

HOW BEST TO CONFRONT THE BULLY: SHOULD TITLE IX OR ANTI-BULLYING STATUTES BE THE ANSWER?

SUSAN HANLEY KOSSE*

AND ROBERT H. WRIGHT**

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college she attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹

I. INTRODUCTION

This article examines liability for peer-on-peer sexual harassment in the context of bullying under Title IX and state anti-bullying laws. Part II describes the persistent problem of bullying in school and its extremely harmful effects on students. Part III explores the background of Title IX and the evolving law regarding peer-on-peer harassment. Part IV proceeds to summarize state anti-bullying laws, while Part V analyzes which legal approach, Title IX or anti-bullying statutes, is best to protect children from peer-on-peer sexual harassment at school. The article then argues that both Title IX and anti-bullying statutes are necessary to protect our children because Title IX does not cover those forms of harassment that do not fit the definition of sexual harassment or are not of adequate severity. Despite the importance of anti-bullying statutes, many currently existing statutes are flawed because they are too deferential to local schools. The article concludes by offering practical suggestions to legislatures when drafting anti-bullying statutes.

* Susan Hanley Kosse is an Associate Professor of Law at the Louis D. Brandeis School of Law, University of Louisville, J.D., University of Louisville School of Law, 1991; B.A., Miami University, 1987.

** Robert H. Wright is a LL.M. candidate, Franklin Pierce Law Center, 2005; J.D., University of Louisville School of Law, 2003; B.A. Centre College, 2000.

1. Stan Davis, *Stop Bullying Now!*, at <http://www.stopbullyingnow.com> (last visited Jan. 12, 2005) (quoting Eleanor Roosevelt, *The Great Question* (1958)).

II. BULLYING IN THE SCHOOLS

*There is another kind of violence, and that is violence by talking. It can leave you hurting more than a cut with a knife. It can leave you bruised inside.*²

Bullying, one form of student-on-student harassment, is a major problem for schools today. Although an exact definition of bullying is difficult to ascertain, bullying in this article means “when one child or group of children repeatedly picks on another child—often one who is seen as weaker and more vulnerable.”³ Bullying can involve many types of behaviors, including “physical violence and attacks,” “verbal taunts,” “name-calling and put-downs,” “threats and intimidation,” “extortion or stealing of money and possessions,” and “exclusion from the peer group.”⁴ Bullying usually begins in elementary school, peaks in middle school, and diminishes, but does not disappear, in high school.⁵ “Boys and girls usually bully same sex classmates, with female bullying taking an indirect, manipulative form.”⁶

Often dismissed as just teasing or fighting, many individuals are unaware of how pervasive the problem of bullying is in schools, even though research shows that eighty percent of adolescents report being bullied during their school years and ninety percent of fourth through eighth graders report being victims of bullying.⁷ If these facts were not alarming enough, statistics estimate that a child is bullied every seven minutes.⁸ Bullying often occurs at schools in areas where there is minimal or no supervision.⁹ Students are frustrated that teachers or other adults in the classroom ignore bullying incidents.¹⁰ Students uniformly express the desire that teachers intervene rather than ignore teasing and bullying.¹¹

Although bullying has existed since the dawn of time, advances in technology are making it easier for bullies to engage in harmful behavior. Web pages designed by students to criticize, stigmatize and traumatize their classmates are becoming more and more common. For example, a website called www.SchoolRumors.com “offered virtual scrawlings on a bathroom wall, and in two weeks it let 67,000 students into that bathroom for a peek. The stuff was

2. NAT'L ASS'N OF ATT'YS GENERAL, BRUISED INSIDE: WHAT OUR CHILDREN SAY ABOUT YOUTH VIOLENCE, WHAT CAUSES IT AND WHAT WE SHOULD DO ABOUT IT 5 (Apr. 2000), http://www.atg.wa.gov/pubs/bruised_inside041000.pdf.

3. WASH. STATE OFFICE OF THE ATT'Y GEN. ET AL., BULLYING IT'S NOT OKAY (distinguishing bullying from fighting and teasing because it involves the bully controlling the victim), http://www.atg.wa.gov/bullying/BullyingBrochure8_05.pdf (last visited Jan. 15, 2005).

4. MARLIES SUDERMANN ET AL., BULLYING: INFORMATION FOR PARENTS AND TEACHERS (1996), <http://www.lfcc.on.ca/bully.htm>.

5. WASH. STATE ATT'Y GEN.'S TASK FORCE, PROTECTING OUR CHILDREN 5 (Jan. 2001), http://www.atg.wa.gov/pubs/Protecting_Our_Children013001.pdf (last visited Jan. 15, 2005).

6. *Id.* at 6.

7. *Id.* at 5.

8. ATRIUM SOCIETY, BULLYING STATISTICS, at http://www.atriumsoc.org/pages/bullying_statistics.html (last visited Jan. 15, 2005).

9. WASH. STATE ATT'Y GEN.'S TASK FORCE, *supra* note 5, at 5.

10. *Id.*

11. *Id.*

scurrilous and vicious, cyberspace blood sport. One girl was reportedly ready to kill herself because of what was said about her.”¹²

Unfortunately, this girl’s reaction is not atypical. In fact, bullying is often seen as a common link between school violence, suicide and homicide.¹³ Homicide perpetrators are more than twice as likely as homicide victims to have been bullied by peers.¹⁴ Besides suicide and homicide, other harmful victim responses include staying home from school, changing schools to feel safe, and avoiding school bathrooms and other places at school for fear of being harassed or assaulted.¹⁵ The long term effects of bullying can be devastating, including depression and low self-esteem.¹⁶

A. Sexual Harassment

Peer-on-peer sexual harassment, one form of bullying, has equally alarming statistics. Estimates from a 1993 study indicate that of the 1,600 public high school students polled, eighty-five percent of the girls and seventy-six percent of the boys reported experiencing some sort of sexual harassment.¹⁷ The harassment may take many forms, from unwanted touching to minor insults or teasing.¹⁸ Types of sexual harassment students experience in school include sexual comments, jokes, gestures or looks, being touched, grabbed, or pinched in a sexual way, sexual rumors spread about them, clothing pulled off or down, or even being forced to engage in sexual behavior other than kissing.¹⁹

Although peer-on-peer sexual harassment is much more explicit and concerning, victims’ responses to this type of harassment mirror the responses to other types of bullying. The victims of peer-on-peer sexual harassment do not want to attend school, do not want to talk as much in class, and find it harder to pay attention in class. In addition, some children reported thinking about changing schools.²⁰

B. Sexual Harassment of Homosexual Students

In Dylan N.’s case, verbal harassment escalated almost immediately into physical violence. Other students began spitting on him and throwing food at him. One day in the parking lot outside his school, six students surrounded him and threw a lasso around his neck, saying, “Let’s tie the faggot to the back of the truck.” After that incident, the harassment and violence intensified. “I was liv-

12. Pat Morrison, *Behind the Tragedy, the Despair of an Outcast*, L.A. TIMES, Mar. 7, 2001, at B1. The site was shut down days before Andy Williams killed students at Santana High School in Southern California.

13. ATRIUM SOCIETY, *supra* note 8.

14. *Id.*

15. Up to seven percent of eighth graders stay home at least once a month because of bullying. WASH. STATE ATT’Y GEN.’S TASK FORCE, *supra* note 5, at 5.

16. SUDERMANN ET AL., *supra* note 4.

17. AM. ASS’N OF UNIV. WOMEN, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS* 7 (1993).

18. *Id.* at 9.

19. *Id.*

20. *Id.*

ing in the disciplinary office because other harassment was going on. Everyone knew," he said. "It gave permission for a whole new level of physical stuff to occur." He was pushed up against lockers by students who shouted "fag" and "bitch" at him. On one occasion, a group of students surrounded him outside the school, punching him and jeering while security officers stood nearby. When the assault ended, he had a split lip and a broken nose and was bleeding profusely from his ear.²¹

As Dylan N.'s story suggests, sexual harassment and bullying of homosexual students is a major problem in schools. Human Rights Watch, an international research and advocacy group, released a report that documented the seriousness of the problem.²² According to this report, nearly every homosexual student interviewed experienced constant verbal and non-physical abuse. Besides name calling, these students were subject to written notes, obscene or suggestive cartoons, graffiti scrawled on walls or lockers, or pornography. It was not uncommon for these behaviors to escalate fairly quickly from mere verbal taunts to unwelcome sexual contact or even physical violence.²³ Gay, lesbian, bisexual and transgender students reported having difficulty concentrating in school and fearing for their safety, and some students actually changed schools or dropped out altogether.²⁴

The results of a 2003 survey by the Gay, Lesbian and Straight Education Network echo the findings of Human Rights Watch.²⁵ This report found that eighty-four percent of lesbian, gay, bisexual and transgender ("LGBT") students reported being verbally harassed in the past school year because of their sexual orientation.²⁶ More than ninety percent of LGBT students reported regularly hearing homophobic comments at school²⁷ and, most shockingly, eighty-five percent of LGBT students reported that when faculty or staff heard homophobic remarks, they never intervened or intervened only some of the time.²⁸ In addition to the verbal abuse, nearly forty percent of these students reported being physically harassed in the past school year because of their sexual orientation.²⁹

The research discussed in this Part does not even begin to take into account the detrimental effects for children who are bystanders of this bullying. The statistics paint a bleak picture of the safety and well-being of today's students, whether they are bully, victim, or bystander. The United States and many other governments have taken notice of the statistics. On March 1, 2004, Health and Human Services Secretary Tommy G. Thompson announced a new campaign,

21. HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS, <http://www.hrw.org/reports/2001/uslgbt/Final-06a.html> (1999).

