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MORE THAN THE VICTIMS: A POPULATION-BASED, PUBLIC HEALTH APPROACH TO BULLYING OF LGBT YOUTH

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INTRODUCTION

2010 might one day be known as the year that school bullying began to be taken seriously. If so, the long-overdue focus on the problem can be traced to a number of closely clustered, high-profile events that ended in tragedy for teens who were bullied because of their real or perceived sexual orientation, or, in a closely related way, for their failure to conform to rigidly policed gender norms. Consider these cases:

Tyler Clementi is dead because the internet dissemination of videos showing him in an intimate setting with another man was too much for him to bear. He jumped off the George Washington Bridge.¹ Billy Lucas, 15, from Indiana,² and Seth Walsh, 13, from Central California,³ hanged themselves after being bullied because they were gay. And Asher Brown, 13, unable to endure repeated taunts because he was small, Buddhist, and “deemed” gay, put a gun to his head.⁴ Add to those the suicides of Cody Barker, Raymond Chase, and Justin Aaberg,⁵ and it’s clear that something serious is going on here.

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¹ John Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 3, 2010, at 1.

² Geoff Mulvihill and Samantha Henry, *Activists rally to help gay teens after suicide of college student*, ST. LOUIS POST-DISPATCH, Oct. 3, 2010, at A3.

³ Thomas Curwen, *Gay teen endured a daily gantlet*, L.A. TIMES, Oct. 8, 2010, available at <http://articles.latimes.com/print/2010/oct/08/local/la-me-seth-walsh-20101008>.

⁴ Peggy O’Hare, *Protest set near Asher’s school Hamilton Middle official call off after-class activities today*, HOUSTON CHRONICLE, Oct. 5, 2010, at B2.

⁵ George Stinson and John Johnson, *Kentucky’s bullying laws need to be strengthened*, COURIER-JOURNAL, Nov. 30, 2010, at A9.

What is less clear is what should be done about the kind of behavior that leads to such tragic results, and to the host of more common (if less dramatic) results: depression, anxiety, low self-esteem, poor performance in school, and health problems.

Some students will always look for ways to bolster their own fragile sense of self-worth and to engage in actions they believe will find support among groups of fellow students. At times, of course, those efforts result in often-harmless teasing, against which a thick skin is the best remedy. But in a small percentage of cases, students go beyond mere teasing and engage in a range of actions that fall under the broad rubric of “bullying.” It is then that concerns are raised.

There is no clear, concise definition of bullying. But while most would agree that physical violence and relentless, systematic harassment and humiliation qualify as bullying, other cases are less clear. Should so-called “cyber-bullying” be a subject of concern? What about nasty and pointed comments that go beyond teasing but don’t usually cause lasting damage?

Here is one serviceable definition: “A person is bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself.”⁶

Note that this definition focuses on the victim of the violence, thereby getting to the most important aspect of the problem: the effect this kind of relentlessly negative treatment has on those who are attacked in this way. In the awful cases that introduced this article, hardly anyone would argue that the kids were not “bullied” in any reasonable construction of that term. But what is to be

⁶ *What is Bullying?*, OLWEUS BULLYING PREVENTION PROGRAM, <http://www.olweus.org/public/bullying.page> (last visited Jan. 3, 2011). The site’s founder, Dan Olweus, is the author of an influential book, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* (1993). The Massachusetts law, explored more fully in Part II, defines bullying as follows:

The repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim’s property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying.

Cyber-bullying, in turn, is defined as follows:

Bullying through the use of technology or any electronic communication...including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

MASS. GEN. LAWS ch. 71, § 37O(a) (2010).

done about it? And are there important negative consequences for those other than the direct victims?

This brief article looks at two approaches to combating bullying in the schools.⁷ Although my focus is on bullying that is triggered by the real or perceived sexual orientation of the victim, it is worth remembering that bullying takes place in a host of different contexts (including the workplace) and is used against people – not just kids – based on all kinds of “characteristics” that either cause discomfort in the bullier or can be exploited for social gain.

