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Recommended Citation

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SCHOOL BULLYING VICTIMIZATION AS AN
EDUCATIONAL DISABILITY

by DOUGLAS E. ABRAMS*

INTRODUCTION

After decades of national indifference that often left bullied elementary and secondary students to fend for themselves without meaningful protection from public school authorities, the United States now takes school bullying more seriously than ever before.1 According to the National Center for Education Statistics, however, much work is yet to be done because bullying remains "a widespread and often neglected problem in schools."2 This symposium helps confront the neglect and illuminate continuing challenges.

The watershed event that drew public attention to bullying occurred on April 20, 1999, when two seniors turned bombs and semiautomatic weapons on classmates at Columbine High School in Littleton, Colorado.3 As twelve classmates and a teacher lay dead, the nation learned that the killers' pent up rage may have stemmed at least partly from teasing and taunting they had endured for years while school authorities looked the other way.4 More than three dozen of the high school's parents and students later told the Colorado

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3. U.S. DEPT OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES, supra note 2, at 1 (“[Columbine] ignited a wave of new legislative action within state legislatures that aimed to curtail bullying behavior on school campuses.”).

4. Id. at ix; Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 404-05.
governor's Columbine Review Commission that "a significant amount of bullying had occurred," but that "it would have been futile to report bullying to the school administration because no one there would have done anything about it."6

Public perceptions sometimes drive the legislative process. In forty-nine states, statutes enacted or strengthened since Columbine now mandate that public school districts take preventive and disciplinary measures against bullying.6 Nearly all of these state statutes reach not only traditional face-to-face bullying, but also cyberbullying—"the "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."8

In individual cases, face-to-face bullying and cyberbullying frequently coalesce because perpetrators who spread their messages electronically also frequently confront their victims in school with shoving, spitting and similar assaultive conduct.9 Taken alone, however, cyberbullying presents distinctive constitutional concerns because the electronic messages generally consist of words that students send from off-campus locations. More than forty years of Supreme Court First Amendment student speech decisions, however, would authorize public elementary and secondary schools to discipline student cyberbullies on sufficient factual showings.10

Because enactments on paper protect no one and the law does not apply itself, the protection of bullied students ultimately depends on whether and how school administrators and teachers actually fulfill the statutory mandates consistent with their constitutional authority. Former Harvard Law School Dean Roscoe Pound was right that "[t]he life of the law is in its enforcement."11

Pound's dictum remains instructive in the public schools because

5. Report of Governor Bill Owens, COLUMBINE REVIEW COMM'N 98 n.211 (May 2001), available at http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf; see also DAVE CULLEN, COLUMBINE 158 (2009) ("There's no evidence that bullying led to murder, but considerable evidence it was a problem at Columbine High.").


7. U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES, supra note 2, at x.


9. See, e.g., Douglas E. Abrams, Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates, 37 NEW ENG. J. ON CRIM. & CIVIL CONFINEMENT 181, 182, 192-93 (2011) [hereinafter Abrams, Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates] (discussing the case of Phoebe Prince, a fifteen-year-old who hanged herself following months of bullying and cyberbullying in South Hadley, Massachusetts).

10. See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (finding that schools may discipline student speech that is "substantially disruptive").

powerful, if sometimes hidden, disincentives to vigorous enforcement of anti-bullying statutes may test educators’ resolve in their daily interactions with students. In elementary and secondary schools alike, bullying can remain what the National Center for Education Statistics calls an “often neglected problem” because entering the bullying thicket brings professional costs and risks that may give local educators pause.

In the student handbook and perhaps at public forums, for example, state and local school superintendents and other administrators must walk a tightrope as they draft and periodically refine anti-bullying policies for parents, students, and professional staff. Typically without providing appropriations to school districts as they manage tight budgets, state anti-bullying legislation requires districts to devote precious time and resources to assessing the prevalence of bullying; to training staff members about anti-bullying strategies; and then to designing, presenting, and supervising classroom bullying prevention curricula.

Administrators, teachers, guidance counselors, school social workers, and other professional staff must divert much of their daily attention from pedagogy to investigating bullying incidents, mediating student altercations that arise from bullying, and resolving complaints from parents of perpetrators and victims. As if all these issues were not enough, school authorities must also navigate legal obligations and constraints, support bullied students, and painstakingly document their investigations and disciplinary decisions in individual cases.