22. *Id.*

23. *Id.*

24. *Id.*

25. See JOSEPH G. KOSCIW, GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE 2003 NATIONAL SCHOOL CLIMATE SURVEY, http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF (2004) [hereinafter GLSEN].

26. *Id.* at 15.

27. *Id.* at 5.

28. *Id.* at 6.

29. *Id.* at 15.

“Take A Stand. Lend A Hand. Stop Bullying Now!” designed to educate more Americans about how to stop bullying and youth violence.³⁰ The campaign

includes a Web-based, animated story featuring a cast of young people who deal with bullies in the classrooms, hallways, and grounds of a middle school. With help from teachers, parents, and other adults, the bullied characters get support from fellow students who step up to make it clear that bullying is ‘not cool’.³¹

In addition to the web page, which is updated every two weeks, the campaign has radio public service announcements and resource kits for helping create bullying prevention programs.³² Although it is hoped that the campaign will be effective in educating citizens about the problem, it can only be viewed as part of a solution; both anti-bullying statutes and Title IX are necessary if the problem of bullying is to be effectively remedied.

III. TITLE IX LIABILITY FOR PEER-ON-PEER SEXUAL HARASSMENT

A. Background to Title IX

Title IX was passed in 1972 largely to help women gain access to the same educational opportunities as their male counterparts.³³ Congress debated whether Title IX was actually needed or instead, if Congress could just add the word “sex” to Title VII which prohibited racial discrimination.³⁴ Title IX’s proponents, however, were ultimately victorious and Title IX was passed providing that, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”³⁵

At the time of its passage, there was uncertainty about whether Title IX was intended to cover sexual harassment.³⁶ In fact, not until the 1990s did the Supreme Court hear cases pertaining to sexual harassment and Title IX. One of the first of these cases, *Gebser v. Lago Vista Independent School District*, involved alleged sexual harassment of an eighth grader by her teacher.³⁷ The student claimed that the teacher made sexually suggestive comments to her and other female students.³⁸ The teacher also fondled Gebser’s breasts and ultimately engaged in sexual intercourse with her.³⁹

30. News Release, U.S. Dep’t of Health and Human Services, HHS Launches Campaign to Prevent Youth Bullying, <http://www.hhs.gov/news/press/2004pres/20040301.html> (Mar. 1, 2004).

31. *Id.*

32. *Id.*

33. See Kelly Titus, *Students, Beware: Gebser v. Lago Vista Independent School District*, 60 LA. L. REV. 321, 327 (1999).

34. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 663 (1999); 20 U.S.C. § 681 et seq. (Supp. 1999) (although Title VII prohibited sexual discrimination, educational facilities were exempted).

35. 20 U.S.C. § 1681(a) (2005).

36. *Davis*, 526 U.S. at 663.

37. *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274 (1998).

38. *Id.* at 277-78.

39. *Id.* at 278.

The Court in *Gebser* set out a two part standard for holding schools liable under Title IX.⁴⁰ First, a school official with authority to address the problem must have actual knowledge of the harassment.⁴¹ Second, the official must fail to respond adequately.⁴² This is a fairly difficult standard for the plaintiff to satisfy, since it does not require that the school actually stop the harassment; apparently, an adequate response does not go that far. Furthermore, liability is established only if the official acts with “deliberate indifference” or an official decision not to correct the violation.⁴³ In *Gebser*, the school officials knew about the teacher’s sexually inappropriate comments to the female students and warned him to watch his classroom comments, but because the school did not have actual knowledge of the teacher’s sexual acts with Gebser, the Court refused to find the school liable under Title IX for sexual harassment.⁴⁴

B. *Davis v. Monroe County Board of Education*

In 1999, the Supreme Court decided *Davis*, a case involving Title IX and sexual harassment issues.⁴⁵ Instead of teacher-on-student sexual harassment, the sexual harassment in *Davis* was peer-on-peer.⁴⁶ The plaintiff sued the school district, not for the other student’s actions, but for its own inaction, by allowing the known harassment to continue against her.⁴⁷ During the school year of 1999, Davis, a fifth grade girl, endured continual verbal and physical harassment by one of her classmates. Davis was subjected to her fellow classmate rubbing against her genital areas and breasts, as well as, constant verbal comments to her such as “I want to feel your boobs” and “I want to get in bed with you.”⁴⁸ Even though the girl’s mother complained to the school, nothing was ever done to stop the harassment.⁴⁹ It only stopped when the fellow classmate was charged with sexual battery.⁵⁰

The Court reversed the Eleventh Circuit’s holding that schools could not be liable for peer-on-peer harassment, holding instead that a recipient of federal funds could be liable “for deliberate indifference to known acts of harassment.”⁵¹ The Court held that in order to be liable under Title IX, “[t]he recipient itself must ‘exclude [persons] from participation in . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under ‘its ‘program[s] or activit[ies]’.”⁵² In remanding the case to the district court for further proceedings,

40. *Id.* at 292.

41. *Id.* at 288.

42. *Id.* at 290.

43. *Id.*

44. *Id.* at 278, 291.

45. *Davis*, 526 U.S. at 633.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 634.

50. *Id.*

51. *Id.* at 633.

52. *Id.* at 640-41.

the Court found that the school might have created a hostile environment for the plaintiff in failing to take disciplinary actions against the student.⁵³

After determining that a private remedy was available under Title IX for peer-on-peer harassment, the Court defined sex discrimination in the same fashion as it had done in Title VII.⁵⁴ Prior Title VII cases included sexual harassment as a form of sex discrimination.⁵⁵ Under Title VII, employers can be liable for both quid pro quo sexual harassment and hostile environment sexual harassment.⁵⁶ Adopting this approach for Title IX, the Court concluded that a school district could be liable for hostile environment sexual harassment when the student's behavior is so "severe, pervasive, and objectively offensive" as to deprive the victim of the educational opportunities provided by the school.⁵⁷ Unlike Title VII, which uses agency principles, liability only attaches if the school has actual knowledge of the harassment and acts with deliberate indifference.⁵⁸

Just what constitutes "severe, pervasive, and objectively offensive" has been the subject of many debates. Justice Kennedy's dissent in *Davis* anticipated that such a nebulous standard would result in widespread problems for schools.⁵⁹ The Office of Civil Rights (OCR) publishes a guide to aid schools in determining their responsibilities for peer-on-peer sexual harassment.⁶⁰ That guide says, "[I]t is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists."⁶¹ Among the factors that should be considered are: the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject or subjects of the harassment; the size of the school, location of the incidents, and context in which they occurred; and other incidents at the school.⁶² These guidelines, although helpful, illustrate the problem schools and courts face with Title IX lawsuits. The facts must be examined on a case-by-case basis. What may qualify as a hostile environment at one school may not be actionable at another. Unfortunately, it is impossible for a bright line test to be developed in this area of law.

53. *Id.* at 649.

54. *Id.* at 636.

55. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

56. *Id.* at 65-66. Quid pro quo sexual harassment is defined as "advances or requests for sexual favors in return for advancements or other employment decisions, and 'hostile environment' involves an environment that interferes with performance." Titus, *supra* note 33, at 324-25.

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

58. *Id.* at 643.

59. *Id.* at 654-86 (Kennedy, J., dissenting). Justice Kennedy, Chief Justice Rehnquist, Justice Scalia and Justice Thomas comprised the dissent. "The majority's opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion." *Id.* at 657.

60. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.

61. *Id.* at 7.

62. *Id.* at 6-7.