Part I explores a few of the cases that have been brought against school districts and officials, typically for failing to prevent on-going bullying.⁸ These are generally actions that have as their principal goal compensating the victim, so that effects on future behavior are not typically among the central aims of the plaintiffs. But these suits often do affect future behavior, in at least two mutually reinforcing ways: (1) the suits often lead to settlements in which the defendant district agrees to either create anti-bullying programs, or to improve existing ones; and (2) the damages awarded can themselves supply a powerful deterrent to future misbehavior. Particularly in an era of strapped budgets and concomitantly limited resources, schools – the ones that have been held liable, and the ones that have not – will have strong incentive to avoid finding themselves on the wrong end of a suit for damages, particularly since the punitive damages in such suits are quite likely to be high.

The limitations of lawsuits are substantial, however. Often, students do not come forward, or do so only after years of abuse. Even where they do have the courage and ability to file a complaint, though, substantial legal obstacles may impede not only recovery, but also the potentially ameliorative effect on subsequent acts of violence or threatened violence. Far better would be an approach that focused on all of the populations affected by the culture of bullying. Thus, in Part II, I expand the focus outward from the victim, and examine a statute that recognizes and addresses the effects that bullying has on every population within a school: the bullied; the bullies; those who observe the bullying; and, indirectly, on every student and staff member because of the culture of tolerated violence and intimidation that impairs learning, and creates an atmosphere of fear and disrespect.

I. THE VALUE AND LIMITS OF LITIGATION TO ADDRESS BULLYING

Carlos Ball devotes an entire chapter of his excellent book, *From the Closet to the Courtroom*, to an account of the bullying of Jamie Nabozny and the (belated) judicial response to the years of

⁷ There are others, of course. One initiative that has generated a good deal of attention is blogger and advice columnist Dan Savage’s “It Gets Better” Project, in which LGBT adults who were bullied speak about their lives today. (There are also encouraging testimonials from straight politicians, such as Secretary of State Hillary Clinton, President Barack Obama, and Vice President Joe Biden.) The video files are available at: <http://www.youtube.com/itgetsbetterproject> (last visited Jan. 7, 2011). New files, most by “non-celebrities,” are constantly being uploaded.

⁸ There is also the possibility of claims in tort against the bullies themselves. Many of these will sound in battery, assault, and (perhaps most aptly) intentional infliction of emotional distress. Some cases, such as the one involving Tyler Clementi, also raise the possibility of an invasion of privacy claim. See John Culhane, *Family Has Strong Tort Actions in Clementi Suicide Case*, WORD IN EDGEWISE, Oct. 1, 2010, available at <http://wordinedgewise.org/?p=1472> (last visited Jan. 7, 2011). Because the focus of this article is on remediation at the institutional level, these claims against fellow students are not further discussed.

torment he endured.⁹ This is an apt case to showcase, as Nabozny's ultimate recovery of almost \$1 million (in a settlement reached between the liability and damages phases of trial) represented the first victory of its type. In brief, Nabozny was physically and emotionally bullied throughout middle school and high school – both for being gay and for acting in ways that were seen as not sufficiently “male.”¹⁰ Despite his parents' ongoing efforts to help him, officials at Nabozny's Wisconsin school district either ignored or enabled the horrific actions – actions that included urinating on him and kicking him so hard that he required abdominal surgery.¹¹ As the Seventh Circuit Court of Appeals succinctly noted in its 1996 decision reversing a grant of summary judgment in favor of the district and its officials: “[T]here is evidence to suggest that some of the administrators themselves mocked Nabozny's predicament.”¹²

Recovery was sought under section 1983 of the post-Civil War civil rights act,¹³ the federal law that allows a private right of action for the deprivation of civil rights by government officials. On remand from the Seventh Circuit's decision, Nabozny's attorney successfully argued to the jury that school officials had violated his right to equal protection under the law, treating his case differently because of both his sexual orientation and his sex.¹⁴ Nabozny established that the officials would have, and did, take accusations of bullying and other inappropriate conduct toward girls much more seriously than they did Nabozny's complaints, which alleged far more serious conduct.¹⁵