12. ROBERS ET AL., supra note 2, at 44.
14. See Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 414-16 (discussing prevention curricula).
16. See, e.g., Jan Hoffman, Online Bullies Pull Schools Into the Fray, N.Y. TIMES, June 27, 2010, http://www.nytimes.com/2010/06/28/style/28bully.html (reporting that seventh-grade guidance counselor can spend up to three-quarters of her time mediating student disputes that began with insults transmitted electronically, while these disputes also distract the school’s principal from other pedagogical responsibilities); see also TED FEINBERG & NICOLE ROBEY, CYBERBULLYING 26, 29-31 (2009) http://google.com (search “Ted Feinberg & Nicole Robey, Cyberbullying eddigest”, then use the “cyberbullying” link from nisd.schoolnet.com) (noting that staff members need to be educated about cyberbullying).
Perhaps the most powerful personal disincentive of all, school authorities act under the specter of threatened and actual litigation from disciplined bullies and their parents. Litigation remains stressful to parties, and is marked by uncertainty and expense even when the school district wins. As one commentator explains:

The prospect of a lawsuit, with its resulting publicity, expense, and unpleasantness is hardly one that will be relished by either teacher or school administrator, even if the school and teacher are ultimately vindicated. Indeed, a threat by a student or parent, even if it is based on a groundless claim and falls short of a formal lawsuit, is an extremely disagreeable experience that most teachers and school administrators will attempt to avoid if at all possible.\(^{18}\)

Parts I and II of this essay urge school authorities, parents, and other concerned citizens to perceive bullying victimization as a disability that burdens targeted students. Since 1975, the federal Individuals with Disabilities Education Act (IDEA)\(^{19}\) has guaranteed “full educational opportunity to all children with disabilities” in every state.\(^{20}\) The IDEA reaches both congenital disabilities\(^{21}\) and disabilities that, like bullying victimization, stem from events or circumstances unrelated to biology or birth.\(^{22}\)

Perceiving bullying victimization as a disability can improve children’s lives by providing authorities renewed purpose for managing the attendant costs and risks that accompany efforts at prevention and discipline.\(^{23}\) The

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18. Anne Proffitt Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 GEO. WASH. L. REV. 49, 94-95 (1996); see also, e.g., Daniel M. Stewart & Eric J. Fritsch, School and Law Enforcement Efforts to Combat Cyberbullying, 55 PREVENTING SCH. FAILURE 79, 81 (2011) (“School administrators . . . have been reluctant to get involved in cyberbullying incidents, fearing civil litigation over regulating speech or behaviors that are protected by the First Amendment.”).


21. Id. § 1401(3) (defining “child with a disability” as a child with intellectual, hearing, speech or language impairments, severe emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or any child who needs special education and related services, as well as any child between three and nine who experiences developmental delays or requires special education and related services).

22. See, e.g., Cedar Rapids Comty. Sch. Dist. v. Garret F., 526 U.S. 66, 69, 77-79 (1999) (determining rights under the IDEA of high school student who was paralyzed from the neck down in a motorcycle accident when he was four years old).

23. Stewart & Fritsch, supra note 18, at 81 (“[S]chool administrators, if not aware of the potential deleterious effects of cyberbullying, might feel that it should be subordinated to other matters that require their immediate attention.”).
perception may also provide a readily understood rationale to help school authorities win support and cooperation from students, parents, and other local constituencies for these efforts.

The IDEA provides a persuasive analogy because after more than thirty-five years, "[f]ew voices in American discourse openly challenge the right of [disabled] children to attend public school, and those that do are confronted by vociferous objectors." To be sure, courts regularly resolve disagreements between parents and their school district about how best to redeem the IDEA's promise of a free public education to a particular student with disabilities. Despite the passions aroused in some cases, however, I have never heard an educator advocate that public education was better off under the pre-IDEA regime, which left millions of disabled children isolated, ignored, warehoused in school, or denied a free public education entirely. The IDEA has become "a hallmark of education policy in the United States," strongly supported by presidents and members of Congress from both parties.

To set the context for perceiving bullying victimization as an educational disability, Part I describes the public schools' central role in protecting bullied students, and then briefly discusses the schools' statutory and

25. See, e.g., R.P. v. Alamo Heights Ind. Sch. Dist., 703 F.3d 801, 815 (5th Cir. 2012) (holding that a Texas student was not denied a free appropriate public education where an essentially nonverbal student continued using a speech output system despite her lack of success with it and its delay in implementing more effective systems for her); S.A. v. Weast, No. 8:11-CV-01137, 2012 U.S. Dist. LEXIS 138287, at *38 (D. Md. Sept. 26, 2012) (finding a student in Maryland was not denied a free appropriate public education where his parents were dissatisfied with his individualized education plan and sought reimbursement for sending him to private school).
28. See, e.g., Exec. Order No. 13227, 3 C.F.R. 792 (Oct. 8, 2001) ("The education of all children, regardless of background or disability . . . must always be a national priority."); Statement on the 25th Anniversary of the Individuals with Disabilities Education Act, 36 WEEKLY COMP. PRES. DOC. 2942 (Nov. 29, 2000) ("America's ongoing commitment to . . . the IDEA is both an economic and moral imperative for our future."); Office of the Press Secretary, Statement by the President on the 35th Anniversary of the Individuals with Disabilities Education Act, THE WHITE HOUSE (Nov. 29, 2010), http://www.whitehouse.gov/the-press-office/2010/11/29/statement-president-35th-anniversary-individuals-with-disabilities-educa ("In America, we believe that every child, regardless of class, color, creed, or ability, deserves access to a world-class education.").
29. See, e.g., Statement on Congressional Passage of the "Individuals with Disabilities Education Improvement Act of 2004", 2004 PUB. PAPERS 2992 (Nov. 20, 2004) ("This legislation shows that we can accomplish a great deal when we work together, and I commend the Congress for this bipartisan achievement."); Remarks on Signing the Individuals with Disabilities Education Act Amendments of 1997, 1997 PUB. PAPERS 699 (June 4, 1997) (discussing how the success of the bill resulted from support across bipartisan and regional lines).
constitutional authority to provide this protection, a discussion that summarizes writings I have presented elsewhere. Part II then explains why, without amending the IDEA or other disability laws, perceiving bullying as a disability makes sound pedagogical sense as schools implement state antibullying legislation. Social science research demonstrates that, similar to the physical or emotional conditions recognized in the IDEA, bullying victimization that evades prevention efforts may compromise a student’s capacity to learn. One bullying researcher hits the target: “Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.”

