

**AMERICAN BAR ASSOCIATION**

**RESOLUTION 107A UNANIMOUSLY APPROVED BY THE ABA HOUSE OF DELEGATES  
FEBRUARY 14, 2011\***

RESOLVED, That the American Bar Association urges federal, state, tribal, territorial, and local officials to prevent and remediate the existence and dangers of bullying, including cyberbullying and youth-to-youth sexual and physical harassment, by

(1) defining these acts and developing education programs to assist teachers, parents, and children in identifying victims and enhancing appropriate interventions,

(2) analyzing existing laws and policies designed to prevent and respond to these acts and adopting and/or revising them as appropriate,

(3) monitoring the effectiveness of measures to prevent these acts and fostering interventions successfully implemented to reduce and respond to them,

(4) providing training,

(5) reporting on collected data,

(6) providing appropriate notice of bullying incidents to the families of involved youth, and having those families participate, when appropriate, in bullying prevention and intervention efforts, and

(7) affording institutional protections particularly for those children at risk of these acts resulting from actual or perceived characteristics such as race, religion, national origin, sex, disability, sexual orientation, or gender identity.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local, officials and school administrators to adopt policies that discourage (1) inappropriate referral of youth to the juvenile justice system for acts of bullying and student-on-student harassment, and (2) inappropriate use of expulsion and out-of-school suspension for such acts.

FURTHER RESOLVED, That the American Bar Association urges government, private, and academic institutions to fund programs, research and evaluation that address prevention of and responses to these acts, including efforts to study and enhance evidence-based, and culturally and linguistically competent approaches.

FURTHER RESOLVED, That the American Bar Association urges all law enforcement agencies to cooperate with the FBI's data collection program related to hate crimes committed by and against juveniles under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.

FURTHER RESOLVED, That the American Bar Association urges Internet Service Providers and social networking platforms to adopt Terms of Service that define and prohibit cyberbullying and cyberhate.

FURTHER RESOLVED, That the American Bar Association urges school districts to follow the October 2010 U.S. Department of Education Office of Civil Rights "Dear Colleague" letter on bullying and harassment, and the Department to monitor compliance with the letter's guidelines and more aggressively utilize federal and state civil rights protection authority under Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act.

FURTHER RESOLVED, That the application of bullying, cyberbullying, and related laws and policies should not be used to compromise the protected First Amendment free speech rights of students.

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\* The principal American Bar Association sponsor of this resolution, the ABA Commission on Youth at Risk, was joined by these ABA cosponsors: Coalition on Racial and Ethnic Justice, Commission on Women in the Profession, Section of Family Law, Standing Committee on Public Education, Criminal Justice Section, General Practice, Solo and Small Firm Division, Section of Science & Technology Law, Section of Individual Rights and Responsibilities, Commission on Sexual Orientation and Gender Identity, Section of Antitrust Law, Young Lawyers Division, and the Judicial Division Lawyers Conference.

## REPORT

On October 21, 2010, President Barack Obama stated to the nation: “We’ve got to dispel this myth that bullying is just a normal rite of passage, that it’s some inevitable part of growing up. It’s not. We have an obligation to ensure that our schools are safe for all of our kids.”<sup>1</sup> In the wake of recent media attention surrounding several suicides by young people who identified as lesbian, gay, bisexual or transgender (LGBT) and who were bullied, taunted, and teased, it is time for the American Bar Association to emphatically call for improved law and policy to better protect our children from this harm.

In August 2002 the House of Delegates approved a recommendation on this topic, calling for anti-bullying/harassment programs for children, parents, teachers, and school administrators. It urged appropriate court diversion programs so that bullies did not get unnecessarily stigmatized; called for more diligent efforts to prevent and respond to youth on youth violence in residential care facilities; as well as for improved data collection on hate crimes committed by and against juveniles and acts of harassment and bullying committed by and against children. Finally, this policy urged the organized bar and lawyers generally to help facilitate education and programs on these issues. This new proposed Resolution builds on that 2002 policy due to the growing awareness of new forms of bullying and their devastating impact on children, and the need to further improve our responses to this problem. Another Association policy, from 2007, called for protection of LGBT foster and homeless youth from discrimination and violence.

In October 2010, the United States Department of Education distributed guidelines to clarify when student bullying violates federal law. The guidelines, delivered as a “Dear Colleague” letter, emphasize the prohibition of discrimination based on race, color, national origin, sex, or disability.<sup>2</sup> This Report to the ABA House of Delegates urges implementation of the Department’s letter and encourages more extensive school policies in accordance with federal law.

Building upon the American Bar Association’s related 2002 policy recommendations, that called for educational initiatives and law reform regarding hate crimes and anti-bias behavior, this new Resolution and Report specifically urges that officials develop sound anti-bullying and anti-harassment policies. These policies must be culturally and linguistically competent; must not inappropriately discipline offenders; and must appropriately protect and support victims of bullying. The new Resolution stresses the importance of action and collaboration by federal agencies, the private sector (including internet service providers), and non-profit organizations to combat bullying in the schools and suggests why new or amended federal laws may be necessary.

