
Law and Policy on the Concept of Bullying at School

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The nationwide effort to reduce bullying in U.S. schools can be regarded as part of larger civil and human rights movements that have provided children with many of the rights afforded to adult citizens, including protection from harm in the workplace. Many bullied children find that their schools are hostile environments, but civil rights protections against harassment apply only to children who fall into protected classes, such as racial and ethnic minorities, students with disabilities, and victims of gender harassment or religious discrimination. This article identifies the conceptual challenges that bullying poses for legal and policy efforts, reviews judicial and legislative efforts to reduce bullying, and makes some recommendations for school policy. Recognition that all children have a right to public education would be one avenue for broadening protection against bullying to all children.

Keywords: bullying, harassment, children's rights, school safety

Two events in 1999 were turning points in the recognition of school bullying as an important societal problem in the United States. The shooting at Columbine High School was the most notorious of a series of school attacks that were widely viewed in the press as actions by vengeful victims of bullying (Dinkes, Kemp, & Baum, 2009; Fein et al., 2002). Equally important, but less prominent in the national news, in the same year, the U.S. Supreme Court (*Davis v. Monroe County Board of Education*, 1999) established that schools could be liable for failure to stop student-to-student sexual harassment. This far-reaching decision has supported nationwide lawsuits concerning victims of bullying (Alley & Limber, 2009), as well as a directive from the U.S. Department of Education's Office for Civil Rights (hereafter "Office for Civil Rights") that certain forms of bullying must be addressed as civil rights violations (U.S. Department of Education, Office for Civil Rights, 2010). Since 1999, 49 of 50 states have passed antibullying legislation (Federal Partners in Bullying Prevention, 2014). This article examines law and policy on the concept of bullying at school that stem from these judicial and legislative developments.

The movement to protect children from bullying represents a historic step forward in children's rights. In the past century, laws and policies concerning child labor, child protection, social welfare, adoption, divorce, and criminal prosecution, among others, have advanced the rights of children in the United States. The effort to prevent bullying promises to extend to children a basic right to safety already afforded to adults. This movement also

intersects with important civil and human rights concerns for persons with disabilities, racial and ethnic minorities, sexual minorities, women, and others who constitute protected classes of individuals.

Despite more than a decade of judicial and legislative activity, as well as a massive increase in scientific research and the development of numerous prevention programs (Bradshaw, 2015; Hymel & Swearer, 2015), law and policy about bullying remain fragmented and inconsistent. The purpose of this article is to critically examine conceptual challenges in judicial and legislative efforts to address bullying in schools. Because of space limitations, we concentrate on the core issue of how bullying is defined and who should be protected. We begin with an analysis of definitional challenges with bullying and explain how bullying is distinguished from other forms of peer aggression and from the concept of harassment. We analyze some important judicial decisions and actions by the U.S. Department of Education that illuminate the gap between a civil rights approach to harassment and the broader realm of bullying, and note the persistence of these problems in state legislation. We conclude that current legal and policy approaches, strongly rooted in laws regarding harassment and discrimination, do not provide adequate protection for all bullied students and that a more comprehensive approach that recognizes the right to education for all children is needed.

Conceptual Challenges

Bullying is such a broad and omnibus concept that there is potential for confusion and controversy over its meaning, severity, and relation with other constructs. The conventional definition of bullying includes three characteristics: (1) intentional aggression, (2) a power imbalance between aggressor and victim, and (3) repetition of the aggressive

Editor's note. This article is one of six in the "School Bullying and Victimization" special issue of the *American Psychologist* (May–June 2015). Susan M. Swearer and Shelley Hymel provided the scholarly lead for the special issue.

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We thank Richard Bonnie, David Osher, Jane Riese, Marlene Snyder, Nan Stein, and Craig Wood for their reviews of earlier versions of this article.

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behavior (Olweus, 2013; Solberg & Olweus, 2003). These three characteristics were recognized by the Centers for Disease Control and Prevention in its uniform definition of bullying (Gladden, Vivolo-Kantor, Hamburger, & Lumpkin, 2014). Each of these criteria poses challenges for law and policy.

The first criterion of intentional aggression is broadly inclusive and means that bullying can be physical, verbal, or social in nature (Gladden et al., 2014). As a result, bullying can overlap with many other proscribed behaviors such as criminal assault, extortion, hate crimes, and sexual harassment. In its milder forms, bullying can be difficult to distinguish from ordinary teasing, horseplay, or conflict. With regard to social or relational bullying, it may be hard to draw the line between children's friendship squabbles and painful social ostracism.

The second criterion, the requirement for a power imbalance between aggressor and victim, is at the core of the concept of bullying and distinguishes it from other forms of peer aggression. However, a power imbalance is difficult to assess. Although judgments about physical size and strength are feasible in cases of physical bullying, bullying is most often verbal or social and requires a determination of a power differential that requires an assessment of peer status, self-confidence, or cognitive capability (Cornell & Cole, 2011; Olweus, 2013). In some contexts, the victim lacks power for less obvious reasons, such as because of minority sexual orientation, disability, or membership in a particular racial or ethnic group (Greif & Furlong, 2006). A further complication is that interpersonal power is not a static quality because it can vary across situations and circumstances. A person surrounded by friends gains temporary power over an adversary. An anonymous individual posting to a website has power to make

hurtful remarks that may not have been possible in a face-to-face situation.

