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## Bullying Victimization as a Disability in Public Elementary and Secondary Education

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CONCLUSION

## **Bullying Victimization as a Disability in Public Elementary and Secondary Education**

*Douglas E. Abrams* \*

### I. INTRODUCTION

#### *A. Jamey Rodemeyer (1997-2011)*

“JAMIE IS STUPID, GAY, FAT AND UGLY. HE MUST DIE!”<sup>1</sup>

“I wouldn’t care if you died. No one would. So just do it :) It would make everyone WAY more happier!”<sup>2</sup>

“Kill your self!!!! You have nothing left!”<sup>3</sup>

“you’re a bad person, you don’t belong here, jump off a bridge or something!”<sup>4</sup>

“Go kill yourself, you’re worthless, ugly and dont have a point to live.”<sup>5</sup>

“You werent born this way. You shouldnt have ever been born.”<sup>6</sup>

“Jamie” was Jamey Rodemeyer, a 14-year-old freshman who was starting his second week at Williamsville North High School in Williamsville, New York, in the fall of 2011.<sup>7</sup> For several months, classmates targeting him as gay sent messages such as these in social media, the climax of bullying

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1. Sandra Tan, *Teenager Struggled with Bullying Before Taking his Life*, BUFFALO NEWS, Sept. 20, 2011, at B1 [hereinafter Tan, *Teenager Struggled*].

2. *Id.*

3. Sandra Tan, *Teen Suicide Probe Looks at Charges in Bullying*, BUFFALO NEWS, Sept. 22, 2011, at A1 [hereinafter Tan, *Teen Suicide*].

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.*

that reportedly began in the fifth grade and continued throughout middle school.<sup>8</sup>

As Jamey entered Williamsville North, his life was torn between outward signs of emotional strength and inner impulses toward personal despair. In May of 2011, he used his webcam to produce and post online his video for the “It Gets Better Project,” which seeks to fortify students who are bullied because of perceptions about their sexual orientation.<sup>9</sup> The project’s perspective is that the sting of childhood and adolescent bullying fades with the passage of time. “All you have to do is hold your head up and you’ll go far,” Jamey spoke directly into the camera, “Just love yourself and you’re set . . . . It gets better.”<sup>10</sup> The video, his intermittent positive blog postings, and his denials of personal troubles reportedly reassured his parents that he was taking the incessant bullying in stride.<sup>11</sup>

Advising schoolchildren to wait patiently until life “gets better” may seem sensible to many adults, and may indeed help many children overcome frustration or setback caused by bullying or other crises in their lives. The advice has its limits, however, because impatience can color an adolescent’s worldview. Recollecting a difficult childhood decades later is one thing; awaiting a better adulthood may be quite another.

Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs . . . .

. . . A child will experience a given time period not according to its actual duration, measured objectively by calendar and clock, but

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8. Tan, *Teenager Struggled*, *supra* note 1.

9. As of September 20, 2012, Jamey Rodemeyer’s video has been viewed 1,701,667 times. Jamey Rodemeyer, *It Gets Better, I Promise!*, YOUTUBE, [http://www.youtube.com/watch?v=Pb1CaGMdWk&feature=player\\_embedded](http://www.youtube.com/watch?v=Pb1CaGMdWk&feature=player_embedded) (last visited Sept. 20, 2012); *see also* IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/> (last visited Sept. 20, 2012).

10. Anahad O’Connor, *Suicide Draws Attention to Gay Bullying*, N.Y. TIMES WELL BLOG (Sept. 21, 2011, 4:23 PM), <http://well.blogs.nytimes.com/2011/09/21/suicide-of-gay-teenager-who-urged-hope/>; Rodemeyer, *supra* note 9.

11. *Bullied N.Y. Teen Dead in Apparent Suicide*, UNITED PRESS INT’L, Sept. 20, 2011, available at [http://www.upi.com/Top\\_News/US/2011/09/20/Bullied-NY-teen-dead-in-apparent-suicide/UPI-72481316556692/](http://www.upi.com/Top_News/US/2011/09/20/Bullied-NY-teen-dead-in-apparent-suicide/UPI-72481316556692/); Molly O’Shea, *Teen Suicide Is Wake-Up Call*, DETROIT NEWS, Sept. 26, 2011, at A2; Tan, *Teenager Struggled*, *supra* note 1; Ben Yakas, *Teen Who Recorded “It Gets Better” Video Found Dead of Apparent Suicide*, GOTHAMIST (Sept. 21, 2011), [http://gothamist.com/2011/09/21/teen\\_who\\_recorded\\_it\\_gets\\_better\\_vi.php](http://gothamist.com/2011/09/21/teen_who_recorded_it_gets_better_vi.php).

according to his purely subjective feelings of impatience and frustration.<sup>12</sup>

Jamey Rodemeyer's outward expressions of optimism masked suicidal thoughts that began as early as the fifth grade and later led him to begin seeing a social worker and a therapist.<sup>13</sup> Early in 2011, he responded to a social media question, "What's one thing people don't know about you?" "How much I hate my life," he typed, "Maybe it's cause I'm bullied. a lot."<sup>14</sup> "People would just keep sending me hate, telling me that gay people go to hell," he explained on YouTube.<sup>15</sup>

On September 8, 2011, Jamey wrote that "[n]o one in my school cares about preventing suicide, while you're the ones calling me [slur not quoted in the media] and tearing me down."<sup>16</sup> On September 9, he wrote that "I always say how bullied I am, but no one listens. What do I have to do so people will listen to me?"<sup>17</sup> Perhaps anticipating four more years of actual and virtual bullying in high school, Jamey posted his final online message in the early morning hours a few days later and then committed suicide in his backyard.<sup>18</sup>

### B. *The Emerging National Consensus About School Bullying*

As of January 2013, forty-nine states (all but Montana) have enacted anti-bullying statutes,<sup>19</sup> thirty-six of which explicitly address cyberbullying, the "electronic aggression"<sup>20</sup> that Jamey Rodemeyer endured in the last months of his life. The state statutes typically require school districts to adopt

12. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 40-41 (2d ed. 1979).

13. Tan, *Teenager Struggled*, *supra* note 1.

14. Tan, *Teen Suicide*, *supra* note 3.

15. Rodemeyer, *supra* note 9; *Homophobic Bullying Takes Life of Another U.S. Teen*, 14, INT'L BUS. TIMES (Sept. 22, 2011), <http://www.ibtimes.com/articles/218023/20110922/bullying-teenager-homosexuality-gay-homophobic-suicide-us-health.htm>.

16. Tan, *Teenager Struggled*, *supra* note 1.

17. *Id.*

18. *Id.*

19. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Overview of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (2013), [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf).

20. VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., *ANALYSIS OF STATE BULLYING LAWS AND POLICIES* 15 (2011). For more information on "electronic aggression," see Faye Mishna et al., *Ongoing and Online: Children and Youth's Perceptions of Cyber Bullying*, 31 CHILD & YOUTH SERVICES REV. 1222, 1222 (2009) (coining the term "online social cruelty"); *Electronic Aggression: Technology and Youth Violence*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ViolencePrevention/youthviolence/electronicaggression/index.html> (last updated Aug. 30, 2011) (explaining that "electronic aggression is the term that most accurately captures all types of violence that occur electronically").

written anti-bullying policies, teach prevention curricula, discipline bullies, and cooperate with law enforcement when bullying turns criminal.<sup>21</sup> By acting in such unison, state legislatures have articulated a national consensus that bullying in the public elementary and secondary schools inhibits learning by substantially disrupting or interfering with the educational mission and by compromising victims' physical or emotional security.<sup>22</sup>

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21. Douglas E. Abrams, *A Coordinated Public Response to School Bullying*, in OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN 399, 405 (Maurice R. Dyson & Daniel B. Weddle eds., 2009); see also *Cyberbullying*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/cyberbullying.aspx> (last visited Sept. 20, 2012) (summarizing state anti-bullying statutes).