As Ball points out, the jury's decision in *Nabozny* had a catalytic effect. School officials that had long ignored or been downright hostile to the bullying directed at LGBT and other “non-conforming” students suddenly became quite interested in establishing programs and procedures designed to address these issues.¹⁶ Moreover, Nabozny's success led to other suits that ultimately settled in the plaintiffs' favor, sometimes with express citation to the precedential case.¹⁷

Such litigation remains a limited tool, however. Nabozny himself did not bring suit until well after his nightmare had run its course, when he had become a student and activist at the University of Minnesota. Most bullied students never actually bring such lawsuits.

A recent case arising in New York State highlights another possibility – one that can be effective either with or without private litigation. Where sufficient publicity is generated on a particular case, the Justice Department can sometimes intervene in order to put pressure on a school district to fix problems that lead to the harassment and bullying of LGBT youth.

It is certain that more than one reader has cringed while reading about the bullying that this poor 14-year-old kid (known from court documents and local reports only as “Jacob” or “J.L.”) from Mohawk High School endured at the hands of his fellow high school students. The Complaint, filed by the New York Civil Liberties Union, is painful to read, as it details physical violence and injury, death threats, destruction of property, name-calling (including “pussy,” “bitch,”

⁹ CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM 67-98 (2010).

¹⁰ *Nabozny v. Poklesny*, 92 F.3d 446, 449 (7th Cir. 1996).

¹¹ *Id.*

¹² *Id.*

¹³ 42 U.S.C. § 1983 (2010).

¹⁴ BALL, *supra* note 9, at 94-98.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

“cocksucker,” and “faggot” to name just a few), and the heart-breaking, unrelenting misery that Jacob suffered.¹⁸

His father’s repeated efforts to get the school officials – especially the principal – to do something went unheeded. Over time, in fact, it became clear where this official’s sympathies lay: He told Jacob’s dad that he wasn’t going to change what the school was doing in order to “cater to homosexuals.”¹⁹ Even though the school has a clear policy against bullying,²⁰ policies don’t help if the principal is oblivious, or worse.

The evidence and the New York State law were clearly on Jacob’s side, and then his case received an unexpected and welcome jolt – the Obama Department of Justice (“DOJ”) moved to intervene on behalf of the bullied kid.²¹ This development was enormously significant for a couple of reasons.

First, it demonstrated a steely commitment to civil rights that had not been in evidence during the Bush Administration. The DOJ’s position was very aggressive, especially since taking it required taking a controversial stand on an unsettled but important issue: Does Title IX – the federal law that protects against gender discrimination in education²² – also cover discrimination based on gender stereotyping?

There is some reason to think that it does. A line of cases establishes that an action for employment discrimination grounded in Title VII of the Civil Rights Act of 1964 properly lies where an employee suffers adverse job consequences because of perceived inability to conform to prevailing gender norms.²³ In a recent decision by the Third Circuit Court of Appeals, a gay employee’s claim was allowed to survive summary judgment where the mistreatment he had suffered was allegedly based on sexual stereotyping.²⁴ The court held that so long as impermissible sex stereotyping was a motivating factor in the employer’s challenged action, the claim would be cognizable even if sexual orientation discrimination were also in play.²⁵

When applied to Title IX, such cases are a potentially rich vein of recovery for bullied youth, because, as the court noted, the line is thin and hard to discern between discrimination based on

¹⁸ Amended Complaint at 1-2, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943 (N.D.N.Y. 2009), available at <http://www.nyclu.org/case/jl-v-mohawk-central-school-district-challenging-school-districts-failure-protect-gay-student-ha> (last visited Jan. 4, 2011).

¹⁹ *Id.* at 9.

