

STICKS, STONES, AND SCHOOLYARD BULLIES: RESTORATIVE JUSTICE, MEDIATION AND A NEW APPROACH TO CONFLICT RESOLUTION IN OUR SCHOOLS

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ABSTRACT

One of the most damaging and increasing problems in our schools today is student teasing and bullying. The research is clear: victims and bystanders of bullying will experience emotional scars with long-term effects. This Article discusses the failure of the traditional legal system to prevent bullying and to provide appropriate compensation for its victims. In addition, the Article introduces a new approach to conflict resolution in our schools called the Social Inclusion Approach. Based upon principles of Restorative Justice, the Social Inclusion Approach seeks to change the climate of the school and give bystanders the power to say, "Stop." Finally, this Article discusses a model anti-bullying statute that requires schools to adopt and implement research-based, whole-school approaches to end bullying. Only in a school environment where teasing and bullying are out of place can we truly get a handle on this subversive and difficult community problem.

INTRODUCTION

Teasing and bullying are a community issue, problems which must be dealt with by society as a whole, and must involve parents, schools and the general media. Social exclusion is an attack on the soul of the child, causing emotional scars that are hard to heal, and [that] can last a lifetime.¹

Student teasing and bullying are serious problems in schools today.² The research in this area is clear: the victims of bullying will experience emotional scars with long-term effects.³ Further, bullying often affects witnesses to the

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¹ Jessie Salisbury, *Psychologist: Teasing, Bullying Involve Many Issues*, THE TELEGRAPH (Nashua, N.H.), May 12, 2000, available at <http://www.thechildtoday.com/files/SocialInclusionArticleTelegraphNH> (quoting Kim John Payne, M. Ed., the creator of the Social Inclusion Approach).

² Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 642 (2004).

³ *Id.*

bullying in serious and lasting ways.⁴ Consider the following facts regarding teasing and bullying in our schools. Estimates show that

[a]most 30% of youth in the United States (or over 5.7 million) are estimated to be involved in bullying as either a bully, a target of bullying, or both.⁵ In a recent national survey of students in grades 6-10, 13% reported bullying others, 11% reported being the target of bullies, and another 6% said that they bullied others and were bullied themselves.⁶

Educational research defines bullying as “a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child.”⁷ Bullying is sustained and cruel, and sometimes continues for years.⁸ Some call it a form of child abuse perpetrated by the child’s peers.⁹ Ample evidence shows that bullying goes on in almost every school and remains one of the most difficult problems for school officials to control.¹⁰ “Research has found that bullying is most likely to occur in schools where there is a lack of adult supervision during breaks, where teachers and students are indifferent to or accept bullying behavior, and where rules against bullying are not consistently enforced.”¹¹ Schools have employed many approaches to stop teasing and bullying, one of the most popular being peer mediation programs or other conflict resolution programs. The research shows, however, that bullying programs may not be effective when they focus primarily on individual bullies or a particular incident of bullying.¹² In contrast, school-wide commitment to end the behavior results in up to fifty percent reductions in teasing and bullying.¹³

This Article considers the Social Inclusion Approach, a program based upon the work of Kim John Payne, M.Ed., an international educator and counselor who developed a restorative justice approach to deal with conflict in schools, as a mechanism to effectively prevent and handle bullying in schools.¹⁴ Although the Social Inclusion Approach contains aspects of traditional conflict resolution, it is distinct in two ways. First, it seeks to alter the

⁴ *Id.*

⁵ Nat’l Youth Violence Prevention Res. Ctr., *Bullying Facts and Statistics*, <http://www.safeyouth.org/scripts/faq/bullying.asp> (last visited May 22, 2009) [hereinafter *National Youth*].

⁶ *Id.* (citing Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 J. AM. MED. ASS’N 2094, 2094 (2001)).

⁷ Weddle, *supra* note 2, at 645.

⁸ *Id.*

⁹ Dan Olweus, Annotation, *Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD. PSYCHOL. & PSYCHIATRY 1171, 1173 (1994).

¹⁰ See generally HILDA CLARICE QUIROZ ET AL., NAT’L SCHOOL SAFETY CTR., *Fact Sheet 2, in BULLYING IN SCHOOLS: FIGHTING THE BULLY BATTLE* (2006), http://www.schoolsafety.us/pubfiles/bullying_fact_sheets.pdf (describing that bullying affects all types of students and affects the entire school environment).

¹¹ National Youth, *supra* note 5 (citing DAN OLWEUS ET AL., *BLUEPRINTS FOR VIOLENCE PREVENTION: BULLYING PREVENTION PROGRAM* (Delbert S. Elliot ed., 1999)).

¹² John Braithwaite, *Education, Truth, Reconciliation: Comment on Scheff*, 67 REV. JUR. U.P.R. 609, 609 (1998). See also National Youth, *supra* note 5.

¹³ Braithwaite, *supra* note 12, at 609. See also National Youth, *supra* note 5.

¹⁴ Kim John Payne, *From the Bathrooms to the Balkans Teasing to Terrorism*, <http://www.thechildtoday.com/files/FromTheBathroomsToTheBalkansTeasingAndTerrorim> (last visited May 22, 2009); see generally *The Child Today*, *Social Inclusion & The New Rites of Pas-*

school climate as a whole by requiring the community to define teasing and bullying explicitly.¹⁵ By creating a “telling” culture, bystanders and witnesses of bullying are more likely to speak out and stop the bullying behavior. Second, the Social Inclusion Approach borrows from the Restorative Justice movement by holding those who bully accountable for their actions without blame.¹⁶ The Social Inclusion Approach is one example of a whole-school approach that seeks to change the school environment by raising awareness about bullying, increasing teacher and parent involvement and supervision, forming clear rules and strong social norms against bullying, and providing support and protection for all students.¹⁷

Part I of this Article examines bullying behavior in terms of its effects on both the child who bullies and the target of bullying behavior. Part II examines the failures of the traditional legal system to prevent school bullying or to provide compensation to victims of serious bullying. Part III outlines and discusses the limitations of traditional peer mediation as a means of conflict resolution in schools. Part IV examines the Social Inclusion Approach as a specific example of a whole-school approach to end violence and bullying in our schools. Part V examines how conflict resolution works within the Social Inclusion Approach, specifically the “Ready for Change” Meeting and “No Blame” Mediation. Part VI examines state legislative responses to bullying and suggests additional components for a model bullying statute. Finally, this Article concludes by suggesting that although there will always be conflict in our schools, we need a new way to approach conflict resolution positively so that it becomes an opportunity for growth and development for our children rather than an instrument for further destruction.

I. THE BULLYING CYCLE

Whether perpetrated by girls or boys, bullying has three consistent characteristics: “1) Repetitive negative actions targeted at a specific victim, 2) Direct confrontation caused by a perpetrated imbalance of power, and 3) Effective manipulation of emotional responses such as fear, inadequacy, etc.”¹⁸ Another important aspect of bullying is the “physical or psychological intimidation occurs repeatedly over time to create an ongoing pattern of harassment and abuse.”¹⁹

sage: Addressing Isolation, Teasing & Bullying, <http://www.thechildtoday.com> (last visited May 22, 2009) (describing the Social Inclusion Approach more generally).

¹⁵ See generally The Child Today, The Social Inclusion Approach: How the Training and Implementation Process Works, <http://www.thechildtoday.com/files/HowTheTrainingAndImplementationProcessWorks> (last visited May 22, 2009).

¹⁶ See generally Therese Sibon, The Importance of the No Blame Meeting, <http://www.thechildtoday.com/files/TheImportanceOfTheNoBlameMeeting> (last visited May 22, 2009).

¹⁷ *Id.*

¹⁸ Weddle, *supra* note 2, at 646.

¹⁹ *Id.*

Bullies feel a strong need to dominate others and often have little empathy for their targets.²⁰ Boys who bully are often physically bigger and stronger than their targets.²¹ Although we might assume that bullies tend to be anti-social, the research suggests that bullies actually do have friends. “Their friends typically share their pro-violence attitudes and problem behaviors (such as drinking and smoking) and may be involved in bullying as well.”²² Unfortunately, these friends also tend to participate in the bullying behavior.²³

Targets of bullying often keep their problems a secret because they feel they should handle bullying themselves and also worry about the bully’s revenge or other children’s disapproval. Moreover, “they think that adults can do little to help them.”²⁴ For example, children often hide bullying from their teachers despite the fact that teachers may be in the best position to intervene on the victim’s behalf. “Teachers’ lack of awareness is evident in playground observations in which teachers intervened to stop only one in twenty-five . . . bullying episodes.”²⁵

How does the bullying cycle start? One educator makes an interesting analogy between bullying in our schools and the horror of genocide.²⁶ Kim John Payne asserts that “when ‘joking around’ crosses the line into put-downs and then teasing we are witnessing the genesis of genocide.”²⁷ The act of dehumanizing another person is at the center of this phenomenon.²⁸ The research suggests that the common features of terrorists are strikingly similar to those of children who bully: a lack of empathy and a sense of “powerlessness but most telling a sense that no one would listen to their story.”²⁹ Payne argues that terrorists often believe their cause will be heard only when they turn to extreme

²⁰ Olweus, *supra* note 9, at 1180; Kim John Payne, *The Child Today, The Social Inclusion Approach: Justice without Blame: A Workshop Guide for Intervention* 37 (unpublished manuscript, on file with the author) [hereinafter *Guide*]; National Youth, *supra* note 5.

²¹ Olweus, *supra* note 9, at 1180; National Youth, *supra* note 5.

²² National Youth, *supra* note 5 (citing Nansel et al., *supra* note 6, at 2099).

²³ *Id.* (citing DAN OLWEUS, *AGGRESSION IN THE SCHOOLS: BULLIES AND WHIPPING BOYS* (1978)).

²⁴ *Guide*, *supra* note 20, at 37.

²⁵ *Id.*

²⁶ Payne, *supra* note 14. My interest in the Social Inclusion Approach came as a result of attending a three-day training lead by Kim John Payne in Minneapolis, MN, in May 2006, to train community/parent mediations in the techniques of the Social Inclusion Approach. The following description of Payne’s beliefs and his Social Inclusion Approach is my summary of various aspects of the training. On Payne’s website, there are various descriptions of the approach written by other training attendees and a short paper by Payne. However, there are no authoritative documents of Payne’s approach except that come from his training materials. As such, the authority for much of this paper will refer the reader to Payne’s website, and to the training materials I received as a participant in my training. Kim John Payne has granted me permission to cite to his website and training materials in this paper. I also refer to outside authority as appropriate to lend additional support for Payne’s assertions.

²⁷ Payne, *supra* note 14, at 1.

²⁸ *Id.* See also BARBARA COLOROSO, *EXTRAORDINARY EVIL: A SHORT WALK TO GENOCIDE*, at xxi, 52-53 (2007) (asserting that that genocide is simply bullying taken to its extreme; it’s a slippery slope from the schoolyard scene in which a bully picks on someone as a growing crowd either joins in or passively stands by, to hate crimes, to an entire group in a country being exterminated by another).

²⁹ Payne, *supra* note 14, at 1.