C. Cases since *Davis*

Since *Davis*, courts have had the opportunity to decide the level of conduct necessary to satisfy the severe, pervasive, and objectively offensive standard, the actual notice requirement, and the deliberate indifference of the school requirement.⁶³ Although plaintiffs have been successful in bringing peer-on-peer harassment claims under Title IX, victories occur only in the most egregious circumstances. Since the *Davis* standard is so high, courts have been reluctant to rule in favor of students. As a result, critics contend that *Davis* has not provided a vehicle to curtail sexual harassment in the schools, but instead, “has been the glue that has held the . . . status quo of general indifference in place.”⁶⁴

Although a detailed examination of all the post-*Davis* cases is beyond the scope of this article, an example of a situation that meets the high standard of *Davis* is found in *Vance v. Spencer County Public School District*.⁶⁵ *Vance* involved harassment that began on Alma McGowen’s second day of school.⁶⁶ The harassment first started with peers verbally abusing her, calling her “the gay girl,” “whore” and other more offensive labels.⁶⁷ This behavior escalated and male students engaged in harassing Alma and other female students by continually hitting them, snapping their bras, and grabbing their butts.⁶⁸ This behavior of her classmates appeared mild, however, when compared to the day several students backed her up against a wall and held her hands and pulled her hair while they tried to yank off her shirt.⁶⁹ Finally a boy intervened to help Alma even as another boy was taking his pants off in order to have sex with her.⁷⁰ Alma’s mother complained to the school about these horrible incidents, as well as many other incidents of inappropriate touching.⁷¹ Despite Alma’s and her mother’s well-documented concerns spanning four school years, the school took no action to address these specific harassment allegations.⁷²

The Sixth Circuit had little difficulty affirming the trial court’s denial of summary judgment for the Board of Education.⁷³ Alma was able to show her harassment was severe, pervasive and offensive because she had endured numerous incidents of verbal and physical sexual harassment.⁷⁴ In addition,

63. See *P.H. v. Sch. Dist. of Kansas City*, 265 F.3d 653 (8th Cir. 2001); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000); *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999); *Adusumilli v. Ill. Inst. of Tech.*, No. 98-3561, 1999 U.S. App. LEXIS 17954 (7th Cir. July 21, 1999); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238 (10th Cir. 1999).

64. Gigi Rollini, Note & Comment, *Davis v. Monroe County Board of Education: A Hollow Victory for Student Victims of Peer Sexual Harassment*, 30 FLA. ST. U. L. REV. 987, 995 (2003).

65. See *Vance*, 231 F.3d at 259; See also *Murrell*, 186 F.3d at 1247 (reversing the lower court’s dismissal of the student’s Title IX cause of action).

66. *Vance*, 231 F.3d at 256.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 256-258.

73. The jury awarded Alma \$220,000. *Id.* at 258.

74. *Id.* at 259.

Alma and her mother's repeated verbal and written complaints to her teachers and principal satisfied the notice requirement.⁷⁵ Finally, the school acted with deliberate indifference because the school's response was "clearly unreasonable in light of the known circumstances."⁷⁶ Acknowledging that no particular response was required, the circuit court focused on the school's lack of any response or ineffective response to the various complaints.⁷⁷ The court was particularly disturbed by the school's lack of action when Alma was stabbed in the hand with a pen and when the students tried to rip off her shirt, as well as by the lack of an investigation following the filing of a detailed complaint with the Title IX coordinator.⁷⁸ Looking at these and the many other incidents, the Sixth Circuit affirmed the district court's order denying the Board's Rule 50 motion.⁷⁹

In contrast, most other circuits have refused to find for the plaintiff because the conduct did not qualify as severe or pervasive, the plaintiff failed to show actual notice was given, or the school was not deliberately indifferent.⁸⁰ For example, the Seventh Circuit in *Adusumilli v. Illinois Institute of Technology* refused to find two incidents of inappropriate touching (one on the shoulder and one on the breast) severe.⁸¹ In actuality, there were twelve incidents of harassment but the court refused to consider them since only two were actually reported.⁸²

Even when the harassment is severe, the circuits have been hesitant to impose liability. For example, in *Sopher v. Hoben*, the school successfully defended a suit because school administrators did not react with deliberate indifference upon learning of a special education student's rape and inappropriate touching.⁸³ The school contacted legal authorities, installed a window in the room, offered the plaintiff increased supervision and an escort and created counseling sessions on how to relate to members of the opposite sex.⁸⁴ The Court stated that these actions were not "clearly unreasonable in light of the known circumstances."⁸⁵ Arguing the possibility that the school did, indeed, act

75. *Id.*

76. *Id.* at 260.

77. *Id.* at 262.

78. *Id.*

79. *Id.* at 264.

80. See *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817 (7th Cir. 2003) (concluding school district did not act unreasonably and plaintiff was not denied access to educational opportunities); *Hawkins v. Sarasota Co. Sch. Bd.* 322 F.3d 1279 (11th Cir. 2003); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000) (concluding school district was not deliberately indifferent); *Johnson v. Indep. Sch. Dist. No. 47*, 194 F. Supp. 2d 939 (D. Minn. 2002); *Burwell v. Pekin Comm. High Sch. Dist.* 303, 213 F. Supp. 2d 917 (C.D. Ill. 2002); *Benefield v. Bd. of Tr. of Univ. of Ala.*, 214 F. Supp. 2d 1212 (N. D. Ala. 2002); *Wilson v. Beaumont Indep. Sch. Dist.*, 144 F. Supp. 2d 690 (E.D. Tex. 2001); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369 (M.D. Ga. 2001); *C.R.K. v. U.S.D.* 260, 176 F. Supp. 2d 1145 (D. Kan. 2001); *Manfredi v. Mt. Vernon Bd. of Educ.*, 94 F. Supp. 2d 447 (S.D.N.Y. 2000). For an excellent discussion of all these cases see Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. L. REP. 1 (2004).

81. 191 F.3d 455, 1999 WL 528169 (7th Cir. 1999).

82. *Id.*

83. 195 F.3d 845, 855 (6th Cir. 1999).

84. *Id.* at 849-50.

85. *Id.* at 855.

with deliberate indifference, the dissent takes note that the rape was not a lone incident and that the mother had complained before about inappropriate sexual advances on her daughter and her not wanting her daughter to be left alone with certain boys.⁸⁶

IV. AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION

In an attempt to provide students with a safer, more secure learning environment, many states have begun passing legislation aimed at deterring bullying.⁸⁷ The manner and degree in which these laws address the problem, however, vary greatly from state to state. Indeed, state anti-bullying laws differ in several ways; most notably in how each defines “bullying,” facilitates the reporting of bullying, and enumerates the consequences of bullying. While nearly every state anti-bullying law currently enacted includes the three aforementioned elements, a few go even further in attempting to address the problem of school bullying by requiring or encouraging local school boards to adopt affirmative measures aimed at addressing bullying before it actually happens.⁸⁸

A. The Definition of “Bullying”

Of those states with anti-bullying laws currently in effect, only a few actually provide an explicit definition of the term “bullying.”⁸⁹ Most often, this task is left entirely within the discretion of the local school board.⁹⁰ For those anti-bullying laws which do define the term, however, the types of conduct prohibited under each definition vary greatly. Some states, like Arkansas and New Hampshire, define the term broadly as any conduct rising to the level of “pupil harassment.”⁹¹ Most states, however, are much more specific in regards to the type of harassing conduct that constitute “bullying” within the meaning of their anti-bullying law. These states define the term based upon either the intent of

86. *Id.* at 857.

87. See ARK. CODE ANN. § 6-18-514 (Michie 2004); COLO. REV. STAT. § 22-32-109.1 (1998); CONN. GEN. STAT. § 10-222d (2002); GA. CODE ANN. § 20-2-145 (Harrison 1989); LA. REV. STAT. ANN. § 17:416.13 (West 2004); N.H. REV. STAT. ANN. § 193-F:3 (1999); N.J. STAT. ANN. § 18A:37-15 (1999 West); 708 OKLA. ST. ANN. tit. 24 § 100.4 (West 1997); OR. REV. STAT. § 339.356 (2003); R.I. GEN. LAWS § 16-21-26 (2001); WASH. REV. CODE § 28A:300.285 (1997); W. VA. CODE § 18-2C-3 *et seq.* (2004). For states with laws intended to create a safer learning environment for students, but not addressing bullying specifically, see CAL. EDUC. CODE § 32282 (Deering 2002); 105 ILL. COMP. STAT. 5/10-20.14 (1998); M.N.A. 1A.03(2); MISS. CODE ANN. § 37-11-54 (1999); NEV. REV. STAT. 388.139 (2002); VT. STAT. ANN. tit. 16 § 165 (2002).

88. See, e.g., COLO. REV. STAT. § 22-32-109.1(2)(a)(X) (1998) (requiring schools to enact “a specific policy concerning bullying prevention and education”); LA. REV. STAT. ANN. § 17:415.17(C)(2) (West 2004) (encouraging schools to “develop and offer youth development and assistance programs that employ violence prevention and intervention initiatives for students in kindergarten and the elementary grades”).

89. See ARK. CODE ANN. § 6-18-514 (Michie 2004); COL. REV. STAT. § 22-32-109 (1998); CONN. GEN. STAT. § 10-222d (2002); LA. REV. STAT. ANN. § 17:416.13 (West 2004); N.H. REV. STAT. ANN. § 193-F:3 (1999); N.J. STAT. ANN. § 18A:37-15 (West 1999); OR. REV. STAT. § 339.356 (2003); R.I. GEN. LAWS § 16-21-26 (2001); WASH. REV. CODE § 28A:300.285 (1997).

90. GA. CODE ANN. § 20-2-145 (2004); W. VA. CODE § 18-2C-3 *et seq.* (2004).

91. ARK. CODE ANN. § 6-18-514(a) (Michie 2004); N.H. REV. STAT. ANN. § 193-F:3 (1999).

the perpetrator, the reasonableness of his actions, or the effect that it has on another student.