Teachers and school administrators familiar with the IDEA have grown accustomed to perceiving a disabled student’s fragile physical or emotional condition as a barrier to learning. Bullying can leave student victims similarly fragile, and perceptions matter in the public schools as much as in other areas of everyday life.

I. The Public Schools’ Place in Bullying Regulation

A. The Pediatric Safety System

Face-to-face bullying has plagued public schools for generations. Cyberbullying among public school students barely existed fifteen years ago, but by virtually all accounts, “the state of affairs is that bullying online is on the rise.” Some researchers even suggest that cyberbullying is so prevalent today that many students casually accept it as “an expectation of high school,” indeed almost as a rite of passage for classmates who are unfortunate enough to be targeted, usually for appearing somehow

30. Abrams, Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates, supra note 9, at 191-224; Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 414-16.

31. 20 U.S.C. § 1415 (procedural safeguards); Deborah Goebert et al., The Impact of Cyberbullying on Substance Use and Mental Health in a Multiethnic Sample, 15 Maternal Health J. 1282, 1285-86 (2011) (discussing cyberbullying).


33. See Michael A. Couvillon & Vessela Ilieva, Recommended Practices: A Review of Schoolwide Preventative Programs and Strategies on Cyberbullying, 55 Preventing Sch. Failure 96, 96 (2011) (“Conventionally, for as long as children have attended school, there has been some form of bullying.”).


35. Goebert, supra note 31, at 1285.
“different” from most other students.36

Researchers predict that without effective intervention, the number of school cyberbullying incidents will likely increase as technology continues to permeate American life, especially for children and adolescents.37 According to the Pew Research Center, “95% of all teens ages 12-17 are now online and 80% of those online teens are users of social media sites.”38

The National Institute of Child Health and Human Development recently found that “approximately 30 percent of American schoolchildren in grades six through 10 have been bullied or have bullied other children ‘sometimes’ or more often within a semester.”39 Cyberbullying victimizes between 20% and 25% of middle school and high school students,40 though some surveys report even higher percentages.41 In a 2011 study, 76% of 14- to 24-year-olds interviewed said that digital abuse is a very serious or a somewhat serious problem for people their age.42

Facing numbers such as these, the Centers for Disease Control and
Prevention (CDC) has identified school bullying as a "major public health problem" that warrants a coordinated response from the pediatric safety system. The system begins at home with parents, who remain primarily responsible for protecting, disciplining and teaching values to their children. Research indicates that "parent training and education are essential components of effective interventions to reduce bullying." When parents falter or request assistance from public authorities for protection that the parents cannot provide by themselves, however, the pediatric safety system may extend to a variety of agencies, including the public schools.

The schools stand as the central, and potentially the most effective, public entities in the pediatric safety system's response to bullying by elementary and secondary students. Public schools enroll most of the nation's school-age children, who must attend unless they enroll in private schools or receive home schooling. Throughout the academic year, students...

43. MERLE E. HAMBURGER ET AL., CDC, MEASURING BULLYING VICTIMIZATION, PERPETRATION, AND BYSTANDER EXPERIENCES: A COMPENDIUM OF ASSESSMENT TOOLS 1 (2011) ("Bullying, particularly among school-age children, is a major public health problem both domestically and internationally" (internal citation omitted)).

44. Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 400 ("The pediatric safety system begins with the child's parents but extends in appropriate cases primarily to the school district (for public school students), the juvenile criminal courts, the state child protective agency and perhaps the mental health agency and law enforcement.").

45. E.g., Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); see also, e.g., Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (parents hold the opportunity and responsibility for "inculcation of moral standards . . . and elements of good citizenship."); cf. Parham v. J. R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").


47. Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 419-23 (discussing possible interventions by (1) law enforcement and the juvenile and criminal courts, when conduct amounts to stalking, criminal harassment or other criminal violation, (2) the state child protection agency, when suspected domestic maltreatment contributes to the child's distress, and (3) the state mental health agency, when the child suffers, or may have suffered, substantial emotional distress before the cyberbullying is discovered).