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violence.³⁰ Payne sees similarities between terrorists and children who bully: they each feel their cause is “just” and that it is an “us against them” dynamic.³¹

[Terrorists] feel the adversary is much bigger and more powerful and therefore they have few choices but to adopt what they see as direct action. Likewise most children who tease and bully ironically enough see themselves as victims. This is brought about because many schools lack the tools or interest to spend time working through conflict and instead rely primarily on a moralistic and punitive approach.³²

Children who bully are told their actions are not in keeping with the rules of the school.³³ Payne asserts that this results in these children feeling like outsiders.³⁴ Typical responses to bullying at school, such as reprimands, detentions, or expulsions within the school disciplinary system, are consequences that often leave the children who bully feeling like victims.³⁵ As a result, the bullies “feel justified in getting back at the school and also at the child they were bullying in the first place.”³⁶ The perpetrators “see their bullying as vindicated” and interpret their bullying behavior as “standing up for themselves.”³⁷ These beliefs lead to a “warped cycle” that is vicious and damaging in nature.³⁸

To put an end to this cycle, we need to stop resolving disputes by simply finding someone to blame and punish. The result of the “blame” game is that the accused tries to avoid punishment by claiming innocence or passing the blame onto someone else. The central question becomes: can we have justice without blame? The answer is yes, if we humanize our approach to conflict resolution. One such approach to humanizing conflict resolution is the Social Inclusion Approach.

Payne defines social inclusion as, “[e]xpressing disapproval while not seeking to give punishment and apportion blame but rather dealing with the matter openly, not judgmentally but firmly.”³⁹ Payne asserts that “social inclusion creates an open environment where kids can talk without fear of retribution and where bullies [lose] prominence.”⁴⁰

Other experts in the field support Payne’s theory. Michael Palmer, a lawyer, educator, and mediator who counsels schools, supports social inclusion and asserts that a “cheap” peace can be bought with “force, violence, and intima-

³⁰ *Id.*

³¹ *Id.* at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* See also Alixandra Blitz, Note, *Peer Mediation Programs: An End to School Violence?*, 4 CARDOZO J. CONFLICT RESOL. 6 (2002) (discussing the problem with punitive measures of discipline in school violence situations).

³⁷ Payne, *supra* note 14, at 2.

³⁸ *Id.*

³⁹ Bethany Paquin, *Bullying Expert Speaks at PES*, MONADNOCK LEDGER (Peterborough, N.H.), Oct. 31, 2002, available at <http://www.thechildtoday.com/files/SocialInclusionArticlePeterboroughNH> (quoting Kim John Payne).

⁴⁰ *Id.*

tion.”⁴¹ But, Palmer reminds us, “this is a peace without justice, which is the same as deferred war.”⁴²

Payne bases his theory of social inclusion in part on a restorative justice methodology. “Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”⁴³ One important principle of restorative justice is to focus on the rehabilitation of the offender.⁴⁴ A restorative justice approach requires a community to change its focus from a punitive approach to “inspiring grace in victims and offenders by showing compassion.”⁴⁵ For Payne, this approach involves ensuring that the child who bullies understands the deeper implications of her actions.⁴⁶ Further, the perpetrator participates in designing and carrying out an agreed-upon resolution. “Human dynamic replaces blame and a chance to put things right replaces shame.”⁴⁷ The Social Inclusion Approach “confronts the bully with the implications of her actions but does not seek to apportion blame.” Instead, it seeks to find a way to permanently improve the situation.⁴⁸

Most of all, the Social Inclusion Approach involves in its problem-solving process the most influential group in the bullying problem: the bystanders and witnesses to the bullying behavior.⁴⁹ The premise of the Social Inclusion Approach is changing the culture of the school: “When you change the bullying culture, everything changes when you focus on kindness.”⁵⁰ Parents, teachers, and bystanders must become involved each time they see something happen.⁵¹ Conflicts on the playground are inevitable, but conflict can go horribly wrong when nothing is done about it.⁵² “Bullying is a community issue. It has to involve the media, parents, [and] schools. A school’s anti-bullying policy will have only limited effect (in the outside world). Children have to get involved. Students have to know it is wrong.”⁵³

Based upon principals of restorative justice, the Social Inclusion Approach seeks to end the bullying cycle, and to give schools, parents, and students the practical tools for long-lasting change.

⁴¹ Michael Palmer, *Civic Education and Peace*, VT. B.J., Fall 2005, at 35, 35.

⁴² *Id.*

⁴³ Diana L. Grimes, *Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems in Clergy Sexual Abuse Cases*, 63 WASH. & LEE L. REV. 1693, 1702 (2006) (citing Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 372-73 (1999)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1703.

⁴⁶ Payne, *supra* note 14, at 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Salisbury, *supra* note 1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

II. THE FAILURE OF THE TRADITIONAL LEGAL SYSTEM TO REMEDY SCHOOL BULLYING

In order to stop bullying, harassment, and violence in our schools, courts and legislators must provide schools with an incentive to adopt a whole-school approach towards conflict resolution.⁵⁴ Traditional legal remedies for victims of serious bullying are ineffective because they “view bullying from an incident-based perspective rather than from a school culture perspective.”⁵⁵ The legal system focuses on what school administrators knew about specific incidents rather than what the school could have done to ensure a culture where bullying is unacceptable to everyone in the school.⁵⁶ This section will briefly review federal and state remedies available for victims of bullying and illustrate how they have failed to provide any real incentive for change within our schools.

A. Federal Law Approaches

1. Title IX and Gender-Based Bullying

One obvious form of bullying in today’s schools is gender-based bullying; in fact, sexual harassment can be viewed as a form of bullying with gender as its focus.⁵⁷ Title IX prohibits discrimination on the basis of sex “under any education program or activity receiving Federal financial assistance.”⁵⁸ Title IX, however, has been narrowly construed by the United States Supreme Court, and the holding in *Davis v. Monroe County Board of Education*⁵⁹ makes it particularly difficult for plaintiffs to sustain a claim for gender-based bullying.⁶⁰ In *Davis*, a fifth grade girl experienced repeated verbal and physical sexual harassment at school by a male classmate.⁶¹ Although the girl made repeated appeals to several school officials and her teachers about the harassment, the school did nothing to stop the harassment.⁶² The harassment was sufficiently severe that the harasser was eventually charged with sexual battery; nevertheless, it had taken three months of complaining to school officials before the victim was allowed to move to a seat in another part of the class-

⁵⁴ By “whole school approach,” I am referring to an anti-bullying program that works to change the culture of the school by involving all aspects of the school community, i.e., parents, teachers, students, administrators, lunchroom staff, community members, etc. One example of such a program, in addition to the Social Inclusion Approach, is the Olweus Bullying Prevention Program, which has consistently been shown to reduce bullying in all types of school settings by thirty to seventy percent in the first year of implementation. See Olweus Bullying Prevention Program, <http://www.clemson.edu/olweus/index.html> (last visited May 22, 2009).

⁵⁵ Weddle, *supra* note 2, at 658-59.

⁵⁶ *Id.* at 659.

⁵⁷ *Id.* at 660.

⁵⁸ 20 U.S.C. § 1681(a) (2006).

⁵⁹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

⁶⁰ See *id.* at 633. See also Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387 (2002) (discussing that courts have exhibited confusion with regard to applying the *Davis* standards of “actual notice,” “deliberate indifference,” etc.).

⁶¹ *Davis*, 526 U.S. at 633.

⁶² *Id.* at 633-34.

room away from the boy.⁶³ Under *Davis*, school officials are liable for damages “only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁶⁴ Like other standards of liability involving bullying, the *Davis* standard looks to the school’s response to specific incidents of known harassment rather than to the school’s response to an overall culture that permits the behavior to continue.⁶⁵ Thus, while *Davis* certainly requires schools to act when they have knowledge of gender-based harassment, “it does not place any affirmative duty upon schools to anticipate such behavior and take effective steps to prevent it.”⁶⁶ As such, a bullying victim cannot easily sustain a claim under title IX.⁶⁷

2. Section 1983 Claims for Federal Rights Deprivations

Claims brought under § 1983 of the Civil Rights Act have not been any more successful than title IX claims.⁶⁸ Under § 1983, students can hold a school liable by arguing that the school has deprived students of their constitutional rights to due process or equal protection.⁶⁹ Students can assert a § 1983 claim and argue that their due process rights were violated based upon a school’s special relationship with the students, and that under this relationship, the school is liable for harms inflicted on students while under the school’s care.⁷⁰ Alternatively, students may argue that the school was aware of the likelihood of bullying and created an environment in which bullying acts could occur, resulting in violation of their substantive due process rights.⁷¹ Additionally, bullying victims can seek relief under theories of discrimination and denial of equal protection rights because of their membership in a definable class.⁷²

Under § 1983, bullying victims can raise a claim that bullying has violated either their Fourteenth Amendment right to (1) substantive due process under the Due Process Clause or (2) equal treatment under the Equal Protection Clause.⁷³ While § 1983 does not give bullying victims any substantive rights, it does give bullying victims the ability to raise a federal constitutional or statu-

⁶³ *Id.* at 634-35.

⁶⁴ *Id.* at 650.

⁶⁵ Weddle, *supra* note 2, at 660.

⁶⁶ *Id.* at 661.

⁶⁷ Paul M. Secunda, *At the Crossroads of Title IX and a New “Idea”: Why Bullying Need Not Be “A Normal Part of Growing Up” for Special Education Children*, 12 DUKE J. GEN- DER L. & POL’Y 1, 9 (2005).

⁶⁸ 42 U.S.C. § 1983 (2006). Section 1983 grants plaintiffs a private right of action for injuries suffered as a result of violations of the constitution or other federal law. *Id.* The statute provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

⁶⁹ Secunda, *supra* note 67, at 22.

⁷⁰ *Id.* at 27; Weddle, *supra* note 2, at 664.

⁷¹ Secunda, *supra* note 67, at 27; Weddle, *supra* note 2, at 666.

⁷² Weddle, *supra* note 2, at 670.

⁷³ *Id.* at 663.

tory claim “against an individual acting in an official manner under color of state law.”⁷⁴ A review of the substantive due process and equal protection § 1983 claim possibilities illustrates the difficulties for bullying victims in raising federal claims.

a. Substantive Due Process Claims

Generally, substantive due process § 1983 claims have little success because the state has no obligation to protect its citizens from violent acts by private individuals.⁷⁵ Basically, a school is not liable for violation of a student’s rights if the school has no duty to protect them. However, there are two instances when states are vested with a duty to protect: “(1) where a ‘special relationship’ exists between the state and the person harmed; or (2) where the state is responsible for the ‘creation of the danger’ which caused the person’s harm.”⁷⁶ Despite these two liability theories, bullying victims still have had little success in raising § 1983 substantive due process claims against schools.

