

Introduction

One measure of the scope of a problem is the attention that it attracts from society in general and from the government in particular. Based on that measure, bullying is a problem of monumental proportions.

All facets of society have embraced antibullying as a cause. A documentary film called *Bully*, released in 2012, follows the lives of five students who were bullied; two of the students killed themselves. The content of *Bully* is provocative, but the Motion Picture Association of America changed its rating from R to PG-13 due to the protests of people who wanted a wider audience to see—and benefit from—the movie.¹ Beyond the movie, there are support groups, programs, websites, and campaigns on Facebook all focused on the problem of bullying.² The news media regularly reports on incidents of bullying, such as the Tyler Clementi suicide and the recent conviction of his room-

1. Bully, Now Playing, Official Site, <http://thebullyproject.com/indexflash.html> (last visited June 14, 2012).

2. See, e.g., Bullying Support Groups, <http://www.overcomebullying.org/bullying-support-groups.html#LocalYouthSchoolBullying> (last visited June 14, 2012); Dakarai I. Aarons, *Efforts to End Bullying, a Challenge to Leaders, Gain New Momentum*, EDUC. WK.: SPOTLIGHT ON BULLYING, May 12, 2010; U.S. Dep't of Health and Human Services, [stopbullying.gov](http://www.stopbullying.gov/), <http://www.stopbullying.gov/> (last visited June 14, 2012); Facebook, Stop Bullying: Speak Up, <http://www.facebook.com/stopbullyingspeakup> (last visited June 14, 2012).

mate, and celebrities have been prominent in campaigning against it.³

The government, too, has become involved in the problem of bullying. In August of 2010, the U.S. Department of Education, the U.S. Department of Health and Human Services, and four other federal departments held the first-ever

3. Reports concerning incidents of bullying at school are widespread. *See, e.g.*, Michelle Nicks, WFMJ, *Wellsville Mother Speaks Out Against Bullying, After Son Tries to Take His Own Life* (Mar. 22, 2012), <http://www.wfmj.com/story/17234194/wellsville-mother-speak-out-against-bullying-after-son-tried-to-take-his-own-life>; Carrie Wood, *Bullying Incidents on the Rise in Lake Washington School District*, KIRKLAND REP., Feb. 24, 2010, *available at* <http://www.kirklandreporter.com/news/85094287.html>; Peter Schworm & Milton J. Valencia, *Anger Turns Toward Staff in Bullying Case*, BOSTON GLOBE, Mar. 31, 2010, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/03/31/anger_turns_toward_school_staff_in_bullying_case/; Jason Schultz, *Palm Beach County Reports Most School Bullying Incidents, Though Numbers Might be Skewed*, PALM BEACH POST, July 20, 2011, *available at* <http://www.palmbeachpost.com/news/schools/palm-beach-county-reports-most-school-bullying-incidents-1624781.html?sort=desc>. Such reports often involve lawsuits filed against school districts. *See, e.g.*, Steve McConnell, *Bullying Federal Lawsuit Lodged Against Scranton School District Headed to Settlement Talks*, SCRANTON TIMES-TRIB., Mar. 23, 2012, *available at* <http://thetimes-tribune.com/news/bullying-federal-lawsuit-lodged-against-scranton-school-district-headed-to-settlement-talks-1.1289388#axzz1r0uyO78t>; Steve Williams, *Care2, Sixth Bullied Student Sues Minnesota School District* (Aug. 13, 2011), <http://www.care2.com/causes/sixth-bullied-student-sues-minnesota-school-district.html>. The Tyler Clementi case received considerable media attention. *See, e.g.*, Joseph Ax & Jessica Dye, Reuters, *Rutgers Hate Crime Verdict Sends Anti-Bullying Message* (Mar. 17, 2012), <http://www.reuters.com/article/2012/03/17/us-crime-rutgers-analysis-idUSBRE82G04B20120317>. On celebrity campaigns, see John Mitchell, PopEater, *Celebrities Team Up for Anti-Bullying Campaigns* (Oct. 6, 2010), <http://www.popeater.com/2010/10/06/tim-gunn-ellen-degeneres-bullying-psa/>.