The vast majority of those states that provide a definition of “bullying” for adoption by local school boards in their anti-bullying policies define the term according to the intent of the perpetrator. In Colorado, “bullying” includes “any written or verbal expression, or physical act or gesture, or a pattern thereof, which is intended to cause distress upon one or more students in the school, on school grounds, in school vehicles, at a designated bus stop, or at school activities or sanctioned events.”⁹² A similar definition has been adopted by the Connecticut legislature in its anti-bullying law; defining the term as “any overt act by a student or a group of students directed against another student with the intent to ridicule, humiliate or intimidate the other student while on school grounds or at a school-sponsored activity which acts are repeated against the same student over time.”⁹³

Other “intent-states,” however, are even more specific in articulating the type of harassment meant to be prohibited under their anti-bullying law. In Louisiana, for example, “bullying” is defined as:

any intentional gesture or written, verbal, or physical act that: (a) a reasonable person under the circumstances should know would have the effect of harming a student or damaging his property or placing a student in reasonable fear of harm to his life or person or damage to his property; and (b) is so severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.⁹⁴

A similar definition has been adopted by Rhode Island which in its anti-bullying law defines the term to include:

intentional written, verbal or physical act or threat of a physical act that, under the totality of the circumstances: (i) a reasonable person should know will have the effect of: physically harming a student, damaging a student’s property, placing a student in reasonable fear of harm to his or her person, or placing a student in reasonable fear of damage to his or her property; or (ii) is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.⁹⁵

Washington, too, has enacted a similar definition of bullying. Under its anti-bullying law, “bullying” includes:

any intentional written, verbal, or physical act [which] (a) physically harms a student or damages the student’s property; or (b) has the effect of substantially interfering with a student’s education; or (c) is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or (d) has the effect of substantially disrupting the orderly operation of the school⁹⁶

92. COLO. REV. STAT. § 22-32-109.1(2)(a)(X) (1998).

93. CONN. GEN. STAT. § 10-222d (2002).

94. LA. REV. STAT. ANN. § 17:416.13(B)(2) (West 2004).

95. R.I. GEN. LAWS § 16-21-26(a)(2) (2001).

96. WASH. REV. CODE § 28A:300.285(2) (1997).

In New Jersey and Oregon, however, “bullying” is not defined according to the intent of the perpetrator, but rather according to the perception of his actions to others and the effect which his actions have on others. That is, under the New Jersey statute:

any gesture or written, verbal or physical act that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental physical or sensory handicap, or by any other distinguishing characteristic that takes place on school property, at any school-sponsored function or on a school bus that a reasonable person should know, under the circumstances, will have the effect of harming a student or damaging the student’s property, or placing a student in reasonable fear of harm to his person or damage to his property; or has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.⁹⁷

Oregon’s anti-bullying statute considers neither the intent of the alleged bully nor how his actions are perceived by others. Instead, that statute considers exclusively the effect that the bully’s conduct has on other students; defining “bullying” as:

any act that substantially interferes with a student’s educational benefits, opportunities or performance, that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, and that has the effect of: (1) physically harming a student or damaging a student’s property; (2) knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; or (3) creating a hostile educational environment.⁹⁸

B. Differences in How Bullying is Reported

Just as states differ in how they define “bullying” within the meaning of their anti-bullying law, so too do they differ in the way in which school officials are to be notified of specific incidents of bullying. Some states place a statutory duty on school employees to report such incidents.⁹⁹ Others merely encourage employees to do so by providing them with immunity from any cause of action arising from their failure to report.¹⁰⁰ In addition, a few states require local school boards to develop a method by which students can anonymously report incidents of bullying to school officials so that they may be acted upon accordingly.¹⁰¹

97. N.J.STAT. ANN. § 18A:37-15(b) (West 1999).

98. OR. REV. STAT. § 339.356(1) (2003).

99. See ARK. CODE ANN. § 6-18-514 (Michie 2004); CONN. GEN. STAT. § 10-222d (2002); N.H. REV. STAT. ANN. § 193-F:3 (1999); N.J.STAT. ANN. § 18A:37-15 (West 1999).

100. See LA. REV. STAT. ANN. § 17:416.13 (West 2004); R.I. GEN. LAWS § 16-21-26 (2001); WASH. REV. CODE § 28A:300.285 (1997); W. VA. CODE § 18-2C-3 *et seq.* (2004).

101. See CONN. GEN. STAT. § 10-222d (2002); N.J.STAT. ANN. § 18A:37-15 (West 1999); OR. REV. STAT. § 339.356 (2003); W. VA. CODE § 18-2C-3 *et seq.* (2004).

Only a few states actually require a school employee who witnesses an act of bullying to report it to a principal or other designated school official.¹⁰² Arkansas' anti-bullying law requires "that a school employee who has witnessed or has reliable information that a pupil has been a victim of bullying as defined by the district shall report the incident to the principal."¹⁰³ This approach is typical of those anti-bullying laws which place an affirmative duty on school employees to report acts of bullying. Connecticut has a similar provision in its anti-bullying law "requir[ing] school teachers and other school staff who witness acts of bullying or receive student reports of bullying to be notified by school administrators."¹⁰⁴ New Hampshire's anti-bullying law also includes a reporting requirement which requires school employees to "report . . . incident[s] to the principal, or other designated school official, who in turn shall report the incident to the superintendent."¹⁰⁵ New Jersey's anti-bullying law, while not actually requiring reporting itself, does require the local school board to adopt "a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously."¹⁰⁶

Other anti-bullying laws encourage employees to report incidents of bullying by providing immunity from any liability which might later arise from an employee's failure to report the act.¹⁰⁷ Louisiana's anti-bullying law, for example, encourages reporting by rewarding those employees who in good faith report incidents with "immun[ity] from a right of action for damages arising from any failure to remedy the reported incident."¹⁰⁸ Similarly, West Virginia's anti-bullying law provides school employees with immunity from a cause of action for damages arising from reporting [an incident of bullying],¹⁰⁹ so long as the employee does so in good faith to the appropriate school official, and in compliance with the applicable procedure.¹¹⁰ Other states, however, do not expressly require that a school employee reporting an incident of bullying do so in good faith. Oregon's anti-bullying law, for example, grants school employees "immun[ity] from a cause of action for damages arising from any failure to remedy the reported act."¹¹¹ Similarly, Washington's anti-bullying law provides immunity "from a right of action for damages arising from any failure to remedy the reported incident,"¹¹² and Rhode Island's anti-bullying law provides that

102. See ARK. CODE ANN. § 6-18-514 (Michie 2004); CONN. GEN. STAT. § 10-222d (2002); N.H. REV. STAT. ANN. § 193-F:3 (1999); N.J. STAT. ANN. § 18A:37-15 (West 1999).

103. ARK. CODE ANN. § 6-18-514(a)(4) (Michie 2004).

104. CONN. GEN. STAT. § 10-222d (2002).

105. N.H. REV. STAT. ANN. § 193 F-3(II) (1999).

106. N.J. STAT. ANN. § 18A:37-15(a)(5) (West 1999).

107. See LA. REV. STAT. ANN. § 17:416.13 (West 2004); R.I. GEN. LAWS § 16-21-26 (2001); WASH. REV. CODE § 28A:300.285 (1997); W. VA. CODE § 18-2C-3 *et seq.* (2004).

108. LA. REV. STAT. ANN. § 17:416.13(B)(3) (West 2004).

109. W. VA. CODE § 18-2C-4 (2004).

110. See *id.*

111. OR. REV. STAT. § 339.362(3) (2003).

112. WASH. REV. CODE § 28A.600.480(3) (1997).

school employees who report acts of bullying “promptly”¹¹³ are “not liable for damages arising from any failure to remedy the reported incident.”¹¹⁴

In addition to requiring or encouraging school employees to report acts of bullying, a few states’ anti-bullying laws also require local school districts to create a way for students to anonymously report acts of bullying.¹¹⁵ New Jersey’s anti-bullying law requires that local school districts enact a policy which contains, among other things, “a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously . . .”¹¹⁶ Connecticut’s anti-bullying law goes even further, requiring school districts to formulate a policy which both allows students to anonymously reports acts of bullying and “enable[s] the parents or guardians of students to file written reports of suspected bullying.”¹¹⁷

C. Consequences of Bullying

No current state anti-bullying law creates a private cause of action for bullying. Indeed, most anti-bullying laws leave the consequences for committing such an act entirely within the discretion of the local school board.¹¹⁸ Three states, however, do provide local school boards with some guidance on how to handle incidents of bullying. Colorado’s anti-bullying law provides that while the consequences for an act of bullying are within the discretion of the local school district, any such punishment “shall include a reasonable balance between the pattern and the severity of such bullying behavior.”¹¹⁹ Although it does not fix a remedy itself, Connecticut’s anti-bullying law “require[s] the parents or guardians of students who commit any verified acts of bullying and the guardians of students against whom such acts were directed to be notified”¹²⁰

West Virginia’s anti-bullying law, however, is by far the most extensive in regard to the consequences for committing an act of bullying. That is, not only does West Virginia’s anti-bullying law require “a disciplinary procedure for any student guilty of harassment, intimidation or bullying,”¹²¹ but also the formula-

113. R.I. GEN. LAWS § 16-21-26(h) (2001).

114. *Id.*

115. See CONN. GEN. STAT. § 10-222d (2002); N.J.STAT. ANN. § 18A:37-15(b)(5) (West 1999); OR. REV. STAT. § 339.356(2)(e) (2003); W. VA. CODE § 18-2C-3(2004). For states with laws intended to create a safer learning environment for student, but not addressing bullying specifically, see CAL. EDUC. CODE § 32282(a)(2) (Deering 2002); MINN. STAT. ANN. § 1A.03(2) (West 2004); NEV. REV. STAT. 388.132 (2002);

116. N.J.STAT. ANN. § 18A:37-15(b)(5) (West 1999).

117. CONN. GEN. STAT. § 10-222d (2002).

118. See, e.g., ARK. CODE ANN. § 6-18-514(e)(2) (Michie 2004); COLO. REV. STAT. § 22-109.1 (1998); CONN. GEN. STAT. § 10-222d (2002); N.J.STAT. ANN. § 18A:37-15 (West 1996); OR. REV. STAT. § 339.356 (2003).