Special Relationship Theory: Under the special relationship theory of substantive due process, students argue that because schools exercise control over them, schools are vested with a special duty to protect students from bullying acts.⁷⁷ However, the special relationship theory fails because courts do not recognize a special relationship between schools and their students.⁷⁸ Courts find a special relationship to exist where an individual is involuntarily under the control of the state.⁷⁹ “[G]enerally, the [S]tate must take a person ‘into its custody and hold[] him there against his will’ before an affirmative duty arises to protect him from harms inflicted by private persons.”⁸⁰ Absent an affirmative duty to protect, the State cannot be held liable for the actions of the bullying student, a private person.

Plaintiffs have argued that schools have an affirmative duty to protect students because students are statutorily required to attend schools.⁸¹ However, courts have rejected this argument by pointing out that students leave at the end of the school day and return home to their parents.⁸² “Therefore, students cannot be deemed to be ‘unable to act on [their] own behalf; they can freely turn to their parents and even to law enforcement officials, if necessary, for aid and protection.”⁸³ Thus, bullying victims are unable to raise successful § 1983 substantive due process claims under the special relationship theory.

‘Creation of the Danger’ Theory: Like the special relationship theory, the creation of danger theory presents problems for bullying victims. A victim of bullying may argue that the school was aware of the bully’s apt to harm him or

⁷⁴ Secunda, *supra* note 67, at 21-22.

⁷⁵ *Id.* at 26.

⁷⁶ *Id.* at 26-27.

⁷⁷ *Id.* at 27; Weddle, *supra* note 2, at 664.

⁷⁸ Weddle, *supra* note 2, at 664.

⁷⁹ Secunda, *supra* note 67, at 27.

⁸⁰ Weddle, *supra* note 2, at 664-65.

⁸¹ See *Stevenson v. Martin County Bd. of Educ.*, 3 F. App’x 25, 31 (4th Cir. 2001) (per curiam); *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 993-94 (10th Cir. 1994); *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990).

⁸² Weddle, *supra* note 2, at 665.

⁸³ *Id.*

her and did nothing to stop the bully, thus creating the danger. For a school to be liable for creating the danger, victimized students must establish that the school (1) created a dangerous environment and (2) through its authority, provided the bully with the opportunity to commit bullying actions.⁸⁴ Bullying victims' claims fail under this theory because courts require a showing that a school official took an affirmative act that "increased or enhanced the danger to" the student.⁸⁵ Knowledge and indifference to occurrences of bullying do not meet the affirmative act requirement, because courts require schools to actually take action to enhance the bullying.⁸⁶ "Where the state actor merely fails to act in the face of a known danger, the courts have been unwilling to view the inaction as a danger-enhancing affirmative act absent deliberate indifference to the plaintiff's plight."⁸⁷

Even when students are able to establish an egregious action by a school official, courts are cautious to hold schools liable. "Courts will usually conclude that any danger of peer-on-peer bullying and violence existing in the victim's school is not the fault of school officials, despite the officials' inaction concerning—or, in some cases even their participation in—the harassment."⁸⁸ For a school to be liable for creating a danger, its actions to bring about the danger must "shock the conscience."⁸⁹ Therefore, a claim brought under the creation of danger exception will likely fail. Accordingly, student victims attempting to bring a § 1983 substantive due process claim face an uphill, losing battle.

b. Equal Protection

Victims of bullying who attempt to bring § 1983 claims under the Equal Protection Clause of the Fourteenth Amendment also face similar hurdles. The Equal Protection Clause states, "[n]o state shall . . . deny to any person within its jurisdiction equal protection of the laws."⁹⁰ States are not required to treat everyone equally under the Equal Protection Clause, but unequal treatment by a state cannot be based on an individual's membership in a definable or protected class.⁹¹ Victims of bullying seeking to recover under the Equal Protection Clause must establish that they (1) are a member of a protected class; and (2) that the school officials failed to stop the bullying because the student was a part of a protected class.⁹²

Under the Equal Protection Clause, bullying victims must establish that in comparison to other students in a similar situation, the school provided them less protection from harassment and that the school's decreased protection

⁸⁴ *Id.* at 666.

⁸⁵ *Id.* See *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir. 1998); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992); *Sanders v. Bd. of County Comm'rs*, 192 F. Supp. 2d 1094, 1109 (D. Colo. 2001).

⁸⁶ See *Doe v. Sabine Parish Sch. Bd.*, 24 F. Supp. 2d. 655, 664 (W.D. La. 1998).

⁸⁷ Weddle, *supra* note 2, at 667.

⁸⁸ *Id.* at 670.

⁸⁹ See *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL 276975, at *8 (D. N.H. Mar. 21, 2001).

⁹⁰ U.S. CONST. amend. XIV, § 1.

⁹¹ Weddle, *supra* note 2, at 671.

⁹² *Id.*

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resulted because the victim belonged to a protected class.⁹³ In addition, the victim must show that the “disparate treatment” received “was not merely negligently discriminatory” but was “intentionally discriminatory” or deliberately indifferent to the victim’s rights because of his or her disfavored class status.⁹⁴

The first problem students encounter is showing that they are a part of an identifiable class and that the school discriminated against them *because* of their class status. Generally, students are not able to establish membership in a protected class.⁹⁵

Students who are able to establish membership in a protected class then face a bigger burden: demonstrating the school’s inaction was *due to* their membership in the protected class. As Professor Daniel Weddle points out:

The problem for most victims, of course, is that the motivation behind the school officials’ inaction is not the victims’ membership in some identifiable class. Instead, the inaction is rooted in the officials’ apathy about bullying generally or their inability or unwillingness to recognize the extent of the problem or the seriousness of the victim’s plight.⁹⁶

Thus, victimized students raising claims under the Equal Protection Clause rarely succeed. Overall, bullying claims raised under § 1983 of the Civil Rights Act have little success because “most courts are reluctant to conclude that school officials should be saddled with the responsibility, under the Constitution, to protect students from one another.”⁹⁷

B. State Law Approaches

In addition to claims based in federal law, a victim of bullying can also attempt to hold a school liable under a state legal theory. However, like the federal claims, state legal claims have been ineffective in providing victims with compensation for their injuries and preventing bullying more generally. This section reviews the following mechanisms for holding schools liable for bullying under state law: (a) state anti-bullying legislation; (b) “zero tolerance” approaches; and (c) state tort claims against schools. Discussion of the limitations of these three state law approaches further establishes that the current legal system is unable to remedy school bullying.

1. The Ineffectiveness of Anti-Bullying Legislation

The first way states have attempted to legally combat bullying is through anti-bullying statutes. Despite the good intentions with which state legislatures enacted these statutes, they have been largely ineffective in reducing incidents of bullying because they focus on specific incidents rather than forcing schools to adopt a whole-school approach to bullying. “Statutory attempts to address bullying directly fail, for the most part, to require the processes that are critical

⁹³ *Id.* See also *Nabozny v. Podlesny*, 92 F.3d 446, 453-54 (7th Cir. 1996); *Snelling*, 2001 WL 276975, at *9.

⁹⁴ Weddle, *supra* note 2, at 671. See also *Nabozny*, 92 F.3d at 453.

⁹⁵ Weddle, *supra* note 2, at 672.

⁹⁶ *Id.*

⁹⁷ *Id.*

to effective prevention, leaving schools the option of creating anti-bullying policies, but not anti-bullying cultures.”⁹⁸

Not all states have anti-bullying statutes. Those that do typically require each school board to adopt anti-bullying policies.⁹⁹ However, these policies vary in their specificity with regard to dealing with teasing and bullying. This variance leaves the issue largely to the discretion of individual schools.

Most statutes start off with a comprehensive definition of bullying.¹⁰⁰ For example, a typical definition of bullying is:

- . . . any intentional gesture or written, verbal, or physical act that:
- (a) A reasonable person under the circumstances should know will have the effect of harming a student or damaging his property or placing a student in reasonable fear or 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.¹⁰¹

Typically, anti-bullying statutes then require schools to create a school policy defining and prohibiting bullying. School-wide distribution of the policy is required, and the policy must be made generally available to all students and their families.¹⁰² Different statutes require the policies to contain different components. For example, some require employees to report suspected bullying incidents; others prohibit retaliation against individuals who report incidents; and some include “model policies” for use in creating school policies.¹⁰³

⁹⁸ *Id.* at 673.

⁹⁹ At the time of this Article, the following states have passed anti-bullying statutes: Alaska, ALASKA STAT. § 14.33.200 (2008), Arizona, ARIZ. REV. STAT. ANN. § 15-341(40) (2008), Arkansas, ARK. CODE ANN. § 6-18-514(a) (2008), California, CAL. EDUC. CODE § 32261 (West 2008), Colorado, COLO. REV. STAT. § 22-32-109.1(2)(a)(X) (2005), Connecticut, CONN. GEN. STAT. § 10-222d (2008), Delaware, DEL. CODE ANN. tit. 14, § 4112D(b) (2008), Georgia, GA. CODE ANN. § 20-2-751.4(b) (2007), Idaho, IDAHO CODE ANN. § 33-512(6) (2008), Illinois, 105 ILL. COMP. STAT. 5/27-23.7(d) (2008), Indiana, IND. CODE § 20-33-8-13.5 (2008), Iowa, IOWA CODE § 280.28(3) (2008), Louisiana, LA. REV. STAT. ANN. § 17:416.13(B)(1) (2008), Maine, ME. REV. STAT. ANN. tit. 20-A, § 1001(15)(H) (2008), Minnesota, MINN. STAT. § 121A.0695 (2008), Missouri, MO. REV. STAT. § 160.775(1) (2008), New Hampshire, N.H. REV. STAT. ANN. § 193-F:3(I)(a) (2007), New Jersey, N.J. STAT. ANN. § 18A:37-13 (West 2008), New York, N.Y. EDUC. LAW § 2801-a(2)(j) (McKinney 2001), Ohio, OHIO REV. CODE ANN. § 3313.666(B) (West 2008), Oklahoma, OKLA. STAT. tit. 70, § 24-100.3(B) (2008), Oregon, OR. REV. STAT. § 339.356(1) (2008), Rhode Island, R.I. GEN. LAWS § 816-21-26(b) (2006), South Carolina, S.C. CODE ANN. § 59-63-140(A) (2008), Tennessee, TENN. CODE ANN. § 49-6-1016 (West 2008), Texas, TEX. EDUC. CODE ANN. § 37.083(a) (Vernon 2006), Virginia, VA. CODE ANN. § 22.1-279.6(B) (West 2008), Washington, WASH. REV. CODE § 28A.300.285(1) (2008), West Virginia, W. VA. CODE § 18-2C-3 (2008). While the majority of states only require schools to adopt policies, more recent statutes do require more be implemented by schools. See discussion of these state statutes *infra*.

¹⁰⁰ Fred Hartmeister & Vickie Fix-Turkowski, Commentary, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1, 9 (2005); Weddle, *supra* note 2, at 674.

¹⁰¹ LA. REV. STAT. ANN. § 17:416.13(B)(2) (2008).

¹⁰² Weddle, *supra* note 2, at 675. For example, Louisiana requires “each city, parish, and other local public school board shall adopt and incorporate into the student code of conduct as provided in this [s]ection a policy prohibiting the harassment, intimidation, and bullying of a student by another student.” LA. REV. STAT. ANN. § 17:416.13(B)(1) (2008).