22. See, e.g., 105 ILL. COMP. STAT. 5/27-23.7(a) (Supp. 2012) ("The General Assembly finds that a safe and civil school environment is necessary for students to learn and achieve and that bullying causes physical, psychological, and emotional harm to students and interferes with students' ability to learn and participate in school activities."); IOWA CODE § 280.28 (West 2011) ("The general assembly finds that a safe and civil school environment is necessary for students to learn and achieve at high academic levels. Harassing and bullying behavior can seriously disrupt the ability of school employees to maintain a safe and civil environment, and the ability of students to learn and succeed."); NEB. REV. STAT. § 79-2,137(1) (West, Westlaw through 102nd Leg. Second Reg. Sess. (2012)) ("The Legislature finds and declares that . . . [b]ullying disrupts a school's ability to educate students; and . . . [b]ullying threatens public safety by creating an atmosphere in which such behavior can escalate into violence."); N.J. STAT. ANN. § 18A:37-13 (West, Westlaw through L.2012) ("The Legislature finds and declares that: a safe and civil environment in school is necessary for students to learn and achieve high academic standards; [and] harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment."); N.Y. EDUC. LAW § 10 (McKinney, Westlaw through L.2012) ("The legislature finds that students' ability to learn and to meet high academic standards, and a school's ability to educate its students, are compromised by incidents of discrimination or harassment including bullying, taunting or intimidation."); OKLA. STAT. tit. 70, § 24-100.3 (West, Westlaw through the Second Reg. Sess.) ("The Legislature finds that bullying has a negative effect on the social environment of schools, creates a climate of fear among students, inhibits their ability to learn, and leads to other antisocial behavior."); OR. REV. STAT. ANN. § 339.353(1)(b) (West, Westlaw though 2012 Reg. Sess.) ("Harassment, intimidation or bullying and cyberbullying, like other disruptive or violent behavior, are conduct that disrupts a student's ability to learn and a school's ability to educate its students in a safe environment."); TENN. CODE ANN. § 49-6-1014 (West, Westlaw through 2012 Second Reg. Sess.) ("Harassment, intimidation, bullying or cyber-bullying, like other disruptive or violent behavior, is conduct that disrupts a student's ability to learn and a school's ability to educate its students in a safe environment."); W. VA. CODE ANN. § 18-2C-1 (West, Westlaw through the 2012 First Extraordinary Sess.) ("The Legislature finds that a safe and civil environment in school is necessary for students to learn and achieve high academic standards. The Legislature finds that harassment, intimidation or bullying, like other disruptive or violent behavior, is conduct that disrupts

Several states also require school administrators to notify law enforcement authorities about students in school who commit criminal acts characteristic of much bullying (such as assault, harassment, stalking, or sexual or racial intimidation).<sup>23</sup> At the federal level, agencies have recommended creative anti-bullying strategies<sup>24</sup> and Congress has authorized grants to states and localities for bullying-prevention curricula.<sup>25</sup>

Educators, social science researchers, legislators, and other concerned citizens continue debating the likely effectiveness of particular states' anti-bullying statutes, which the lawmakers periodically amend in light of experience and emerging studies. Legislation and periodic amendments remain only tentative first steps, however, because, as former Harvard Law School Dean Roscoe Pound wrote, "[t]he life of the law is in its enforcement."<sup>26</sup> Pound's dictum means that achieving a statute's protective purpose depends not on mere enactment, but on responsible efforts by public authorities to implement the statute. Words on paper protect no one, and statutes do not enforce themselves.

Implementing statutory mandates often comes with costs and risks that might give public authorities pause as they contemplate enforcement meas-

both a student's ability to learn and a school's ability to educate its students in a safe, nonthreatening environment."); 2011 Cal. Stat. 732 ("A safe and civil school environment is necessary for pupils to learn and achieve . . . . Bullying causes physical, psychological, and emotional harm to pupils, and interferes with pupils' ability to learn and participate in school activities."); 2007 Ark. Acts 509 ("[B]ullying creates an intolerable and sometimes dangerous educational environment for a student or public school employee who is the target of bullying or who is close to the target . . . . [C]yberbullying . . . is a growing problem for public school students due to the increased use of such electronic devices by children both on and off of public school premises."); 2002 Wash. Sess. Laws 942 ("The legislature declares that a safe and civil environment in school is necessary for students to learn and achieve high academic standards. The legislature finds that harassment, intimidation, or bullying, like other disruptive or violent behavior, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment.").

23. See, e.g., T. Nikki Eckland, *The Safe Schools Act: Legal and ADR Responses to Violence in Schools*, 31 URB. LAW. 309, 314 (1999).

24. See, e.g., DAN OLWEUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., BULLYING IS NOT A FACT OF LIFE 28-31 (2003); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., MAKE TIME TO LISTEN . . . TAKE TIME TO TALK . . . ABOUT BULLYING (2003), <http://store.samhsa.gov/shin/content/SMA08-4321.pdf>; Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ., We Will Not Fail Our Children: Remarks of Secretary Duncan at the Second Annual Federal Partners in Bullying Prevention Summit (Sept. 21, 2011), available at <http://www.ed.gov/news/speeches/we-will-not-fail-our-children> (discussing federal initiatives); U.S. Dep't of Health & Human Servs., STOP BULLYING, <http://www.stopbullying.gov/> (last visited Sept. 22, 2012).

25. 42 U.S.C. §§ 3796e(b)(13), 14043c-3(i)(4) (2006).

26. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 619 (1908).

ures. Designing anti-bullying policies, teaching bullying-prevention curricula, and monitoring disputes among students strain tight local school district budgets by consuming precious time of faculty members and administrators;<sup>27</sup> disciplinary sanctions may expose these school authorities to litigation by disciplined bullies and also their parents.<sup>28</sup>

Mindful of these costs and risks, the core of my presentation today is that face-to-face bullying and cyberbullying should be perceived as acts that saddle victims with a disability that inhibits learning. This perception may strengthen the resolve of school authorities to counter bullying, and may also provide a readily understood rationale to help schools win essential support and cooperation from students, parents and other local constituencies for bullying prevention programs.

Perceiving bullying victimization as an educational disability puts school authorities on familiar terrain because they have grown accustomed to enforcing the Individuals with Disabilities Education Act (IDEA), which Congress enacted in 1975 as the Education for All Handicapped Children Act.<sup>29</sup> For more than a generation, the IDEA has sought to guarantee “full educational opportunity to all children with disabilities,”<sup>30</sup> and the emerging state legislation seeks to guarantee this opportunity to children who are bullied.<sup>31</sup> The IDEA reaches both congenital disabilities<sup>32</sup> and disabilities that, like bullying victimization, stem from events or circumstances unrelated to biology or birth.<sup>33</sup>

Without amending the IDEA or other disability laws to recite bullying, two reasons support analogies between bullying victimization and disabilities. First, Part II of this Article describes how face-to-face bullying and cyberbullying impose on victims the sort of educational deprivation that the IDEA addresses. Second, Part III describes how today’s belated public sensitivity

27. See, e.g., Abrams, *supra* note 21, at 414-16; 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?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/28/style/28bully.html?pagewanted=all&_r=0) (seventh-grade guidance counselor reported that she can spend up to three-quarters of her time mediating student disputes that began with insults transmitted electronically; these disputes also distract the school’s principal from other pedagogical responsibilities).

28. See, e.g., Douglas E. Abrams, *Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 187-88 (2011) [hereinafter Abrams, *Recognizing the Public School’s Authority*].

29. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-91).

30. 20 U.S.C. § 1412(a)(2).

31. See *supra* note 22 and accompanying text.

32. 20 U.S.C. § 1401(3) (defining “child with a disability”).

33. See, e.g., Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (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).

to school bullying victims resembles the belated public sensitivity to students with disabilities that led to passage of the IDEA in 1975. Public awareness of the plight of schoolchildren with disabilities was long overdue by the early 1970s, and public awareness to the plight of bullied schoolchildren is long overdue today. In light of the IDEA and recent state anti-bullying legislation in virtually all states, it is no longer acceptable public policy to perpetuate insensitivity in either sphere.