When discussing “bullying” and “harassment” in this Resolution and Report, we do not intend to include domestic violence, dating violence, sexual assault or stalking – although those are also important issues affecting children and youth. Approximately one in five female high school students reports being physically and/or sexually abused by a dating partner,<sup>3</sup> and 12% of stalking victims report being stalked before the age of 18.<sup>4</sup> A variety of services, outreach, and legal and other interventions are emerging to address teen dating violence, sexual assault and stalking, which are beyond the scope of this Resolution and Report.

However, it is important to note that in the development of education programs to assist teachers, parents, and children in identifying victims of bullying and harassment that are recommended here, care should be taken to distinguish bullying and harassment from domestic or dating violence, sexual assault, and stalking, which very often require a different kind of intervention. State or federal legislation developed in accordance with this Resolution should incorporate previously identified and addressed issues of domestic or dating violence and stalking, as distinguished from bullying and harassment. State and local policies that include guidance for educators should include training on the appropriate identification of domestic or dating violence and stalking, as distinguished from bullying and harassment. This should also enhance reporting systems to clarify incidents of all kinds.

Bullying, harassment, and hate crimes<sup>5</sup> are serious issues that are affecting an exorbitant number of youth. In a 2010 survey answered by 40,000 high school students, forty-seven percent reported they were the victims of bullying within the

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<sup>1</sup> President Barack Obama, Address Regarding Anti-Bullying (October 21, 2010) *available at* <http://www.whitehouse.gov/blog/2010/10/21/president-obama-it-gets-better>.

<sup>2</sup> Letter from Russlyn Ali, Assistant Secretary for Civil Rights, United States Department of Education to Schools, Colleges and Universities Nationwide (October 26, 2010) *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>3</sup> Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 J. Am. Med. Ass'n 572-579 (2001).

<sup>4</sup> Tjaden and Thoennes. (1998). “Stalking in America: Findings from the National Violence Against Women Survey.” U.S. Department of Justice, National Institute of Justice, Washington, DC.

<sup>5</sup> When discussing bullying and harassment in this report, emphasis is made on youth on youth actions. However, adults may instigate these acts as well. To the extent that the report discusses hate crimes, the focus is on hate crimes committed by and against juveniles.

past twelve months, while fifty percent admitted to having bullied.<sup>6</sup> Twenty-three percent of these high school students admitted that they are prejudiced against certain groups and twenty-one percent said they mistreated someone because that person belonged to a different group.<sup>7</sup> Ninety percent of lesbian, gay, bisexual, and transgender youth report having been verbally or physically harassed or assaulted.<sup>8</sup> Since the ABA's August 2002 related policy, many schools have adopted anti-bullying policies. In fact, according to the Anti-Defamation League, 45 states have now enacted an anti-bullying statute.<sup>9</sup> These policies are to be commended, as the rate of bullying, harassment, and hate crimes has decreased. However, the alarmingly high number of students still involved in bullying, harassment, and hate crimes lingers. Therefore, this Recommendation calls for additional actions to promote anti-bullying and anti-harassment policies that will further protect our youth.

### **Supporting Appropriate School Responses to Disciplining Bullies and Protecting Victims**

This Resolution encourages schools to take appropriate action when dealing with bullying, harassment, or hate crimes. Specifically, school systems should provide protective and supportive services to victims while simultaneously refraining from inappropriately disciplining the wrongdoer.

Policies of suspension or exclusion, "three strikes," or zero tolerance have shown to be ineffective in disciplining child bullies.<sup>10</sup> Children who bully their peers are in need of positive reinforcements and pro-social role models. Teachers, guidance counselors, and classmates are the ideal candidates by which a bully can learn to engage in pro-social behavior. With nearly 50% of high school students admitting to bullying a classmate in the past year,<sup>11</sup> the punishment of out-of-school suspension or expulsion would result in an enormous number of students missing school. Excessive absences due to out-of-school suspension or expulsion may reduce a student's ability to learn the classroom material if he or she is not provided with a private tutor. This in turn can lead to the student repeating the grade and failing to graduate on time. Without the positive reinforcement of teachers and classmates, the suspended or expelled student will likely spend his or her time socializing with delinquent or truant children. The Centers for Disease Control and Prevention found that when youth are not in school they are more likely to smoke cigarettes, drink alcohol, use drugs, and engage in sexual intercourse.<sup>12</sup> These severe punishments may also discourage victims and bystanders to report an incident of bullying, harassment, or a hate crime in fear of future retaliation.

Furthermore, placing a bully in an alternative school will only move the problem elsewhere. The student will often interact with other offenders who may support and encourage each other's antisocial behavior.<sup>13</sup> Merely separating the bully from his or her victims does not address the factors that created the problem.