²⁰ *Id.* at 15. The School has a “Bullying Incident Report Form.” See Bullying Incident Report Form, <http://www.mohawk.k12.ny.us/forms.cfm?myForm=3837>.

²¹ Press Release, Department of Justice, Justice Department Settles with New York School District to Ensure Students Have Equal Opportunities (March 30, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crt-340.html>.

²² 20 U.S.C. § 1681 (2010).

²³ See e.g. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864 (9th Cir. 2001). Although the case law has developed to include claims of same-sex harassment, the principle that gender stereotyping is discrimination “based on sex” within the contemplation of Title VII originated in a case involving a woman who claimed that she had not been made a partner of her firm because of her failure to act in ways that women were supposed to act. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²⁴ *Prowel*, 579 F.3d at 291.

²⁵ *Id.* at 292.

sexual orientation and discrimination grounded in impermissible gender stereotyping.²⁶ The plaintiff, Prowel, was eventually “outed” on the job, but the harassment he suffered appears mostly to have been grounded in fellow employees’ discomfort with his behavior, which surely was not stereotypically male.²⁷ Indeed, both Prowel’s behavior and that of the “real men” who harassed him are the stuff of easy parody.²⁸ While he “filed” his nails, the other guys “ripp[ed] them off with a utility knife.” (Utility knives?)²⁹ Also, he pushed the buttons on his machine at work “with pizzazz!” (What kind of real man does *that*?)³⁰

Jacob’s case was similar: Middle-school students, struggling with their own identities and cosmic purpose, are not particularly well-equipped to deal with the kind of outlandish diversity that someone like Jacob presents. The Complaint details the following: “Both before and after J.L. came out as gay at school, students would tell him to get a sex change operation because he was so ‘girly’ and aggressively mocked him for dyeing his hair, wearing eye makeup, and speaking with a high-pitched voice.”³¹

Despite the clear parallels between the two cases, the case law under Title IX does not as clearly establish a claim for discrimination based on gender stereotyping, so the Justice Department’s move was bold and therefore controversial. According to Roger Clegg, a former Civil Rights Division official under Presidents Reagan and (the first) Bush, the Obama DOJ was “making up a legal violation where there [hadn’t] been one.”³²

Clegg’s view is based on the false assumption that the claim “really” was about sexual orientation discrimination, but, as the *Prowel v. Wise* court pointed out, matters are not that simple. The Obama Administration’s approach, supported to an extent by emerging case law, provides a useful tool to supplement the existing legal remedies for serious bullying where a plausible case for harassment based on non-conformance with gender norms can be made.³³

Second, the Justice Department’s actions also suggest a way forward for bullied LGBT kids who do not have the wherewithal or outside support to bring suit. Imagine a similar situation involving a student in another state – a student without the financial or emotional resources to bring a lawsuit. Attracting the attention of a few sympathetic teachers (a technique that sometimes

²⁶ *Id.*

²⁷ *Id.* at 287.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (internal quotation marks omitted).

³¹ Amended Complaint at 2, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943 (N.D.N.Y. 2009).

³² Ari Shapiro, *Justice Department Intervenes in Gay Rights Suit*, NAT’L PUB. RADIO (Jan. 15, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=122620723> (last visited Jan. 4, 2011).

³³ See *Doe v. Brimfield Grade Sch.*, 552 F.Supp.2d 816, 822-23 (C.D. Ill. 2008) (allegations were sufficient to support a claim against school under Title IX for “gender stereotyping”); *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp.2d 952, 964-65, 973-74 (D. Kansas 2005) (harassment of another male student based on false rumor that he had been caught masturbating in school bathroom was sufficient to support student’s Title IX sexual harassment claim under “gender stereotyping” theory); *Howell v. N. Cent. Coll.*, 320 F.Supp.2d 717, 720 (N.D. Ill. 2004) (“federal courts have looked to title VII precedent to inform their analyses of sexual discrimination claims under Title IX.”); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F.Supp.2d 1081, 1092-93 (D. Minn. 2000) (concluding that plaintiff stated a cognizable Title IX same-sex harassment claim under “gender stereotyping” theory where he did not meet his peers’ stereotyped expectations of masculinity).

works³⁴) might be enough to get the matter to the local press, and then possibly to either an advocacy group (as in the New York case, where the state's branch of the American Civil Liberties Union lent its support) or to the government.