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 public education as much as in other areas of everyday life.

## II. BULLYING VICTIMIZATION AS AN EDUCATIONAL DISABILITY

### A. A "Major Public Health Problem"<sup>34</sup>

#### 1. The Scope of the Problem

Leading national experts have graced this *Missouri Law Review* Symposium with thoughtful insights concerning constitutional, psychological and practical issues raised by efforts to confront cyberbullying's effects on schoolchildren whose classmates tag them as "different." This tagging may arise not only from perceptions of the target's sexual orientation, but also from such factors as the target's race, ethnicity, social isolation, physical or emotional weakness or disability, obesity, small size, appearance, or lack of social skills.<sup>35</sup> Researchers have even linked bullying to a target's speech or

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34. DIV. OF VIOLENCE PREVENTION, CTNS. FOR DISEASE CONTROL AND PREVENTION, MEASURING BULLYING VICTIMIZATION, PERPETRATION, AND BYSTANDER EXPERIENCES: A COMPENDIUM OF ASSESSMENT TOOLS I (Merle E. Hamburger et al. eds., 2011), [http://permanent.access.gpo.gov/gpo5257/assessment\\_tools.pdf](http://permanent.access.gpo.gov/gpo5257/assessment_tools.pdf); see also *Electronic Aggression: Technology and Youth Violence*, *supra* note 20.

35. See, e.g., Ian Janssen et al., *Associations Between Overweight and Obesity with Bullying Behaviors in School-Aged Children*, 113 PEDIATRICS 1187, 1187 (2004) (discussing the link between obesity and childhood bullying); Kirsti Kumpulainen et al., *Bullying and Psychiatric Symptoms Among Elementary School-Age Children*, 22 CHILD ABUSE & NEGLECT 705, 712 (1998) (discussing bully-victims with psychological disturbances or who exhibit certain social skills); J.P. Piek et al., *The Relationship Between Bullying and Self-Worth in Children with Movement Coordination Problems*, 75 BRIT. J. EDUC. PSYCHOL. 453, 454 (2005) (discussing children with physical disabilities and lack of social skills as being bullied by peers); Young Shin Kim et al., *School Bullying and Youth Violence: Causes or Consequences of Psychopathologic Behavior?*, 63 ARCHIVE GEN. PSYCHIATRY 1035, 1039-40 (2006) (noting that children who experience social isolation are likely to be bullied).



language impairment, vision problems, cancer, cerebral palsy, diabetes, or muscular dystrophy.<sup>36</sup>

Bullying occurs when a student or group of students repeatedly cause intentional physical or emotional harm to another student in a relationship marked by an imbalance in physical or emotional power.<sup>37</sup> The harm may come from physical assault, words, ostracism, teasing, or some combination. Repetition and power imbalance distinguish bullying from isolated disagreements between students, or even from isolated acts of violence or intimidation.<sup>38</sup>

Bullies have prowled schools for a long time.<sup>39</sup> Fans of old movies might recall *Tom Brown's School Days*, which starred Sir Cedric Hardwicke and Freddy Bartholomew in 1940. The movie was based on an 1857 novel about a British public school, and bullying was the main theme.<sup>40</sup>

Even more virulent today is cyberbullying – messages that “repeatedly target victims with threats, ‘rumors,’ gossip, or insults” through such electronic media as “email, instant messaging, blogs, cell phones, social networking sites, and even websites featuring the victim.”<sup>41</sup> Cyberbullying barely existed fifteen years ago, but this Symposium’s keynote speaker, Dean Palfrey is right that “[b]y virtually all accounts, bullying of young people by their peers online is on the rise.”<sup>42</sup> Some researchers suggest that cyberbullying is so prevalent today that many students now casually dismiss it as “an

36. See, e.g., Susan P. Limber, *Addressing Youth Bullying Behaviors*, in AM. MED. ASS'N, EDUCATIONAL FORUM ON ADOLESCENT HEALTH: YOUTH BULLYING 5, 9-10 (2002), <http://www.ama-assn.org/ama1/pub/upload/mm/39/youthbullying.pdf>; Jeanne Van Cleave & Matthew M. Davis, *Bullying and Peer Victimization Among Children with Special Health Care Needs*, 118 PEDIATRICS 1212, 1213 (2006).

37. Limber, *supra* note 36, at 6.

38. See RANA SAMPSON, U.S. DEP'T OF JUSTICE, *BULLYING IN SCHOOLS* 2-3 (2002); Limber, *supra* note 36, at 6; Dan Olweus, *Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171 (1994), reprinted in PETER K. SMITH & ANTHONY PELLEGRINI, *PSYCHOLOGY OF EDUCATION: SOCIAL BEHAVIOUR AND THE SCHOOL PEER GROUP* 539, 540; Wendy M. Craig, *The Relationship Among Bullying, Victimization, Depression, Anxiety, and Aggression in Elementary School Children*, 24 PERSONALITY & INDIVIDUAL DIFFERENCES 123, 123 (1998); Pick et al., *supra* note 35, at 454.

39. Michael A. Couvillon & Vessela Ilieva, *Recommended Practices: A Review of Schoolwide Preventative Programs and Strategies on Cyberbullying*, 55 PREVENTING SCH. FAILURE 96, 96 (2011).

40. TOM BROWN'S SCHOOL DAYS (The Play's the Thing Productions, Inc., 1940).

41. Abrams, *supra* note 21, at 401-02.

42. *Hearing on Cyberbullying and Other Online Safety Issues for Children*; H.R. 1966, the “Megan Meier Cyberbullying Prevention Act”; and H.R. 3630, the “Adolescent Web Awareness Requires Education Act (AWARE Act)” Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary (2009) (statement of Dean John Palfrey, Harvard Law School), available at <http://judiciary.house.gov/hearings/pdf/Palfrey090930.pdf>.

expectation of high school,"<sup>43</sup> indeed almost as a rite of passage for students unfortunate enough to be targeted by their classmates. Other researchers predict that cyberbullying incidents will likely multiply as technology's influence on children's daily lives continues to grow.<sup>44</sup>

The estimates tell a grim story. "[A] nationally representative survey conducted by the National Institute of Child Health and Human Development (NICHD) [found that] approximately 30% of . . . schoolchildren in grades six through ten have been bullied[,] or have bullied other children 'sometimes[,] or more often[,] within a semester."<sup>45</sup> Cyberbullying victimizes between 20% and 25% of middle school and high school students,<sup>46</sup> though some polls report even higher percentages.<sup>47</sup> In a 2011 study, 76% of 14- to 24-year-olds said that digital abuse is a serious problem for people their age.<sup>48</sup>

These imposing percentages, and the physical and emotional injury that they portend for increasing numbers of young victims, have led the U.S. Department of Education to call actual and virtual school bullying "an urgent social, health, and education concern."<sup>49</sup> The Centers for Disease Control and

43. Deborah Goebert et al., *The Impact of Cyberbullying on Substance Use and Mental Health in a Multiethnic Sample*, 15 *MATERNAL & CHILD HEALTH J.* 1282, 1285 (2010).

44. Sheri Bauman & Heather Pero, *Bullying and Cyberbullying Among Deaf Students and Their Hearing Peers: An Exploratory Study*, 16 *J. DEAF STUDIES & DEAF EDUC.* 236, 237 (2011).

45. *School Bullying*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/school-bullying-overview.aspx> (last visited Sept. 22, 2012).

46. Connie Cass & Stacy A. Anderson, *Young Find Online Abuse Pervasive, Poll Says*, *BOS. GLOBE* (Sept. 28, 2011), [http://www.boston.com/news/nation/washington/articles/2011/09/28/young\\_people\\_say\\_online\\_meanness\\_pervasive\\_poll\\_says/](http://www.boston.com/news/nation/washington/articles/2011/09/28/young_people_say_online_meanness_pervasive_poll_says/) (quoting Dr. Sameer Hinduja); see also, *Research*, CYBERBULLYING RES. CENTER, <http://cyberbullying.us/research.php> (last visited Aug. 10, 2012) (reporting 2010 survey of a random sample of 4441 youths between the ages of 10 and 18 from 37 schools in a large school district in the southern United States; about 20% of the sample's students reported that they had experienced cyberbullying and about 20% admitted cyberbullying others).