A study of 213 school psychologists concluded that while suspension and exclusion were the most frequently implemented anti-bullying strategies, these disciplinary practices were also the least effective.<sup>14</sup> Instead, school-wide positive behavior support plans, modifying space and schedule for less structured activities, and immediate responses to bullying incidents were most effective.<sup>15</sup> The goal of bullying discipline practices should be to reinforce pro-social behavior rather than suspend or expel the student.

In addition to refraining from the use of improper discipline of bullies, school systems must also ensure they are protecting and supporting the victims of bullying, harassment, and hate crimes. Bullying affects victims physically,

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<sup>6</sup> Press Release, Josephson Institute, Largest Study Ever Shows Half of All High School Students Were Bullies and Nearly Half Were the Victims of Bullying During Past Year (October 25, 2010) available at <http://charactercounts.org/pdf/reportcard/2010/press-release.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA – A SURVEY OF STUDENTS AND TEACHERS (2005).

<sup>9</sup> Anti-Defamation League, *Bullying/Cyberbullying Prevention Law: Model Statute and Advocacy Toolkit*, [http://www.adl.org/civil\\_rights/Anti-bullying%20Law%20Toolkit\\_2009.pdf](http://www.adl.org/civil_rights/Anti-bullying%20Law%20Toolkit_2009.pdf)

<sup>10</sup> AM. MED. ASS'N, EDUCATIONAL FORUM ON ADOLESCENT HEALTH: YOUTH BULLYING (2002) (Hereinafter EDUCATIONAL FORUM).

<sup>11</sup> Josephson Institute, *supra* note 4.

<sup>12</sup> CENTER FOR DISEASE CONTROL AND PREVENTION, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School*, 43 MORBIDITY & MORTALITY WKLY REP. 129 (March 4, 1994).

<sup>13</sup> EDUCATIONAL FORUM, *supra* note 8.

<sup>14</sup> Yiping C. Sherer & Amanda B. Nickerson, *Anti-Bullying Practices in American Schools: Perspectives of School Psychologists*, 47 PSYCHOL. IN THE SCHOOLS 217 (2010).

<sup>15</sup> *Id.*

academically, and psychosocially. Victims have reported having lower self-esteem, higher rates of depression, more feelings of loneliness, and greater anxiety.<sup>16</sup> As a result, victims of bullying tend to avoid school. Like their bullied counterparts, victims of bullying who avoid school are more likely to fail their classes and graduate late, or not at all. Without appropriate support, victims of bullying are also more likely to report suicidal ideation than their non-bullied peers.<sup>17</sup> In an effort to help these children, it is imperative that schools implement support systems. Immediately following bullying incidents, victims must be provided with individual psychological support.<sup>18</sup> Programs such as group therapy or peer mediation, whereby the bully and victim discuss the incident with a mediator (often another peer), are inappropriate.<sup>19</sup> As there is a clear power imbalance between the two students, the victim will feel distressed and uncomfortable sitting next to the bully. The victim must be assured that “no one deserves to be bullied and we’re going to do everything we can to stop it.”<sup>20</sup>

Schools systems that have adopted programs to change the overall climate of the school and the norms for behavior have had immediate success. For example, schools that have used the Olweus Bullying Prevention Program have found “significant reductions in student reports of general antisocial behavior such as school bullying, vandalism, school violence, fighting, theft, and truancy; and significant improvements in the classroom social climate as reflected in students’ reports of improved order and discipline, more positive social relationships, and more positive attitudes toward schoolwork and school.”<sup>21</sup> Students attending schools with anti-bullying or anti-harassment policies that specifically include protections based on sexual orientation and/or gender identity/expression have heard “fewer homophobic remarks, experienced lower levels of victimization related to their sexual orientation, were more likely to report that staff intervened when hearing homophobic remarks and were more likely to report incidents of harassment and assault to school staff than students at schools with a general policy or no policy.”<sup>22</sup>

Studies have shown that between 2003 and 2008, the rate of bullying and peer victimization actually decreased.<sup>23</sup> This drop was in large part due to the implementation of anti-bullying programs.<sup>24</sup> In light of this positive correlation, the American Bar Association is proposing a policy that encourages all school systems to implement a long-term anti-bullying program aimed at changing the school environment, appropriately disciplining bullies, and protecting the victims.

### **Promoting Evidence-Based and Culturally and Linguistically Competent Prevention and Intervention Programs**

The law should promote, and funding should be provided from individual school budgets, school districts and state Departments of Education, for evidence-based and culturally and linguistically competent approaches to reducing bullying in schools. Research on bullying in schools shows that it occurs worldwide and a variety of intervention programs have been implemented with various degrees of success.<sup>25</sup> Historically, programs were based on “commonsense ideas about what might reduce bullying rather than on empirically validated theories of why children bully, why children become victims, or why bullying occurs.”<sup>26</sup> In 2009, a comprehensive review examined the effectiveness of the thirty highest-quality anti-bullying programs in the world.<sup>27</sup> This analysis concluded that “bullying and victimization were reduced by twenty to twenty-three percent in experimental schools compared with control schools.”<sup>28</sup>

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<sup>16</sup> EDUCATIONAL FORUM, *supra* note 8. See also, U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter Harassment and Bullying (October 26, 2010) Background, Summary, and Fast Facts <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf>

<sup>17</sup> KEN RIGBY, BULLYING IN SCHOOLS AND WHAT TO DO ABOUT IT 56-57 (ACER Press 2007).