With the prospect of criminal or civil sanctions – in addition to tort damages – looming over them, district officials will be more likely to settle these claims in ways that not only compensate the victim, but that require concrete steps to address the issues that enabled the bullying to continue in the first place. The settlement in the Mohawk School District case is perhaps instructive in this regard. Under the terms of that agreement, the school district is required to hire an expert consultant on harassment and discrimination to review the district's policies.³⁵ The district also agreed to conduct annual training for faculty and staff. Perhaps most important from a deterrence perspective, the district must also file annual compliance reports with the U.S. government and with Jacob himself.³⁶

These outcomes are good, but do not address the problem in the kind of systematic way that is likely to result in permanent and positive change. While they deter, they do not reliably result in sustained, specific programs or initiatives likely to reduce bullying. Even those settlements that require certain remedial measures can be uninformed or ineffective. And even when they are carefully designed – not usually the outcome from litigation – they address the problem only at one specific site, or perhaps, in one district, and not more systematically.

What is needed, instead, is a public health approach that considers the needs and interests of the specific populations identified earlier in this article: those bullied; the bullies; those who witness the bullying; and the entire school community in which the conduct takes place.

II. AN EVIDENCE-BASED, POPULATION-SENSITIVE APPROACH TO COMBATING BULLYING

A more comprehensive approach to the problem of school bullying is beginning to be enacted into law in a few forward-looking jurisdictions. The New Jersey legislature quickened its pace after Tyler Clementi's death, and on January 6, 2011, the socially conservative state governor, Chris Christie, signed a far-reaching, anti-bullying bill into law.³⁷ For purposes of this discussion though, I will focus on the Massachusetts law, which was enacted in April, 2010, and gave schools until the end of the year to provide evidence of compliance. Almost all schools met the deadline.³⁸

³⁴ See BALL, *supra* note 8 at 95-96.

³⁵ Stipulation and Settlement Agreement at 2, J.L. v. Mohawk Cent. Sch. Dist., No. 09-CV-943 (N.D.N.Y. 2009), *available at* http://www.nyclu.org/files/JL_Approved_Settlement_Order_3.29.10.pdf.

³⁶ Ruth Schneider, *Gay Teen Settles Out of Court With School Over Bullying*, 365 GAY, March 30, 2010, *available at* <http://www.365gay.com/news/gay-teen-settles-out-of-court-with-school-over-bullying/> (last visited Jan. 4, 2010).

³⁷ Richard Pérez-Peña, *Christie Signs Tougher Law on Bullying in Schools*, N.Y. TIMES, Jan. 6, 2011, *available at* <http://www.nytimes.com/2011/01/07/nyregion/07bully.html>. One might reasonably conclude that Gov. Christie was not especially enthused about the measure: he waited a long time between legislative enactment and signing and did not issue any statement to accompany his action. He might have been bowing to reality, as the measure enjoyed almost unanimous support among legislators.

³⁸ Editorial, *Coming Through on Deadline*, BOSTON GLOBE, Jan. 5, 2011, *available at* http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2011/01/05/coming_through_on_deadline (last visited Jan. 5, 2011) (noting that 99% of all schools had complied by deadline).