47. Doug Gross, *Poll: More than Half of Teens, Young Adults Harassed Online*, *CNN* (Sept. 27, 2011), [http://articles.cnn.com/2011-09-27/tech/tech\\_web\\_online-bullying-poll\\_1\\_mtv-poll-respondents-digital-media?\\_s=PM:TECH](http://articles.cnn.com/2011-09-27/tech/tech_web_online-bullying-poll_1_mtv-poll-respondents-digital-media?_s=PM:TECH) (reporting Associated Press/MTV poll which found that 56% of respondents – between fourteen and twenty-four years old – reported that they had "experienced abuse" through digital media).

48. KNOWLEDGE NETWORK ASSOCIATED PRESS-MTV DIGITAL ABUSE SURVEY AUGUST 2011 CONDUCTED BY KNOWLEDGE NETWORKS 36 (2011), [http://www.athinline.org/pdfs/2011-MTV-AP\\_Digital\\_Abuse\\_Study\\_Full.pdf](http://www.athinline.org/pdfs/2011-MTV-AP_Digital_Abuse_Study_Full.pdf).

49. STUART-CASSEL ET AL., *supra* note 20, at 1; see also, e.g., Nicholas D. Kristof, Op-Ed., *Born Not to Get Bullied*, *N.Y. TIMES* (Mar. 1, 2012), <http://www.nytimes.com/2012/03/01/opinion/kristof-born-to-not-get-bullied.html> ("Bullying and teenage cruelty are human rights abuses that need to be higher on our agenda.").

Prevention has identified school bullying as a “major public health problem,”<sup>50</sup> an assessment echoed by the American Medical Association, the National Institutes of Health, and the World Health Organization.<sup>51</sup>

## 2. The Public Schools’ Role

Major public health problems that threaten children’s well-being call for a coordinated response from the “pediatric safety system.”<sup>52</sup> The system begins at home with parents, who remain primarily responsible for protecting, disciplining, and teaching values to their children.<sup>53</sup> The Supreme Court has recognized 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.”<sup>54</sup>

Responsibility for children’s well-being, however, does not necessarily end with the parents. When parents falter or seek assistance from public authorities for protection that parents cannot provide by themselves, the pediatric safety system may extend to public elementary and secondary schools, law enforcement, the juvenile and criminal courts, the state child protective agency, and perhaps in extreme cases, the state mental health agency.<sup>55</sup> This Article focuses on public schools, which are the central, and potentially the

50. DIV. OF VIOLENCE PREVENTION, *supra* note 34, at 1; *Electronic Aggression: Technology and Youth Violence*, *supra* note 20.

51. Victoria Stagg Elliott, *AMA Recognizes Bullying as Public Health Problem*, AMEDNEWS (July 16, 2001), <http://www.ama-assn.org/amednews/2001/07/09/hlsa0709.htm> (noting that school bullying is a “public health problem”); Press Release, Nat’l Insts. of Health, *Bullying Widespread in U.S. Schools, Survey Finds* (Apr. 24, 2001), *available at* <http://www.nih.gov/news/pr/apr2001/nichd-24.htm>; Jorge C. Sraibstein & Bennett L. Leventhal, *Prevention of Bullying-Related Morbidity and Mortality: A Call for Public Health Policies*, at 5, *Bulletin of the WHO*/88:403 (2010) (finding a “major public health problem” and a “psychosocial hazard” worldwide); *see also, e.g.*, UNICEF, *PROTECTING CHILDREN FROM VIOLENCE IN SPORT: A REVIEW WITH FOCUS ON INDUSTRIALIZED COUNTRIES* 5 (2010), [http://www.unicef-irc.org/publications/pdf/violence\\_in\\_sport.pdf](http://www.unicef-irc.org/publications/pdf/violence_in_sport.pdf) (suggesting in a study of youth sports worldwide that bullying without meaningful intervention efforts by a nation’s pediatric safety system may violate the child victim’s human rights under international law).

52. Abrams, *supra* note 21, at 400 (discussing the pediatric safety system).

53. *Id.*

54. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see also, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment for making life’s difficult decisions.”); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (noting that parents hold the opportunity and responsibility for “inculcation of moral standards . . . and elements of good citizenship.”).

55. Abrams, *supra* note 21, at 400.

most effective, public entities in the pediatric safety system's protective response to bullying by elementary and secondary students.

The public schools' central role in responding effectively to student bullying derives from the essential character of public education itself. Public schools, for example, enroll most of the nation's school-age children,<sup>56</sup> who interact throughout the academic year with teachers and administrators who are charged (in the Supreme Court's words) with "maintaining discipline, health, and safety"<sup>57</sup> and "protect[ing] pupils from mistreatment by other children."<sup>58</sup> Not only that, but most bullies know their victims largely or entirely from school,<sup>59</sup> and bullies normally foresee reaction only from other classmates because they know that hardly any of the Internet's two billion other users worldwide would have reason to pay attention.<sup>60</sup>

The essential character of public education is enshrined in the law. States guarantee children a free public education, and compulsory education statutes and the juvenile court's truancy and neglect jurisdiction compel attendance by children who do not attend private schools or receive home schooling.<sup>61</sup> Justice Alito is right that "[m]ost parents, realistically, have no choice but to send their children to a public school."<sup>62</sup>

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56. FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING 3 (2012) (the nation had 73.9 million children under 18 in 2011); U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2011 1 (2012) (49.4 million children attended kindergarten through grade twelve in the public schools in 2011).

57. *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002).

58. *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring).

59. *Id.* at 348 (stating that students "spend the school hours in close association with each other, both in the classroom and during recreation periods."); Jaana Juvenon & Elisheva F. Gross, *Extending the School Grounds? – Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 497 (2008) ("[W]hen most schoolmates have Internet access at home, electronic communication is conducted largely within school-based peer networks.").

60. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (upholding a disciplinary sanction imposed on a high school student for a blog posting that concerned events at school, and encouraging her classmates to read and provide responses); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (upholding discipline imposed by a middle school because "the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District"); *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last updated Jan. 17, 2013) (2,405,518,376 Internet users worldwide on June 30, 2012).

61. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 572-75 (1975).

62. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

### B. *The Disability of School Bullying Victimization*

I have written before about why the public schools' first response to face-to-face bullying and cyberbullying should be effective prevention curricula, including curricula that enlist parents, students, school personnel, and other local constituencies in a cooperative effort to create a school culture grounded in civility, mutual respect, and freedom from physical or emotional violence.<sup>63</sup> Prevention curricula, carefully conceived and effectively taught, have been shown to reduce the volume of cyberbullying in elementary and secondary schools.<sup>64</sup>

Much bullying, however, evades even the most effective prevention curricula<sup>65</sup> and creates barriers to educational opportunity similar in effect to barriers created by physical or emotional disabilities recognized by the IDEA. Bullying 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.”<sup>66</sup> “Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.”<sup>67</sup>

Pediatric professionals recognize bullying as a form of child abuse, normally perpetrated by other children rather than by adults.<sup>68</sup> Researchers have found that bullied students may display psychosomatic symptoms re-

63. Abrams, *supra* note 21, at 410-12.

64. *Id.* at 411.

65. *Id.* (“[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. . .”).

66. Kris Bosworth et al., *Factors Associated with Bullying Behavior in Middle School Students*, 19 J. EARLY ADOLESCENCE 341, 342 (1999).