48. Stewart & Fritsch, supra note 18, at 81 ("Although the onus for controlling cyberbullying rests with many institutions, schools play an important role in ensuring the health and safety of the students they educate . . . .").

49. FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING, 2012, at 3 (2012) ("In 2011, there were 73.9 million children in the United States, 1.5 million more than in 2000."); THOMAS D. SNYDER & SALLY A. D I Lo w, U. S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2011, at 1 (2012) (49.4 million children were enrolled in elementary and secondary public schools in 2011).

50. See, e.g., Goss v. Lopez, 419 U.S. 565, 572-75 (1975) (explaining the constitutional implications of a right to public education); see also Morse v. Frederick, 551 U.S. 393, 424 (2007)
interact with teachers and administrators who are charged (in the Supreme Court's words) with "maintaining discipline, health, and safety" and "protect[ing] pupils from mistreatment by other children." Most bullies know their victims largely or entirely from school, and bullies normally foresee reaction only from other classmates because they know that hardly anyone else, including any of the Internet's two billion other users worldwide, would have reason to pay attention.

B. Statutory and Constitutional Authority

As of November 2012, forty-nine states (all but Montana) have enacted anti-bullying legislation that recognizes public schools' central role in the pediatric safety system. The legislation requires public school districts to adopt written anti-bullying policies, teach bullying prevention curricula, discipline identifiable bullies, and cooperate with law enforcement when bullying turns criminal. Nearly all states define "bullying" to include cyberbullying or "electronic harassment." Safe schools acts and statewide administrative policies may also require schools to notify law enforcement authorities about students in school who commit acts of bullying, or who commit other criminal acts that often accompany bullying and even some cyberbullying (such as assault, harassment, stalking, or sexual or racial intimidation).

(Alito, J., concurring) ("Most parents, realistically, have no choice but to send their children to a public school . . . .")

53. See, e.g., id. at 348 (explaining that students "spend the school hours in close association with each other, both in the classroom and during recreation periods"); Jaana Juvonen & Elishava F. Gross, Extending the School Grounds?—Bullying Experiences in Cyberspace, 78 J. SCH. HEALTH 496, 497 (2008) ("When most schoolmates have Internet access at home, electronic communication is conducted largely within school-based peer networks.").
54. See, e.g., J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (upholding discipline imposed by middle school because student's "web site was aimed not at a random audience, but at the specific audience of students and others connected with th[e] particular School District"); see also Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) (upholding disciplinary sanction imposed on high school student for blog posting that concerned events at school, on which the student encouraged her classmates to read and provide responses); Internet Usage Statistics: The Internet Big Picture, INTERNET WORLD STATS—USAGE AND POPULATION STATISTICS, http://www.internetworldstats.com/stats.htm (last updated Feb. 17, 2013) (reporting 2,405,518,376 Internet users worldwide as of June 30, 2012).
55. Hinduja & Patchin, supra note 6 (providing a comprehensive chart of state cyberbullying laws).
56. See, e.g., Juvonen & Gross, supra note 53, at 501 (reporting that despite initial anonymity on the Internet, "73% of the respondents were 'pretty sure' or 'totally sure' of the identity of the perpetrator").
57. See generally Hinduja & Patchin, supra note 6 (providing a comprehensive chart of the specific requirements of state cyberbullying laws).
58. Id. at 1.
59. Id.; Samantha Neiman et al., Bullying: A State of Affairs, 41 J.L. & EDUC. 603, 629-38
Unlike traditional bullies, who confront their victims face-to-face at school, cyberbullies convey their messages through language. The Supreme Court has yet to decide a case specifically implicating the speech rights of student cyberbullies, but the Court’s First Amendment doctrine authorizes public schools to discipline these students in appropriate cases.

Since Tinker v. Des Moines Independent Community School District was decided in 1969, the Court has authorized schools to discipline student speech that causes, or reasonably threatens, (1) “substantial disruption of or material interference with school activities,” or (2) “collision with the rights of other students to be secure and to be let alone.” Even in the absence of such disruption or collision, the Court also authorized schools to discipline student speech that neutralizes, or threatens to neutralize, educators’ efforts to teach “the boundaries of socially appropriate behavior,” “habits and manners of civility,” and respect for “the sensibilities of fellow students.” On a sufficient factual showing in a suit by the disciplined student and the parents, face-to-face bullying and cyberbullying would qualify on all counts.

Cyberbullies typically transmit their message from locations off campus, such as computers in their homes. Despite “some uncertainty” in the case law, the “substantial weight” of lower court precedent authorizes public schools, under Tinker, to discipline cyberbullies for off-campus messaging “where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.”

(2012).