Although there is widespread agreement among scholars that bullying is defined by the dominance of an aggressor over a victim, research has found that students often disregard or overlook power imbalance in their reports of bullying (Cornell & Huang, 2014; Green, Felix, Sharkey, Furlong, & Kras, 2013; Ybarra, Espelage, & Mitchell, 2014). Despite hundreds of studies using various survey methods, a satisfactory approach to assess the power imbalance criterion has yet to be identified, posing a challenge to efforts to measure bullying prevalence and the effectiveness of prevention efforts (Cornell & Cole, 2011; Greif & Furlong, 2006).

Although the definition of bullying conventionally requires a power imbalance, sexual harassment and other acts of discrimination (as discussed below) can occur in the absence of a clear power difference. Furthermore, there is no requirement for a power imbalance in criminal acts that occur in the context of bullying. For example, a physical assault is an assault even if the target was not obviously smaller or weaker. The question of a power differential might be regarded as superfluous in such cases when harm to the victim is obvious. We return to this point in our analysis of laws that define bullying.

Despite the challenges in identifying it, a power differential is often important in differentiating bullying from other aggressive behavior among children and youth. From a societal and moral perspective, the youth who inflicts harm on a comparatively weaker victim may be considered more blameworthy and deserving of consequences. There may be greater concern about both the impact of bullying on the victim (Ybarra et al., 2014) and the developmental trajectory of the youth who bullies others (Ttofi, Farrington, Lösel, & Loeber, 2011).

Research has confirmed that the impact of bullying on victims is often greater than that of other forms of peer aggression or victimization (Felix, Sharkey, Green, Furlong, & Tanigawa, 2011; Turner, Finkelhor, Shattuck, Hamby, & Mitchell, 2014; Ybarra et al., 2014). For example, Felix and colleagues (2011) found that among students in Grades 5 to 12, those who experienced bullying reported less life satisfaction, school connectedness, and hope compared with peers who experienced peer victimization that was not bullying or those who reported no victimization. In a nationally representative sample of children and youth aged 6 to 17 years, Turner et al. (2014) found that power imbalance independently increased the traumatic impact of peer victimization. These findings are especially important because of the long-term effects of peer victimization in school (McDougall & Vaillancourt, 2015).

Furthermore, school efforts to address bullying may require somewhat different strategies for intervention and prevention than for other forms of peer aggression. For example, efforts by school staff to address a student's persistent humiliation of a classmate with developmental delay should be different from efforts to end a fight or an aggressive verbal exchange between students of equal status. As a result, we conclude that the power imbalance



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should be retained both as an area of scientific investigation and as a critical issue in assessing individual cases of student aggression. The most significant problem from a legal and policy perspective, however, is that the power imbalance criterion is often omitted from definitions of bullying in the law, and is not an explicit component of legal definitions of harassment, as reviewed below.

The third criterion for bullying is that it is a repetitive behavior. On one hand, if repetition is viewed as a necessary criterion for intervention, this might complicate enforcement of antibullying rules, because observers have the added burden of detecting multiple incidents of abusive behavior before they can conclude that bullying has occurred. On the other hand, recognition of a repetitive pattern to bullying may be helpful in ruling out less serious behaviors (Solberg & Olweus, 2003). Most definitions recognize that a single incident can be sufficiently harmful or likely to be repeated that it can be regarded as bullying (Gladden et al., 2014; Olweus, 2013).

More recently, cyberbullying has emerged as a novel and especially noxious way to engage in bullying. Through the use of digital communication (e.g., web postings, text messages, tweets), the perpetrator of bullying can exercise great power in creating public humiliation on a continuous basis. Although there are some unique and challenging aspects to cyberbullying (Kowalski, Limber, & Agatston, 2012), most authorities recognize that cyberbullying is a modality for engaging in verbal and social bullying, subject to the same definitional criteria, rather than a qualitatively different behavior (Gladden et al., 2014; Olweus, 2013; Smith et al., 2002).

In summary, there are definitional challenges with the concept of bullying that pose a dilemma for policymakers. Laws concerning bullying must rest on a definition that can

be readily applied and understood. The complications associated with the definition of bullying have led some to recommend that it would be preferable to focus more generally on all forms of peer victimization regardless of power differential or repetition (Finkelhor, Turner, & Hamby, 2012). However, the moral urgency to stop bullying is based on the plight of a victim who is overpowered and subjected to repeated humiliation, and there is evidence that victims of bullying experience more serious adjustment problems than victims of other forms of peer aggression (Juvonen & Graham, 2014; Ybarra et al., 2014). Moreover, to the extent that research indicates that bullying is a more pernicious and complex form of aggressive behavior, then specific intervention efforts may be needed (Tofi et al., 2011). Our proposed response to this dilemma follows an analysis of the closely related concept of harassment.