67. Cobb v. W. Va. Human Rights Comm’n, 619 S.E.2d 274, 289 (W. Va. 2005) (quoting Phillip Leon M. v. Greenbrier Cnty. Bd. of Educ., 484 S.E.2d 909, 914 (W. Va. 1996), *modified*, Cathe A. v. Doddridge Cnty. Bd. of Educ., 490 S.E.2d 340 (W. Va. 1997)); *see also, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 614 (5th Cir. 2004) (discussing “the special need[s] of educators to maintain a safe and effective learning environment”).

68. *See, e.g.*, Limber, *supra* note 36, at 6; Olweus, *supra* note 38, at 542; Richard Goldbloom, *Children’s Inhumanity to Children*, 144 J. PEDIATRICS 3, 3 (2004); Kumpulainen et al., *supra* note 35, at 706; Arne Duncan, Sec’y of Educ., U.S. Dep’t of Educ., *The Myths About Bullying: Remarks at the Bullying Prevention Summit* (Aug. 11, 2010), *available at* <http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit> (“Ultimately, bullying is really a form of physical and mental abuse.”).

sembling symptoms suffered by child abuse victims, including sleep disturbances, bedwetting, abdominal pain, anxiety and depression, loneliness, low self-esteem, and heightened fear for personal safety.<sup>69</sup> Bullying victims may also suffer school phobia, increased truancy, or impaired concentration and diminished classroom achievement.<sup>70</sup> Victims may be at greater risk of dropping out of high school before graduation.<sup>71</sup> They may also suffer lifelong emotional scars whose remnants suggest that the “It Gets Better” project, and similar outreach to children bullied for reasons other than sexual orientation, offer no sure substitutes for the pediatric safety system’s immediate attention.<sup>72</sup>

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69. Louise Arseneault et al., *Bullying Victimization Uniquely Contributes to Adjustment Problems in Young Children: A Nationally Representative Cohort Study*, 118 PEDIATRICS 130, 131 (2006); Minne Fekkes et al., *Bullying Behavior and Associations with Psychosomatic Complaints and Depression in Victims*, 144 J. PEDIATRICS 17, 21 (2004); Gianluca Gini & Tiziana Pozzoli, *Association Between Bullying and Psychosomatic Problems: A Meta-Analysis*, 123 PEDIATRICS 1059, 1059 (2009); Gwen M. Glew et al., *Bullying, Psychosocial Adjustment, and Academic Performance in Elementary School*, 159 ARCHIVES PEDIATRICS & ADOLESCENT MED. 1026, 1030-31 (2005); Kimberly L. Mason, *Cyberbullying: A Preliminary Assessment for School Personnel*, 45 PSYCHOL. SCHS. 323, 325, 327-28 (2008); Justin W. Patchin & Sameer Hinduja, *Cyberbullying and Self-Esteem*, 80 J. SCH. HEALTH 614, 619 (2010) (finding that “[e]xperience with cyberbullying, both as a victim and as an offender, was associated with significantly lower levels of self-esteem, even after controlling for demographic differences”); Gitanjali Saluja et al., *Prevalence of and Risk Factors for Depressive Symptoms Among Young Adolescents*, 158 ARCHIVES PEDIATRICS & ADOLESCENT MED. 760, 764 (2004); see also, e.g., Reid Cherner, *Book ‘Em: Cal Ripkin, Jr. Writes Second Novel*, U.S.A. TODAY (Mar. 6, 2012), <http://content.usatoday.com/communities/gameon/post/2012/03/book-em-cal-ripken-writes-second-novel/1> (quoting Cal Ripkin, Jr.: “I was bullied in school and I didn’t like the feeling. Sometimes you feel powerless. Kids don’t know where to turn.”).

70. See, e.g., DIV. OF VIOLENCE PREVENTION, *supra* note 34, at 1; Tanya Beran & Qing Li, *Cyber-Harassment: A Study of a New Method for an Old Behavior*, 32 J. EDUC. COMPUTING RES. 265, 272 (2005) (noting that bullying victims may suffer from sadness, anxiety, fear and an inability to concentrate that affected grades); Glew et al., *supra* note 69, at 1030; Kumpulainen et al., *supra* note 35, at 715; 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) (noting that bullying victims may suffer from truancy).

71. Kris Bosworth et al., *supra* note 66, at 341.

72. See, e.g., Olweus, *supra* note 38, at 547-49; Lyndal Bond et al., *Does Bullying Cause Emotional Problems? A Prospective Study of Young Teenagers*, 323 BRIT. MED. J. 480, 480 (2001); Riittakerttu Kaltiala-Heino et al., *Bullying at School – An Indicator of Adolescents at Risk for Mental Disorders*, 23 J. ADOLESCENCE 661, 668 (2000); Kumpulainen et al., *supra* note 35, at 706; 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); Dieter Wolke et al., *Bullying Involvement in Primary School and Common Health Problems*, 85 ARCHIVES DISEASE CHILDHOOD 197, 197 (2001).

Sustained face-to-face bullying may leave bruises or other physical manifestations, but a cyberbullying victim's plight may be even more severe because "once anything gets online you can't get rid of it."<sup>73</sup> Internet postings can deprive victims of safe sanctuary in their homes,<sup>74</sup> and may leave them feeling "tethered to their tormenters."<sup>75</sup> "If someone is picking on you in the school yard, you can go home," said the mother of a 13-year-old Virginia boy who committed suicide with a shotgun after cyberbullies taunted him about his small size and dared him to kill himself for more than a month. "When it's on the computer at home, you have nowhere to go."<sup>76</sup>

Virulence may escalate – as it did in Jamey Rodemeyer's case – because electronic transmission does not expose the victim's body language and tone of voice to the cyberbully. Cyberbullies may not even recognize the potential destructiveness of their messages<sup>77</sup> because of "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."<sup>78</sup> In lay terms, one high school sophomore explained that "it's so much easier to be mean online" because the bullies "don't see your reaction."<sup>79</sup>

Jamey Rodemeyer's suicide was not the typical response to bullying, but his response was also not unique.<sup>80</sup> Researcher Dan Olweus found that bullying "victims' devaluation of themselves sometimes becomes so overwhelm-

73. Cass & Anderson, *supra* note 46 (quoting former student).

74. Mishna et al., *supra* note 20, at 1224.

75. Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 56 n.44 (2005).

76. Bob Meadows, *The Web: The Bully's New Playground*, PEOPLE, Mar. 14, 2005, <http://www.people.com/people/archive/article/0,,20147083,00.html>; *see also* Cass & Anderson, *supra* note 46 (quoting Dr. Sameer Hinduja: "When I was bullied in middle school I could go home and slam my door and forget about it for a while. . . . These kids can be accessed around the clock through technology. There's really no escape.").

77. Mason, *supra* note 69, at 329; *see also* Peter K. Smith et al., *Cyberbullying: Its Nature and Impact in Secondary School Pupils*, 49 J. CHILD PSYCHOL. & PSYCHIATRY 376, 383 (2008) (cyberbullying can "reduce any inhibition of inflicting pain due to empathy at seeing the victim's distress.").

78. Adam Hanft, Op-Ed., *Internet and Social Media Behavior 101*, CHRISTIAN SCI. MONITOR (May 28, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/0528/Internet-and-social-media-behavior-101>; *see also* Mason, *supra* note 69, at 328-29.