119. COLO. REV. STAT. § 22-32-109.1(2)(a)(X) (1998).

120. CONN. GEN. STAT. § 10-222d(7) (2002).

121. W. VA. CODE § 18-2C-4(9) (2004).

tion of “a strategy for protecting a victim from additional harassment, intimidation or bullying, and from retaliation following a report.”¹²²

D. More Affirmative Measures

Every state anti-bullying law addressed in this section seeks to discourage bullying in order to create a safer, more secure learning environment for students. Most of these laws seek to achieve this end by requiring local school boards to have a procedure which addresses bullying after an incident has already occurred. Yet, a few states require or encourage local school boards to take affirmative measures in order to stop acts of bullying before they can ever occur. Louisiana’s anti-bullying law, for example, enables schools to “develop and offer youth development and assistance programs that employ violence prevention and intervention initiatives for students in kindergarten and the elementary grades.”¹²³

Similarly, New Jersey schools are encouraged “to establish bullying prevention programs, and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members.”¹²⁴ In order to facilitate such programs, the New Jersey statute requires school districts to “(1) provide training on the school district’s harassment, intimidation or bullying policies to school employees and volunteers who have significant contact with students; and (2) develop a process for discussing the district’s harassment, intimidation or bullying policy with students” to the extent that funds are available for these purposes.¹²⁵ Furthermore, “[i]nformation regarding the school district policy [against bullying] shall be incorporated into a school employee training program.”¹²⁶

Oklahoma has also chosen to affirmatively address the problem of bullying by requiring each public school to form a “Safe School Committee.”¹²⁷ Composed of at least six members of the school community, this committee advises the principal as to:

122. *Id.* § 18-2C-4(8) (2004).

123. LA. REV. STAT. ANN. § 17:416.17(C)(2) (2004). Pursuant to LA. REV. STAT. ANN. § 17:416.17(C),

[s]uch programs may include but shall not be limited to the following components: (a) Provisions of services for students including behavioral training and intervention techniques that promote cooperation and enhance interpersonal and conflict resolution skills, peer mediation, anger management, bullying prevention, life skills training, mentoring, counseling, and tutoring programs that improve academic achievement; (b)(i) Provisions of services which support the parents of students identified with behavioral needs that may need intervention or support. Such parent services may include literacy services or parental training. (b)(ii) Required participation of any parent of a student so identified in such intervention at the school or other designated facility. (c) Collaboration with community-based organizations, including but not limited to youth services, civil, social services, mental health, volunteer services, and juvenile agencies.

Id. § 17:416.17(C).

124. N.J.STAT. ANN. § 18A:37-17(b) (West 1999).

125. *Id.* § 18A:37-17(b).

126. *Id.* § 18A:37-17(c).

127. See OKLA. STAT. ANN. tit. 70, § 24-100.5(A) (West 1997).

(1) unsafe conditions, possible strategies for students to avoid harm at school, student victimization, crime prevention, school violence, and other issues which prohibit the maintenance of a safe school; (2) student harassment, intimidation, and bullying at school; (3) professional development needs of faculty and staff to implement methods to decrease student harassment, intimidation, and bullying; and (4) methods to encourage the involvement of the community and students, the development of individual relationships between students and school staff, and use of problem-solving teams that include counselors and/or school psychologists.¹²⁸

In doing so, Section 24-100.5 requires the committee to “review traditional and accepted harassment, intimidation, and bullying prevention programs utilized by other states, state agencies, or school districts.”¹²⁹

Oregon, too, encourages school districts to “form harassment, intimidation or bullying prevention task forces, programs, and other initiatives involving school employees, students, administrators, volunteers, parents, guardians, law enforcement and community representatives.”¹³⁰

Finally, West Virginia encourages but does not require “schools and county boards . . . to form bullying prevention task forces, programs and other initiatives involving school staff, students, teachers, administrators, parents, law enforcement and community members.”¹³¹ In addition to these program, West Virginia law also requires, “to the extent state and federal funds are appropriated for [such] purposes,”¹³² that each school district:

(1) Provide training on the harassment, intimidation or bullying policy to school employees and volunteers who have direct contact with students; and (2) Develop a process for educating students on the harassment, intimidation or bullying policy; and (3) Information regarding the county board policy against harassment, intimidation, or bullying shall be incorporated into each school’s current employee training program.¹³³

V. ANALYSIS

Although Title IX is a helpful tool in the eradication of harassment in schools, it is not enough. Title IX does not require schools to adopt written policies prohibiting sexual harassment, it applies only to the most severe and egregious forms of harassment, and it is debatable whether it applies to sexual orientation harassment. Nonetheless, states can close this gap by passing laws that require schools to specifically define the types of harassment prohibited as well as to outline the reporting, drafting, investigation and discipline procedures. Because such laws would necessarily involve some curtailment of the hateful, offensive speech that so often accompanies bullying, legislatures must be mindful of the First Amendment when drafting these laws. Of course, even though

128. *Id.* § 24-100.5(B) (1997).

129. *Id.*

130. OR. REV. STAT. § 339.359 (2003).

131. W. VA. CODE § 18-2C-5(a) (2004).

132. *Id.* § 18-2C-5(b) (2004).

133. *Id.*

such laws may limit free speech, many commentators have questioned and criticized this rigid adherence to the First Amendment.¹³⁴ The better approach would be to adopt a balancing test that weighs the value of speech against the harm it produces.¹³⁵ Under this pragmatic approach, anti-bullying statutes will not run afoul of the Constitution because harassing speech is of very little or no value which is outweighed by the devastating harm it produces.

A. Title IX Is Not Adequate by Itself to Protect Students from Harassment

Because Title IX does not require schools to adopt specific written policies prohibiting sexual harassment, it is absolutely vital that state anti-bullying statutes be bolstered and used.¹³⁶ Requiring schools to adopt, disseminate and enforce strict anti-bullying policies will deter harassment incidents and serve as a clear indicator that the school will not tolerate or condone harassment. Experts contend that bullying can be reduced by up to fifty percent if a school-wide commitment to end bullying is adopted.¹³⁷ Part of that approach involves forming clear rules and strong social norms against bullying.¹³⁸ This premise is also supported by GLSEN, which found a relationship between student safety, school attendance and safe schools laws. Among the several key findings is that LGBT students who did not have (or did not know of) a policy protecting them from violence and harassment were forty percent more likely to report skipping school out of fear for their personal safety.¹³⁹ Yet despite their proven effectiveness, without specific legislation requiring written policies, schools will not adopt them.¹⁴⁰

¹³⁴ David Feldman, *Content Neutrality*, in *IMPORTING THE FIRST AMENDMENT* 140, 146 (Ian Loveland ed., 1998).

¹³⁵ See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & NAT'L ASS'N OF ATT'YS GEN., *PROTECTING STUDENTS FROM HARASSMENT AND HATE CRIME* 27 (Jan. 1999), <http://www.ed.gov/offices/OCR/archives/Harassment/index.html>

¹³⁶ U.S. DEP'T OF EDUC., *supra* note 135, provides that Title IX requires a recipient of Federal funds to notify students and parents of elementary and secondary students of its policy against discrimination based on sex and have in place a prompt and equitable procedure for resolving sex discrimination complaints. Sexual harassment can be a form of sexual discrimination. The *Guidance* clearly states that, while a recipient's policy and procedure must meet all procedural requirements of Title IX and apply to sexual harassment, a school does not have to have a policy and procedure specifically addressing sexual harassment, as long as its non-discrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination. The Office for Civil Rights has found that policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited sex discrimination, and that it will not be tolerated by the school. That awareness, in turn, can be a key element in preventing sexual harassment.

¹³⁷ Nels Ericson, *Addressing the Problem of Juvenile Bullying*, Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet 27 (June, 2001), available at <http://www.ncjrs.org/pdffiles1/ojdp/fs200126.pdf>

¹³⁸ *Id.*

¹³⁹ GLSEN, *supra* note 25.

¹⁴⁰ See Press Release, Dave Horn, Assistant Attorney General of Washington State, *Myths and Facts About the Bullying / Safe Schools Bill* (Feb. 5, 2002), at http://www.safeschoolscoalition.org/bully_summary2-5-02.pdf.