Civil Rights Laws and Bullying

The term *harassment* is often used interchangeably with bullying, but it has an established history in civil rights law and policy that precedes the fledgling laws and developing policies concerning bullying. Civil rights laws in the United States are the culmination of many different advocacy movements and years of struggle to win protections for specific classes of individuals who have been identified as vulnerable to discrimination. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin, whereas Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex. Both Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 2004 prohibit discrimination on the basis of disability. Of particular relevance to educators is that these laws protect students from discriminatory actions that deprive them of their right to free appropriate public education (FAPE), a concept articulated in the 1975 Education of All Handicapped Children Act (also known as Public Law 94-142), and revised in the 1990 Individuals with Disabilities Education Act (IDEA). Since their inception, these laws have been generally interpreted to mean that teachers, administrators, and other school personnel who are employed in public schools receiving federal funds must not engage in discriminatory practices against their students. These laws clearly protect students from discriminatory treatment by adults at school, but there was substantial disagreement among the federal courts regarding their application to student-on-student harassment (Stein, 1999).

In 1999, the Supreme Court decision in *Davis v. Monroe County Board of Education* (1999) ruled that school authorities could be held liable under Title IX for damages in a case involving student-on-student harassment. Although the case made no direct reference to bullying, *Davis v. Monroe* has emerged as a landmark case with broad implications for bullying. Specifically, the case involved a fifth-grade girl who was repeatedly harassed by a male classmate who made sexually suggestive statements and gestures, and touched her inappropriately. During months of harassment, the girl was distressed, her grades

declined, and she wrote a suicide note. Frustrated by the school's lack of responsiveness, the parents went to the police and pressed charges. The boy pled guilty to sexual battery.

The family sued school authorities on the basis of the Title IX provision that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (20 U.S.C. §1681[a]). The lower courts sided with the school officials and the family appealed; after 6 years, the case reached the U.S. Supreme Court. The Supreme Court's 5–4 decision was a monumental shift in the legal obligations of schools for student behavior. For the first time, the Supreme Court recognized that sexual harassment of one student by another student could constitute a discriminatory act under Title IX. This decision opened the door for more cases arguing that schools should take action to stop harassment. In its decision, the Supreme Court identified four conditions that must be met in order for a school to be held liable. First, the student must be victimized because of membership in a protected category. Students who are not in a protected category, or whose harassment is not based on their membership in that protected category, are not included. For example, if a student from a racial minority group is teased for being overweight, the student would not be included in the scope of civil rights violations because obesity is not a protected category and the teasing was not directed at his or her minority status.

A second condition is that the harassment at school must be severe. Ordinary teasing, name-calling, and rough play among students are not sufficient unless "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect" (p. 21). The court recognized that mildly aggressive behavior is commonplace among students and did not require that schools be held to the same standards expected for adults in the workplace. Third, the court decided that school authorities must be aware of the harassment, and are not liable for harassment that they did not know about. Fourth, schools are liable only if they are "deliberately indifferent" to the harassment. Schools are not required to prevent or stop harassment, but only to make a reasonable effort to intervene when they become aware of it. Under the scope of this decision, schools do not have to be successful in their efforts and there is no standard of practice specified for schools and no specific requirement that they maintain a school environment that is reasonably free from harassment.

Although the *Davis v. Monroe* decision can be regarded as a great step forward for children's rights in school, it fell short of extending to students the protections from harassment afforded to adults in the workplace (Graves, 2008). Both the third and fourth conditions represent a significant difference from standards commonly applied in many adult workplace settings. In the adult workplace, employers may be liable for sexual harassment by coworkers that they should have known

about, even if they were unaware of it. Furthermore, employers are expected to be successful in their efforts to remedy the harassment and restore a harassment-free workplace (Schneider, Pryor, & Fitzgerald, 2010).

Subsequent cases illustrate how courts have applied the standards of the *Davis v. Monroe* decision to bullying. In *Shore Regional High School Board of Education v. P.S. Forty-one* (2004), the Third Circuit held that the school district's failure to stop bullying can constitute a denial of a student's right to FAPE under IDEA, 20 U.S.C. §§ 1400–1487. In this case, a boy had been verbally and physically bullied because of his perceived "girlish" appearance and was called names such as "gay" and "faggot." The boy was classified as eligible for special education services because of emotional disturbance that was attributed to being bullied. After the boy attempted suicide in the eighth grade, his parents were unwilling to send him to the local high school, where he would be exposed to the same students who had bullied him in elementary and middle school. Although school authorities initially denied the boy's transfer, the parents argued successfully to the court that he should be permitted to attend a different high school.

In a highly publicized case that prompted the Connecticut legislature to pass antibullying legislation, a 12-year-old boy died by suicide after years of physical and verbal bullying in middle school (Connecticut Commission on Children, n.d.). In this case, *Scruggs v. Meriden Board of Education* (2005), the plaintiff successfully argued that the boy was bullied because of his learning disability, and that the school failed to follow appropriate special education procedures, did not train its staff adequately, and did not have appropriate antibullying and harassment policies.

