STICKS, STONES, AND SCHOOLYARD BULLIES: RESTORATIVE JUSTICE, MEDIATION AND A NEW APPROACH TO CONFLICT RESOLUTION IN OUR SCHOOLS

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Abstract: One of the most damaging and increasing problems in our schools today is student teasing and bullying. The research is clear: victims and bystanders of bullying will experience emotional scars with long-term effects. This Article discusses the failure of the traditional legal system to prevent bullying and to provide appropriate compensation for its victims. In addition, the Article introduces a new approach to conflict resolution in our schools called the Social Inclusion Approach. Based upon principles of Restorative Justice, the Social Inclusion Approach seeks to change the climate of the school and give the bystanders the power to say, “Stop.” Finally, this article discusses a model anti-bullying statute that requires schools to adopt and implement research-based, whole-school approaches to end bullying. It is only in a school environment where teasing and bullying are out of place that we can truly get a handle on this subversive and difficult community problem.

I. INTRODUCTION

Teasing and bullying are a community issue, problems which must be dealt with by society as a whole, and must involve parents, schools and the general media. Social exclusion is an attack on the soul of the child causing emotional scars that are hard to heal, and [that] can last a lifetime.1

One of the most damaging and increasing problems in our schools today is student teasing and bullying.2 The research in this area is clear: the victims of bullying will experience emotional scars with long-term effects.3 Further, witnesses to the bullying are often affected in serious, lasting ways.4 Consider the following facts regarding teasing and bullying in our schools. Almost 30% of youth in the United States

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3 Id.

4 Id.
or over 5.7 million) are estimated to be involved in bullying as either a bully, a target of bullying, or both. In a recent national survey of students in grades 6-10, 13% reported bullying others, 11% reported being the target of bullies, and another 6% said that they bullied others and were bullied themselves.5

In educational research, bullying is defined “as a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child.”6 Bullying is sustained and cruel, and sometimes continues for years.7 Some have called it a form of child abuse perpetrated by the child's peers.8 There is ample evidence to show that bullying goes on in almost every school and that it remains one of the most difficult problems for school officials to control. Research has also found that bullying is most likely to occur in schools where there is a lack of adult supervision during breaks, where teachers and students are indifferent to or accept bullying behavior, and where rules against bullying are not consistently enforced.9 There have been many approaches to stop teasing bullying in schools, one of the most popular of which has been Peer Mediation Programs or other conflict resolution programs. The research has shown, however, that bullying programs may not be effective when their focus is primarily on individual bullies or a particular incident of bullying.10 In contrast, when there is a school-wide commitment to end bullying, teasing and bullying can be reduced by up to 50%.11

This paper considers the Social Inclusion Approach, a program based upon the work of Kim John Payne, M.Ed., an international educator and counselor who has developed a restorative justice approach to deal with conflict in schools.12 Although the Social Inclusion Approach contains aspects of traditional conflict resolution, it is distinct in two ways. First, it seeks to alter the school climate as a whole by having the community define teasing and bullying explicitly. By creating a “telling” culture, bystanders and witnesses of bullying are more likely to speak out and stop the bullying behavior. Second, the Social Inclusion Approach borrows from the Restorative Justice movement by seeking to hold those who bully accountable for their actions without blame. The Social Inclusion Approach is one example of a whole-school approach that seeks to change the school environment by raising awareness about bullying, increasing

6 Weddle, supra note 2 at 646.
7 Id.
8 Id.
11 National Youth Violence Website, supra note 5.
teacher and parent involvement and supervision, forming clear rules and strong social norms against bullying, and providing support and protection for all students.