<sup>18</sup> Sherer & Nickerson, *supra* note 12.

<sup>19</sup> *Id.*; EDUCATIONAL FORUM, *supra* note 8.

<sup>20</sup> EDUCATIONAL FORUM, *supra* note 8.

<sup>21</sup> Olweus Bullying Prevention Program, <http://www.olweus.org/public/index.page>.

<sup>22</sup> GLSEN, *2009 National School Climate Survey: Nearly 9 out of 10 LGBT Students Experience Harassment in School*, Sept. 14, 2010, <http://www.glsen.org/cgi-bin/iowa/all/news/record/2624.html>.

<sup>23</sup> David Finkelhor, Heather Turner, Richard Ormrod & Sherry L. Hamby, *Trends in Childhood Violence and Abuse Exposure*, 164 ARCHIVES OF PEDIATRIC ADOLESCENT MED. 238 (2010).

<sup>24</sup> *Id.*

<sup>25</sup> David P. Farrington & Maria M. Ttofi, *Reducing School Bullying: Evidence-Based Implications for Policy*, 38 CRIME & JUST. 281 (2009).

<sup>26</sup> *Id.* at 284.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 282.

Based upon the comprehensive review, its authors emphatically stated that “policy makers and practitioners should draw on high-quality evidence-based programs that have been proved to be effective.”<sup>29</sup> Effective anti-bullying programs are known to include the following: “target known risk factors in youth violence; involve youth, parents, teachers and community members; monitor the implementation of program components; use culturally-relevant, gender-specific and developmentally appropriate strategies; establish high standards and expectations for staff and participants; and provide comprehensive and ongoing interventions”<sup>30</sup>

Furthermore, “to be effective, communications, curricula, and interventions must reflect the cultural needs of students and parents. Students who are not fluent in English may have difficulty communicating about a problem and may be reluctant to do so. Written information should be translated into relevant languages.”<sup>31</sup> Without taking into consideration the cultural and linguistic differences among youth, it is unlikely that any program will be successful.

It is imperative that federal, state, and local laws promote evidence-based and culturally and linguistically competent approaches to bullying intervention and prevention. In addition, that funding should be provided by federal, state and local governments. Without funding from a variety of sources, it is unlikely that every school will have the resources on its own to implement such programs.

### **The Need for Comprehensive State and Local Anti-Bullying Policies**

There is no one reason why bullies bully or why the children bullied are bullied. Therefore, in order for state and local agencies to have effective anti-bullying policies, they must address the entire range of reasons youth are bullied.

Sometimes bullying takes place outside of the teacher’s view, and other times bullying happens in plain view of teachers or other adults and nothing is done to stop it.<sup>32</sup> This is likely due to the fact that many teachers and other adults do not take bullying seriously or recognize the magnitude of the problem.<sup>33</sup> Additionally, if a school district does not define bullying behavior in policy, or a state does not define such behavior in law, each school administrator, teacher, school resource officer, family, and student likely has a distinct, and possibly conflicting, idea of what bullying is.<sup>34</sup> Bullying behavior exists along a spectrum. As recognized in the “Dear Colleague” letter: “Harassing conduct may take many forms, including verbal acts and name calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”

Because bullying behavior does not occur in a vacuum, but rather persists and becomes increasingly serious in schools that send the message that bullying will be tolerated, it is critical that bullying prevention and intervention efforts are comprehensive and begin with an analysis of a school’s climate and all contributing factors. Enacting statewide anti-bullying laws will raise awareness of peer harassment and give schools the support needed to deal with the issue.<sup>35</sup> This is especially true when a state anti-bullying law requires local school districts to develop “policy provisions concerning education, parental involvement, intervention and procedures for investigating acts of bullying at schools,” as is the case for Michigan’s anti-bullying law.<sup>36</sup> Such statewide laws and local policies are necessary to ensure proper handling of incidents of bullying and in preventing further incidences from occurring.<sup>37</sup>

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<sup>29</sup> *Id.* at 322.

<sup>30</sup> Jeffrey M. Jenson & Matthew O. Howard, *Causes and Prevention of Youth Violence*, 77 DENV. U. L. REV. 629 (2000).

<sup>31</sup> Ted Feinberg, *Bullying Intervention and Prevention*, 4(1) *Principal Leadership Magazine* (2003).

<sup>32</sup> Jill Grim, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight*, 10 BARRY L. REV. 155 (2008).