It is difficult to assess how frequently school systems are sued for failure to protect students from bullying, because most cases are settled without readily available records. However, in an analysis of 166 federal and state court decisions that specifically involved bullying at school, Holben and Zirkel (2014) found a dramatic increase in litigation since the early 1990s, typically based on Title IX or Fourteenth Amendment (substantive due process and equal protection) claims. The study found that the overwhelming number of claims and rulings favored defendants (schools) over plaintiffs (parents), which seemed attributable to two factors, the court's traditional tendency (a) "to provide ample latitude to public school authorities" (Holben & Zirkel, 2014, p. 324), and (b) to recognize state immunities to tort liability (Holben & Zirkel, 2014). However, cases reaching the level of a court decision are likely skewed because school authorities with weaker defenses are more likely to reach a settlement. The emergence of clearer and stricter educational standards for schools to protect students from bullying is likely to favor more successful plaintiff cases. At the same time, successful plaintiff cases will send a strong message to school authorities and prompt widespread institutional change.

Federal Guidance on Bullying and Harassment

Educational standards regarding bullying are emerging most clearly through a series of “Dear Colleague” letters from offices of the U.S. Department of Education to school authorities. In 2010, the Office for Civil Rights (U.S. Department of Education, Office for Civil Rights, 2010) sent a Dear Colleague letter to schools across the nation to provide guidance on dealing with bullying that rises to the level of a civil rights violation. Although the policy language and specific standards of the letter have been variously interpreted and widely debated (Marcus, 2011), at its core, the Office for Civil Rights emphasized that school administrators should not fail to recognize that some forms of bullying constitute discriminatory harassment under federal law. As the Dear Colleague letter advised, bullying of an individual based on race, color, national origin, sex, or disability can be a civil rights violation if it is sufficiently severe, pervasive, or persistent that it interferes with a student’s ability to benefit from the school’s services, activities, or opportunities (U.S. Department of Education, Office for Civil Rights, 2010).

Furthermore, when a student who is being bullied is also identified as a victim of a federal civil rights violation, the school has more than an obligation to stop the violation. The Office for Civil Rights indicated that schools must “eliminate any hostile environment and its effects” as well as take steps to “prevent the harassment from recurring” (U.S. Department of Education, Office for Civil Rights, 2010, pp. 2–3). These obligations imply a broader and sustained effort to influence student behavior and improve the school climate beyond simply disciplining the culpable student. More generally, the Office for Civil Rights encouraged schools to conduct staff training on the school’s civil rights obligations, to have clear policies and procedures in place, and to provide some form of orientation to students and families that would help them recognize and seek help for harassment. These recommended standards go well beyond the conditions for liability articulated in *Davis v. Monroe*.

In 2011, another Office for Civil Rights Dear Colleague letter advised that the Title IX protection against gender-based harassment would include students harassed on the basis of their perceived sexual orientation. This was an important extension of protection because harassment based on sexual orientation is so pervasive and sexual minority students report extraordinarily high levels of bullying (O’Malley Olsen, Kann, Vivolo-Kantor, Kinchen, & McManus, 2014). In 2013, the U.S. Department of Education Office of Special Education and Rehabilitative Services issued guidance to school authorities emphasizing their obligation to prevent the bullying of students with disabilities, stating, “whether or not the bullying is related to the students’ disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied” (U.S. Department of Education Office of Special Education and Rehabilitative

Services, 2013, p. 2). In response to “ever-increasing numbers of complaints concerning the bullying of students with disabilities and the effects of that bullying on their education” (p. 1), the Office for Civil Rights issued a follow-up letter to school personnel 1 year later (Lhamon, 2014) to reiterate that the bullying of a student with a disability can result in a denial of FAPE, highlight schools’ obligations to address behavior that may constitute disability-based harassment, and explain schools’ responsibilities to remedy any denial of FAPE.

Although the federal law protects the rights of students with disabilities (subsequently supported in a 2014 federal district court decision in *T.K. v New York City Department of Education*), the Office of Special Education and Rehabilitative Services authorities also observed,

Bullying of any student simply cannot be tolerated in our schools. A school where children don’t feel safe is a school where children struggle to learn. Every student deserves to thrive in a safe school and classroom free from bullying. (Yudin, 2013, p. 1)

The observation that all students should be protected from bullying may seem obvious, but it is not recognized in federal law.

A key problem with the use of civil rights law to prevent bullying is that there are bullied students who do not fall into one of the protected groups (Alley & Limber, 2009; Cascardi, Brown, Iannarone, & Cardona, 2014; General Accounting Office, 2012). Moreover, some students may be members of a protected group, but bullying often targets multiple characteristics (“You’re fat and stupid”) that do not narrowly focus on protected characteristics such as race or religion. The application of civil rights laws regarding harassment to cases of bullying, however beneficial to so many students, creates gaps and ambiguities that do not protect all other bullied students (General Accounting Office, 2012). Although students with disabilities have an explicit right to a FAPE mandated by IDEA, students without disabilities are not included under this legislation. A natural question is why students without disabilities do not have a comparable right to FAPE? If all students had a right to public education, then school bullying of any student, regardless of disability status or membership in any protected class, could represent a violation of that student’s rights. This recognition would provide a civil rights protection to all students who are bullied with sufficient severity that it denies their right to public education—if such a right existed.