¹⁰³ Weddle, *supra* note 2, at 675-76.

One significant weakness with these statutes is that schools are not required to *implement* the policies, only to adopt them.¹⁰⁴ Thus, whether a school actually carries out the policy is at its discretion. Realistically, schools have every incentive to refrain from drawing attention to bullying problems at their schools. Additionally, as Weddle points out, whether a school enforces a policy is based largely upon the school culture.¹⁰⁵ But school cultures are unlikely to fully embrace an anti-bullying policy without the involvement of the entire school community. “To the extent the policies are developed without the intensive involvement of the whole school community, they will likely be enforced only in egregious situations.”¹⁰⁶

Further, state statutes rarely provide any incentive for schools to enforce the policies.¹⁰⁷ Statutes may require schools to report disciplinary actions brought against bullying students. However, without any requirement that policies be implemented, schools who do act on bullying incidents are viewed as having problems compared with those schools that make no reports because they have no policy.¹⁰⁸ Further, statutes give immunity to those staff members who report bullying behavior, and do not create any causes of action on behalf of a victim of a serious bullying incident. Weddle asks an appropriate question: Without a cause of action available to bullying victims, what good is immunity from them?¹⁰⁹ Finally, most anti-bullying statutes fail to require teachers, administrators, and parents from receiving training in identifying bullying. Many statutes “encourage” community training as a requirement of the school’s anti-bullying policy, but whether this training will actually be implemented is based solely upon the funding available to any given school.¹¹⁰ When the statutes fail to require training, schools assume that training is unnecessary or unneeded. As one bullying expert points out:

¹⁰⁴ For example, Louisiana’s statute only requires schools to adopt a policy prohibiting bullying. LA. REV. STAT. ANN. § 17:416.13(B)(1) (2008). While the beginning of the statute requires policies be adopted by Aug. 1, 2001, the statute does not outline a penalty or consequence for schools that fail to adopt an anti-bullying policy. *Id.* See also Hartmeister & Fix-Turkowski, *supra* note 100, at 11 (“More than half of the states with anti-bullying statutes decline to specify explicit penalties for bullying infractions.”).

¹⁰⁵ Weddle, *supra* note 2, at 676. He states:

The difficulty, however, is that written policies are only as effective as the efforts to enforce them, and those efforts generally turn on whether the school culture has embraced the policies. . . . Model policies may be helpful in guiding conversations among members of a school community, but they are just as likely—perhaps more likely—to encourage boards to adopt the policies with little real involvement of the school community.

Id. (footnotes omitted).

¹⁰⁶ *Id.*

¹⁰⁷ Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 67 (2005).

¹⁰⁸ Weddle, *supra* note 2, at 677.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 677-78. For example, Louisiana provides “[a] school may, upon approval of its governing authority, develop and offer youth development and assistance programs that employ violence prevention and intervention initiatives for students in kindergarten and the elementary grades.” LA. REV. STAT. ANN. § 17:416.17 (2008). Thus, the schools are encouraged to create prevention programs, but again, no requirement or funding is given to school districts for this purpose.

The statutes seem to be based on the premise that bullying is easily discovered and that a list of consequences for bullying will address the problem. Those premises, as the educational research has demonstrated repeatedly, are false: bullying is largely an underground phenomenon, and only a cultural shift for everyone involved is likely to produce the kind of supervision by school officials that will bring it to the light and stop it.¹¹¹

Thus, while anti-bullying legislation is necessary in order to prevent bullying, current and future anti-bullying statutes must be reformed in order to prevent future bullying occurrences and to compensate the injuries of bullying victims. Section VII of this Article will discuss proposed changes to a model anti-bullying statute in more detail.

2. “Zero Tolerance” Approaches

In addition to anti-bullying legislation, many schools have adopted “zero tolerance” approaches to school bullying and harassment within their student conduct and discipline plans. Zero tolerance policies discipline students for any action of violence, regardless of the rationale behind the action.¹¹² “While zero tolerance began as a [c]ongressional response to students with guns, gun cases are the smallest category of school discipline cases.”¹¹³ Zero tolerance covers a whole range of student misbehaviors, including threats made in a classroom setting, sexual harassment, and drugs and weapons.¹¹⁴ Some critics have argued that “[z]ero tolerance has become a one-size-fits-all solution to all problems that schools confront.”¹¹⁵ Although zero tolerance policies theoretically are directed at students who misbehave intentionally, they also apply to those who misbehave unintentionally.¹¹⁶ As a result, such policies provide no options for explanations about what happened or a more holistic way to prevent the occurrence from recurring.

Zero tolerance approaches do not prevent bullying—they only place a band-aid on the problem. Under zero tolerance approaches to bullying, a stu-

¹¹¹ Weddle, *supra* note 2, at 679.

¹¹² Scott R. Simpson, *Report Card: Grading the Country’s Response to Columbine*, 53 *BUFF. L. REV.* 415, 431 (2005).

¹¹³ RALPH C. MARTIN, II, AM. BAR ASS’N, *ZERO TOLERANCE POLICY REPORT* (2001), available at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html>. See James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 *KAN. J.L. & PUB. POL’Y* 369, 371-372 (2000) (“Most state and local zero tolerance school policies have their genesis in the Gun Free School Act of 1994.”); see also 20 U.S.C. § 7151 (2006). When drafting this Act, the legislature intended that it:

be the policy of the United States that a high quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and [will] improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.

Peden, *supra*, at 372 (quoting Improving America’s School Act of 1994, Pub. L. No. 103-761, § 1001(a)(1), 108 Stat. 3518, 3519).

¹¹⁴ MARTIN, *supra* note 113; Peden, *supra* note 113, at 373 (stating that schools tend to lump different behaviors together in terms of punishment).

¹¹⁵ MARTIN, *supra* note 113. See Peden, *supra* note 113, at 373.

¹¹⁶ MARTIN, *supra* note 113.

dent who engages in a bullying act is either suspended or expelled.¹¹⁷ Thus, zero tolerance approaches fail to remedy bullying behavior in schools because they are incident specific and do not address the prevention of bullying.¹¹⁸ Further, zero tolerance policies prevent educators from asking the most important questions: Why did the child engage in the bullying behavior? How has the victim of the bullying suffered? What is the class dynamic that allows the bullying behavior to occur? As Weddle points out:

Students may learn a great deal about punishment for particular behaviors, but they learn little about rethinking the values and motivations that inspired those behaviors or, in fact, about what makes those behaviors wrong in the first place. Unlike whole-school approaches to bullying prevention—which force a sustained discussion about bullying in all its forms, its roots, and its effects—zero tolerance approaches simply remove the offender without teaching anyone anything deeper than that the rules had better be observed.¹¹⁹

With zero tolerance policies, schools only temporarily “fix” the situation because neither the bully nor his or her fellow students are learning how and why the bully’s behavior was wrong.

Additionally, zero tolerance approaches are undesirable because of their strict liability enforcement. Regardless of a student’s reason for violating the policy, schools penalize the student.¹²⁰ Since the enactment of zero tolerance approaches, applications of the policies have led to ridiculous results.¹²¹ For example, a girl took a knife from a friend after talking her out of committing suicide.¹²² The knife was found in the girl’s locker, and she was suspended for sixteen weeks.¹²³ An even more extreme example involves a student who, during a discussion of Columbine, expressed understanding how the perpetrators could “‘snap’ under the pressure of relentless teasing.”¹²⁴ She was also suspended.¹²⁵ Further, zero tolerance policies may do more harm than good in the fight against bullying. Rather than allow students to discuss violence or bullying, schools just classify the issue of violence as taboo and remove an important opportunity for growth and learning from students.

Finally, zero tolerance policies may inhibit the recognition and reporting of bullying behavior. Teachers and students may not identify instances of bullying out of a fear of the consequences to the child who bullies. “The average teacher will be reluctant to address the harsh teasing and taunting . . . if the

¹¹⁷ Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783, 791 (2003).

¹¹⁸ Simpson, *supra* note 112, at 442.

¹¹⁹ Weddle, *supra* note 2, at 682.

¹²⁰ See *Mistake with Lunch Box Results in Expulsion*, N.Y. TIMES, Feb. 7, 1998, at A13 (seven year old who turns in knife found in lunch box suspended from school); Yolanda Rodriguez, *Cobb School Calls Wallet Chain a Weapon, Suspends Girl, 11*, ATLANTA J.-CONST., Sept. 28, 2000, at A1 (girl with wallet chain suspended under “zero tolerance” policy).

¹²¹ Weddle, *supra* note 2, at 680.

¹²² *Id.* (citing Peden, *supra* note 113, at 373).

¹²³ *Id.*

¹²⁴ *Id.* (citing Richard C. Demerle, Note, *The New Scylla and Charybdis: Student Speech vs. Student Safety After Columbine*, 10 B.U. PUB. INT. L.J. 428, 430-31 (2001)).

¹²⁵ *Id.*

consequences for the offender are excessive and unjust.”¹²⁶ With the litigation that may ensue by parents challenging a student’s expulsion, school officials are unlikely to report bullying.¹²⁷ Accordingly, zero tolerance approaches are not an effective means of eliminating bullying in our schools.

3. Tort Liability

Finally, under state law bullying victims can attempt to hold a school tortiously liable for failing to prevent the bullying behavior. Under state tort law, students can raise negligent supervision claims against schools.¹²⁸ However, “[i]mmunity and problems with foreseeability and causation doom most attempts by victims to obtain remedies from schools that have allowed the victimization to occur.”¹²⁹ Bullying victims face two obstacles in raising state tort claims: (1) schools and their officials are most often immune from tort liability; and (2) victims of bullying find extreme difficulty in proving the causation element of a tort claim by showing the bullying incident was foreseeable to school officials.¹³⁰

a. The Obstacle of Immunity

In order to protect schools from an onslaught of lawsuits, states have given schools sovereign immunity from tort claims.¹³¹ Under the doctrine of sovereign immunity, regardless of the degree of negligence, school officials are shielded from tort claims.¹³² The state establishes the doctrine of sovereign immunity and generally extends it to schools.¹³³ States extend sovereign immunity to schools because:

Without immunity for ordinary negligence in everyday decision-making, the sheer number of educators in any state’s public system would create a potentially devastating liability exposure that could ultimately leave the state incapable of providing a free public education system to its citizens.

The second rationale is also rooted in a legitimate need to free teachers from the fear of liability as they take on the significant responsibilities of educating large groups of young people.¹³⁴

However, while states extend sovereign immunity to schools, immunity is not always extended to school officials or to school board members.¹³⁵ School officials receive a “qualified” immunity applying “only to acts that can be considered ‘discretionary’ or to acts performed negligently as opposed to those

¹²⁶ *Id.* at 682.

¹²⁷ *Id.* at 680.

¹²⁸ Matthew Earhart, Note, *Bullying: What’s Being Done and Why Schools Aren’t Doing More*, 25 J. JUV. L. 26, 28 (2005). See also Alison Bethel, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 196 (2004).

¹²⁹ Weddle, *supra* note 2, at 683. See also Earhart, *supra* note 128, at 28.