<sup>33</sup> *Id.*

<sup>34</sup> The Illinois anti-bullying law was recently amended to include a broad, non-exhaustive definition of bullying to assist with the systemic prevention of and intervention in bullying. See *Illinois Prevent School Violence Act*, 105 ILCS 5/27-23.7(b) (2010) (“Bullying . . . may take various forms, including without limitation one or more of the following: harassment, threats, intimidation, stalking, physical violence, sexual harassment, sexual violence, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying. This list is meant to be illustrative and non-exhaustive.”).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 172.

<sup>37</sup> *Id.*

According to at least one author, “when schools have failed to implement effective bullying prevention policies consistently, at all grade levels, the long-term consequences may be unleashed on society, revealed years later, in the form of egregious school and workplace violence.”<sup>38</sup> Once state and local agencies decide to take the important step of implementing anti-bullying and/or anti-harassment policies, care needs to be taken to ensure that the policies address the reasons for which youth are bullied and/or harassed.

The difference between mere aggression and bullying is that “bullying is repetitive and involves a power imbalance between a socially powerful perpetrator and a socially weaker victim. Hence, bullies prey on students who are often marginalized in the wider school community because of actual or perceived differences.”<sup>39</sup> These perceived differences include, but are not limited to, obesity, disability, sexual orientation, race, color, national origin, and gender-based stereotypes.<sup>40</sup> In addition to the previously mentioned categories, according to the U.S. Substance Abuse and Mental Health Services Administration, children are also bullied for things such as being quiet, having different tastes, wearing the ‘wrong’ clothing, having a different religion, and any other imaginative ‘excuse.’<sup>41</sup>

The reverse also needs to be explored in order to effectively reduce the level of bullying in schools. Why do children bully? While there are no set reasons or profiles for youth who bully, there are two factors which appear to influence whether a child repeatedly engages in bullying behavior: age and sex.<sup>42</sup> Studies have shown that a larger portion of elementary and primary school students engage in bullying behavior, as opposed to secondary school students, and males tend to bully more than females.<sup>43</sup> Other than that, there is no set profile for a bully, just as there is no set profile as to who is a victim. Therefore, policies instituted must recognize this and look carefully for bullying behavior rather than relying on stereotypes.

The policies instituted by state and local agencies should include detailed, explicit directions on how educators should handle incidents of bullying, a consistent reporting system for incidences of bullying issues, and educational programs for students.<sup>44</sup> Furthermore, as studies and anecdotal evidence in case law exhibit that bullies tend to target victims on the basis of perceived or actual sexual orientation, race, religion, disability, gender, gender identity, or national origin, policies should specifically prohibit bullying and/or harassment on these bases.<sup>45</sup> Unless the anti-bullying or anti-harassment policies implemented by state and local agencies address the many reasons youth are bullied, they will not be optimally effective in reducing bullying.

This resolution also encourages sharing information about bullying incidents with the families of those involved. Some laws complicate this provision. Student privacy and records law limit the instances in which identifying information about students can be shared or exchanged. Families are often frustrated because, although a school may give notice that their child has been the victim of bullying, the school cannot divulge the name(s) of the students who bullied their child. Also, if the name of a student who bullies is made public but the school does not respond effectively to the situation, the bullying may intensify, putting involved students at greater risk for negative outcomes.

When a youth’s sexual orientation or gender identity is related to their bullying or harassment, it has happened that when a school notified a student’s family that the student was a victim of bullying it essentially served to “out” the student, who then faced negative repercussions at home. This, in turn, can unfortunately lead to a student being abused, running away, becoming homeless, engaging in survival crimes while living on the street, being arrested/prosecuted, or entering the juvenile or criminal justice system. Therefore, schools should be advised that although they may contact a family when their child is being bullied, they must be careful not to “out” the student. Although this area is likely confusing to

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<sup>38</sup> Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT’L L. J. 105 (2008).

<sup>39</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147 (2009).

<sup>40</sup> *See Id.*

<sup>41</sup> Children Who Are Bullied, *The ABC’s of Bullying: Addressing, Blocking and Curbing School Aggression* available at [http://pathwayscourses.kitsolutions.net/bully/bully\\_2\\_pg8.htm](http://pathwayscourses.kitsolutions.net/bully/bully_2_pg8.htm)

<sup>42</sup> Ken Rigby, *Why do Some Children Bully at School?: The Contributions of Negative Attitudes Towards Victims and the Perceived Expectations of Friends, Parents and Teachers*, 26 SCHOOL PSYCHOL. INT’L 147(2005).

<sup>43</sup> *Id.*

<sup>44</sup> Grim, *supra* note 30.