By taking into account all of the populations affected by bullying – not only the kids bullied, but those doing the bullying, and the entire school population – the Massachusetts law reflects a public health approach.³⁹ Massachusetts has recognized the population-wide nature of the problem by requiring the Department of Education to consult with the Department of Public Health in developing a model plan for schools to consider in creating their own plans, tailored to their specific circumstances.⁴⁰ That same section of the statute also acknowledges the scientific, statistical tools of public health in requiring consultation with that department on “evidence-based curricula” and “academic-based research.”⁴¹

This comprehensive way of dealing with the problem, especially since the law also requires follow-up reporting, stands the best chance of actually reducing the incidence of bullying and its effects – which is the goal. From the perspective of public health, success is measured by a reduction in the incidence of the behaviors that the intervention seeks to prevent. While it is unrealistic to believe that even the best-designed program can entirely eliminate bullying, a substantial reduction in the number of cases of bullied students and – just as significantly – in the *severity* of the cases that do arise would represent a public health triumph.

The law recognizes that the bullied kids themselves are the population that most needs to be reached, and therefore provides a complex combination of prevention and treatment initiatives to address their needs.⁴² However, it also addresses the perpetrators of the bullying, the responsibility of school officials, and the learning environment.⁴³ While it is too soon to assess how successful this comprehensive program will be, the pieces that have been put into place seem likely to have a significant effect. A brief discussion of some of the more central provisions follows.

The law begins by defining bullying quite broadly, recognizing that it takes many forms and occurs not only at school but outside of its confines in ways that can contribute to a hostile learning environment.⁴⁴ Thus, bullying can consist of physical acts but also of written, verbal, or electronic communication that causes harm (physical or emotional) or fear of harm, or that creates a hostile environment for the victim. Beyond that, an act is considered “bullying” if it “materially and substantially disrupts the education process or the orderly operation of the school.”⁴⁵ Note that the focus of this last sort of action is not on harm to the victim at all. Thus, it recognizes that the effect on *other* students, school staff, and, consequentially, the learning environment are also important components of bullying and are therefore necessary to address.

That comprehensive concern also informs the provisions on cyber-bullying. The law prohibits electronic acts that have the effects described above, and recognizes the creative cruelty to which cyber-bullies often resort. Thus, it bans bullying through the creation of a web-based “secret identity,” or through false attribution of an electronic communication.⁴⁶ Also of significance, the law

³⁹ Recent work by influential public health law professor Wendy Parmet has highlighted this approach of looking at specifically affected populations in the effort to enact sound public health policy. *See generally* WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW (2009).

⁴⁰ MASS. GEN. LAWS ch. 71, § 370 (j) (2010).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ MASS. GEN. LAWS ch. 71, § 370(a) (2010) (definition of “bullying”).

⁴⁶ *Id.* (definition of “cyber-bullying”).

reaches beyond the physical confines of the school (even beyond school-sanctioned activities that take place off campus), prohibiting both physical and “cyber” activity that “creates a hostile environment at school for the victim, infringes on the rights of the victim at school” or that causes a significant disruption of “the education process or the orderly operation of a school.”⁴⁷

The law’s commitment to the creation of, training for, and implementation of, a plan to deal with the manifold consequences of bullying is also comprehensive. The statute requires, among other things, that schools: 1) establish “clear procedures” for reporting, responding and investigating allegations of bullying; 2) ensure that any disciplinary action taken “balance the need for accountability with the need to teach appropriate behavior”; 3) involve parents; 4) and develop “a strategy for providing counseling or referral for appropriate services for perpetrators and victims and for appropriate family members of said students.”⁴⁸ Professional development relating to the issue is also specifically required; not only teachers and administrators, but “all staff members” are to be included in such training.⁴⁹

Note the various populations within the school, and outside of it, covered by this process. As noted earlier, bullies not only cause harm to their victims but are often in need of help themselves. The impulse to bully can reflect issues that are best addressed with a thoughtful combination of sanctions (accountability is vital) and treatment of the underlying problems. Inasmuch as family dynamics often contribute to bullying – for example, kids who are bullied, but don’t have sympathetic parents and kids who bully in response to problems at home – getting parents, guardians and siblings involved in the response is a sensible approach.