Part I of this Article examines bullying behavior in terms of its effects on both the child who bullies and the target of bullying behavior. Part II examines the failures of the traditional legal system to either prevent school bullying or to provide compensation to victims of serious bullying. Part III outlines traditional peer mediation as a means of conflict resolution in schools and discusses its limitations. Part IV examines the Social Inclusion Approach as a specific example of a whole-school approach to end violence and bullying in our schools. Part V examines how conflict resolution works within the Social Inclusion Approach, specifically the “Ready for Change” Meeting and “No Blame” Mediation. Part VI examines state legislative responses to bullying and suggests additional components for a model bullying statute. Finally, the Article concludes that although there will always be conflict in our schools, we need a new way to approach conflict resolution positively so that it becomes an opportunity for growth and development for our children rather than an instrument for further destruction.

I. THE CYCLE OF BULLYING

Whether perpetrated by girls or boys, bullying has three consistent characteristics: (1) Repetitive negative actions targeted at a specific victim; (2) Direct confrontation caused by a perpetrated imbalance of power; and (3) Effective manipulation of emotional responses such as fear, inadequacy, etc. In addition, another important aspect of bullying is the “physical or psychological intimidation occurs repeatedly over time to create an ongoing pattern of harassment and abuse.”

Bullies have a strong need to dominate others and usually have little empathy for their targets. Male bullies are often physically bigger and stronger than their peers. Surprisingly, bullies appear to have little difficulty in making friends. Their friends typically share their pro-violence attitudes and problem behaviors (such as drinking and smoking) and may be involved in bullying as well. These friends are often followers that do not initiate bullying, but participate in it. Targets of bullying often keep their problems a secret; they feel they should handle bullying themselves; they worry about the bully’s revenge or other children’s disapproval; and/or they think that adults can do little to help them. Bullying is often hidden from teachers. Teachers’ lack of awareness is

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13 Weddle, supra note 2 at 646.
14 Id.
16 Id.
19 Payne, supra note 15.
evident in playground observations in which teachers intervened to stop only one in twenty five (4%) of the bullying episodes.20

How does bullying cycle start? One educator makes an interesting analogy between bullying in our schools and the horror of genocide.21 Kim John Payne asserts that when “joking around” crosses the line into put downs and then teasing, we are witnessing the genesis of genocide.22 The act of de-humanizing another person lies at the heart of this phenomenon.23 The research suggests that the common features of terrorists are strikingly similar to children who bully: a lack of empathy, a sense of powerlessness, but most telling, a sense that no one will listen to their story.24 Payne argues that terrorists often believe their cause will be heard only when they turn to extreme violence.25 Payne sees similarities between terrorism and children who bully: they each feel their cause is “just” and that it is an “us” against “them” dynamic.26

[Terrorists] feel the adversary is much bigger and more powerful and therefore they have few choices but to adopt what they see as direct action. Likewise, most children who tease and bully ironically enough see themselves as victims. This is brought about because many schools lack the tools or interest to spend time working through conflict and instead rely primarily on a moralistic and punitive approach.27

For children who bully, they are told their actions are not in keeping with the rules of the school. Payne asserts that this results in them feeling like outsiders.28 Typical responses to bullying at school, such as reprimands, detentions or expulsions within the school disciplinary system, are consequences that often leave the child who bullies

21 Payne, supra note 15. My interest in the Social Inclusion Approach came as a result of attending a three-day training lead by Kim John Payne in Minneapolis, MN, in May 2006, to train community/parent mediations in the techniques of the Social Inclusion Approach. The following description of Payne’s beliefs and his Social Inclusion Approach is my summary of various aspects of the training. On Payne’s website, there are various descriptions of the approach written by other training attendees and a short paper by Payne, supra note 25. However, there are no authoritative documents of Payne’s approach except that come from his training materials. As such, the authority for much of this paper will refer the reader to Payne’s website, and to the training materials I received as a participant in my training. Kim John Payne has granted me permission to cite to his website and training materials in this paper. I also refer to outside authority as appropriate to lend additional support for Payne’s assertions.
22 Payne, supra note 15.
23 Id. See also Barbara Coloroso, ORDINARY PEOPLE: A BRIEF HISTORY OF GENOCIDE, Viking Canada (2007) (asserting that that genocide is simply bullying taken to its extreme; that it’s a slippery slope from the schoolyard scene in which a bully picks on someone as a growing crowd either joins in or passively stands by, to hate crimes, to an entire group in a country being exterminated by another); see http://www.canada.com/montrealgazette/features/genocidetrial/story.htm.
24 Payne, supra note 20, at 47.
25 Payne, supra note 15.
26 Id.
27 Id. at 2.
28 Id.
feeling like a victim. They now feel justified in getting back at the school and also at the child they were bullying in the first place. The perpetrator sees their bullying as vindicated and they interpret their bullying behavior as “standing up for themselves.”