<sup>45</sup> Sacks and Salem, *supra* note 36.

school personnel, in certain circumstances a student may have the right to “be out” (express their sexual identity) at school, yet also have a right to privacy about that identity as it relates to their family.<sup>46</sup>

### **Strengthening Tools that Provide Help and Recourse for Victims of Cyberbullying**

Cyberbullying has been receiving increasing attention in the press, and there is concern about the widespread scope of this activity. This led the ABA Section of Antitrust Law to produce, as the first of its series of youth-education professionally produced short videos, one illustrating the harm caused by cyberbullying. Among the legal issues raised by this behavior is the right to privacy. Privacy law on the internet is covered by a variety of federal statutes, and some state laws govern the exchange of information and protect children’s privacy on the web. However, many instances of cyberbullying and cyberhate<sup>47</sup> can be addressed by an individual Internet Service Provider’s (ISP) “Terms of Service” agreement that is signed by the user.<sup>48</sup> Commercial providers may prohibit users from using their services to send anti-Semitic, racist, or bigoted messages. Such prohibitions do not violate the constitutional rights of users because a commercial provider is not a government agency.

Because the relationship between providers and users is usually strictly based on contract (users often click “I agree” to a site’s terms of use after signing up), it is the agreement between the provider and the user, and not the U.S. Constitution, which governs the relationship. These Terms of Service agreements and privacy policies are, therefore, self imposed rules that control what behavior is acceptable on the individual provider’s platform. Many cyberbullying and harassment incidents actually violate ISP Terms of Service. These are typically called a “TOS violation” and such incidents can have serious consequences for the account holder.<sup>49</sup> In most cases, many ISPs will close a cyberbully’s account, which will also close their parents’ household account.

Terms of Service enforcement can be a vital tool in preventing and addressing cyberbullying because it offers a practical recourse and serves as a first avenue for users subjected to bullying and harassment. ISPs and social networking platforms should be encouraged to adopt Terms of Service that clearly define and prohibit cyberbullying and cyberhate.

### **Expanding Collaborations, Partnerships, and Enforcement Actions by Federal Agencies**

In August 2010 a Federal National Bullying Summit was convened by the “Federal Partners in Bullying Prevention Steering Committee” to address the effects of bullying and harassment in our nation’s schools and to share insights on prevention with the goal of developing a national strategy to end bullying.<sup>50</sup> This federal summit was a collaborative effort by the U.S. Departments of Education, Health and Human Services (HHS), Agriculture, the Interior, and Justice with participation from federal, state, and local agencies; researchers; nongovernmental organizations and corporate leaders; and youth. The summit was the culmination of months of unprecedented collaboration between federal agencies.<sup>51</sup> In his remarks, Education Secretary Arne Duncan emphasized that in going forward, the agencies would join forces and use the Summit outcomes to “launch a sustained commitment to address and reduce bullying.”<sup>52</sup>

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<sup>46</sup> See, e.g., *Nguon v. Wolf*, 517 F.Supp.2d 1177 (U.S.D.C. C.D. CA 2007); *Sterling v. Borough of Minersville*, 232 F.3d 190 (C.A.3 PA 2000).

<sup>47</sup> The Anti-Defamation League defines cyberhate as: “any use of electronic communications technology to spread anti-Semitic, racist, bigoted, extremist or terrorist messages or information. These electronic communications technologies include the Internet (i.e., Web-sites, social networking sites, “Web 2.0” user-generated content, dating sites, blogs, on-line games, instant messages, and E-mail) as well as other computer- and cell phone-based information technologies (such as text messages and mobile phones).”  
[http://www.adl.org/internet/Binder\\_final.pdf](http://www.adl.org/internet/Binder_final.pdf)

<sup>48</sup> “Cyberbullying of LGBT Students” a National Conference Call sponsored by the National LGBT Bar Association. An audio recording of the call is *available at* [http://lgbtbar.org/events/Cyberbullying\\_of\\_LGBT\\_Students\\_Call\\_Recording.wav](http://lgbtbar.org/events/Cyberbullying_of_LGBT_Students_Call_Recording.wav).

<sup>49</sup> StopCyberbullying.org offers a practical guide for parents and is operated by Wired Kids Inc., a 501(c)3, charity dedicated to protecting children from sexual exploitation related to the Internet and supports WiredSafety, the world’s largest Internet safety, help and education resource *available at* <http://www.stopcyberbullying.org/parents/guide.html>.

<sup>50</sup> The Federal Bullying Prevention Summit was held in Washington DC, August 11-12, 2010 and was sponsored by the Federal Partners in Bullying Prevention Steering Committee, *available at* [http://www.findyouthinfo.gov/spotlight\\_bullyingSummit.shtml](http://www.findyouthinfo.gov/spotlight_bullyingSummit.shtml).

<sup>51</sup> In advance of the Summit, a broad coalition of civil rights, education, religious, and professional organizations proposed a series of thoughtful and comprehensive program proposals, training, data collection, and outreach proposals, *available at* <http://www.civilrights.org/advocacy/letters/2010/coalition-letter-to-sec-duncan-on-bullying-cyberbullying-and-harassment-recommendations.pdf>.