¹³⁰ Weddle, *supra* note 2, at 683. See also Earhart, *supra* note 128, at 28.

¹³¹ Weddle, *supra* note 2, at 683.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 686.

¹³⁵ *Id.* at 684.

performed with gross negligence, recklessness, malice, etc.”¹³⁶ However, most disciplinary decisions fall within this discretionary immunity extension.¹³⁷ Thus, regardless of the ability to establish negligence against a school or its officials, qualified immunity bars a suit against the school administrators and/or teachers.

b. The Obstacle of Foreseeability

Even if immunity does not bar the tort claim, victims of bullying may have difficulty showing that bullying was foreseeable to school officials. Courts view bullying acts largely as unanticipated, impulsive acts.¹³⁸ Thus, schools evade tort actions because if they are unable to foresee the bullying event, why should they be liable for it? Courts permit schools to escape tort liability by finding that: (1) schools have no duty to protect the student from an unforeseeable event and (2) a school’s inaction is not the cause of an unforeseeable event.¹³⁹

Schools escape tort liability under the first premise because they have no duty to protect students from unforeseeable events. While schools may know that bullying is possible, courts are “careful to point out that schools are not insurers of their students’ safety against all possible harms.”¹⁴⁰ Liability does not attach to schools unless the victim/student can show specifically that the school was warned that a threat to the student existed or that the school could have done something specific to have prevented the injury.¹⁴¹ Thus, unless a student is able to establish the school knew about the bullying threat prior to its occurrence, the student’s claim will be unsuccessful.

Schools further escape negligence liability because victims of bullying find extreme difficulty in proving causation.¹⁴² In order for a school to be liable in tort, its negligent supervision must be the legal cause of the student’s injury.¹⁴³ “Even if a court concludes that a student’s tortious act was foreseeable, it may nevertheless conclude that the negligent supervision is still not the legal cause of the victim’s injury because the student’s tortious conduct was the predominant factor in causing the injury”¹⁴⁴ Thus, a claim against a school for failure to supervise, without establishing legal cause, will not succeed in state court.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Earhart, *supra* note 128, at 28. “[C]ourts focus on foreseeability as the primary determinant for grounds of school liability, holding that bullying behavior is often unknown to school officials and escalation to violence, particularly by previously non-violent students, is unforeseeable.” *Id.* See also *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 145 (5th Cir. 1992); *Canty v. Old Rochester Reg’l Sch. Dist.*, 54 F. Supp. 2d 66, 72 (D. Mass. 1999); *C.M. v. Se. Delco Sch. Dist.*, 828 F. Supp. 1179, 1191 (E.D. Pa. 1993); *Marquay v. Eno*, 662 A.2d 272, 279 (N.H. 1995).

¹³⁹ Weddle, *supra* note 2, at 688, 690.

¹⁴⁰ *Id.* at 688-89.

¹⁴¹ *Id.* at 689; Earhart, *supra* note 128, at 28. See *Wallmuth v. Rapides Parish Sch. Bd.*, 813 So. 2d. 341, 347 (La. 2002).

¹⁴² Weddle, *supra* note 2, at 690; Earhart, *supra* note 128, at 28.

¹⁴³ Weddle, *supra* note 2, at 690.

¹⁴⁴ *Id.* at 693.

Accordingly, few federal and state legal remedies are available to bullying victims. If the legal system offers little support for victims of bullying, schools need to find alternative ways of preventing bullying and protecting their students from bullying behavior.

III. THE TRADITIONAL APPROACH TO CONFLICT RESOLUTION IN SCHOOLS: PEER MEDIATION PROGRAMS

One way many schools have chosen to deal with teasing and bullying is through the use of peer mediation programs. Peer mediation is a negotiation-based strategy that uses student mediators to resolve conflicts among their peers.¹⁴⁵ When a dispute occurs at school, the mediators, usually in student teams, become neutral third parties and work with the disputants through conflict resolution.¹⁴⁶ Over the last decade, many schools have chosen to establish peer mediation programs on their campuses as a safeguard and a structured mechanism to prevent and to handle peer-to-peer student conflict. Some evidence suggests that peer mediation programs help with bullying, but more recently experts have questioned the effectiveness of these programs.¹⁴⁷ Critics of peer mediation have argued that the programs are too reactive, instead of proactive, and focus too intensely on the perpetrator, instead of seeking to change the school climate as a whole. This section will briefly describe peer mediation programs and discuss their limitations.

“The goal of [peer mediation programs] is for students to learn how to deflate a minor conflict before it escalates into a more serious incident.”¹⁴⁸ In its simplest form, peer mediation involves training a small group of students to help resolve school disputes.¹⁴⁹ “The basic elements of mediation are voluntary participation, roughly equal bargaining power, mediator neutrality, a non-binding outcome, and confidentiality.”¹⁵⁰ Under traditional theories of mediation, we expect the parties to come to mediation with equal bargaining power.¹⁵¹ However, the victim of bullying is rarely on equal footing with the abuser.¹⁵² Accordingly, this may impact the eventual outcome of the dispute.¹⁵³

¹⁴⁵ Blitz, *supra* note 36, at § III.

¹⁴⁶ *Id.*

¹⁴⁷ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 30, 56-57 (1999).

¹⁴⁸ See Blitz, *supra* note 36, at § III.

¹⁴⁹ William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 HARV. NEGOT. L. REV. 213, 214 (1998).

¹⁵⁰ Colleen N. Kotyk, Note, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL RTS. J. 277, 279 (1997) (citing Andre G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 274 (1992)) (discussing the problems of mandatory mediation in divorce).

¹⁵¹ *Id.* at 279.

¹⁵² Weddle, *supra* note 2, at 645 (citing Raymond T. Chodzinski & Fran Burke, *Bullying: A Conflict Management Issue for Teachers, Parents, and Child Caregivers*, MOSAIC, Spring 1998, at 1, 2).

¹⁵³ See Kotyk, *supra* note 150, at 279.

One goal of peer mediation programs is to resolve conflict in a positive way.¹⁵⁴ Peer mediation programs accomplish this by giving students, mediators, and disputants “nonviolent tools and skills to deal with these daily conflicts that could otherwise lead to self-destructive and violent behaviors.”¹⁵⁵

Although peer mediation programs have “acquired almost saintly status in today’s elementary, middle and high schools,” they may not always be the ideal solution.¹⁵⁶

Professor John Braithwaite suggests that peer mediation programs to resolve bullying in schools may be ineffective from a restorative justice perspective based upon the current educational research.¹⁵⁷ “Only one of four studies . . . found peer mediation to be associated with a decrease in aggressive behavior.”¹⁵⁸ In contrast, whole-school approaches that confront bullying by involving parents and teachers have shown fifty percent reductions in bullying.¹⁵⁹ Research reviewing the effectiveness of school peer mediation programs found that programs “which simply train children to resolve disputes when conflicts arise among students [had] nonsignificant or weak effects” on bullying behavior.¹⁶⁰ Braithwaite commented:

It appears a whole-school approach is needed that tackles not just individual incidents but that links incidents to a change program for the culture of the school, in particular to how seriously members of the school community take rules about bullying. Put another way, the school must not only resolve the bullying incident; it must use it as a resource to affirm the disapproval of bullying in the culture of the school.¹⁶¹

Braithwaite points out that several actors have the power to prevent most crimes.¹⁶² The same is true for bullying. “The victimization of a child by a fourth-grade bully can be prevented by the intervention of every child in the playground in grade five or above who observes it.”¹⁶³ According to Braithwaite, this is why peer mediation may not be as effective as it could be.¹⁶⁴ Peer mediation programs that target *primarily* the bully are not as effective as those programs that are based upon the disapproval directed at the bystanders of bullying, i.e., those who have the power “to intervene to prevent bullying before it gets out of hand.”¹⁶⁵ Further, it may be unrealistic for students, particularly those in younger grades, to actually be the mediator in a difficult case.¹⁶⁶

¹⁵⁴ Blitz, *supra* note 36, at § III.

¹⁵⁵ *Id.*

¹⁵⁶ Haft & Weiss, *supra* note 149, at 213.

¹⁵⁷ Braithwaite, *supra* note 12, at 609 (citing Denise Gottfredson, *School-Based Crime Prevention*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (Lawrence Sherman et al. eds., 1996); Olweus, *supra* note 9, at 1171-90).

¹⁵⁸ Braithwaite, *supra* note 147, at 30.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 56.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 56-57.

¹⁶⁵ *Id.* at 57.

¹⁶⁶ Braithwaite, *supra* note 12, at 610.

In addition, a traditional peer mediation program may attempt to resolve a dispute by having both students involved at the same time, i.e., the target of the bullying behavior and the bully.¹⁶⁷ In some situations, this tactic may serve to re-victimize the target of the bullying.¹⁶⁸ Imagine a child already beaten down by a bully being forced to encounter the bully in a mediation session. Like a victim of crime in Victim-Offender Mediation (VOM), peer mediation in a bullying context may not address a victim's real concerns and may, in fact, make the situation worse.¹⁶⁹ In a critique of VOMs, Professor Jennifer Brown asserts that given the vital emotional issues at stake for most victims, VOM may actually harm victims recovering from crime rather than help them.¹⁷⁰

The bullying experience itself, because it is usually repetitive and continues over a longer period of time, has disturbing effects on any child.¹⁷¹ Not only have victims suffered the immediate pain and suffering of being the target of a bully's torment, they have also suffered emotional and psychological effects that can remain with them well into their adult lives.¹⁷²

If peer mediation is not the best solution for schools attempting to control and eliminate bullying amongst their students, then what can the school community do? One approach may be Payne's Social Inclusion Approach.

IV. THE SOCIAL INCLUSION APPROACH: CHANGING THE SCHOOL CLIMATE

This next section will describe the practical application of the Social Inclusion Approach in today's schools. Although the Social Inclusion Approach is not the only whole-school approach to deal with conflict resolution within schools, this Article will use it as a practical example to illustrate how such a program works. The central question for all schools struggling with teasing and bullying is: How can schools change their culture with regard to conflict?¹⁷³ Under the Social Inclusion Approach, schools would undertake four steps to alter the school's culture toward bullying: First, invoke a community commitment towards the practice of inclusion, not exclusion. Second, define teasing and bullying explicitly within the school and the community. Third, "teach" teachers to identify a child in need. And fourth, develop specific support networks for bullied children.¹⁷⁴

¹⁶⁷ See Lawrence T. Kajs et al., *The Use of the Peer Mediation Program to Address Peer-To-Peer Student Conflict in Schools: A Case Study*, 146 EDUC. L. REP. 605 (2000) (describing peer mediation programs generally).

¹⁶⁸ See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273 (1994).

¹⁶⁹ *Id.* at 1274.

¹⁷⁰ *Id.* at 1273.

¹⁷¹ Weddle, *supra* note 2, at 646.

¹⁷² *Id.* at 646-47.

¹⁷³ See generally The Child Today, Articles, <http://www.thechildtoday.com/Articles/> (last visited May 23, 2009) for different articles on Kim John Payne's approaches.