79. Pat Ferguson, *Teen Talk: Fight "Cyberbullying," but How to Enforce?*, OREGONIAN, May 17, 2007.

80. *See, e.g.*, Abrams, *supra* note 21, at 402 (discussing prior suicides); Abrams, *Recognizing the Public Schools' Authority*, *supra* note 28, at 181-82; Michael Ollove, *Bullying and Teen Suicide: How Do We Adjust School Climate?*, CHRISTIAN SCI. MONITOR (Apr. 28, 2010), <http://www.csmonitor.com/USA/Society/2010/0428/Bullying-and-teen-suicide-How-do-we-adjust-school-climate>.

ing that they see suicide as the only possible solution.”<sup>81</sup> Other bullying victims may harbor suicidal thoughts that diminish emotional well-being, even when these thoughts do not ripen into suicide attempts.<sup>82</sup>

Because depression and suicide ideation appear common among nine- to thirteen-year-olds victimized by bullying,<sup>83</sup> “bullycide”<sup>84</sup> and “cyberbullycide”<sup>85</sup> have become almost terms of art in educational circles following a rash of suicides in recent years. Researchers do not know the precise number of bullying victims who are driven to contemplate or attempt suicide, 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.”<sup>86</sup> Half of the nation’s forty-nine million elementary and secondary students suffer face-to-face or cyberbullying at some time before leaving high school; a victim may endure bullying for weeks, months or even years (as Jamey Rodemeyer did);<sup>87</sup> and suicide is the third

81. Olweus, *supra* note 38, at 552.

82. See, e.g., DIV. OF VIOLENCE PREVENTION, *supra* note 34, at 1; Fekkes et al., *supra* note 69, at 17; Peter K. Smith, *The Silent Nightmare: Bullying and Victimization in School Peer Groups*, 4 PSYCHOLOGIST 243, 245 (1991).

83. Marcel F. van der Wal et al., *Psychosocial Health Among Young Victims and Offenders of Direct and Indirect Bullying*, 111 PEDIATRICS 1312, 1312-14 (2003); see also, e.g., WALTER B. ROBERTS, JR., WORKING WITH PARENTS OF BULLIES AND VICTIMS 14 (2008) (describing “acts of suicide when those who feel that they have no other solution to their torment except via ‘escaping’ personal pain kill themselves”); Mason, *supra* note 69, at 325; Ollove, *supra* note 80.

84. See NEIL MARR & TIM FIELD, BULLYCID: DEATH AT PLAYTIME (2d ed. 2011); BULLYCID IN AMERICA: MOMS SPEAK OUT ABOUT THE BULLYING/SUICIDE CONNECTION (Brenda High ed., 2007); THE BULLYCID PROJECT, <http://thebullycideproject.com/>.

85. SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 66 (2009).

86. Young Shin Kim et al., *School Bullying and Suicidal Risk in Korean Middle School Students*, 115 PEDIATRICS 357, 357-58 (2005) (presenting U.S. findings and citing other studies reaching similar conclusions); see also, e.g., Anat Brunstein Klomek et al., *Bullying, Depression, and Suicidality in Adolescents*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 40, 47 (2007) (finding that “[d]epression, [serious suicidal ideation], and suicide attempts [a]re significantly associated with” bullying behavior among high school students).

87. See Olweus, *supra* note 38, at 552; 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) (noting that “10% of American third- through sixth-grade children have reported experiencing frequent victimization from peers,” and “the child who has been labeled as victimized at one point in time, tends to preserve that label years later”); Susan P. Limber, *Bullying Among Children and Youth*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention), Apr. 1998, available at <http://www.ojjdp.gov/jbulletin/19804/bullying2.html> (finding that 77% of survey participants indicated they were bullied during their school careers).



leading cause of death among American adolescents.<sup>88</sup> As researchers intimate, the lines between bullying and childhood suicide likely cross with troubling frequency.

“Bullying is not the only risk factor for suicidal thoughts and behaviors, but it surely now must be added to the list.”<sup>89</sup> Even if bullying is only one cause among others, the numbers are cause for discomfort. In a 2011 nationwide survey by the Centers for Disease Control and Prevention, 28.5% of high school students said that they felt so sad or hopeless every day for two consecutive weeks in the prior month that they stopped doing some usual activities.<sup>90</sup> During the twelve months preceding the survey, 12.8% of students had planned how they would attempt suicide, 7.8% of students had actually attempted suicide one or more times, and 2.4% of students had made a suicide attempt that resulted in an injury, poisoning, or overdose that required treatment by a physician or nurse.<sup>91</sup> These predictors may be underestimates because medical experts believe that many child and adolescent deaths reported as “accidental” are actually suicides.<sup>92</sup> Even in the bulk of cases that do not end in suicide, bullying can exact a heavy physical and emotional toll that, like a disability recognized by the IDEA, effectively denies victims full opportunity to enjoy the free public education that state law guarantees.<sup>93</sup>

In light of bullying’s severe emotional and physical manifestations, perceiving bullying victimization as an educational disability makes sound pedagogical sense and advances the child protective impulses that underlie the national consensus expressed by the state anti-bullying legislation. The perception also makes sense because, as Part III demonstrates, bullying victimization and educational disability each hold pedigrees marked by decades of official indifference to schoolchildren who faced barriers to equal educational opportunity.

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88. CTRS. FOR DISEASE CONTROL & PREVENTION, SUICIDE: FACTS AT A GLANCE 2 (2010), [http://www.cdc.gov/ViolencePrevention/pdf/Suicide\\_DataSheet-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/Suicide_DataSheet-a.pdf).

89. Kim et al., *supra* note 86, at 357, 361 (presenting U.S. findings and citing other studies reaching similar conclusions).

90. *Youth Risk Behavior Surveillance – United States, 2011*, MORBIDITY AND MORTALITY WEEKLY REPORT (U.S. Dep’t of Health & Human Servs.), June 8, 2012 at 10, available at <http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf>.

91. *Id.* at 11-12.

92. See generally Leon Eisenberg, *The Epidemiology of Suicide in Adolescents*, 13 PEDIATRIC ANNALS 47 (1984).

93. See, e.g., N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

### III. THE HISTORICAL ROOTS OF STUDENT-DISABILITY AND ANTI-BULLYING LEGISLATION

Like general public recognition of the effects of physical or emotional disabilities on educational opportunity in public elementary and secondary schools, general public recognition of the effects of bullying on educational opportunity was a long time coming.

#### A. *The Belated Public Recognition of Disabled Students' Needs*

For decades, states closed public schoolhouse doors to thousands of children whose physical or emotional disabilities led authorities to label them “ineducable.” In 1985, Justice Thurgood Marshall wrote that in public education and other areas of American life, children and adults with mental disabilities had been “subject to a ‘lengthy and tragic history’ of segregation and discrimination that can only be called grotesque.”<sup>94</sup> He explained:

During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the “science” of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the “feeble-minded” as a “menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.” A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and “nearly extinguish their race.” Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them . . . .<sup>95</sup>

The Supreme Court tacitly approved categorical exclusion when it reviewed Oregon’s compulsory education statute in its landmark *Pierce v. So-*

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94. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in part and dissenting in part) (internal citation omitted).

95. *Id.* at 461-63 (citations omitted); *see also, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring) (discussing state statutes “indiscriminately . . . prohibiting certain individuals with disabilities from . . . attending public schools”).

*ciety of Sisters* decision in 1925.<sup>96</sup> Without a hint of criticism or constitutional infirmity, the unanimous Court recited the statute's exemption for "children who are not normal."<sup>97</sup> The Court dismissed the exemption as "not specially important here," even though the decision determined the constitutionality of the state's formula for delivering universal public education.<sup>98</sup>

Before and after *Pierce*, lower courts upheld state constitutional and statutory mandates that excluded many disabled students from a free public education. In 1919, for example, the Wisconsin Supreme Court rejected a challenge to a jury verdict that excluded "a crippled and defective child" whose "depressing and nauseating effect upon the teachers and school children . . . distract[ed] the attention of other pupils, and interfere[d] generally with the school's discipline and progress."<sup>99</sup> The state supreme court held that "[t]he right of a child of school age to attend the public schools . . . cannot be insisted upon when its presence therein is harmful to the best interests of the school. This, like other individual rights, must be subordinated to the general welfare."<sup>100</sup>

Education law had progressed little by 1958, when the Illinois Supreme Court interpreted the state constitutional provision that guaranteed "a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." The court held that the provision had "no application" to "feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education."<sup>101</sup> The court reasoned that the "constitutional guarantee . . . cannot assure that all children are educable," and that "the mentally deficient are objects of charity."<sup>102</sup>

By 1970, more than half of the nation's eight million children with disabilities were still "either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"<sup>103</sup> As late as 1974, the educational needs of 82% of the nation's emotionally disturbed children went unmet.<sup>104</sup> As lower courts appeared poised to recognize the states' constitutional obligation to provide a free public education to children with physical or emotional disabilities,<sup>105</sup> Congress responded in

96. 268 U.S. 510, 530-31, 534-35 (1925) (on substantive due process grounds, striking down state statute that mandated that all children attend public schools).