In addition, anti-bullying legislation is needed to provide remedies for the types of harassment that are beyond the scope of Title IX, because Title IX will only provide a remedy if the sexual harassment is sufficiently severe, persistent or pervasive to affect a student's ability to participate in or benefit from an educational program. Often sexual harassment will not rise to this extreme level, yet this behavior should not be tolerated in our nation's schools. The anti-bullying policies should therefore not be limited to only the most severe incidents. Instead, they should prohibit any harassment that has the purpose or effect of substantially or unreasonably interfering with an individual's academic performance or adversely affecting an individual's learning opportunities. Additionally, state anti-bullying policies should not define hostile environments in the same way that federal courts do,¹⁴¹ but instead should broaden them to include situations even where no tangible harm is suffered by the student.

This type of broader definition will also help to prohibit sexual and non-sexual behavior directed at a student because of the student's sexual orientation, which may not fit within Title IX's definition of sexual harassment. Because the Supreme Court has not officially ruled that discrimination based on sexual orientation fits within Title VII or Title IX's protections, a major gap possibly exists for plaintiffs suffering from this common type of harassment. For example, heckling comments made to students because of their sexual orientation, such as "gay students are not welcome here," do not constitute sexual harassment under Title IX.¹⁴² There is no good reason why such behavior should be overlooked in schools.

Indeed, lower courts are making headway in this realm. Despite originally holding that Title VII did not protect against sexual orientation discrimination, lower courts recently appear to interpret Title VII as now encompassing discrimination based on sexual orientation.¹⁴³ For example, in *Rene v. MGM Grand Hotel, Inc.*,¹⁴⁴ the Ninth Circuit sitting en banc reversed the lower court and a divided Ninth Circuit panel's ruling that a homosexual male could not bring suit under Title VII to recover for the verbal and physical harassment he suffered from his co-workers.¹⁴⁵ Plaintiffs have successfully used various theories to support their Title VII cases including the Sex-Specific Harassment Theory, the Sex-Stereotyping Theory and the Disparate Impact Theory.¹⁴⁶ However there are still many Circuits that refuse to allow Title VII protection for sexual orientation discrimination.¹⁴⁷

141. See Davis, 526 U.S. at 652.

142. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & NAT'L ASS'N OF ATT'YS GEN., *supra* note 135, at 18.

143. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding that there was no protection under Title VII for sexual orientation discrimination).

144. 305 F.3d 1061 (9th Cir. 2002).

145. *Id.* at 1064.

146. For a discussion of these theories and summaries of the cases, see Matthew Clark, Note, *Stating A Title VII Claim For Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. REV. 313 (2003).

147. See *e.g.* *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

The courts have viewed Title IX in the same manner. For example, the Northern District of California, relying on the Title VII cases for guidance, allowed a suit to proceed holding that harassment due to the victim's perceived homosexuality can constitute "sexual harassment" within the meaning of Title IX.¹⁴⁸ At the same time, however, a Minnesota federal district court dismissed a plaintiff's Title IX claims based on discrimination due to his sexual orientation or perceived sexual orientation.¹⁴⁹ Until the Supreme Court speaks directly on this issue or Congress amends Title IX to include sexual orientation, anti-bullying statutes are necessary to cover these gaps.

B. Necessary Components for an Effective Anti-Bullying Statute

To be effective state legislatures should require school district policies to include the following components: (1) a general statement of the policy that a school district values a learning and working environment that is free from any type of violence and harassment; (2) consistent statewide definitions of the types of violence and harassment prohibited; (3) specific reporting procedures; (4) specific investigation procedures; (5) consistent range of school district actions; (6) reprisal provision prohibiting retaliation; (7) a statement that policy does not prohibit other procedures available or required under law; (8) provisions describing how the policy will be disseminated and employees and students trained; (9) penalty provisions for schools that fail to adopt or enforce anti-bullying policies; (10) requirement that policies be submitted for review to the State's Department of Education

Unfortunately, many anti-bullying statutes do not require all of these components, and, as a whole, they are too deferential to the decision-making powers of local school authorities. The way in which most of these laws define "bullying" is a good example. Although a few of the anti-bullying laws discussed in Part V of this article give meaning to the term themselves, most leave this task entirely within the discretion of local school districts. As such, it is possible that the type of conduct punishable as "bullying" within one school district might not constitute a punishable offense in another district within the same state. Such an incongruous approach to defining the very conduct that an anti-bullying law seeks to address does nothing but confuse the purpose of such legislation. Ultimately, then, the great deference now afforded to local school districts in defining "bullying" only serves to undermine any effectiveness that the state's anti-bullying law might otherwise have.

At a minimum, the statutes should require the anti-harassment policies to prohibit harassment based on the victim's actual or perceived race, gender, sexual orientation, gender identity, ethnicity, or disability. By including religion and sexual orientation, these policies will be broader than the prohibitions

148. *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1171 (N.D. Cal. 2000). *See also Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 834 (S.D. Iowa 2004).

149. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000). The court did hold, however, that Title IX would support a claim of harassment based on the perception that plaintiff did not fit his peers' stereotypes of masculinity.

found in federal statutes.¹⁵⁰ The statute itself should define these various types of harassment. The definition should make clear that harassment is not limited to oral conduct but may include written, graphic and physical conduct relating to each category. The statute should encourage districts to provide examples of harassing behavior for each category.¹⁵¹ In addition, the statute should require that all policies prohibit harassment during all academic programs and extra-curricular activities even if occurring outside of school.

Just as many state anti-bullying laws afford too much deference to local school districts in defining “bullying,” these laws also allow local authorities too much leeway in fashioning a remedy for violations of a school’s anti-bullying policy. Here again, many of the laws discussed in Part V of this article are silent as to what type of recourse should be levied against a student found to be in violation of a school’s anti-bullying policy. Even those states that do provide for some form of recourse do so only generally, leaving the specifics of such a punishment entirely within the discretion of the local school district. Thus, it is likely that the punishment for bullying in one school district might substantially vary from that in another district within the same state. Such a result is simply not fair to either the victims or perpetrators of bullying. Although the authors can appreciate that the appropriate punishment should largely depend on the specifics of the incident, at a minimum, all policies should indicate the same range of distinct penalties and actions a school will employ to combat bullying and specific examples of when each should be used. An anti-bullying statute should require policies to make clear that appropriate responses to bullying incidents may include counseling, warning, suspension, exclusion, expulsion, remediation, termination or discharge. In addition, bullying will be reported to law enforcement and/or governmental and nongovernmental agencies that

150. Of those laws considered in Part IV of this article, only New Jersey’s statute has defined bullying as an act of harassment motivated by another’s religion or sexual orientation. Furthermore, only California, Minnesota and New Jersey have protections for both sexual orientation and gender identity. Only 5 other states, Connecticut, Massachusetts, Vermont, Washington, and Wisconsin, have protection for sexual orientation. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, STATE OF THE STATES 2004 2 (2004), available at <http://www.glsen.org/cgi-bin/iowa/educator/library/record/1687.html>.

151. For example, the Arizona Sample School Policy Prohibiting Harassment and Violence provides the following examples of sexual harassment: (1) sexual advances; (2) touching, patting, grabbing or pinching another person’s intimate parts, whether that person is of the same sex or the opposite sex; (3) coercing or forcing or attempting to coerce or force the touching of anyone’s intimate parts; (4) coercing, forcing or attempting to coerce or force sexual intercourse or a sexual act on another; (5) graffiti of a sexual nature; (6) sexual gestures; (7) sexual or dirty jokes; (8) touching oneself sexually or talking about one’s sexual activity in front of others; (9) spreading rumors about or rating other students as to sexual activity or performance; (10) unwelcome, sexually motivated or inappropriate patting, pinching or physical contact (This prohibition does not preclude legitimate, non physical conduct such as the use of necessary restraints to avoid physical harm to persons or property, or conduct such as teacher’s consoling hug of a young student, or one student’s demonstration of a sport’s move requiring contact with another student.); (11) other unwelcome sexual behavior or words, including demands for sexual favors, when accompanied by implied or overt threats concerning an individual’s educational status or implied or overt promises of preferential treatment. OFFICE OF THE ATT’Y GEN. (Arizona), ARIZONA SAMPLE SCHOOL POLICY PROHIBITING HARASSMENT AND VIOLENCE, *in* OFFICE FOR CIVIL RIGHTS & NAT’L ASS’N OF ATT’YS GEN. *supra* note 135, app. A, at 59.

address civil rights violations in schools in accordance with state and federal law regarding data or records privacy.

The overall effectiveness of the laws discussed in Part V of this article would be greatly increased if less deference were afforded to local school districts in the formulation and enforcement of such policies. While great deference should normally be given to a matter of local concern such as a school district policy, doing so in the context of anti-bullying breeds only uncertainty as to the type of conduct prohibited by the policy and what remedy exists for violating a state's prohibition against bullying. In order to enact truly effective anti-bullying legislation, the state legislature, either directly or through the state board of education, should articulate a single standard against which to determine whether a particular act of harassment rises to the level of "bullying" punishable under the law. Moreover, the state legislature, not the local school district, should fashion a range of remedies appropriate for the age and for the offense of those found guilty of such forms of harassment. Until these standards are brought into uniformity, the application of these laws will continue to be undermined by the inequities bred by such inconsistency.