¹⁷⁴ See The Child Today, Social Inclusion Workshop with Kim John Payne, <http://www.thechildtoday.com/files/SocialInclusionArticleCalgary> (last visited May 23, 2009) (describing the overall process of the Social Inclusion Approach).

A. *The First Step: A Community Commitment to Social Inclusion*

When schools first make the decision to use a Social Inclusion Approach or any other whole-school approach to deal with issues of bullying and teasing, they are likely committing to several years of work to lay the foundation for the program.¹⁷⁵ Typically, a group of parents, teachers, and community members form a Social Inclusion Committee to review and consider the needs of the school and their commitment to the approach.¹⁷⁶ During the first year, the Social Inclusion Committee meets weekly or bi-weekly writing a workable school policy.¹⁷⁷ Faculty and parents then review and approve the policy.¹⁷⁸ Through the initial meetings, the entire school community considers its attitudes towards social inclusion.¹⁷⁹ Parents of the community are asked to do the same.¹⁸⁰ This initial process is important to lay the groundwork for the success of the approach. Social inclusion must become a foundation within a school's philosophy, as opposed to a responsive action used to "treat" specific situations. Schools that have adopted the Social Inclusion Approach admit that it requires work, attention, and a commitment to change.¹⁸¹

Once the program has been adopted and instituted (over a period of approximately three years), the flow of events that result from a teasing and bullying incident typically occur as follows.¹⁸² After a report of an incident by a parent, teacher, or child to the student's teacher, the teacher notifies the Social Inclusion Committee.¹⁸³ The choices for responses to the incident are typically: (1) a private word from the teacher to both parties (either together or independently); (2) an informal conference (usually at the time the incident occurred) between the teacher and each student separately; (3) a "Ready For Change" meeting; and/or (4) a Formal "No Blame"/Restorative Justice Meeting.¹⁸⁴ These concepts are described in more detail below.

B. *Changing the School Climate: Defining Teasing and Bullying Explicitly*

One of the most important steps towards changing the culture of the school is to define teasing and bullying explicitly for students, teachers, and parents.¹⁸⁵ Because the Social Inclusion Approach seeks to create a community where bullying is not tolerated, the first step is to ensure that all community members, particularly the teachers and students, develop an explicit

¹⁷⁵ *Id.* The narrative in this section is largely my interpretation of the Social Inclusion process and theory. I gained this information from attending Payne's training sessions, and using the materials on his website, The Child Today, <http://thechildtoday.com> (last visited May 23, 2009).

¹⁷⁶ See Sibon, *supra* note 16 (describing the process of how her school adopted the Social Inclusion Approach).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *id.*

¹⁸⁵ See The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3.

understanding of acceptable and unacceptable behavior.¹⁸⁶ Although this concept appears simplistic at first, it turns out to be revolutionary. Defining the behavior explicitly provides all members of the community with an understanding of where an incident of teasing crosses the line.¹⁸⁷ Further, it gives bystanders the authority to identify bullying behavior so that they can intervene in a bullying incident as soon as they recognize it.¹⁸⁸

The research suggests that children who bully are lacking significantly in “empathy, impulse control, perspective, imagination and fantasy.”¹⁸⁹ Such children have difficulty being able to put themselves in the shoes of other children; refraining from reacting quickly; taking into account others’ point of view; and imagining a different way they could have reacted.¹⁹⁰ Payne asserts that “if these four foundational emotional qualities are deeply cultivated” within members of the community, “then a situation of social difficulty stands a very good chance of being resolved before it escalates.”¹⁹¹

A significant challenge is to break from a “class habit” of verbal responses that automatically become put-downs or teasing.¹⁹² In order to change the school culture, the community needs to become more aware of language and how others can interpret words and gestures. Payne encourages school communities to develop their own definitions of teasing and bullying behavior.¹⁹³ Estimates show that “only two out of ten putdowns are actually witnessed or heard by adults.”¹⁹⁴ In order to shift this behavior, Payne recommends that each teacher hold a class parent meeting and a meeting with the students separately to brainstorm definitions of teasing and bullying.¹⁹⁵

Consider the following example of how students might define teasing and bullying in a class exercise. The teacher asks a simple question: When does “joking around” go too far? The list on the blackboard might read as follows:¹⁹⁶

Joking Around Becomes Teasing When¹⁹⁷
“Everyone doesn’t think it is funny. . . .”
“When someone asks for it to stop and it doesn’t”
“When the person teasing reacts badly when they are teased”
“When it becomes a habit”

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Guide, *supra* note 20, at 6.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 14.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3 (describing how to come up with definitions of “teasing” crossing the line into “bullying”).

¹⁹⁷ This list was generated during the mediator training I attended with Kim John Payne. The Social Inclusion School Community Training, (May 10, 2006) (notes from training on file with author). See also The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3 (describing how to define teasing and bullying as a community).

- “When no one will help because they think they will be teased”
“When it is meant to hurt or put down another person”
Teasing Becomes Bullying When¹⁹⁸
“Someone is constantly excluded”
“When there is ganging up”
“When there is physical abuse or hitting”
“When someone is being ignored”
“When there is a disrespect of property or stealing”
“Where there are malicious and hurtful rumors”
“When there is an intolerance of differences”
“When there is an attempt to get someone else to do any of the actions stated above”

This simple exercise begins the process of defining teasing and bullying in ways in which children at all levels can understand. By creating a community definition of teasing and bullying, the community gives itself the right to interrupt put-downs and teasing before they transform into bullying.¹⁹⁹

Another step towards changing the school climate is to give students the confidence to interrupt bullying behavior. Payne advises each classroom to develop a specific plan of how children should stop putdowns.²⁰⁰ Payne calls this the “Put Down Practice” and suggests the following three-step plan to give children the language to break the habit of verbal put-downs:

- (1) *Disapprove*: Expressing disapproval. “It’s not OK to do/say things like that in this family/school. It makes things worse when you do/say things like that.”
- (2) *Discover*: Asking in an age appropriate way: i) “What’s the problem?” “What’s bothering you?” ii) “What can we do about it?”
.
- (3) *Do-Over/Rephrase*: Give an opportunity for the student to rephrase. “Let’s work out how to do/say that in a better way.”²⁰¹

Payne asserts that the result is “extraordinarily powerful when we create communities of consciousness. Our children feel safe yet challenged to grow.”²⁰² Payne has a message for parents as well. He implores the community as a whole, i.e., parents, administrators and teachers, “to look at their own social habits.”²⁰³ Are there ways in which we could change our behavior? Payne reminds us: “all through this process of change the most important thing of all is to look at our own social habits and also strive to be worthy of imitation.”²⁰⁴

C. “Teaching” the Teachers to Identify a Target of Bullying

The third step to changing the school climate is to educate teachers in identifying students who are the targets of bullying. “Many signs [suggest] that

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* See also Theresa Melia, The Child Today, Sebastopol Independent School Newsletter, <http://www.thechildtoday.com/files/SebastopolIndependentSchoolNewsletterArticle> (last visited May 23, 2009).

²⁰¹ Guide, *supra* note 20, at 14.

²⁰² *Id.* at 15.

²⁰³ *Id.*

²⁰⁴ *Id.*

a child is being bullied . . . research shows that [children react in different stages as they try to] cope with bullying.”²⁰⁵ This Descending Continuum of Harassment incorporates the classical fear reactions of flight, fight, and freeze.²⁰⁶ “[O]nly in the final stages [do] children tell their parents and then tell a teacher.”²⁰⁷ Thus, teachers need training to watch for early signs that a child is being targeted. The pattern of bullied children waiting to tell is also why our schools need to develop a culture in which bullying behavior seems “out of place by everyone.”²⁰⁸

Some signs that a child is being targeted and bullied include: taking an unusual route around the playground or on the way home; an abrupt lack of interest in school or refusing to go to school; bullying of younger children; torn or missing clothing; out of character withdrawing from family or school activities; excessive hunger or difficulty focusing on any one task.²⁰⁹

“The effects of bullying can be far reaching and prevent the full and healthy development of everyone involved: the child that bullies, the child that has been targeted and those that have been either active or inactive bystanders.”²¹⁰ The whole community loses when this occurs.²¹¹

D. *The Circle of Friends: A Support Network for the Victim of Bullying*

Once a child is identified as a target, Payne advises the school to build specific support for this child: the Circle of Friends.²¹² The research shows that “[s]upport from peers and older students [is] highly effective in breaking the patterns of bullying and teasing.”²¹³ Payne describes that “[t]he Circle of Friends is a method for building relationships around a student who is vulnerable to social exclusion because of disruptive behavior, a behavioral difficulty, or peer relationship difficulties in their lives.”²¹⁴

This method aims to provide the following for a vulnerable student:

[I]ncrease the active attempts of the peer group to intervene positively in that student’s life; increase the level of acceptance and inclusion of a student; increase opportunities for the student to make friends in or outside the Circle itself; and, to increase insight and understanding for the student into his or her own feelings and behavior.²¹⁵

²⁰⁵ The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3.

²⁰⁶ *Id.* See also *Saliva Tests May Reveal Effects of Bullying*, iVILLAGE YOUR TOTAL HEALTH, May 31, 2007, <http://yourtotalhealth.ivillage.com/saliva-test-may-reveal-effects-bullying.html> (describing new research that documents that sufferers of long-time bullying have increased cortisol—a hormone responsible for the body’s response to danger).

²⁰⁷ The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3.

²⁰⁸ *Id.* (describing the overall process of the Social Inclusion Approach).

²⁰⁹ Guide, *supra* note 20, at 38; The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3.

²¹⁰ The Child Today, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 3.

²¹¹ *Id.*

²¹² Guide, *supra* note 20, at 22.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

The main purpose of this approach is to not only help the child being bullied, but also to impact positively all the other relationships within the school.²¹⁶ Payne notes that school leaders with whom he has worked comment upon “the depth and richness of the support offered by Circle members.”²¹⁷ Payne reminds us that “children are . . . ingenious in devising practical strategies for defusing potentially difficult situations involving the target child.”²¹⁸

Teachers set up the Circle very explicitly. The teacher can approach a few class members or older students to ask if they will be part of the Circle.²¹⁹ Another method is for the teacher to bring up the Circle in a class meeting.²²⁰ The class discusses the problem openly and non-judgmentally.²²¹ If the class thinks the Circle is a good idea, the class chooses its members.²²² Another approach is for the target child to write down five names of classmates that she/he feels would be a good match for the situation.²²³ The class teacher can then use this information and select the most appropriate students to set up the Circle.²²⁴ The teacher may also include older children in the Circle, particularly if they previously have had some exposure to the social inclusion process.²²⁵ The Circle members gather weekly to decide how to best support the child being bullied.²²⁶ There is no time limit to the duration of the Circle; it remains intact for as long as the group feels the Circle is helpful.²²⁷

V. THE “NO BLAME” APPROACH TO SOCIAL INCLUSION: A PRACTICAL APPLICATION OF RESTORATIVE JUSTICE AND MEDIATION

Once a bullying situation is identified, some intervention is necessary. While the Social Inclusion Approach does not seek to blame, it does seek to bring all students involved in a social difficulty to an awareness of the implications of their actions. The “no blame” mentality under this whole-school approach to bullying adopts a restorative justice approach to solving conflict within schools.²²⁸ This section explores the two types of “meetings” or mediations that are instrumental to Payne’s approach.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Payne, *supra* note 14.

