with few incidence reports may apply for a less stringent program by demonstrating a low number of incidents and the successful handling of incidents that did arise. One counter-argument to this suggestion is that it might incentivize schools to under-report. This suggested 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

¹⁸⁸ N.J. STAT. ANN. §§ 18A:37-20, 21 (West 2011).

¹⁸⁹ See N.J. STAT. ANN. § 18A:37-20.

¹⁹⁰ *Id.*

known” of an incident and failed to report.¹⁹¹ The suggestion is not to eliminate the option for 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 (defined) discipline remaining, the risk of under-reporting will be minimal because the fear of discipline will continue to encourage administrators and employees to report, rather than ignore, an incident.

Another justification for cutting the anti-bullying specialist position relates to the fact that this employee is typically the school’s guidance counselor.¹⁹² 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.¹⁹³ While correctly recognizing that there exists a potential problem for students who are investigated by their own guidance counselor, Richard Bozza 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:

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

¹⁹¹ See *supra* Part III.B.

¹⁹² 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.

¹⁹³ Bozza, *supra* note 112.

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be whether the anti-bullying coordinator has relevant background experience. If so, this supports the elimination of the anti-bullying specialist position. If neither individual would have relevant experience, a school should consider keeping both positions unless it has a reasonable justification 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 school safety 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.

IV. 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 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 failed 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 proposed ways in which each section should be redrafted such that the Act would strike a balance between the current law's strict rules and the New Jersey Supreme Court's loose,

totality of the circumstances approach. The proposed changes include allowing educators discretion in reporting, listing possible punishments and considerations to help determine when information can be deemed “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 notable concerns because the Act has already increased the number of reports of bullying.¹⁹⁴ Such an increase presents more opportunities for parents to claim school districts have reacted inappropriately and may result in increased litigation in this area. In deciding these cases, courts need more discretion than the strict terms of the Act allow. While it stems from admirable goals, the Act 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.¹⁹⁵

¹⁹⁴ See *supra* note 14 and accompanying text.

¹⁹⁵ See Rundquist, *supra* note 12.