This leads to a warped cycle that is vicious and damaging in nature.

To put an end to this cycle, we need to stop resolving disputes by simply finding someone to blame and punish. The result of the “blame” game is that the accused tries to avoid punishment by claiming innocence or passing the blame onto someone else. The central question becomes: can have justice without blame? The answer seems to be “yes,” if we humanize our approach to conflict resolution.

Payne defines Social Inclusion as, “[e]xpressing disapproval while not seeking to give punishment and apportion blame but rather dealing with the matter openly, not judgmentally but firmly.” Payne asserts that Social Inclusion creates an open environment where kids can talk without fear of retribution and where bullies [lose] prominence.

Payne’s theory is supported by other experts in the field. Michael Palmer, a lawyer, educator and mediator who counsels schools, asserts that a “cheap” peace can be bought with “force, violence, and intimidation.” But, Palmer reminds us, “this is a peace without justice, which is the same as deferred war.” Payne’s theory of Social Inclusion is based, in part, on a Restorative Justice methodology. “Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.” Restorative Justice focuses on rehabilitation of both victim and offender and applies in both individual and institutional contexts. Though Restorative Justice has been the “dominant model of criminal justice throughout most of human history for perhaps all of the world’s peoples,” the United States and many other nations have shifted away from this approach to an adversarial, retributive system. A Restorative Justice approach requires a community to change its focus from a punitive approach to

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29 Id.
30 Id. See Alixandra Blitz, Peer Mediation Programs: An End to School Violence?, 4 Cardozo Online J. Conf. Res. 6, 9 (2002)(discussing the problem with punitive measures of discipline in school violence situations).
31 Id.
32 Id.
34 Id.
36 Id.
38 Id.
39 Id. (fn 45).
40 Id.
“inspiring grace in victims and offenders by showing compassion.” For Payne, this approach involves making sure that the child who bullies understands the deeper implications of his or her actions. Further, the perpetrator is involved in designing and carrying out an agreed-upon resolution. “Human dynamic replaces blame[,] and a chance to put things right replaces shame.” The Social Inclusion Approach confronts the bully with the implications of her actions but does not seek to apportion blame; instead it seeks to find a way that the situation can improve and remain improved.

Most of all, the Social Inclusion Approach involves in its problem-solving process the most influential group in the bullying problem: the bystanders and witnesses to the bullying behavior. The Social Inclusion Approach is premised on changing the culture of the school: “When you change the bullying culture, everything changes when you focus on kindness,” Payne asserts. Parents, teachers and bystanders must become involved each time something is seen. Conflicts on the playground are inevitable. But conflict can go horribly wrong when nothing is done about it.

Bullying is a community issue. It has to involve the media, parents, [and] schools. A school’s anti-bullying policy will have only limited effect (in the outside world). Children have to get involved. Students have to know it is wrong.

Based upon principals of Restorative Justice, the Social Inclusion Approach seeks to end the bullying cycle, and to give schools, parents and students the practical tools for long-lasting change.