60. See, e.g., id. at 637 (explaining that cyberbullying occurs “online rather than on school property or at school functions.”).
62. Id. at 514.
63. Id. at 508.
65. Id. (citation omitted).
66. Id.; see also Couvillon & Ilieva, supra note 33, at 97 (“Our society has entrusted schools with more than the academic success of the new generation; schools are the places where children learn behaviors considered appropriate for the society at large.”).
67. See, e.g., Abrams, Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates supra note 9, at 197-98, 212-18 (describing Tinker and its application in other cases; explaining social science of bullying and its consequences).
68. See Morse, 551 U.S. at 401 (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004)) (“There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.”).
message's off-campus origins are "not material" where the school handbook provides notice of off-campus reach to students and their parents, the cyberbully receives procedural due process guaranteed in the handbook and by the Constitution, and the factual record demonstrates the harm recited by one or both prongs of Tinker.

II. BULLYING VICTIMIZATION AS AN EDUCATIONAL DISABILITY

A. Prevention First

The public schools' implementation of statutory anti-bullying mandates begins with effective prevention curricula that enlist parents, students and school staff in a comprehensive effort to maintain a school culture grounded in civility, mutual respect, and freedom from physical or emotional violence. With rates of bullying already disturbingly high and evidently rising in many schools, schools cannot rely primarily on suspensions or expulsions, delinquency referrals, or criminal prosecution. Nor should the nation relish high school student's Equal Protection and state law discrimination claims against school district and school officials who did not discipline classmates who engaged in religious bullying.

71. J.C. ex rel. R.C., 711 F. Supp. 2d at 1108 ("[U]nder the majority rule . . . the geographic origin of the speech is not material; Tinker applies to both on-campus and off-campus speech." (citing Tinker, 393 U.S. 503 (1969); LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001)).

72. See, e.g., Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005) (upholding discipline of student whose speech violated rules of common courtesy which were set forth in the student handbook); Flaherty, 247 F. Supp. 2d at 705-06 (prohibiting discipline of a high school student because the student handbook did not limit the school's disciplinary authority to conduct that occurred on school premises or that related to school activities).

73. See, e.g., Goss, 419 U.S. at 584 (where a student faces suspension for less than ten days, due process requires "at least an informal give-and-take between student and disciplinarian").

74. See, e.g., Mahaffey ex rel. Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 785-86 (E.D. Mich. 2002) (holding that school violated student's First Amendment rights by disciplining him for website created off campus because the record contained no evidence of disruption); Killion, 136 F. Supp. 2d at 455 (holding that school violated student’s First Amendment rights by disciplining him for criticizing the school’s athletic director by email sent from his home computer because the school “failed to adduce any evidence of actual disruption”); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (granting preliminary injunction to prevent student's suspension, based in part on finding that plaintiff was likely to succeed on the merits of his claim that the school violated his First Amendment rights by disciplining him for a mock obituary website created off campus; the school had presented “no evidence” that the site created a threat); Beussink ex rel. Beussink v. Woodward R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180-82 (E.D. Mo. 1998) (granting preliminary injunction to prevent student’s suspension, based in part on finding that plaintiff was likely to succeed on the merits of his claim that the school violated the plaintiff/student’s First Amendment rights by disciplining him for creating a website off-campus, where principal did not indicate a fear of disruption).

75. See Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 410-12, 414-16 (discussing prevention curricula); see also, e.g., AFT, NEA: Arming Educators Won't Keep Schools Safe, NAT'L EDUC. ASS'N (Dec. 20, 2012), http://www.nea.org/home/53943.htm ("We must continue to do more to prevent bullying in our schools.").

76. See supra text accompanying notes 33-42 (citing statistics regarding the prevalence of bullying and cyberbullying).
such primary reliance because coercive measures react only after a victim has already suffered emotional or physical damage. Effective prevention measures proactively spare many victims, and the juvenile justice and criminal justice systems work best when authorities influence children's behavior without the immediate disruption and later collateral consequences that formal processing may bring.\footnote{77}

B. Freedom from Fear

For school bullying that occurs despite effective prevention curricula,\footnote{78} social science research demonstrates that victimization creates barriers to educational opportunity similar to barriers created by physical or emotional disabilities recognized by the IDEA. Studies and commentary continue, but pediatric professionals have achieved consensus on a fundamental proposition that should cause parents, teachers, and school administrators no surprise: bullied children cannot learn effectively when they are dogged by physical or emotional distress, public humiliation, and anxiety about personal safety. “[F]reedom from fear of bullying is not enough to ensure successful learning,” summarizes one researcher, “but it is a necessary condition for effective learning.”\footnote{79}

Pediatric professionals recognize bullying as a form of child abuse, normally perpetrated by other children rather than by adults.\footnote{80} Researchers


\footnote{78. See Abrams, \textit{A Coordinated Public Response to School Bullying}, supra note 1, at 410-12 (“[B]ullying prevention efforts cannot eliminate all incidents of the targeted antisocial conduct, any more than criminal statutes can eliminate all incidents of the conduct they target. . . . Reduction, the most realistic outcome of prevention efforts, remains a worthwhile goal . . . .”).}