A central limitation to national efforts to prevent bullying is that there is no federal fundamental right to public education (*San Antonio Independent School District v. Rodriguez*, 1973), which has historically been the domain of state and local governments. Arguably, the goal of No Child Left Behind Act (2001) to provide “all children” with “significant opportunity to obtain a high-quality education” represents an inclusive standard that could be applied to all students, and Congress could establish a private right of action for students whose education is not adequate (Boyce, 2012). A national right to education would be consistent with the United Nations Convention on the

Rights of the Child, which, under international law, gives children the right to education (Blanchfield, 2009; United Nations General Assembly, 1989). Notably, the United States and Somalia are the only two of 193 nations that have not ratified the Convention on the Rights of the Child (Blanchfield, 2009).

Many states, in various ways, recognize the rights of students to a public education free from discrimination (General Accounting Office, 2012). The General Accounting Office (2012) has called for an assessment of state civil rights laws in order to identify the full extent of legal protection available to students who are subject to bullying. For example, in New Jersey, the state Supreme Court cited its antidiscrimination law that provides protections beyond those afforded by Title IX. The court unanimously concluded, "Students in the classroom are entitled to no less protection from unlawful discrimination and harassment than their adult counterparts in the workplace." *L. W. v. Toms River Regional Schools Board of Education*, 2007). The court further opined that schools should be required to "implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment" (*L. W. v. Toms River Regional Schools Board of Education*, 2007). The New Jersey antidiscrimination law merits emulation.

State Laws on Bullying

Since 1999, legislative activity on bullying in schools has been remarkably active. Between 1990 and 2010, more than 120 bills were enacted by state legislatures that either introduced or amended education or criminal justice statutes addressing bullying (U.S. Department of Education, 2011). Currently, all but one state has passed a law that directs school districts or individual schools to develop policies to address bullying. Before examining the definitions of bullying used in these statutes and some of the challenges these definitions pose, we provide a brief overview of their provisions.

Key Provisions in State Anti-Bullying Laws

Although state laws vary widely with regard to the types of provisions that must be included in school policies (Alley & Limber, 2009; U.S. Department of Education, 2011), some of the most common provisions include investigation and reporting of bullying, disciplinary actions for students involved in bullying, training of staff, and prevention efforts.

Reporting incidents of bullying. Many state laws emphasize investigation and reporting of bullying incidents. More than one third of the state laws explicitly require or encourage school staff to report known incidents of bullying, and approximately two thirds require or encourage school districts to create procedures for investigating bullying incidents. Although most states give districts considerable flexibility in their procedures, some have taken a more prescriptive approach. For example, in the 2010 amendments to its prior bullying law, New Jersey legislators (N.J.S.A. §18A:37–13) laid out detailed requirements regarding the investigation, documentation, and re-

view of each incident of bullying. Although investigation of bullying incidents is critical, there is concern that some requirements impose an excessive burden on school employees without adding substantial protection to bullied students and their families (Hu, 2011; Rice, 2011). Moreover, few states provide funding to support their new mandates, which limits the potential for successful implementation.

Disciplinary policies. Three quarters of the states in the United States require or encourage school systems to discipline students who bully, but there are broad differences in what kinds of disciplinary consequences are considered appropriate (Sacco, Silbaugh, Corredor, Casey, & Dohert, 2012). Most state laws include general language about the need for "consequences," "disciplinary action," or "remedial action," and several explicitly recognize that disciplinary actions should be age-appropriate (e.g., Arkansas, Georgia, and Missouri), but a handful authorize specific harsh punitive consequences, including suspension, expulsion, and transfer to alternative school settings (Alley & Limber, 2009; Sacco et al., 2012).

Especially troubling are the public calls for zero tolerance for bullying ("Education Department Hosts," 2012) despite widespread criticism that zero tolerance is a failed disciplinary policy (Morgan, Salomen, Plotkin, & Cohen, 2014). According to the American Psychological Association Zero Tolerance Task Force (2008), zero tolerance policies mandate a severe punishment that is applied to all violations regardless of the circumstances. To some educators, *zero tolerance* simply means that a certain form of misbehavior will not be ignored; however, the practice of zero tolerance in schools typically includes a specified punishment, typically long-term suspension or expulsion regardless of the seriousness of the infraction, or whether it was intentional or unintentional. It is the automatic and severe nature of the punishment that has distinguished zero tolerance from other forms of discipline and has raised concern (Cornell, 2006; Morgan et al., 2014). Critics have denounced zero-tolerance policies as unsupported by scientific evidence (American Psychological Association Zero Tolerance Task Force, 2008; Morgan et al., 2014). The use of automatic school suspension has been rejected because it is unnecessarily punitive, fails to address the needs of students who bully, and has a chilling effect on reporting by children and adults (Federal Partners in Bullying Prevention, n.d.; Limber, 2010). In light of reports that bullying is widespread in the general school population, the potential negative consequences of applying zero tolerance to bullying are considerable.

Prevention and support services. More promising than a focus on punishment are provisions in state laws that encourage preventive approaches to bullying, as well as counseling or other support services to students involved in bullying. Approximately half of states currently require or encourage school districts to provide training for school personnel on bullying prevention, and most require or encourage the implementation of bullying prevention, education, or awareness programs for students (Sacco et al., 2012; U.S. Department of Education, 2011).

However, only one third of state laws guide districts to include in their policies the provision of counseling or other support services for bullied students, students who bully, or (in a few states) witnesses to bullying (Sacco et al., 2012).