97. *Id.* at 531.

98. *Id.*

99. *State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919).

100. *Id.* at 154.

101. *Dep't of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958).

102. *Id.* at 270-71.

103. H.R. REP. NO. 94-332, at 2 (1975).

104. *Honing v. Doe*, 484 U.S. 305, 309 (1988); S. REP. NO. 94-168, at 8 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1432.

105. *See, e.g., Mills v. Board of Educ.*, 348 F. Supp. 866, 877-78 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 297 (E.D. Pa.

1975 with the Education for All Handicapped Children Act (later renamed the IDEA). The Supreme Court has described the Act as an initiative to “reverse [a] history of neglect.”<sup>106</sup> Every state has joined the Act’s federal-state partnership, which provides block grant funding in return for full implementation.<sup>107</sup>

The IDEA’s assurance of “full educational opportunity to all children with disabilities”<sup>108</sup> has become “a hallmark of education policy in the United States.”<sup>109</sup> Amid bitter political partisanship during years marked by Democratic and Republican ascendancy alike, overwhelming bipartisan majorities in the United States Senate and House have embraced the landmark 1975 Act and its periodic reauthorization measures.<sup>110</sup> Presidents from both parties have wholeheartedly embraced the Act<sup>111</sup> and the child-protective mission

1972); Pa. Ass’n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1278 (E.D. Pa. 1971).

106. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 52 (2005).

107. Paul T. O’Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 631 (2003).

108. 20 U.S.C. § 1412(a)(2) (2006).

109. Angela Hamilton, *Damage Control: Promoting the Goals of the Individuals with Disabilities Education Act by Foreclosing Compensatory Damage Awards*, 2001 UTAH L. REV. 659, 660 (2001) (citation omitted); *see also, e.g.*, SEYMOUR B. SARASON, PARENTAL INVOLVEMENT AND THE POLITICAL PRINCIPLE 35 (1995) (calling the IDEA the “third revolution in American education,” following enactment of compulsory education acts more than a century ago and the *Brown v. Board of Education* school desegregation decision, 347 U.S. 483 (1954)).

110. *See, e.g.*, 143 CONG. REC. S4295-96 (1997) (statement of Sen. Jeffords) (“Democrats, Republicans, the House and Senate, worked together alongside the administration in crafting this consensus bill.”); Remarks on Signing the Individuals with Disabilities Education Improvement Act of 2004, 2004 PUB. PAPERS 3038-39 (Dec. 3, 2004) (recognizing that congressional members “from both sides of the political aisle . . . worked together to reauthorize” the IDEA); 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) (“this bill . . . received virtual unanimity of support across party lines and regional lines.”).

111. *See, e.g.*, Statement on the 35th Anniversary of the Individuals with Disabilities Education Act, 2010 DAILY COMP. PRES. DOC. 01019 (Nov. 29, 2010) (“In America, we believe that every child, regardless of class, color, or creed, or ability deserves access to a world-class education.”); Proclamation No. 8426, 74 Fed. Reg. 51223 (Sept. 30, 2009) (discussing the IDEA, and noting that “we must insure that every American receives an education that prepares him or her for future success”); Statement on Congressional Passage of the “Individuals with Disabilities Education Improvement Act of 2004,” *supra* note 110 (“Like all students, children with disabilities have the best chance to pursue America’s great promise with a good education.”); Statement on Senate Passage of the Proposed “Individuals With Disabilities Educa-

that it advances.<sup>112</sup> As President Obama stated in 2010 on the IDEA's thirty-fifth anniversary, today "[w]e remember that disability rights are civil rights too."<sup>113</sup>

Today "[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."<sup>114</sup> To be sure, published decisions regularly resolve disagreements between parents and school districts about how best to redeem the IDEA's promise of a free public education to a particular student with disabilities.<sup>115</sup> Despite the passions that these individual disagreements may arouse, however, I have never heard an educator argue that public education was better off with the pre-1970s approach, which left millions of dis-

tion Improvement Act," 2004 PUB. PAPERS 869 (May 13, 2004) ("By working together to open doors for citizens with disabilities, we can help fulfill the promise of our great Nation."); Exec. Order No. 13227, 66 Fed. Reg. 51287 (Oct. 2, 2001) (discussing the IDEA, and stating that "[t]he education of all children, regardless of background or disability . . . must always be a national priority"); Statement on the 35th Anniversary of the Individuals with Disabilities Education Act, 2000 PUB PAPERS 2592-93 (Nov. 29, 2000) ("America's ongoing commitment to . . . the IDEA . . . is both an economic and moral imperative for our future."); Remarks on Signing the Individuals with Disabilities Education Act Amendments of 1997, *supra* note 110 (noting that "the IDEA has been the driving force behind the simple idea . . . that every American is a person of dignity and worth, having a spirit and a soul, and having the right to develop his or her full capacities," and discussing "our national commitment to provide a world-class education for all our children").

112. The education of the nation's students is often seen as an avenue to success for children. *See, e.g.*, President Barack Obama, 2011 State of the Union Address (Jan. 25, 2011) ("[T]he question is whether all of us, as citizens and as parents, are willing to do what's necessary to give every child a chance to succeed . . . . When child walks into a classroom, it should be a place of high expectations and high performance."); President George W. Bush, Remarks on the No Child Left Behind Act at Kearny School in Philadelphia, Pennsylvania (Jan 8, 2009) ("It's unacceptable to our country that vulnerable children slip through the cracks . . . . Every child can learn . . . . [E]very child has dignity and worth."); President Bill Clinton, 2000 State of the Union Address (Jan. 27, 2000) ("Because education is more important than ever, more than ever the key to our children's future, we must make sure all our children have that key."); President Bill Clinton, 1993 State of the Union Address (Feb. 17, 1993) ("America must ask more of our students, our teachers, and our schools. And we must give them the resources they need to meet high standards.");

113. Statement on the 35th Anniversary of the Individuals with Disabilities Education Act, *supra* note 111; *see also, e.g.*, 143 CONG. REC. S4295 (1997) (remarks of Sen. Harkin) (calling the IDEA "a powerful civil rights law"); 143 Cong. Rec. S4295 (remarks of Sen. Frist) (calling the IDEA "a civil rights law").

114. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1148 (2007).

115. *See, e.g.*, R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012); S.A. v. Weast, No. 8:11-CV-01137, 2012 U.S. Dist. LEXIS 138287 (D. Md. Sept. 26, 2012).

abled children isolated, ignored, warehoused in school, or denied an education.<sup>116</sup> The IDEA establishes that “the days of exclusion, segregation, and denial of educational opportunity [are] over in this country.”<sup>117</sup>

### *B. The Belated Public Recognition of Bullied Students’ Needs*

Belated public policy recognition of the educational needs of schoolchildren with disabilities resembles the belated public policy recognition of the educational needs of schoolchildren who suffer face-to-face bullying, cyberbullying, or both.<sup>118</sup> Until the past decade or so, tolerance of school bullying proved remarkably resistant to meaningful change in the United States.<sup>119</sup> Death or serious injuries to a particular victim might provoke a school suspension, an arrest, or other temporary public response to media coverage, but sustained anti-bullying initiatives failed to gain traction with the public.