II. THE FAILURE OF THE TRADITIONAL LEGAL SYSTEM TO REMEDY SCHOOL BULLYING

In order to stop bullying, harassment and violence in our schools, courts and legislators need to provide schools with an incentive to adopt a whole-school approach towards conflict resolution. Traditional legal remedies for victims of serious bullying

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41 Id.
43 Id.
44 Id.
45 Id.
47 Id.
48 Id.
49 Id.
50 By “whole school” approach, I am referring to an anti-bullying program that works to change the culture of the school by involving all aspects of the school community, i.e., parents, teachers, students, administrators, lunchroom staff, community members, etc. One example of such program in addition to the Social Inclusion Approach is the Olweus Bullying Prevention Program which has consistently been shown to reduce bullying in all types of school settings by thirty to seventy percent in the first year of
are ineffective because they “view bullying from an incident-based perspective rather than from a school culture perspective.” The legal system focuses on what school administrators knew about a specific incident rather than what the school could have done to ensure a culture where bullying is unacceptable to everyone in the school. This section will briefly review federal and state remedies available for victims of bullying and illustrate how they have failed to provide any real incentive for change within our schools.

**Federal Law Approaches**

**A. Gender-Based Bullying and Title IX**

Under federal law, one possible avenue of recovery for victims who have suffered injuries as a result of bullying is to file suit under Title IX. One obvious form of bullying in today’s schools is gender-based bullying; in fact, sexual harassment can be viewed as a form of bullying with gender as its focus. Title IX prohibits discrimination on the basis of sex “under any education program or activity receiving Federal financial assistance.” Title IX, however, has been narrowly construed by the U.S. Supreme Court in *Davis v. Monroe County Board of Education* and the holding in *Davis* makes it particularly difficult for plaintiffs to sustain a claim for gender-based bullying. Under *Davis*, school officials are liable for damages “only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” Like other standards of liability involving bullying, the *Davis* standard looks to the school’s response to specific incidents of known harassment rather than on the school’s response to an overall culture that permits the behavior to continue. Thus, while *Davis* certainly requires schools to act when the school has knowledge of gender-based harassment, “it does not place any affirmative duty upon schools to anticipate such behavior and take effective steps to
prevent it.”\textsuperscript{58} As such, it is very difficult for a victim of bullying to sustain a claim under Title IX.\textsuperscript{59}

\textbf{B. Section 1983 Claims for Federal Rights Deprivations}

Claims brought under § 1983 of the Civil Rights Act have not been any more successful that Title IX claims.\textsuperscript{60} Under § 1983, students can hold schools liable by arguing that the school has deprived students of their constitutional rights to due process or equal protection of their rights.\textsuperscript{61} Students can argue that their due process rights have been violated due to schools having a special relationship with the students, and that under this relationship, the schools are liable for harms inflicted on students while under the school’s care.\textsuperscript{62} Alternatively, students may argue that the schools were aware of the likelihood of bullying and created an environment in which bullying acts could occur in violation of their substantive due process rights.\textsuperscript{63} Additionally, bullying victims can claim that they were discriminated against and denied equal protection rights because of their membership in a definable class.\textsuperscript{64} However, the following analysis of each of these claims illustrates again that federal law does not provide satisfactory relief for bullying victims.

Under § 1983, bullying victims can raise a claim that bullying has violated either their Fourteenth Amendment right to (1) substantive due process under the Due Process Clause or (2) equal treatment under the Equal Protection Clause.\textsuperscript{65} While § 1983 does not give bullying victims any substantive rights, it does give bullying victims the ability to raise a federal constitutional or statutory claim “against an individual acting in an official manner under color of state law.”\textsuperscript{66} A review of the substantive due process and equal protection § 1983 claim possibilities illustrates the difficulties for bullying victims raising federal claims.

\textbf{1. Substantive Due Process Claims}

Generally, substantive due process § 1983 claims have little success because the state has no obligation to protect its citizens from violent acts by private individuals.\textsuperscript{67} Basically, a school is not liable for a student’s rights if the school has no duty to protect

\begin{itemize}
  \item \textsuperscript{58} Id. at 661.
  \item \textsuperscript{59} Secunda, supra note 52, at 9.
  \item \textsuperscript{60} Section 1983 grants plaintiffs a private right of action for injuries suffered as a result of violations of the constitution or other federal law. The section provides that:
    