A critical need for schools is guidance on effective prevention and intervention services. Virginia legislation, in 2012, directed a state agency to “provide training for Virginia public school personnel . . . on evidence-based antibullying tactics . . .” (§ 9.1–184). In an era of limited resources, it is especially important for schools to make good decisions in their choice of programs and services. School authorities are inundated with programs and services (e.g., motivational speakers, inspirational videos, guidebooks, and curricula) that purport to reduce bullying but which lack scientific evidence of their effectiveness. There is an unmet need to bridge the gap between popular programs that are widely used in schools and scientific research that could confirm their effectiveness, identify ways to improve them, or suggest more promising alternatives. There is a large body of research on the effectiveness of school-based programs to reduce student aggression and disruptive behavior. A meta-analysis of 249 controlled studies found overall positive effects for a wide variety of school-based programs serving both the general school population (universal programs) and students identified for treatment because of conduct problems or minor classroom disruptiveness (selected/indicated programs; Wilson & Lipsey, 2007). Although not specifically focused on bullying, these findings are useful support for counseling efforts with aggressive youth who may engage in bullying. A more specific body of literature examines the impact of school-wide programs to reduce bullying (see Bradshaw & Ttofi, 2015).

Statutory Definitions of Bullying

There is a distinct gap between state legislative definitions of bullying and the criteria agreed upon by scholars (Alley & Limber, 2009; Gladden et al., 2014). Most states define bullying in terms of its intent to harm and severity of impact, but only four states include a power imbalance in their criteria and only eight define bullying as a repetitive behavior (Sacco et al., 2012). Perhaps the statute that is closest to the scholarly understanding of bullying is found in Virginia law (Va. Code Ann. §22.1–276.01):

“Bullying” means any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma. “Bullying” includes cyberbullying. “Bullying” does not include ordinary teasing, horseplay, argument, or peer conflict.

In contrast, many statutory definitions tend to blur distinctions between the terms *bullying* and *harassment* (Alley & Limber, 2009; Cascardi et al., 2014; Limber & Small, 2003; Sacco et al., 2012; U.S. Department of Education, 2011). In its review of state bullying laws, the U.S. Department of Education (2011) found that “legislative language used in crafting bullying laws often borrows directly from harassment statutes,” which has led to a con-

flation of the terms bullying and harassment, “despite their important legal distinctions” (p. 17). Indeed, Cascardi and colleagues (2014) found that 22 states use the terms harassment, intimidation, and bullying interchangeably, 14 restrict their definitions to bullying, two restrict their definitions to harassment, and eight include the terms *harassment* and *bullying*, but define them differently. Even the Office for Civil Rights, in its 2014 Dear Colleague letter on bullying, acknowledges that “the terms ‘bullying’ and ‘harassment’ are used interchangeably” (U.S. Department of Education Office for Civil Rights, 2014, p. 1).

Challenges of conflating harassment and bullying in state laws.

Harassment, unlike bullying, is a behavior that has been long addressed in state and federal law. Under state law, harassment typically is characterized as unwanted behavior that demeans, threatens, or offends another and results in a hostile environment for the victim. As previously discussed, under federal law, it is a violation of civil rights to engage in harassment on the basis of race, color, national origin, sex, or disability. As noted by the U.S. Department of Education (2011, p. 17), discriminatory harassment “is distinguishable from more general forms of bullying in that it must be motivated by characteristics of the targeted victim. It is generally viewed as a subset of more broadly defined bullying behavior.”

Although discriminatory harassment can be regarded as a subset of bullying behavior because it only includes victims who fall into certain protected categories, harassment does not explicitly require a power imbalance, which clouds its relation with bullying. In principle, harassment could occur in the absence of a power imbalance, which would make some cases of harassment a form of harmful aggression that is not bullying. However, it could be argued that harassment under civil rights law implies the existence of a power imbalance in the notion that certain groups (defined by gender, race, religion, national origin, or disability status) must be protected. In this way harassment might still be regarded as a form of bullying, but one in which the power imbalance is presumed rather than determined. This is not a satisfactory solution because it stretches the concept of power imbalance in a circular direction, so it seems necessary to recognize that harassment does not neatly fit into a broader category of bullying.

Recognizing that bullying may be more likely among particular groups of individuals, and drawing, in part, on language in harassment laws, about one third of the state bullying laws provide a list of characteristics (such as gender, race, national origin, religion, disability, and sexual orientation) that can characterize victims of bullying. The U.S. Department of Education (2011, p. 27) observed that “enumeration can be used in bullying legislation to limit the legal definition of bullying to acts that are motivated by characteristics, or it can be used more symbolically to communicate that discrimination against certain groups will not be tolerated.” Debate has ensued over the wisdom of enumerating protected groups or characteristics in bullying laws. Proponents argue that identification of specific groups sends a clear message to school personnel about the need to protect those students who are most vulnerable to

bullying (U.S. Department of Education, 2011), and some evidence suggests that antibullying policies that enumerate groups of protected youth may be associated with fewer suicide attempts among lesbian and gay youth (Hatzenbuehler & Keyes, 2013). A more inclusive approach is to enumerate the groups deemed most at risk for bullying, but to explicitly recognize in the law that any form of bullying against any student is prohibited. At least six states have specified that schools must offer all students the same protection against bullying without regard to the student's legal status or membership in a protected class (Sacco et al., 2012).