\footnote{79. Kris Bosworth et al., \textit{Factors Associated With Bullying Behavior in Middle School Students}, 19 J. EARLY ADOLESCENCE 341, 342 (1999) (internal citation omitted).}

\footnote{80. See, e.g., Arne Duncan, Sec'y U.S. Dept. of Educ., \textit{The Myths About Bullying: Secretary Arne Duncan's Remarks at the Bullying Prevention Summit} (Aug. 11, 2010), http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit (comparing bullying to gateway drugs); Richard Goldbloom, \textit{Children's Inhumanity to Children}, 144 J. PEDIATRICS 3, 3 (2004) (describing different types of bullying, effects on children, and what pediatricians should do about it); Susan P. Limber, \textit{Addressing Youth Bullying Behaviors}, AM. MED. ASS'N, EDUC. FORUM ON ADOLESCENT HEALTH: YOUTH BULLYING 4, 6 (May 3, 2002) http://www.ama-assn.org/ama1/pub/upload/mm/39/youthbullying.pdf (“It is important to note that bullying, as a form of peer abuse, shares many characteristics with other types of abuse, namely child
have established that bullied students may display psychosomatic symptoms resembling ones suffered by child abuse victims, including sleep disturbances, bedwetting, abdominal pain, anxiety and depression, loneliness, low self-esteem, and heightened fear for personal safety.

Bullying victims may also suffer school phobia, increased truancy, heightened stress, or impaired concentration and diminished classroom achievement. Victims may be at greater risk of dropping out of high school.

maltreatment and domestic violence.

81. See Amy Barnes et al., The Invisibility of Covert Bullying Among Students: Challenges for School Intervention, 22 AUSTRALIAN J. GUIDANCE & COUNSELLING 206, 206 (2012) ("The harmful impact of bullying on young people's health and wellbeing is well-established and of significant concern . . .").

82. See Shetgiri et al., supra note 46, at 2280 (explaining that victims of bullying have higher levels of psychosomatic complaints than their peers); see also John Blosnich & Robert Bossarte, Low-Level Violence in Schools: Is There an Association Between School Safety Measures and Peer Victimization?, 81 J. SCHOOL HEALTH 107, 108 (2011) (explaining that psychosomatic outcomes can be a consequence of being bullied).


84. Gustavo S. Mesch, Parental Mediation, Online Activities, and Cyberbullying, 12 CYBERPSYCHOL. & BEHAV. 387, 388 (2009) [hereinafter Mesch].

85. See, e.g., HAMBURGER ET AL., supra note 43, at 1 (describing that victims of bullying tend to report "poor school performance"); Tanya Beran & Qing Li, Cyber-Harassment: A Study of a New Method for an Old Behavior, 32 J. EDUC. COMPUTING RES. 265, 272 (2005) (comparing the feelings of sadness, anxiety, fear and an inability to concentrate affecting victims of cyberbullying with the "discomfort and distress" that victims of school bullying report); Glew et al., supra note 83, at 1030 ("Lower achievement, feeling unsafe, and feeling sad were all positively associated with being a [bullying] victim as opposed to a bystander."); Mesch, supra note 84, at 388 ("Victims of online bullying displayed low school commitment . . . and about one third of the harassed felt at least one symptom of psychological stress following the incident.");
before graduation, and may suffer negative mental health outcomes and lifelong emotional scars.

"Cyberbullying may have more devastating outcomes than traditional forms of violence, due to its potential to reach a wider audience through mass distribution and the sense of anonymity that technology can provide." Cyberbullying victims know that "it never goes away—the comments live on the Internet forever." Cyberbullying is "a round-the-clock scourge" that "comes right into your home, and there is no safe place you can go," according to the mother of fifteen-year-old Jeffrey Johnston, a Florida honors student who hanged himself to escape unrelenting bullying online.

Michele L. Ybarra et al., Examining the Overlap in Internet Harassment and School Bullying: Implications for School Intervention, 41 J. ADOLESCENT HEALTH S42, S46 (2007) (discussing data showing that "detentions and suspensions, ditching or skipping school, and weapon carrying were each more frequently reported by youth who also reported being harassed online.").

86. See Bosworth et al., supra note 79, at 341 (explaining that fear of harassment or attack was a common reason for not returning to school among a sample of high school dropouts).

87. Sukkyung You et al., Relations Among School Connectedness, Hope, Life Satisfaction, and Bully Victimization, 45 PSYCHOL. SCHS. 446, 456 (2008).