A. *The “Ready for Change” Meeting*²²⁹

The first level of intervention is the “Ready for Change” meeting, which is an informal meeting between a teacher and a child, or a parent and a child when a conflict is first noticed. The children involved in the conflict do not meet together initially.²³⁰ Present at the meeting could be the class teachers/advisors, the students involved (they will be interviewed individually), and possibly the student helpers.²³¹ The purpose of the “Ready for Change” meeting is to help the child who bullies consider the consequences of her actions.²³² For the child who is the target of the bullying, the “Ready for Change” meeting begins the process of understanding and support. In addition, the meeting will attempt to humanize both children for each other.²³³

Each child is asked to fill out a questionnaire (with a parent or teacher) to find out more about the problem. Instead of seeking to blame parties within the social conflict, the “Ready for Change” meeting seeks to have the students understand the implications of their actions and the possibility for changing the situation for the better.²³⁴ The “Ready for Change” meeting seeks to accomplish two main goals: first, to have the students realize that the adults present want to hear their side of the story; and second, that everyone involved has important feelings that are respected by the group.²³⁵

The questionnaire asks the students to consider not only what happened, but also who their classmate is as a person.²³⁶ This method is particularly important to build empathy within the child who bullies so that the student sees his peer as a person rather than a target.²³⁷ The questionnaire asks each student to consider the other student’s hobbies, brothers or sisters, or where she lives.²³⁸ The inquirer explicitly attempts to re-humanize the target of the bullying in the eyes of the child who bullies. The following is an example of the “Ready for Change” Plan created by Kim John Payne.²³⁹

²²⁹ Once again, this narrative is my interpretation of these meetings based upon my attending Payne’s training in May of 2006. The Social Inclusion School Community Training, (May 10, 2006) (notes from training on file with author).

²³⁰ See *The Child Today*, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 4.

²³¹ *Id.*

²³² Guide, *supra* note 20, at 42.

²³³ *Id.* at 44. See *The Child Today*, Social Inclusion Workshop with Kim John Payne, *supra* note 174, at pt. 4.

²³⁴ Guide, *supra* note 20, at 42.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 17-18.

²³⁸ *Id.* at 17.

²³⁹ *Id.*

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My Social Inclusion Change Plan

Students (Your) name _____ Date _____

Who asked you [to] make this Change Plan? (Adult name) _____

Who is helping you write this Change Plan? _____

1. Describe as best you can what happened? _____

2. What other things have happened between you that bothered you? _____

3. How long has this been going on? _____

4. Often it helps to see other sides of a person. What are his or her favorite . . . ?

Hobbies _____ Sports _____

Food _____ Music _____

Does he or she have brothers or sisters? _____

Where does he or she live? _____

What does he or she do at recess? _____

5. What will happen if you all work it out and things improve? _____

6. What will happen if this problem goes on and gets worse? _____

7. You don't always have problems with this person. You must be doing something right. What is it you are doing that is helpful? _____

.....

9. Do you want this situation to improve? Yes No

10. Can friends, Student Helpers, teachers, parents help? Yes Maybe No

11. What can they do to help? _____

We will meet again on _____ (date) to see how things are going.

An important note to the adult helping the student work through these questions: Please make sure all questions are answered in a thoughtful, NO BLAME way. This Change Plan form usually takes about 25 minutes to complete and often needs some discussion with the student. After it's completed please make sure it is given to the Social Inclusion Coordinator who will make copies for the appropriate people (E.g., The Support/Care Group, the Class Teacher, or Advisor, the parent's and the student.)"

Thank you so much for helping this situation improve!

By Kim John Payne, M.Ed., www.thechildtoday.com

As noted above, an actual "Ready for Change" meeting takes approximately twenty-five minutes.²⁴⁰ Payne reminds the mediators to begin the meeting with the statement that "no one is being blamed."²⁴¹ Such an introduction is the core of the restorative justice approach.

²⁴⁰ See supra note 25 and accompanying text.

²⁴¹ Guide, supra note 20, at 42. See The Child Today, Social Inclusion Workshop with Kim John Payne, supra note 174, at pt. 4.

The next stage is to uncover the stories. The adult mediator listens to the stories and prompts the students to summarize how each student sees the situation.²⁴² The “Ready for Change” meeting seeks to build empathy between the students.²⁴³ Payne states: “[e]xclusion cannot thrive in a climate where we view each other with empathy.”²⁴⁴ The students also explore what impact the conflict is having on each of their lives. The group tries to help the children see that a positive resolution of the conflict can improve everyone’s lives.²⁴⁵ At this point, the group explores alternatives through a series of suggestions.²⁴⁶ The crux of the meeting comes when the group asks the important question: “Do you want to change?”²⁴⁷ By now, most children realize change is possible. Payne reminds adults to be willing to wait for an answer. Let the child convince you that he wants to change. Then ask, what help do you need to change?²⁴⁸

B. “No Blame” Mediation: A Restorative Justice Approach

The second meeting or mediation occurs after a series of one or two successful “Ready for Change” meetings with each of the students individually. The “No Blame” mediation is more structured and involves additional members of the school community, i.e., the teacher, a member of the social inclusion committee, trained peers (student helpers), the child who is bullying, the child who is being bullied, and several other children or ‘neutrals’ from the class.²⁴⁹

One interesting dynamic within the Social Inclusion Approach is that the story is usually never what it appeared to be at first. The children know something is not right, and they do not want it to continue going on in that way. Nobody is happy with hurting another person, certainly not with being hurt, even if it seems as if the children involved have become immune to its effect. Children need specific tools in order to help them navigate through the conflicts that arise in our lives each day.²⁵⁰

Consider the template for “No Blame” Mediation:

Setting the Scene

...

- The parents of the key children were notified by the Social Inclusion Coordinating Group (SIC) before the Ready for Change meeting.

Present at the meeting[:] [Mediator]/s & Class Teacher/Advisor; [Student] Mediation Helpers; Students Interviewed in Ready for Change meeting; A neutral student from the class involved.

...

The Introduction.

²⁴² Guide, *supra* note 20, at 44.

²⁴³ *Id.*

²⁴⁴ *Id.*, at 44.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 45.

²⁴⁷ *Id.* at 44-45. See also Sibon, *supra* note 16 (describing the No Blame Meeting).

²⁴⁸ Guide, *supra* note 20, at 45.

²⁴⁹ Guide, *supra* note 20, at 47. See also Sibon *supra* note 16.

²⁵⁰ See, e.g., Melia, *supra* note 200 (describing one “tool” which gives children specific ways in which to respond to “put downs”).

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[The mediator welcomes everyone and emphasizes that no one is in trouble; the purpose of the meeting is work on a positive resolution of the conflict.]

Gathering Stories.

[The mediator encourages those in the Circle to share their experiences of social conflict.]

The Issues.

The [mediator] [i]nvites the [student] Helpers to outline the issue with emphasis on the feelings/effects on those involved. [The student helpers first outline the issues concerning the child bullying; next, the child colluding; third, the child targeted.] After each outline, the [mediator] asks the key child if she/he would like to add anything .

. . . .

Opening and Going Deeper.

The [mediator] tells the group that [they] need to explore the situation more deeply. [Key questions: “What are you concerned about?” “When did this begin?”]

Foundations for Agreement.

. . . .

The [mediator] summarizes the Key Students Needs and Reasons E.g., ““The reason Sarah *wants* it is” The [mediator] initiates a short brainstorming phase.

. . . .

Building Toward Agreement.

The students agree first about one thing, and then about another and another, until in the end they have created a satisfactory agreement that includes all of their issues.

. . . .

Make an Action Plan.

[Decide who will do what and when will they do it.] Let the Key students know that they can seek help during the days to come from anyone in the Circle. [Make a check-in time within a week.]

. . . .

Communicate with the class/es.

Agree what is to be kept confidential and what can be shared outside the meeting [Student helpers] report only the agreements to the class/es.

. . . .

Communicating with the class parents.

In class all students write down, on a sheet of paper entitled, “Our Common Concern,” the ideas that were reported. The students then take this home and write at least two paragraphs, *with the help of their parent/s*, answering three questions. What can I do to help this situation continue to improve? What will I try and do if I see something like this happening again? What support do I need to do this? The parents sign the family homework sheet and it is returned *the next morning*. The class teacher/advisor reviews the homework and leads a discussion about the responses that day.

Communication with Faculty

The [mediator] reports the agreements to the Social Inclusion Coordinating Group and also to the faculty and support staff (bus drivers, playground supervisors, [lunch room personnel]).²⁵¹

²⁵¹ Guide, *supra* note 20, at 49-51.

One important aspect of this restorative justice approach is the full class participation in a solution following the mediation. Having the whole classroom involved, and therefore responsible, for a solution is a key aspect of Payne's approach.²⁵² The research appears to support this type of conflict resolution process. "[P]rograms that are incorporated into the life of the school . . . encourage students to take responsibility for themselves and their own learning."²⁵³ In addition to resolving the immediate conflict, Payne's "No Blame" approach can become a part of the "life of the school" and teach students how to become respectful and meaningful citizens in our society.²⁵⁴ "[The children] develop peacemaking and peace-building skills. Peace is no longer an abstraction or some vague notion; it takes on concrete content."²⁵⁵ Payne's Social Inclusion Approach gives students, teachers, administrators, and parents tools and strategies to combat the epidemic of teasing and bullying in a positive and constructive way.

VI. LEGISLATION TO PROMOTE CHANGE

In addition to having schools adopt whole-school approaches to end bullying, we need to reform anti-bullying statutes to require schools to address bullying thoughtfully and competently. This section will compare two anti-bullying statutes and examine possible revisions to these statutes in order to prevent and remedy bullying more effectively.

As mentioned previously, while anti-bullying legislation has been in place for many years, the current statutes fail to require the *enforcement* of anti-bullying policies at schools.²⁵⁶ Further, the statutes often fail to require an inclusive conflict resolution program that seeks to change the culture of the school—the only way to reduce the actual prevalence of bullying in schools.²⁵⁷ Under most statutory schemes, schools need only create general anti-harassment policies.²⁵⁸ Although many school administrators adopt these policies (with all good intentions), the schools may not implement the policies within their schools. No doubt the implementation of anti-bullying policies takes tremendous effort and time on the part of the whole school community. In addition, school administrators may be reluctant to publicize their anti-bullying policies, fearing that any publicity will suggest to the larger community that the school has a bullying and violence problem. However, without a statutory requirement that schools implement and enforce anti-bullying policies, schools are not likely to undertake the effort to implement a whole-school approach.²⁵⁹

In addition, anti-bullying statutes need to define bullying more comprehensively so that the definition captures the subversive nature of bullying

²⁵² *Id.*

²⁵³ Palmer, *supra* note 41, at 35.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See *supra* note 104 and accompanying text.