In state law, as in federal law, there is an irreconcilable conceptual problem undermining efforts to use civil rights laws to protect victims of bullying: Schools are increasingly facing the complex task of sorting out which of the federal and state antidiscrimination laws apply to a student who is being bullied, and accordingly have different legal obligations in different situations (U.S. Department of Education, Office for Civil Rights, 2014). Consider that a student may be bullied simultaneously in different ways by different students, and that the school's obligations may depend on the student's gender, race, religion, national origin, and disability status. A more straightforward and inclusive path is to protect all students from peer aggression that threatens their right to education in an environment conducive to learning. Just as no student should be victimized because of gender, race, religion, national origin, or disability status, no student should remain unprotected because the aggression fails to meet one of those criteria. A child bullied for diminutive height or excessive weight is no less deserving of protection. The critical issue should be whether a student is being harmed, and whether that harm is injurious to the student's health and well-being. In an adult workplace, the standard would be no less (Schneider et al., 2010).

Challenges of conflating bullying with other peer aggression in state law. There is a tendency in state laws to eschew the academic definition of bullying (particularly its focus on power imbalance) in favor of a broader and more inclusive definition of student aggression. The emphasis in most state laws is on the harmful effects of bullying rather than whether the aggressor has dominance or power over the victim. On one hand, this seems to be a reasonable course of action because of the complexities of identifying a power imbalance that could occur in social or psychological domains and the importance of addressing all forms of peer aggression at school. When a student is being harmed, the question of whether a power imbalance is present is secondary to the need for intervention to stop the harm and prevent its recurrence.

On the other hand, this approach not only ignores important differences between bullying and student aggression with respect to the harms that they cause, but it also fails to recognize that the efforts needed to report, investigate, address, and prevent bullying at school (all of which are key provisions of state antibullying laws) are distinct in some important ways from efforts to address other forms of

peer aggression (Cascardi et al., 2014). For example, in recognition of the reluctance of bullied children and youth to report their victimization to school authorities (Luxenberg, Limber, & Olweus, 2014; Robers, Kemp, Truman, & Snyder, 2013), experts in bullying prevention have emphasized the importance of increasing adult supervision at school (Federal Partners in Bullying Prevention, 2014; Tofi & Farrington, 2011), instituting strategies such as safe reporting procedures to increase students' comfort with reporting bullying that they experience or witness, and careful and expedient investigation of all reports. Similarly, many states require or encourage school staff to report bullying and most highlight the need to develop procedures for investigation of incidents of bullying. Although other forms of aggressive or violent behavior are also likely underreported in schools, and such behaviors typically warrant action on the part of school personnel, the power differential in instances of bullying make it particularly likely that victims will suffer silently, and therefore require particularly sensitive reporting and investigation procedures.

Not only are there differences in the reporting and investigation of instances of bullying versus other aggressive or violent behaviors at school, there are also distinct recommended interventions with bullied and bullying youth. For example, although peer mediation and conflict resolution are common strategies for dealing with *conflicts* among students in school, peer mediation is not recommended in cases of bullying because of the power differential between bullied and bullying students, and the potential for additional harm that such a meeting might cause (Federal Partners in Bullying Prevention, n.d.). Moreover, experts contend that *any* face-to-face meetings between bullied and bullying students should be considered only in carefully prescribed situations, such as when both parties wish to participate, support persons are invited to be present, prior individual meetings have taken place, and those overseeing and facilitating the intervention have specific training in restorative practices (Molnar-Main, 2014). In addition, recognizing the trauma that many bullied students experience, referrals to supportive mental health services within schools and communities may be necessary.

Finally, given differences in the nature and prevalence of bullying versus other forms of peer aggression, and recognizing differences in the harms that each may cause, training and prevention efforts to address bullying must necessarily highlight somewhat unique issues. As Cascardi and colleagues (2014, p. 270) noted, school-based efforts to address peer aggression and bullying certainly "share some overlapping features . . . [but] to be maximally effective, bullying interventions must also target those features of bullying that distinguish it from peer aggression and the broader environment that may support tolerance or acceptance of bullying."

Bullying Within State Criminal Laws

Traditionally, bullying has not been viewed as a criminal act and has either been ignored or treated as a disciplinary matter in schools. Arguably, all states have criminal laws

that may be applied to some bullying behaviors, for example, when bullying constitutes assault and battery or other criminal acts such as extortion, robbery, stalking, or threatening. However, in recent years, there has been a shift toward increasing criminalization of bullying (Cascardi et al., 2014). Seven state bullying laws currently encourage criminal sanctions for bullying by mandating procedures for school personnel to report bullying that may violate criminal law (U.S. Department of Education, 2011). Missouri's state bullying law (Mo. Rev. Stat §167.117.1) directs schools to impose sanctions on school staff who do not comply with reporting requirements.

Another move toward criminalization is the increasing number of states that have modified existing criminal or juvenile codes to explicitly address bullying behavior or that have created new crimes to target bullying or harassment. For example, North Carolina legislators passed a law that criminalizes cyberbullying (N.C.G.S.A. §14–458.1). Idaho created a crime of harassment, intimidation, or bullying among students (I.C. §18–917A).