88. See, e.g., Lyndal Bond et al., Does Bullying Cause Emotional Problems? A Prospective Study of Young Teenagers, 323 BRIT. MED. J. 480, 480, 483 (2001) (analyzing generally a "meta-analysis of studies investigating the relation between victimisation and psychosocial maladjustment" which found, in part, that "victimisation raised levels of subsequent self reported symptoms of anxiety or depression regardless of the coexisting levels of social adversity"); Gregory K. Fritz, What's Behind the Bullying?, 27 BROWN U. CHILD & ADOLESCENT BEHAV. LETTER, Feb. 2011, at 8 ("[T]he effects [of bullying] appear to be long-lasting: A recent study . . . found that individuals who were bullied when they were younger . . . had higher rates of anxiety, depression, hostility, irritability, and drug use as adults."); Kirsti Kumpulainen et al., Bullying and Psychiatric Symptoms Among Elementary School-Age Children, 22 CHILD ABUSE & NEGLECT 705, 706 (1998) ("As adults, victims [of bullying] are found to be more likely depressed and to have poor self-esteem . . . . "); Olweus, supra note 80, at 1179 ("[T]he former victims [of bullying] . . . were more likely to be depressed and had poorer self-esteem [than their non-victimized peers]."); Andre Sourander et al., Persistence of Bullying From Childhood to Adolescence—A Longitudinal 8-Year Follow-Up Study, 24 CHILD ABUSE & NEGLECT 873, 874 (2000) ("In children victimized by bullying during their school years, associations have been reported with later depression, poor self-esteem and difficulties in sexual relationships . . . . "); D. Wolke et al., Bullying Involvement in Primary School and Common Health Problems, 85 ARCHIVES DISEASE CHILDHOOD 197, 197 (2001) ("Adverse effects of peer victimisation on psychological maladjustment such as anxiety, depressive feelings, low self esteem, or loneliness have been found in studies of predominately secondary school children.").

89. Goebert et al., supra note 31, at 1282; see also, e.g., Stewart & Fritsch, supra note 18, at 80 (discussing cyberbullying's potential "heightened" effects due to "the breadth of its audience and the inability of the cybervictim to flee the assailant's attacks . . . facilitated by the omnipresent role communication technologies play in society today").


Cyberbullying can grow particularly virulent from “moral disengagement,” the concept that “[t]he further removed we are from the consequences of our actions, the easier it is to emotionally separate ourselves from our own behavior.” Because electronic transmission does not expose the victim’s body language and tone of voice, “seemingly ordinary people can post desperately cruel comments and images, without seeming to feel the slightest twinge of guilt-inducing empathy.”

Bullying researcher Dan Olweus found that “victims’ devaluation of themselves sometimes becomes so overwhelming that they see suicide as the only possible solution.” “Bullying is not the only risk factor for suicidal thoughts and behaviors,” adds another researcher, “but it surely now must be added to the list.”

Because depression and suicidal ideation appear common among 9- to 13-year-old bullying victims, “bullycide” and “cyberbullycide” have
become almost terms of art in educational circles following a rash of attempted and completed suicides in recent years.¹⁰⁰

Suicide is not the typical response to bullying, but victims probably contemplate or commit suicide more frequently than many people imagine.¹⁰¹ Researchers do not know the precise number of bullying victims who are driven to these extremes, but what researchers do know reinforces studies that find “compelling reasons to associate at least some of the child and adolescent risk for suicidal thoughts and actions to school bullying.”¹⁰² Half of the nation’s forty-nine million elementary and secondary students suffer face-to-face bullying or cyberbullying at some time before leaving high school; some victimization lasts for weeks, months or even years;¹⁰³ and suicide is the third leading cause of death among American adolescents.¹⁰⁴ As researchers intimate, the lines likely cross with disturbing frequency.

Suicidal ideation and classroom learning do not mix. Even in the bulk of cases that do not implicate suicide, unremedied bullying can exact a heavy physical and emotional toll that, like an unremedied disability recognized by the IDEA, compromises victims’ capacity to enjoy their rights (1) to full


⁹⁹. HINDUA & PATCHIN, supra note 8, at 66.

¹⁰⁰. See Abrams, A Coordinated Public Response to School Bullying, supra note 1, at 399-400 (defining “bullycide” and discussing the case of Daniel Scruggs, a 12-year-old boy who committed suicide in 2002 because of bullying at school); Abrams, Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates, supra note 9, at 181-82 (discussing the suicides of 15-year-old Phoebe Prince due to cyberbullying and 11-year-old Carl Joseph Walker-Hoover attributed to in-school bullying); Ollove, supra note 97 (describing “bullycide” as a “term increasingly finding its way into the educational lexicon as a result of several teen suicides that were attributed at least in part to bullying”).


¹⁰². Kim et al., supra note 96, at 357 (presenting U.S. findings and citing other studies reaching similar conclusions); see also, e.g., Anat Brunstein Klomek, Bullying, Depression, and Suicidality in Adolescents, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 40, 47 (2007) (finding that depression, serious suicidal ideation, and suicide attempts are “significantly associated with” bullying behavior among high school students).