²⁵⁷ Weddle, *supra* note 2, at 674.

²⁵⁸ *Id.*

²⁵⁹ Daniel B. Weddle, *When Will Schools Take Bullying Seriously?*, TRIAL, Oct. 2003, at 18, 23 (describing that schools must be given real incentives to confront the problems of bullying and violence).

behavior as opposed to a single bullying incident.²⁶⁰ Any definition of harassment or bullying must “recognize that severe, pervasive harassment is damaging regardless of the bully’s motive.”²⁶¹ Thus, anti-bullying statutes must provide relief for students by defining bullying to include a broad spectrum of harassing behavior consistent with the current educational research.²⁶² Additionally, anti-bullying statutes should require that schools *enforce* the anti-bullying policies and that the schools involve the community in the implementation of their whole-school programs.²⁶³ “To the extent the policies are developed without the intensive involvement of the whole school community, they will likely be enforced only in egregious situations.”²⁶⁴ Anti-bullying statutes must also require that teachers, administrators, and other school personnel receive training to recognize bullying so that they teach others in the school community, including student bystanders, to identify bullying as well.²⁶⁵

In the past five years, several states have created anti-bullying statutes that have adopted many of these suggestions.²⁶⁶ However, as a review of two such statutes reveals, current legislative efforts still do not mandate the adoption of whole-school approaches to bullying. Delaware and Iowa have each enacted statutes that are more progressive than many states because they require not only that their schools adopt anti-bullying policies, but that the schools implement the policies as well.²⁶⁷ In addition, both the Delaware and Iowa statutes have a comprehensive definition of bullying. Delaware defines bullying as:

[A]ny intentional written, electronic, verbal or physical act or actions against another student, school volunteer or school employee that a reasonable person under the circumstances should know will have the effect of:

- (1) Placing a student, school volunteer or school employee in reasonable fear of substantial harm to his or her emotional or physical well-being or substantial damages to his or her property.
- (2) Creating a hostile, threatening, humiliating or abusive educational environment due to the pervasiveness or persistence of actions or due to a power differential between the bully and the target; or
- (3) Interfering with a student having a safe school environment that is necessary to facilitate educational performance, opportunities or benefits; or
- (4) Perpetuating bullying by inciting, soliciting or coercing an individual or group to demean, dehumanize, embarrass or cause emotional, psychological or physical harm to another student, school volunteer or school employee.²⁶⁸

Similarly, Iowa defines bullying as:

[A]ny electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which cre-

²⁶⁰ Weddle, *supra* note 2, at 674-75.

²⁶¹ *Id.* at 675.

²⁶² *Id.*

²⁶³ *Id.* at 676.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 677-78.

²⁶⁶ See statutes cited *supra* note 99.

²⁶⁷ See Earhart, *supra* note 128, at 30 (describing how poorly written anti-bullying statutes require “policies rather than processes”).

²⁶⁸ DEL. CODE ANN. tit. 14, § 4112D(a) (2008).

ates an objectively hostile school environment that meets one or more of the following conditions:

- (1) Places the student in reasonable fear of harm to the student's person or property.
- (2) Has a substantially detrimental effect on the student's physical or mental health.
- (3) Has the effect of substantially interfering with a student's academic performance.
- (4) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.²⁶⁹

In addition to these comprehensive definitions of bullying behavior, both Delaware and Iowa require school districts to develop policies prohibiting bullying.²⁷⁰ These anti-bullying policies must include school-wide policies on

²⁶⁹ IOWA CODE § 280.28(2)(b) (2008).

²⁷⁰ Section 4112D(b)(2) of the Delaware code provides:

Each school district and charter school shall establish a policy which, at a minimum, includes the following components:

- (a) A statement prohibiting bullying of any person on school property or at school functions or by use of data or computer software that is accessed through a computer, computer system, computer network or other electronic technology of a school district or charter school from kindergarten through grade 12 . . .
- (b) A definition of bullying no less inclusive than that in subsection (a) of this section.
- (c) Direction to develop a school-wide bullying prevention program.
- (d) A requirement that each school establish a site-based committee that is responsible for coordinating the school's bullying prevention program . . .
- (e) A requirement that any school employee that has reliable information that would lead a reasonable person to suspect that a person is a target of bullying shall immediately report it to the administration.
- (f) A requirement that each school have a procedure for the administration to promptly investigate in a timely manner and determine whether bullying has occurred.
- (g) A requirement that, to the extent that funding is available, each school develop a plan for a system of supervision in non-classroom areas. . .
- (h) An identification of an appropriate range of consequences for bullying.
- (i) A procedure for a student and parent, guardian or relative caregiver . . . to provide information on bullying activity. . .
- (j) A requirement that a parent, guardian . . . of any target of bullying or person who bullies another as defined herein, is notified.
- (k) A requirement that all bullying incidents be reported to the Department of Education within 5 working days . . .
- (l) A statement prohibiting retaliation following a report of bullying.
- (m) A procedure for communication between school staff members and medical professionals who are involved in treating students for bullying issues.
- (n) A requirement that the school bullying prevention program be implemented throughout the year, and integrated with the school's discipline policies . . .

DEL. CODE ANN. tit. 14, § 4112D(b)(2) (2008). Similarly, Iowa requires schools to adopt a policy prohibiting bullying.

Each policy shall, at a minimum, include all of the following components:

- (a) A statement declaring harassment and bullying to be against state and school policy. The statement shall include but not be limited to the following provisions:
 - (1) School employees, volunteers, and students in school, on school property, or at any school function or school-sponsored activity shall not engage in harassing and bullying behavior.

bullying prevention programs.²⁷¹ For example, an anti-bullying policy in Iowa must include “[a] description of the type of behavior expected [by] employees, volunteers, parents or guardians, and students relative to prevention measures”²⁷² Further, the policy requires school employees, including teachers, to report incidents of bullying to school administrators.²⁷³ However, by including reporting requirements, Delaware and Iowa also grant immunity to school officials who report incidents of bullying in good faith.²⁷⁴

While these two statutes illustrate that legislators are taking school bullying more seriously than before, legislators need to do more. The remainder of this section will describe additional requirements that a model anti-bullying statute might contain to prevent bullying and change the culture within a school.

A. *Additional Components of Anti-Bullying Statutes*

In addition to the positive aspects of the Delaware and Iowa anti-bullying legislation, states should adopt additional components to a model anti-bullying statute. First, a model anti-bullying statute should provide a greater incentive for schools to adopt and implement anti-bullying policies by allowing victims of serious bullying to sue schools under certain circumstances. The statute could provide a victim of bullying with a cause of action against school officials *if* the school has failed to adopt and implement an anti-bullying policy. Those schools that do implement an appropriate anti-bullying policy as required by the statute could then have a rebuttable presumption that the school has met its duty of care to the student in the event the student suffers injury as a result of bullying. In order to qualify for the presumption, however, schools would be required to adopt an appropriate, whole-school approach. “The pre-

(2) School employees, volunteers, and students shall not engage in reprisal, retaliation, or false accusation against a victim, witness, or an individual who has reliable information about such an act of harassment or bullying.

(b) A definition of harassment and bullying as set forth in this section.

(c) A description of the type of behavior expected from school employees, volunteers, parents or guardians, and students relative to prevention measures, reporting, and investigation of harassment of bullying.

(d) The consequences and appropriate remedial action for a person who violates the anti-harassment and anti-bullying policy.

(e) A procedure for reporting an act of harassment or bullying, including the identification by job title of the school official responsible for ensuring that the policy is implemented, and the identification of the person or persons responsible for receiving reports of harassment or bullying.

(f) A procedure for the prompt investigation of complaints, either identifying the school superintendent or the superintendent’s designee as the individual responsible for conducting the investigation

(g) A statement of the manner in which the policy will be publicized.

IOWA CODE § 280.28(3) (2008).

²⁷¹ See DEL. CODE ANN. tit. 14, § 4112D(b)(2)(C) (2008); IOWA CODE § 280.28(4) (2008) (providing that schools “are encouraged to establish programs designed to eliminate harassment and bullying in schools”).

²⁷² IOWA CODE § 280.28(3)(2)(c) (2008).

²⁷³ See DEL. CODE ANN. tit. 14, § 4112D(b)(2)(k) (2008); IOWA CODE § 280.28(3)(2)(e) (2008).

²⁷⁴ See DEL. CODE ANN. tit. 14, § 4112D(e) (2008); IOWA CODE § 280.28(5) (2008).

sumption of reasonable supervision should arise only upon sufficient evidence that practices and outcomes exist [at the schools] that are characteristic of competent, good-faith implementation of effective programs.”²⁷⁵

“In the same way, a school’s failure to implement [an acceptable bullying program] should be viewed as the proximate cause of a bullying victim’s injuries.”²⁷⁶ Hopefully, this liability-shifting framework would compel school officials “to act decisively in accordance with the anti-bullying policy developed by the school community.”²⁷⁷ “Where such a culture exists, bullies are likely to be discovered and thwarted at several points.”²⁷⁸

Another statutory component that might influence schools to implement anti-bullying policies is to condition state and/or federal funding on their implementation.²⁷⁹ By requiring schools to document specifically how they have implemented their anti-bullying policies in order to receive state and/or federal funds, schools would enforce anti-bullying policies. Anti-bullying programs are not costly:

Several proven, cost-effective programs are available that can reduce episodes of bullying and school violence. These programs are effective not only in teaching children and youth how to deal with bullying, but they also impart broader social and problem-solving skills consistent with the whole-school, comprehensive approach advocated by researchers.²⁸⁰

Payne’s Social Inclusion Approach is one such whole-school approach that any school can adopt to dramatically alter the bullying culture in a school.

CONCLUSION

When conflict resolution programs, like peer mediation, are initially introduced by schools, they are often seen as a means of managing conflict and behavioral problems within the school. Adopting peer mediation can be a way “of keeping kids in line, of running a smooth sailing ship, and of preserving an outward appearance of calm.”²⁸¹ However, to truly support all students, schools need to do more. Whole-school approaches, like the Social Inclusion Approach, seek to change the climate of the school and give the bystanders to school bullying the power to say, “Stop.” Further, state anti-bullying statutes need to require schools to adopt research-based, whole-school approaches to bullying. Only in a school environment where teasing and bullying are out of place can we truly get a handle on this subversive, difficult community problem. Finally, we need to reconsider how we deal with the child who bullies. Kim John Payne, an international educator and counselor, encourages us to adopt a “No Blame” approach to teasing and bullying based upon a theory of restorative justice. Restorative justice is slowly being rediscovered because it

²⁷⁵ Weddle, *supra* note 2, at 701.

²⁷⁶ *Id.* at 699.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Kathleen Hart, Note, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1151 (2005).

²⁸⁰ *Id.*

²⁸¹ Palmer, *supra* note 41, at 35.

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seeks to hold the wrongdoer accountable by helping her understand the real consequences of her behavior. Both parties play a role in coming to a resolution. The child who bullies takes responsibility for the wrongdoing. Adults and peers support the target of the bullying. This process allows both children to become a part of the larger community once again.