There are multiple concerns with the criminalization of bullying. First, the concept of bullying may be too broad and subjective for reasonable application in the criminal justice system, especially because it encompasses behaviors engaged in by a large proportion of the population. A national survey found that 40% of all students reported that they were victims of bullying in the past couple of months (Wang, Iannotti, Luk, & Nansel, 2010), and a similar proportion admitted that they engaged in bullying (J. Wang, personal communication, September 4, 2012). A second concern is that the criminalization of school misbehavior has been identified as a practice that leads to higher rates of school disengagement, academic failure and dropout, and ultimately, involvement in the juvenile justice system (Fabelo et al., 2011; Gonsoulin, Zablocki, & Leone, 2012; The Dignity in Schools Campaign, 2012). When bullying is severe enough to constitute one of the traditional criminal offenses, it can be handled under existing law without creation of a bullying offense, but efforts to expand criminal sanctions to encompass other forms of bullying are ill-advised.

Although the content of state antibullying laws has been evaluated and contrasted, remarkably little research has been conducted to study how these laws and policies are implemented and to what effect (Institutes of Medicine and National Research Council, 2014). Researchers can take advantage of the heterogeneity of these laws to examine whether states with more comprehensive and less punitive approaches achieve greater success. Qualitative studies in schools are also needed to evaluate how policies are implemented, including barriers and facilitators in implementation (Institutes of Medicine and National Research Council, 2014).

Recommendations

The General Accounting Office (2012) has emphasized the need to identify gaps in legal protections for groups who are most vulnerable to bullying. We agree with this recommendation, but caution that the strategy of using civil rights laws to protect students from bullying is inherently limited because

students can be bullied for many reasons that do not fall into any of the conventional categories of civil rights protection. A more inclusive, universal approach is needed that protects any student who is bullied.

Despite the fact that nearly all states require the development of school policies on bullying, we know little about their implementation or effectiveness (Institutes of Medicine and National Research Council, 2014). School policies must conform to legal requirements set forth in state antibullying laws, but should also reflect best practices informed by scientific research. In light of available evidence, we recommend that school policies on bullying include these core elements:

1. State laws should protect all students from peer victimization, including harassment and bullying. The concept of bullying should be distinguished from peer aggression and harassment because of research evidence regarding its differential impact and the need for differentiated prevention and intervention measures. Legislative definitions of bullying should encourage schools to use scientific-based measures and interventions that distinguish bullying from other forms of peer victimization.

2. Students and parents should be educated about bullying and provided with multiple means of seeking help for it. Given the reluctance of many children and youth to report bullying that they experience or witness (Espelage, Green, & Polanin, 2012; Luxenberg et al., 2014), it is important that policies include provisions to increase the ease of reporting, such as anonymous reporting procedures (U.S. Department of Education, Office for Civil Rights, 2010).

3. There should be a prompt and thorough investigation of suspected or reported bullying. As noted by the Office for Civil Rights, this should include “immediate intervention strategies for protecting the victim from additional bullying or retaliation . . . notification to parents of the victim or reported victim of bullying and the alleged perpetrator, and, if appropriate, notification to law enforcement officials” (U.S. Department of Education, Office for Civil Rights, 2010, p. 6).

4. Bullying should not be categorized as a criminal behavior because it varies so widely in form and severity, and in most cases, can be handled appropriately with school disciplinary and counseling measures. However, bullying behaviors that also meet criteria for illegal behavior, such as assault or extortion, should be dealt with as deemed appropriate for the circumstances and severity of the behavior.

5. When bullying behavior constitutes sexual harassment or a violation of civil rights in some other way, school authorities should be responsive to their legal obligations (U.S. Department of Education, Office for Civil Rights, 2010).

6. Schools should not use zero-tolerance policies that assign harsh consequences for violations of a school rule, regardless of the context or severity of behavior. Instead, there should be graduated consequences for bullying that are appropriate to the context and severity of the behavior and characteristics of the student(s) (Kowalski et al., 2012;

Swearer, Limber, & Alley, 2009; U.S. Department of Education, Office for Civil Rights, 2010).

7. School policies should direct school staff to assess students who are bullied for possible mental health and academic problems and provide support and referrals for these students and their parents, as needed. Policies also should direct staff to provide support and referrals for students who engage in bullying (Kowalski et al., 2012; U.S. Department of Education, Office for Civil Rights, 2010).

8. School policies should include provisions for training of all staff to prevent, identify, and respond appropriately to bullying. This training would include recognition of the overlap between bullying and illegal behavior.

9. School policies should encourage the adoption of evidence-based strategies to guide prevention and intervention efforts. School authorities should be leery of programs or strategies that are based on emotional appeals with no supporting evidence of effectiveness.

In conclusion, school policies should reflect best practices informed by scientific research, and so we recommend greater reliance on evidence-based practices and rejection of disciplinary practices that are known to be ineffective. Because bullying behavior is so widespread and so varied in form and severity, reliance on criminal sanctions would be ill-advised. A strategy that combines education, school-based interventions, and policy reform leading to cultural change would seem most appropriate. We urge policymakers and legislators to affirm that public education is a right for all students and to recognize that bullying is an impediment to that right.

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