The Massachusetts law does not specifically identify any group of students as victims, whether by race, religion, sexual orientation, or otherwise. It does, however, allow specific school districts (or private or charter schools) to “establish separate discrimination or harassment policies that include categories of students.”⁵⁰

This kind of “home-rule option” might be sensible. It allows each district to respond in a targeted way to the local situation. In some cases, it might make sense to follow the “one size fits all” approach taken by the statute. To some extent, after all, “bullying is bullying,” and singling out certain categories – perhaps especially those based on sexual orientation or gender identity – by name might, depending on the district, contribute to the very stigma it attempts to avoid. The general approach also deprives anti-gay forces of (fallacious) arguments against bullying laws designed to protect LGBT kids.

Yet bullying of LGBT youth is different (which is not necessarily to say “worse”). While it’s true that kids are bullied and harassed for many reasons, LGBT kids might have no one to turn to, including their parents. (By contrast, minority children who are bullied might be able to find comfort in parents who underwent bullying for similar reasons themselves, and who themselves might therefore understand what the child is going through, and how best to deal with it.) In one story, for example, a middle-aged gay man reflected back on a pattern of bullying that led to the loss of part of

⁴⁷ *Id.*, MASS. GEN. LAWS ch. 71, § 37O(b) (2010).

⁴⁸ *Id.*, MASS. GEN. LAWS ch. 71, § 37O(d) (2010).

⁴⁹ *Id.* (list includes “educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, [and] advisors . . .”).

⁵⁰ *Id.*

one of his fingers, and stated that he was too fearful to tell his parents what was going on at the time.⁵¹ Homing in on these kids could have the beneficial purpose of drawing attention to the unique nature of their struggles, which are too-often borne in silence.

It will be important to evaluate the success of these two different approaches over time, while keeping in mind that it might be difficult to separate the effect of these differences from the underlying social and educational settings in which they arise. It could turn out, for example, that the districts that most need specific language on LGBT bullying are the ones least likely to get it, for political reasons. Perhaps political reality also explains the approach taken by the state lawmakers. But if education on these issues takes place throughout the curriculum and is made a regular part of professional development, perhaps the same outcomes can be achieved in a different way.

Whatever its limitations, though, the Massachusetts statute represents progress on the troubling issues raised by school bullying. By considering all constituencies, the law reflects a sound, population-based approach.

CONCLUSION

Bullying is a complex social problem that has lately begun to receive the serious attention it deserves. Litigation can be a successful response in particular cases, but is not well-suited to addressing the problem in the kind of comprehensive way that the issue requires. Recent laws, such as the exemplary statute enacted in Massachusetts, are commendable for their commitment to an approach informed by the population perspective from public health theory and practice. The seriousness of the problem is also beginning to be recognized on the federal level, where a White House summit to address the issue (with special attention to LGBT youth)⁵² coincided with the introduction of several pieces of Congressional legislation designed to address these complex issues on a nation-wide basis.⁵³

While bullying and harassment in schools will never be completely eradicated, this more thoughtful, population-based approach should bring measurable results.

⁵¹ NPR Staff, *Looking Back at the Tremendous Hate of Bullies*, NAT'L PUB. RADIO, Jan. 7, 2011, available at <http://www.npr.org/2011/01/07/132722052/looking-back-at-the-tremendous-hate-of-bullies> (last visited Jan. 7, 2011) (story of Rob Littlefield).

⁵² See *President Obama and the First Lady at the White House Conference on Bullying Prevention*, WHITE HOUSE BLOG, Mar. 10, 2011, available at <http://www.whitehouse.gov/blog/2011/03/10/president-obama-first-lady-white-house-conference-bullying-prevention> (last visited Mar. 22, 2011).

⁵³ See Dana Rudolph, *Will This Week's Anti-Bullying Bills Pass?*, 365 GAY, Mar. 10, 2011, at <http://www.365gay.com/news/will-this-weeks-anti-bullying-bills-pass/> (last visited Mar. 22, 2011) (discussing and describing several bills targeted at bullying throughout the school (including college) years).