    [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.... 42 U.S.C. § 1983 (2000).
  \item \textsuperscript{61} Secunda, supra note 52, at 22.
  \item \textsuperscript{62} Id. at 27; Weddle, supra note 2, at 664.
  \item \textsuperscript{63} Secunda, supra note 52, at 27; Weddle, supra note 2, at 666.
  \item \textsuperscript{64} Weddle, supra note 2, at 670.
  \item \textsuperscript{65} Id. at 664.
  \item \textsuperscript{66} Secunda, supra note 52, at 26.
  \item \textsuperscript{67} Id. at 26.
\end{itemize}
them. However, there are two instances when states are viewed with a duty to protect: “where a ‘special relationship’ exists between the state and the person harmed; or (2) where the state is responsible for the ‘creation of the danger’ which caused the person’s harm.”

Despite these two instances, bullying victims still have had little success in raising § 1983 substantive due process claims against schools.

**Special Relationship Theory:** Under the special relationship theory of substantive due process, students argue that because schools exercise control over them, schools have a special duty to protect students from bullying acts. However, the special relationship theory of § 1983 substantive due process fails because courts do not recognize a special relationship between the school and its students. Courts find a special relationship to exist where an individual is involuntarily under the control of the state. “[G]enerally, the state must take a person ‘into its custody and hold [] him there against his will’ before an affirmative duty arises to protect him from harms inflicted by private persons.” Absent an affirmative duty to protect, the state cannot be held liable for the actions of a private person.

Plaintiffs have argued that schools do have an affirmative duty to protect students because students are statutorily required to attend schools. However, courts have gotten around this affirmative duty pointing out that students leave at the end of the school day and return home to their parents. “Therefore, students cannot be deemed to be ‘unable to act on [their] own behalf;’ they can freely turn to their parents and even to law enforcement officials, if necessary, for aid and protection.”

Thus, bullying victims are unable to raise successful § 1983 substantive due process claims under the special relationship theory.

**‘Creation of the Danger’ Theory:** Like the special relationship theory, the creation of danger exception presents problems for bullying victims. A victim of bullying may attempt to argue that the school was aware of the bully’s apt to harm him/her and did nothing to stop the bully, creating the danger. For a school to be liable to a student for creating the danger, victimized students must establish the school (1) created a dangerous environment and (2) through its authority, provided the bully with the opportunity to commit bullying actions. Bullying victims’ claims fail because courts require a showing that a school official took an affirmative act that “increased or enhanced the

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68 Id. at 27.
69 Id. at 26-27; Weddle, supra note 2, at 664-665.
70 Id.
71 Id., supra note 2, at 664.
73 Weddle, supra note 2, at 665.
74 Id. at 665.
75 Weddle, supra note 2, at 666.
danger to” the student. Schools having knowledge and being indifferent to occurrences of bullying do not meet the affirmative act requirement because courts require schools actually taking action to enhance the bullying. “Where the state actor merely fails to act in the face of a known danger, the courts have been unwilling to view the inaction as a danger-enhancing affirmative act absent deliberate indifference to the plaintiff’s plight.”

Even when students are able to establish an egregious action by a school official, courts are cautious to hold schools liable. “Courts will usually conclude that any danger of peer-on-peer bullying and violence existing in the victim’s school is not the fault of school officials, despite the officials’ inaction concerning—or, in some cases even their participation in—the harassment.” For a school to be liable for creating a danger, their actions to bring about the danger must “shock the conscience.” Therefore, a claim brought under the creation of danger exception will likely fail. Accordingly, student victims attempting to bring a §1983 substantive due process claim face an uphill, losing battle.

2. Equal Protection

Further, victims of bullying who attempt to bring § 1983 claims under the Equal Protection Clause of the Fourteenth Amendment face similar hurdles. The Equal Protection Clause states “[n]o state shall…deny to any person within its jurisdiction equal protection of the laws.” States are not required to treat everyone equally under the Equal Protection Clause, but unequal treatment by a state cannot be based on an individual’s membership in a definable or protected class. Victims of bullying seeking to recover under the Equal Protection Clause must establish that they (1) are a member of a protected class; and (2) that the school officials failed to stop the bullying because the student was a part of a protected class.