Harmonizing the potentially numerous standards and punishments for bullying within a single state is a start, but the effectiveness of anti-bullying policies as a whole might also be increased by requiring, rather than merely encouraging, school employees to report acts of bullying to a principal or other school official. Much like Title IX liability, once a school official gets notice of the bullying, liability should attach if the school does nothing to protect the victim or if what it does is ineffective. As they currently exist, most state anti-bullying laws merely encourage school employees to report acts of bullying by relieving those doing so from any liability arising from the failure to report such conduct. Although encouraging reporting through this means is a step in the right direction to making the halls of public schools safer for students, it does not go far enough. Ideally, school employees should be *required* to report acts of bullying to school officials who in turn should have a statutory duty to investigate the report and, if legitimate, take specific action to prevent the victim from suffering any further harassment. In order to aid in this process, all anti-bullying statutes should require policies to include detailed reporting and response mechanisms. In addition, these various protocols should be well known to school officials. In addressing harassment incidents, the U.S. Department of Education recommends various procedures including encouraging students and parents to notify the district when harassment occurs.¹⁵² The school should interview the victim and make required reports as well as advise the victim of all options.¹⁵³ The school should also evaluate the victim's request for confidentiality and honor it if it can be done without limiting the school's ability to remedy the harassment.¹⁵⁴ Finally, the school needs to take prompt remedial action appropriate to the offense and the age and identity of the parties while pro-

152. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & NAT'L ASS'N OF ATT'YS GEN. *supra* note 135, at 23.

153. *Id.* at 23-24.

154. *Id.* at 24

viding interim protection including separation of the parties, referrals to victim assistance sources, and enforcement of the policy's anti-retaliation provisions.¹⁵⁵

Anti-bullying legislation would also be more effective if each school were required to disclose to the public the number of reported acts of bullying within the previous school year. Doing so would help foster a safer school environment for students by forcing school officials to take reported acts of bullying seriously or else face the reputation of being characterized by members of the local community as an "unsafe" school. If such a poor reputation were to persist for several years, surely many parents would either withdraw their child from enrollment in the school or otherwise enroll their child in another, safer school.

The effectiveness of anti-bullying statutes as a whole also might be increased if penalties were imposed upon school districts that fail to draft or enforce an anti-bullying policy. Even after the Vermont legislature had enacted its anti-bullying statute, for example, many schools ignored the law.¹⁵⁶ Although the language of many anti-bullying statutes is laudable, the purpose of these laws cannot be effectuated unless school districts and school boards are required to enforce the mandate of the state legislature that enacted the anti-bullying statute. The easiest way in which local school authorities might be made to do so is by imposing a penalty on those schools found not to be in compliance with state law. In the alternative, rewards in the way of financial incentives, might be given to those schools with the most comprehensive anti-bullying policy and the fewest amount of bullying incidents reported during a given school year. Such measures clearly require the state to do more than simply pass an anti-bullying statute as a public relations measure. If these statutes are to be effective, the state must be wholly committed to the enforcement of its anti-bullying statute and must evidence this commitment through the continuous review of those policies actually adopted by local school boards.

The greatest problem with state anti-bullying legislation, though, is the number of states that have remained silent on the issue despite an increased awareness of the ill effects bullying has on students both at home and at school. To date, thirty-three states have failed to address this issue through the enactment of an anti-bullying statute. Of these states, nearly one-half have considered such legislation. Yet, these proposals, have either failed to make it out of committee or were voted down once they reached the house floor, at least in part because they sought to prohibit harassment based upon a student's sexual orientation. Most incidents of harassment, however, involve a student who is either homosexual or perceived as such by others. Until the public comes to realize that bullying is fueled in large part by homophobia and that the gay and lesbian students need extra protection from bullies because of their sexual orientation, harassment will continue to be a part of daily life for many students.

155. *Id.*

156. Daniel Greene, The Ballenger-Green Diversity Paper, "You're So Gay!": *Anti-Gay Harassment in Vermont Public Schools*, 27 VT. L. REV. 919, 940-41 (Summer, 2003).

C. Possible Pitfalls for Legislatures to Consider When Drafting Anti-Bullying Statutes

When drafting anti-bullying statutes and policies, legislators and school administrators should be careful not to violate the First Amendment. A recent case addressed the free speech and harassment issues in the context of an anti-harassment policy passed by a school district in Pennsylvania.¹⁵⁷ The Third Circuit held that a Pennsylvania public school district violated students' First Amendment rights when the district adopted an anti-harassment policy.¹⁵⁸ The policy sought to eliminate disrespectful behavior to help meet its goal of "providing all students with a safe, secure, and nurturing school environment."¹⁵⁹

Harassment that was prohibited was defined as "[v]erbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."¹⁶⁰

Prohibited conduct included:

any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any characteristics described above, [including] unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written materials or pictures.¹⁶¹

Punishments for the harassment included "warning, exclusion, suspension, expulsion, transfer, termination, discharge . . . training, education, or counseling."¹⁶²

A guardian of two public school students brought the lawsuit alleging the policy was unconstitutional on its face.¹⁶³ The students, avowed Christians, believed their religion required them to "speak out about the sinful nature and harmful effects of homosexuality."¹⁶⁴ The students requested that the Court declare the policy unconstitutionally vague and overbroad.¹⁶⁵

The federal district court dismissed the case holding that the policy was facially constitutional.¹⁶⁶ The court read the policy as mirroring the standard already codified in Pennsylvania's Human Relations Act, Title VI and Title IX.¹⁶⁷ The court read the first paragraph defining harassment as prohibiting "language

157. See *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

158. *Id.* at 217.

159. *Id.* at 202.

160. *Id.*

161. *Id.* at 202-3.

162. *Saxe*, 240 F.3d at 203.

163. *Id.*

164. *Id.*

165. *Id.* at 203-04.

166. See *Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621 (M.D. Pa. 1999).

167. *Id.* at 626.

or conduct which is based on specified characteristics and which has the effect of 'substantially interfering with a student's educational performance' or which creates a hostile educational atmosphere."¹⁶⁸ This language is virtually the same standard used by Title IX and therefore does not prohibit anything that is not already illegal.¹⁶⁹ The court also refused to accept the plaintiff's vagueness argument, as defining harassment any more precisely may be impossible.¹⁷⁰ Finally, the district court opined that the First Amendment did not protect harassment.¹⁷¹

In reversing the district court, the Third Circuit refused to accept a "harassment exception" to the First Amendment.¹⁷² In addition, the harassment policy extended beyond the scope of the anti-discrimination laws.¹⁷³ While Title VI and Title IX cover only discrimination based on sex, race, color, national origin, age and disability, the policy covered "other personal characteristics" such as "clothing," "appearance," "hobbies and values" and "social skills."¹⁷⁴

Besides being too broad to survive constitutional scrutiny, the court held that the policy could not satisfy the tests the Supreme Court has provided to determine when student speech can be permissibly regulated.¹⁷⁵ As the policy extended to non-vulgar, non-school sponsored speech, the proper test the court must use was set out in *Tinker*.¹⁷⁶ The policy failed the *Tinker* test because it included speech that did not actually cause disruption but merely intended to do so.¹⁷⁷ The court stated:

[A]s *Tinker* made clear, the 'undifferentiated fear or apprehension of disturbance' is not enough to justify a restriction on student speech. Although [State College Area School District] correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the policy.¹⁷⁸

D. Anti-Harassment Policies Do Not Violate the First Amendment

Not surprisingly, critics of the *Saxe* opinion began voicing their disapproval.¹⁷⁹ Some criticized the court's reliance on Title VII and Title IX cases to

168. *Id.* at 625.

169. *Id.* at 626.

170. *Id.* at 625.

171. *Saxe*, 77 F. Supp. 2d at 627.

172. *Saxe*, 240 F.3d at 204.

173. *Id.* at 210–11.

174. *Id.* at 210.

175. *Id.* at 216–17; see also *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001) (also holding that a school district's policy was overbroad and vague).

176. See *Saxe*, 240 F.3d at 216.

177. *Id.*

178. *Id.* at 217.