<sup>52</sup> *The Myths About Bullying: Secretary Arne Duncan’s Remarks at the Bullying Prevention Summit*,

Federal agencies can and should work collaboratively to provide resources and funding to develop and promote programming and training initiatives for educators, administrators, parents, teachers and law enforcement officials on how to recognize and respond to bullying, harassment, and cyberbullying.<sup>53</sup> The Department of Education, the Department of Justice, and the Department of Health and Human Services should update and coordinate reporting requirements and data collection on bullying and cyberbullying and collaborate to increase funding, information, and accessibility to online government and community resources.<sup>54</sup> This includes resources at HHS' student website, *Stop Bullying Now!*, a newly-launched website, [www.bullyinginfo.org](http://www.bullyinginfo.org), and an expansion of the campaign to include a focus on elementary school children, which the Department of Education has committed to fund.<sup>55</sup>

By partnering with state and local educational authorities, federal agencies can give educators, students, parents, and members of the community a voice in developing solutions. Federal agencies can also partner with corporate, civic, nonprofit, and professional groups and associations to strengthen and coordinate prevention efforts. These partnerships can help educate, raise awareness, contribute to policy and protocols, and encourage positive social behavior in order to end bullying and harassment. Sustained federal agency initiatives and partnerships are crucial to eliminating bullying and harassment and ensuring a safe and healthy learning environment for children.

The Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (HCPA), authorizes the provision of grants for local programs to combat hate crimes committed by juveniles, including programs that train local law enforcement officers in identifying, investigating, prosecuting and preventing hate crimes.<sup>56</sup> Coordinated federal agency responses should come from the Justice Department and the FBI by working with civil rights and community-based groups and law enforcement organizations to ensure effective implementation of their responsibilities under the HCPA. In addition, the HCPA amends the federal Hate Crime Statistics Act to require the FBI to collect data on crime directed against individuals because of their gender or gender identity – and for the first time to collect and report on aggregate data on hate crime committed by and against juveniles.<sup>57</sup>

The new mandate for the FBI to collect data about hate crime committed by and against juveniles is especially important, since there is a paucity of published data on juvenile hate crime. Only nine states – Idaho, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Tennessee, and Virginia currently collect such data.

An October 2001 report by the Justice Department's Bureau of Justice Statistics provided a disturbing snapshot of too-frequent involvement of juveniles in hate crime incidents. This report,<sup>58</sup> which carefully analyzed nearly 3,000 of the 24,000 hate crimes to the FBI from 1997 to 1999, revealed that a disproportionately high percentage of both the victims and the perpetrators of hate violence were young people under 18 years of age: 33% of all known hate crime offenders were under 18; 31% of all violent crime offenders and 46% of the property offenders were under 18; another 29% of all hate crime offenders were 18-24; 30% of all victims of bias-motivated aggravated assaults and 34% of the victims of simple assault were under 18; 34% of all persons arrested for hate crimes were under 18; 28% of the violent hate crimes, 56% of the bias-motivated property crimes, and another 27% of those arrested for hate crimes were 18-24. This data also found that juveniles make up nearly a quarter of all reported hate crime victims, that young people are disproportionately likely to be victimized by violent assaults and to have multiple offenders, and that their offenders are more likely to be acquaintances.<sup>59</sup>

### **Amending Federal Law to Establish Comprehensive Anti-Bullying Policies**

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August 11, 2010, available at <http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> The commitment to funding can be found in Secretary Duncan's remarks at the Federal Bullying Prevention Summit.

<sup>56</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (codified as amended in 18 U.S.C. § 249) (2009).

<sup>57</sup> 18 U.S.C. § 249 *supra* note 52.

<sup>58</sup> U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, HATE CRIMES REPORTED IN NIBRS, 1997-99 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hcrn99.pdf>.

<sup>59</sup> David Finkelhor, Richard Ormrod, & Derek Bowen, *Juvenile Victims of Hate Crimes*, (unpublished 11/01 draft prepared for the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice).

Current federal law does not comprehensively address the issues of bullying, cyberbullying, and harassment. Federal legislation prohibits particular harassment based on “race, color and national origin” under Title VI of the Civil Rights Act of 1964,<sup>60</sup> “sex” under Title IX of the Education Amendments of 1972,<sup>61</sup> and “disability” under Section 504 of the Rehabilitation Act.<sup>62</sup> However, no legislation addresses all forms of harassment and no federal legislation addresses, defines, or prohibits bullying or cyberbullying. Research and experience confirms that prevention is necessary and effective in confronting the short and long-term consequences of bullying and harassment.<sup>63</sup>

Federal legislation should be amended to ensure that bullying, cyberbullying, and harassment are clearly defined and the basis clearly enumerated. Schools and local education authorities’ should be required to implement effective policies and strategies to address bullying, and which contain clear prohibitions, training, prevention education, and support services in order to receive federal funding. Finally, federal law should require that school districts collect and report data on bullying and harassment in order to inform the continued development of effective federal, state, and local policies.<sup>64</sup>