National Bullying Summit to bring together state, local, civic, and corporate leaders to plan a strategy to end bullying.⁴ Then, on March 10, 2011, President Barack Obama and First Lady Michelle Obama convened the White House Conference on Bullying Prevention.⁵ As part of a follow-up to the conference, the White House launched a website to collect resources to combat bullying: www.stopbullying.gov.⁶

Despite the societal and governmental attention being paid to the problem, bullying persists. Survey results released in October 2010 by the Josephson Institute Center for Youth Ethics revealed that in the year preceding the survey, 47 percent of the 43,321 high school students surveyed reported being bullied (physically abused, teased, or taunted in a way that upset them), and 50 percent admitted to bullying someone else.⁷ The Sioux City Community

4. See Press Release, U.S. Dep't of Educ., U.S. Education Secretary to Keynote Department's First-Ever Bullying Summit: Partners Will Come Together to Develop a National Strategy for Reducing and Ending Bullying (Aug. 2010), *available at* <http://www.ed.gov/news/media-advisories/us-education-secretary-keynote-departments-first-ever-bullying-summit>.

5. President Obama and the First Lady at the White House Conference on Bullying Prevention, WHITEHOUSE.GOV, Mar. 10, 2011 [hereinafter White House Conference], *available at* <http://www.whitehouse.gov/photos-and-video/video/2011/03/10/president-obama-first-lady-conference-bullying-prevention#transcript>.

6. U.S. Dep't of Health and Human Services, [stopbullying.gov](http://www.stopbullying.gov), <http://www.stopbullying.gov/>.

7. Press Release, Josephson Inst., Ctr. for Youth Ethics, The Ethics of American Youth: 2010; Largest Study Ever Shows Half of All High School Students Were Bullies and Nearly Half Were the Victims of Bullying During Past Year (Oct. 26, 2010), *available at* http://charactercounts.org/programs/reportcard/2010/installment01_report-card_bullying-youth-violence.html.

School District—former home to Alex Libby, one of the five students in *Bully*—partnered with the Waitt Institute for Violence Prevention more than twelve years ago to create an antibullying program; even with this program in place and training for staff, Libby was bullied to the point where his family decided to move.⁸

The consequences of this persistent problem are always painful. As he said in his remarks at the White House conference, President Obama himself felt the effects of bullying: “[W]ith big ears and the name that I have, I wasn’t immune. I didn’t emerge unscathed.”⁹ Similarly, millions of students feel the pain and remember it for years. A long and persistent memory apparently led Eric Giray to sue his former classmate Daniel Dworakowski and former school (Calhoun School) for an act of what he alleges was bullying. The lawsuit was filed in the Manhattan Supreme Court in March 2012. The alleged incident took place on October 15, 2004.¹⁰

Sometimes the consequences are tragic. Tragedy can sometimes mean the need to relocate to another school or another town, as in the case of Libby. But tragedy can take its crueler turn in the form of suicide:

8. Perry Beeman, *Victims of Bullying, Including Iowa Boy, Featured in Movie*, DES MOINES REG. 1A, 6A (Mar. 31, 2012), available at <http://www.desmoinesregister.com/article/20120331/NEWS/303310024/Victims-bullying-including-Iowa-boy-featured-documentary>.

9. White House Conference, *supra* note 5.

10. Barbara Ross, *He Sues School and Student Bully—8 Yrs. Later!* N.Y. DAILY NEWS (Mar. 22, 2012), available at http://articles.nydailynews.com/2012-03-22/news/31227186_1_anti-bullying-policy-elephant-ears-administrators.

Megan Meier was 13 years old when she committed suicide due to bullying from a fellow classmate and her mother through a fake MySpace account. 18 year old Rutgers University student Tyler Clementi jumped from the George Washington Bridge after footage of him engaged in sexual activity was secretly recorded and released online by his roommates. Hope Witsell committed suicide in 2009 after being taunted by classmates for a nude photo she sent to a crush that others found.¹¹

Beyond its effect on individual students, bullying has a decided effect on the entire educational community. Recognizing the wide and profound impact of bullying on the school environment, the U.S. Court of Appeals for the Fourth Circuit observed that schools have an obligation to protect their students, an obligation that outweighs free speech concerns:

According to a federal government initiative, student-on-student bullying is a “major concern” in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to

11. Jessica Kolifrath, All News Wire, Cyberbullying: The Hate, Torment and Death Virus (Oct. 28, 2010), www.allnewswire.com/cyberbullying.

protect their students from harassment and bullying in the school environment. Far from being a situation where school authorities “suppress speech on political and social issues based on disagreement with the viewpoint expressed,” school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.¹²

Since public education remains a responsibility of the states and their units of local government—the school administrators who have the obligation to prevent and punish bullying work for local school districts—the primary response of the law thus far has been at the state and local level: the adoption of statutes and state or local policies. This monograph will review state statutes concerning bullying, discuss the constitutional issues that have arisen or that may arise from the application of antibullying regulations, examine the cases in which school district regulation of bullying has been addressed, review the existing federal guidance that is relevant to bullying, and offer some suggestions for a systemic approach to bullying.

12. *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 572 (4th Cir. 2011) (citations omitted).