179. See Thomas L. Henderson, *From the ACBA: Life After Free Speech Ruling*, 3 LAWYERS J. 4, 4 (2001); Martha McCarthy, *Anti-Harassment Policies In Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52 (2002).

support the conclusion that the policy was overbroad.¹⁸⁰ They argued reliance on these cases was misplaced since those cases focus on the higher standard for finding a school or employer liable for failing to address peer-on-peer harassment. In contrast, the anti-harassment policies seek to control unacceptable student behavior and schools have wide latitude to do this even if the behavior does not violate a federal or state law.¹⁸¹

In addition, the court's finding that the students' freedom of expression was violated was criticized.¹⁸² The court should have followed prior precedent that makes clear student rights are not coextensive with those of adults and that a school has more authority to limit student rights.¹⁸³ Unfortunately, the court chose to compare the policy to a hate speech ordinance without recognizing the distinction made for the treatment of expression rights in the school setting.¹⁸⁴

Although acknowledging the difficulty of classifying private expression that must be tolerated and offensive expression that can be regulated, Professor McCarthy urges courts reviewing harassment policies to remember that student speech that is lewd, indecent and disruptive is already allowed to be regulated.¹⁸⁵ Speech interferes with the education of students and is contrary to the educational goals and mission of the school can be regulated.¹⁸⁶ McCarthy fails to see how harassing expression would not easily interfere with the school's goals and mission and thinks it can therefore be regulated.¹⁸⁷ Finally, she disagrees that a showing of actual disruption is necessary before a school may constitutionally regulate student expression.¹⁸⁸

Other commentaries, instead of questioning the decision itself, have tried to warn schools about possible pitfalls to avoid in light of the problems found with the policy in the *Saxe* case.¹⁸⁹ For example, attorney Thomas L. Henderson advises schools to use consistent definitions of relevant terms and apply the policy only to conduct occurring at school or at a school-related activity.¹⁹⁰ In addition, the policy should apply only to characteristics protected by federal law and proscribe only speech that is (a) lewd, vulgar or profane or that is (b) sufficiently severe or pervasive that it interferes with educational performance and is reasonably believed to cause actual, material disruption.¹⁹¹

180. McCarthy, *supra* note 179, at 63.

181. *Id.* at 63-64.

182. *Id.* at 64.

183. *Id.*

184. *Id.*

185. McCarthy, *supra* note 179, at 65.

186. *Id.*

187. *Id.*

188. *Id.* at 66-67.

189. Henderson, *supra* at note 178, at 4.

190. *Id.*

191. *Id.*

E. Courts Need to Balance the Value of the Speech Against the Harm It Produces

Although the above advice may be helpful to a school district, the real problem with *Saxe* and many cases dealing with the First Amendment in other settings is that judges allow the First Amendment “principles free reign without regard to the desirability or otherwise of the outcomes.”¹⁹² This seems to resonate particularly loudly in a case of harassment, especially since Supreme Court jurisprudence supports the principle that not all speech forms enjoy the same level of protection from state interference.¹⁹³

People who believe that freedom of speech may sometimes have to give way to the protection of other freedoms do not see this principle as demeaning the right of free speech. They would argue, as Feldman does, “a freedom which is exercised in a way which has anti-social consequences is less valuable, and when exercised in that way deserves less protection, than one which has no anti-social consequences, or confers benefits on people.”¹⁹⁴ To determine whether the right of free speech should prevail, he suggests weighing the range of social and individual interests the speech serves and how the rights contribute to those interests.¹⁹⁵ In the case of sexual harassment and bullying, allowing the harassing speech serves no social interest and only a limited individual interest, if any. In addition, social scientists claim a causal connection exists between bullying and victims committing suicide and/or homicide.¹⁹⁶ As a result, this type of situation is one in which the social harms from the speech justify the restraint on speech.

Supporters of this position argue that the origins of the First Amendment itself require such an interpretation. The basis for this argument centers on the belief that not all speech deserves the same protection. They support a hierarchy in which political speech receives more protection than commercial or artistic speech.¹⁹⁷ This is consistent with the Founders’ goals in drafting the First Amendment, as Madison’s emphasis was on guaranteeing citizens the right to criticize and question the *government*. As a result, many feel that political speech should be given the highest level of protection from governmental interference, whereas legislative regulation of harassing speech should be assessed under less rigorous scrutiny standards of a sort applied to commercial or artistic speech.

Proponents of this view argue that this will not be contrary to existing case law. The balancing approach and the view that the freedom of speech can be limited if it harms others can be found in very early American writings, includ-

192. David Feldman, *Content Neutrality*, in *IMPORTING THE FIRST AMENDMENT* 140, 146 (Ian Loveland ed., 1998).

193. Ian Cram, *Beyond Madison? The U.S. Supreme Court and the Regulation of Sexually Explicit Expression*, 2002 *PUBLIC LAW* 743, 746.

194. Feldman, *supra* note 192, at 166-67.

195. *Id.* at 167.

196 See generally Office of Juvenile Justice and Delinquency Protection, OJJDP Fact Sheet (June 2001) at <http://www.ncjrs.org/pdffiles1/ojjdp/fs200127.pdf> (last visited Apr. 19, 2005) and Atrium Society, *Bullying Statistics* at <http://www.atrumsoc.org/pages/bullyingstatistics.html> (last visited Apr. 19, 2005).

197. For a more in depth discussion see Cram, *supra* note 193, at 746.

ing Justice Story's treatise on the constitution.¹⁹⁸ For example, commentators argue that a restriction on certain forms of pornography is comparable to the regulations on false commercial speech which would cause harm.¹⁹⁹ They argue that the "prevention of harm" justification is a sounder basis for supporting the pornography regulations than the "moral consensus" position based on contemporary community standards.²⁰⁰ Why could this same analysis not apply to harassing speech?

Recently, however, the Supreme Court of the United States has steadily been moving away from using this categorization of high and low value speech approach to analyzing free speech claims.²⁰¹ Instead of using a balancing test weighing the value of the speech against the harm it produces, the Court has preferred to analyze all content-based restrictions with strict scrutiny.²⁰² The Justices do this even though the content being regulated could be classified as having a lower value than political speech and thus deserving of less scrutiny.²⁰³ This shift in the Supreme Court's approach makes it more difficult for content regulations to survive a constitutional challenge.

As the above analysis illustrates, the tension between these two countervailing policies of protecting children from bullying and harassment and protecting individual rights is what makes no easy solution possible and what makes us uneasy with the *Saxe* decision. The Third Circuit's strict adherence to the free speech values may actually be damaging public order and the weakest members of our society.

Others share our approach specifically when analyzing the interplay of the First Amendment and harassment. In arguing that Title VII's harassment law does not run afoul of the First Amendment, Professor Ruescher urges courts to take "a pragmatic approach to determining the constitutionality of laws that restrict low-value speech by assessing whether the legislature's aim was to suppress a particular message, or, rather, to achieve a legitimate legislative goal."²⁰⁴ Using the Supreme Court's recent decision in *Virginia v. Black*,²⁰⁵ he argues that any overbreadth problems can be resolved by requiring plaintiffs to prove the speaker's intent was to harass.²⁰⁶ The court's inquiry would focus on whether

198. John F. Wirenius, *The Road to Brandenburg: A Look At The Evolving Understanding of the First Amendment*, 43 DRAKE L. REV. 1, 4 (1994).

199. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 220 (1993).

200. *Id.* at 221.

201. For an excellent discussion of the Court's recent approach, see Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 52-85 (1994).

²⁰² Werhan, *supra*, note 200, at 85.

²⁰³ *Id.* at 65-66.

204. Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment From Expression*, 23 REV. LITIG. 349, 352 (2004). See also Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and The First Amendment: Can The Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67, 87-94 (2002), (suggesting five approaches courts can use to harmonize the First Amendment and hostile environment sexual harassment law and providing a good summary of the literature concerning this heavily debated issue).

205. 538 U.S. 343 (2003) (finding a Virginia hate speech statute banning cross burnings was constitutional as long as defendant's intent to intimidate was proven).

206. Ruescher, *supra* note 204, at 352.

the speaker sought to harass or merely express an opinion.²⁰⁷ The speaker's intent would be ascertained by using a totality of the circumstances analysis.²⁰⁸ Because this would be such a significant burden on plaintiffs, Professor Ruescher suggests it only be required when "the speech, judged by its content, raises the possibility that the speaker was engaging in protected expression."²⁰⁹ This would not be the situation when the speech involved crude remarks or sexual propositions, because no expressive speech is implicated.²¹⁰ Finally, he suggests that any underbreadth issue be resolved by determining what the goal of the policy is. As long as anti-harassment policies are not "a ruse" to suppress free speech, they should be upheld.²¹¹

This approach seems a sensible one when dealing with low value harassing speech in the schools. To apply the First Amendment without weighing the harm the speech creates is to choose theory over reality. Courts have been willing to regulate commercial and artistic speech which arguably has a greater societal value than any speech used by the school bully. Consequently, this demeaning, degrading and destroying speech should be labeled low value and not be subject to strict scrutiny by the courts.

VI. CONCLUSION

Until more states enact anti-bullying legislation that has teeth and Congress amends Title IX to include sexual orientation harassment, bullying will continue to be viewed merely as an unfortunate consequence of childhood, despite research evidencing the far more extensive implications of such conduct. As a civilized nation, we can no longer treat bullying as an inescapable part of childhood but must take a more active role in preventing it. The authors do not mean to suggest that legislation is our only weapon against this crisis, but it can be a formidable weapon in our battle against the bully. We urge Congress and state legislatures to have the courage to protect our children and amend Title IX and pass anti-bullying statutes, and we urge courts to have the wisdom to analyze these new statutes in a common sense manner.

207. *Id.* at 375.

208. *Id.*

209. *Id.* at 376.

210. *Id.*

211. Ruescher, *supra* note 204, at 379.