It has been demonstrated that the best way to prevent harassment and bullying is to have clearly articulated policies defining prohibited conduct and enumerating the basis. Federal legislation should define bullying, harassment, and cyberbullying in a clear and comprehensive way by including the type of conduct that is prohibited.<sup>65</sup> In order to address all types of bullying, legislation should take into account that conduct can be in the form of any written, verbal or physical act, or any electronic communication.<sup>66</sup> Federal legislation should ensure that bullying and harassment policies include a definition that enumerates a specific basis for intervention, including incidents motivated by a student’s actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity, or religion, while at the same time acknowledging additional grounds that may be required by the state or district. A comprehensive federal statute should also include notice, reporting, and training requirements.<sup>67</sup>

Additionally, this Resolution reaffirms a recommendation of the ABA 2002 Resolution on this topic, which was aimed at preventing and responding to juvenile hate crimes.<sup>68</sup> Currently, the “No Child Left Behind Act of 2001” (NCLB) contains provisions on hate crime prevention training and technical assistance.<sup>69</sup> NCLB gives the U.S. Department of Education authority to award grants to states, local educational agencies, and community-based organizations to spend federal dollars on training, technical assistance, and demonstration projects to address violence that is “designed to prevent and to reduce the incidence of crimes and conflicts motivated by hate.” The Safe and Drug-Free Schools Act, as part of NCLB, conditions certain funding to school districts upon their written assurance that they have appropriate and effective discipline policies that prohibit disorderly conduct and a code of conduct policy that allows all students in the class to learn.

There are a several bills currently before Congress that reflect and facilitate the above recommendations. The Safe Schools Improvement Act (SSIA) would amend the Safe and Drug-Free Schools and Communities Act to require schools and districts receiving federal funds to adopt *comprehensive* and *enumerated* codes of conduct specifically prohibiting bullying and harassment.<sup>70</sup> The SSIA would require that states use grants for safe and drug-free schools to collect and report information on the incidence of bullying and harassment to the Department of Education and require local educational agencies and schools to use grants to prevent and respond to incidents of bullying and harassment. These

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<sup>60</sup> Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.).

<sup>61</sup> Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1688).

<sup>62</sup> Section 504 of the Rehabilitation Act, as amended 29 U.S.C. § 791.

<sup>63</sup> Bullying Prevention in the School: Research-Based Strategies for Educators, 11 THE CHALLENGE, 11, (Spring 2003) *available at* <http://www.thechallenge.org/past.htm>.

<sup>64</sup> These recommendations reflect those of the National Safe Schools Partnership, which has the support of almost 30 organizations—representative of constituencies in education, health, civil rights, law enforcement, youth development, and other areas and have joined together in support for federal legislation. These recommendations also take into account the Model Bullying/Cyberbullying Prevention Statute developed by the Anti-Defamation League which is inclusive, comprehensive, and sufficiently protective of the First Amendment.

<sup>65</sup> The National Safe Schools Partnership recommends defining “bullying,” “harassment,” and “cyberbullying” as conduct that adversely affects one or more students, depriving them of access to educational opportunities or benefits provided by their schools.

<sup>66</sup> This recommendation is based on the American Defamation League’s Model Cyberbullying Statute *available at* [http://www.adl.org/civil\\_rights/Model\\_Cyberbullying\\_law%20\\_3.pdf](http://www.adl.org/civil_rights/Model_Cyberbullying_law%20_3.pdf).

<sup>67</sup> *Id.*

<sup>68</sup> American Bar Association policy on bullying approved by the House of Delegates (August 2002).

<sup>69</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

<sup>70</sup> Safe Schools Improvement Act, H.R. 2262.

local education agencies would also be required to notify parents and students annually of the comprehensive policies by outlining prohibited conduct in the school and establishing grievance procedures for students and parents to register complaints.

The Student Non-Discrimination Act (SNDA) is modeled after title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex and provides legal recourse to redress such discrimination.<sup>71</sup> SNDA would prohibit any school program or activity receiving federal financial assistance from discriminating against any public school student on the basis of actual or perceived sexual orientation or gender identity or against any person with whom a student associates or has associated. Discrimination would include harassment and the exclusion from or denial of access to any program or activity that receives federal financial assistance. The SNDA would also allow an aggrieved individual to assert a violation of these prohibitions in a judicial proceeding.

The national attention around the suicide of Rutgers University freshman Tyler Clementi, demonstrates that bullying and harassment is also a problem on college and university campuses. Thus, additional legislation is necessary to ensure that colleges and universities have comprehensive anti-harassment, bullying, and cyberbullying policies. Federal student aid could be conditioned on a requirement that college and university campuses adopt comprehensive codes of conduct that prohibit bullying and harassment, require training, and establish protocols to handle complaints and reported incidents.<sup>72</sup> Thus, it would be important to support efforts to create federal grants to assist colleges and universities to establish programs aimed at prevention, especially including the harassment of LGBT students.

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<sup>71</sup> Student Nondiscrimination Act of 2010, H.R. 4530.

<sup>72</sup> U.S. Senator Frank R. Lautenberg (D-NJ) announced a new legislative effort to ensure that colleges and universities have in place anti-harassment policies, which are not currently required by federal law.