¹⁰³. See, e.g., Amie E. Grills & Thomas H. Ollendick, Peer Victimization, Global Self-Worth, and Anxiety in Middle School Children, 31 J. CLINICAL CHILD & ADOLESCENT PSYCHOL, 59, 60 (2002) (“10% of American third- through sixth-grade children have reported experiencing frequent victimization from peers . . . . [T]he child who experiences victimization only once is the exception.”); Susan P. Limber, Bullying Among Children and Youth, JUVENILE JUSTICE BULLETIN (Apr. 1998), available at http://www.ojjdp.gov/jb/98/98804bullying2.html (noting that victims of bullying in lower grades report being bullied in later years as well); Olweus, supra note 80, at 1182 (“[M]any [victims of bullying] are the targets of harassment for long periods of time, often for many years.”).

enjoyment of the free public education guaranteed in every state constitution,\textsuperscript{105} and (2) to a safe, secure learning environment envisioned by \textit{Tinker}\textsuperscript{106} and explicitly guaranteed by many of the recently enacted state anti-bullying statutes.\textsuperscript{107}

In light of the severe immediate and long term manifestations described here, perceiving bullying victimization as an educational disability makes sound pedagogical sense, advances child protective impulses, and comports with the statutory and constitutional law that determine the public schools’ authority.

CONCLUSION

The U.S. Department of Education calls school bullying’s physical and emotional toll “an urgent social, health, and education concern,”\textsuperscript{108} an assessment echoed by the American Medical Association, the National Institutes of Health, and the World Health Organization.\textsuperscript{109} When an urgent public health concern implicates children’s rights and obligations, effective advocacy depends on lawyers who remain willing to learn from professionals trained in disciplines whose wisdom, experience, and insights complement and enrich our own.\textsuperscript{110} I remain grateful for the sheer quality and quantity of


\textsuperscript{106} See \textit{Tinker}, 393\textsuperscript{U.S.} at 513-14 (holding in specific instances schools may discipline students based on speech).

\textsuperscript{107} See, e.g., ME. REV. STAT. tit. 20-A, § 6554 (2012) (“All students have the right to attend public schools that are safe, secure, and peaceful environments.”); N.H. REV. STAT. ANN. § 193-F:2.1 (2012) (“All pupils have the right to attend public schools, including chartered public schools, that are safe, secure, and peaceful environments. One of the legislature’s highest priorities is to protect our children from physical, emotional, and psychological violence by addressing the harm caused by bullying and cyberbullying in our public schools.”); W. VA. CODE § 18A-5-1c(b)(5) (2012) (establishing Bill of Rights and Responsibilities for Students and School Personnel, including “[t]he right to a attend a school and ride on a bus that is free from bullying”).

\textsuperscript{108} ROBERS \textit{ET AL.}, supra note 2, at 1; see also, \textit{e.g.}, Nicholas D. Kristof, \textit{Born Not to Get Bullied}, N.Y. TIMES, Mar. 1, 2012, http://www.nytimes.com/2012/03/01/opinion/kristof-born-not-get-bullied.html (“Bullying and teenage cruelty are human rights abuses that need to be higher on our agenda.”).


\textsuperscript{110} DOUGLAS E. ABRAMS & SARAH H. RAMSEY, \textit{CHILDREN AND THE LAW: DOCTRINE},
emerging social science bullying research and commentary described here, and for the instructive lessons and promising multi-disciplinary strategies that these sources provide state legislatures and elementary and secondary educators.

In *Brown v. Board of Education*, the Supreme Court called elementary and secondary education "perhaps the most important function of state and local governments." The emerging national focus on school bullying presents yet a new responsibility for educators who already deserve abiding respect for performing not only as classroom instructors, but also as counselors, confidantes, psychologists, hygienists, nutritionists, and various other specialists essential to their students' growth and development.\(^{113}\)

In a nation whose public education policy vows to "leave no child behind,"\(^{114}\) perceiving bullying victimization as imposing a disability can help enlist the collaboration of diverse constituencies as educators manage the versatility that already marks their professional service in the public schools. The ultimate beneficiaries will be some of our nation's most vulnerable students, the thousands of schoolchildren who endure face-to-face bullying, or the "electronic aggression" and "online social cruelty" of cyberbullying. President Obama is right that "no child should be afraid to go to school in this country."\(^{117}\)

\(^{111}\) 347 U.S. 483 (1954).

\(^{112}\) *Id.* at 493.

\(^{113}\) *E.g.*, Rogliano v. Fayette Cty. Bd. of Educ., 347 S.E.2d 220, 226 (W. Va. 1986) (Neely, C.J., dissenting) ("[T]eachers are not merely instructors in sciences and letters. They are authority figures, role models, behavioral examples, surrogate parents.").


\(^{115}\) *See* Electronic Aggression, U.S. CENTERS FOR DISEASE CONTROL & PREVENTION (Oct. 23, 2012), http://www.cdc.gov/ViolencePrevention/youthviolence/electronicaggression (discussing the impacts of the explosion in access and use of communication tools on bullying).

\(^{116}\) *See* Faye Mishna et al., *Ongoing and Online: Children and Youth's Perceptions of Cyber Bullying*, 31 CHILDREN AND YOUTH SERVS. REV. 1222, 1222 (2009) (describing the prevalence and effects of cyberbullying).