Researchers first paid serious attention to school bullying in Scandinavia in the early 1970s, and the pace of research into school bullying accelerated in 1982 when three Norwegian boys between the ages of ten and fourteen committed suicide, probably in reaction to persistent bullying.<sup>120</sup> Most Americans, however, did not pay serious attention until after April 20, 1999, when two seniors turned bombs and semiautomatic weapons on classmates at Columbine High School in Littleton, Colorado.<sup>121</sup> The commando-style raid left twelve classmates, a teacher, and the two killers dead, and two-dozen other victims wounded.<sup>122</sup>

The two Columbine killers reportedly had been taunted in school for years, without intervention by school authorities or other links in the pediatric safety system.<sup>123</sup> Parents and students told the Colorado governor’s Columbine Review Commission that “a significant amount of bullying had oc-

116. See *supra* notes 103-05 and accompanying text.

117. 143 CONG. REC. S4295 (remarks of Sen. Harkin).

118. See, e.g., Larry Magid, *The Reality of Cyberbullying*, SAN JOSE MERCURY NEWS, July 14, 2009 (discussing study that found that 85% of students bullied online were also bullied at school).

119. See, e.g., Duncan, *supra* note 68 (“[T]he problem of bullying has been shrouded in myth and misunderstanding for far too many years. As educators, as state and local officials – and yes, absolutely at the federal level – we simply have not taken the problem of bullying seriously enough.”).

120. DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* 1-2 (1993).

121. WILLIAM H. ERICKSON, *COLUMBINE REVIEW COMM’N, THE REPORT OF GOVERNOR BILL OWENS’ COLUMBINE REVIEW COMMISSION* i-iv (2001).

122. *Id.* at xxi.

123. See, e.g., Michael D. Shear & Jacqueline L. Salmon, *An Education in Taunting: Schools Learning Dangers of Letting Bullies Go Unchecked*, WASH. POST, May 2, 1999, at C1.

curred” in the high school, but that “it would have been futile to report bullying to the school administration because no one there would have done anything about it.”<sup>124</sup> The Commission called bullying a “risk factor” for school violence and recommended that schools “adopt one or more of the bullying-prevention programs that have already been tested and proven effective.”<sup>125</sup>

After the Columbine tragedy, the United States Secret Service and the United States Department of Education studied Columbine and thirty-six other incidents of targeted school violence involving forty-one attackers since 1974.<sup>126</sup> In 2002, the agencies reported a common denominator: “Almost three-quarters of the attackers felt persecuted, bullied, threatened, attacked or injured . . . prior to the incident.”<sup>127</sup> “In several cases, individual attackers had experienced bullying and harassment that was long-standing and severe.”<sup>128</sup> Several attackers “described being bullied in terms that suggested that these experiences approached torment.”<sup>129</sup>

Columbine transformed American public education by focusing unprecedented attention on school violence, including bullying. Swift response in state legislatures from coast to coast expresses an emerging public policy consensus that the traditional tolerance of school bullying – the dismissive “kids will be kids” attitude – no longer justifies turning a blind eye to victims’ distress. The nation’s values have evolved, and the public has greater knowledge and sensitivity about bullying’s potentially harmful short term and long term effects, which Part II of this article describes.

The emerging consensus of the states soundly rejects the timeworn excuse that bullying is an inevitable and ultimately benign rite of passage that

124. ERICKSON, *supra* note 121, at 98 n.211.

125. *Id.* at 98, 102.

126. BRYAN VOSSEKUIL ET AL., U.S. SECRET SERV., U.S. DEP’T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES (2002).

127. *Id.* at 21. This common denominator continues in later school shootings. See, e.g., Michael Martinez, *California Sheriff: Youth Who Shot Classmates Felt He’d Been Bullied*, CNN (Jan. 11, 2013) [http://www.cnn.com/2013/01/10/us/california-school-shooting/index.html?hpt=hp\\_t2](http://www.cnn.com/2013/01/10/us/california-school-shooting/index.html?hpt=hp_t2) (“A 16-year-old student who blasted a California high school classroom with a shotgun . . . was targeting two classmates because he felt he’d been bullied, the local sheriff said.”); *High School Classmates Say Gunman Was Bullied*, NBC NEWS (Apr. 19, 2007), [http://www.msnbc.msn.com/id/18169776/ns/us\\_news-crime\\_and\\_courts/t/high-school-classmates-say-gunman-was-bullied/](http://www.msnbc.msn.com/id/18169776/ns/us_news-crime_and_courts/t/high-school-classmates-say-gunman-was-bullied/) (a few days after the 2007 mass shootings at Virginia Tech, classmates reported that the shooter had been bullied in high school for his shyness, ethnicity and unusual speech).

128. VOSSEKUIL ET AL., *supra* note 126, at 21.

129. *Id.* at 35; see also MARY ELLEN O’TOOLE, FED. BUREAU OF INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 22-23 (1999) (heightened risk of school violence exists when “[b]ullying is part of the school culture and school authorities seem oblivious to it, seldom or never intervening or doing so only selectively”).

adolescents outgrow after “toughing it out.”<sup>130</sup> Similarly rejected is the occasional argument that bullying might even be a positive experience by helping to prepare victims, tagged by classmates as “different,” for the rough-and-tumble “real world.”<sup>131</sup> Since Columbine, the nation has grown more sensitive to the dynamics of bullying and we now expect more from the pediatric safety system than what passed for student protection just a few decades ago.

#### IV. CONCLUSION

President Obama is right that “no child should be afraid to go to school in this country.”<sup>132</sup> The recent proliferation of state legislation qualifies bullying as a matter of transcendent public concern and no longer as the largely personal predicament of individual victims and their families.

Analogies conjoining the IDEA and state anti-bullying legislation recognize that “schools are entrusted with a unique role in our society to mold children into responsible and wise adult citizens.”<sup>133</sup> It is no longer acceptable public policy to revert to the pre-IDEA approach that overlooked the needs of disabled schoolchildren. The public understands more now about disabled children’s needs than was understood then, and the IDEA strives to place disabled children in the mainstream of American society. Similarly, it is no longer acceptable public policy to revert to the earlier approach that overlooked the needs of bullied schoolchildren. We understand more now about these children’s needs than we understood in the past, and the states’ near-universal embrace of anti-bullying legislation tips the scales in favor of protecting bullied children in school.

For decades, millions of schoolchildren like Jamey Rodemeyer have faced harsh choices – to stay home from school, or else to endure emotional or physical injury without meaningful protection from teachers, administrators, or other agents in the pediatric safety system. For students tagged as “different,” these choices imposed a disability that compromised educational opportunity, the core aspiration that should underlie state guarantees of a free public education in our nation whose educational policy strives to “leave no child behind.”<sup>134</sup>

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130. See *supra* note 22 and accompanying text.

131. See, e.g., Ronald Oliver et al., *The Perceived Roles of Bullying in Small-Town Midwestern Schools*, 72 J. COUNSELING & DEV. 416, 416 (1994) (quoting observers); Smith, *supra* note 82, at 245.

132. President Barack Obama, Remarks by the President and First Lady at the White House Conference on Bullying Prevention (Mar. 10, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/10/remarks-president-and-first-lady-white-house-conference-bullying-prevent>).

133. *In re Douglas D.*, 626 N.W.2d 725, 742 (Wis. 2001).

134. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified in scattered sections of 20 U.S.C.); see also, e.g., Exec. Order No. 13,227, 66 Fed. Reg. 51287 (Oct. 2, 2001) (discussing the IDEA, and stating that



Dan Olweus states the rationale for meaningful enforcement of anti-bullying legislation based on contemporary conceptions of sound public policy. “[I]t is a fundamental democratic right for a child to feel safe in school and to be spared the oppression and repeated, intentional humiliation implied in bullying,” he writes. “No student should be afraid of going to school for fear of being harassed or degraded, and no parent should need to worry about such things happening to his or her child!”<sup>135</sup>

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“[u]nfortunately, among those at the greatest risk of being left behind are children with disabilities”); Remarks on Signing the Individuals with Disabilities Education Improvement Act of 2004, *supra* note 110, at 3039 (“Children with disabilities deserve high hopes, high expectations, and extra help . . . [W]e have an obligation to make sure no child is left behind in America.”).

135. OLWEUS, *supra* note 38, at 552 (emphasis omitted).