Under the Equal Protection Clause, bullying victims must establish that in comparison to other students in a similar situation, they were provided less protection from harassment by the school and that the school’s decreased protection was due to the victim belonging to the protected class. In addition, the victim must show that the “disparate treatment” she received “was not merely negligently discriminatory” but was “intentionally discriminatory” or deliberately indifferent to their rights because of their disfavored class status. Thus, the first problem students have is showing they are a part
of an identifiable class and that they were discriminated against by the school *because* of their class status. Generally, students are not able to establish membership in a protected class. Students who are able to show membership in a protected class then face a bigger burden: showing the school’s inaction was *due to* their membership in the protected class. As Weddle points out:

> The problem for most victims, of course, is that the motivation behind the school officials’ inaction is not the victims’ membership in some identifiable class. Instead, the inaction is rooted in the officials’ apathy about bullying generally or their inability or unwillingness to recognize the extent of the problem or the seriousness of the victim’s plight.  

Thus, victimized students raising claims under the Equal Protection Clause rarely succeed. Overall, bullying claims raised under § 1983 of the Civil Rights Act have little success because “most courts are reluctant to conclude that school officials should be saddled with the responsibility, under the Constitution, to protect students from one another.”

*State Law Approaches*

In addition to claims based in federal law, a victim of bullying can also attempt to hold a school liable under a state legal theory. However, like the federal claims, state legal claims have been ineffective in providing victims with compensation for their injuries and preventing bullying more generally. This section reviews the following: (a) the ineffectiveness of anti-bullying legislation; (b) problems with “zero tolerance” approaches; and (c) problems facing students raising state tort claims against schools. These three examples of state law approaches further establish that the current legal system is unable to remedy school bullying.

**A. The Ineffectiveness of Anti-Bullying Legislation**

The first area where states have attempted to legally combat bullying is through anti-bullying statutes. Despite the good intentions with which these statutes have been enacted by state legislatures, they have been largely ineffective in reducing incidences of bullying because they focus on specific incidences of bullying behavior rather than forcing schools to adopt a whole-school approach to bullying. “Statutory attempts to address bullying directly fail, for the most part, to require the processes that are critical to effective prevention, leaving schools the option of creating anti-bullying policies, but not anti-bullying cultures.” Not all states have anti-bullying statutes. Those that do typically require each school board to adopt anti-bullying policies. However, these

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86 Id. at 672.  
87 Id. at 672.  
88 Id. at 672.  
89 Id. at 674.  
policies vary in their specificity with regard to dealing with teasing and bullying which then leaves the issue largely to the discretion of individual schools.

Most statutes start off with a comprehensive definition of bullying.91 For example, a typical definition of bullying is:

[a]ny intentional gesture or written, verbal, or physical act that: (a) a reasonable person under the circumstances should know will have the effect of harming a student or damaging his property or placing a student in reasonable fear or harm to his life or person or damage to his property; and (b) is so severe, persistent and pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.92

Typically, anti-bullying statutes then require schools to create a school policy defining and prohibiting bullying. This policy must be distributed school-wide and generally made available to all students and their families.93 Statutes usually require that the policies have different components: some require employees to report suspected bullying incidents; others prohibit retaliation against individuals who report incidents; and some must create “model policies” for use in creating school policies.94 However, one significant weakness in these statutes is that schools are not required to implement the policies, only to adopt them.95 Thus, whether a school actually carries out the policy is at its discretion. And, realistically, schools have every incentive to refrain from drawing attention to “bullying” problems at their schools. Additionally, as Weddle points out,
whether a school enforces a policy is based largely upon the school culture. But school cultures are unlikely to fully embrace an anti-bullying policy without the involvement of the entire school community. “To the extent the policies are developed without the intensive involvement of the whole school community, they will likely be enforced only in egregious situations.”

Further, state statutes rarely provide any incentive for schools to enforce the policies. Statutes may require schools to report disciplinary actions made because of bullying, but without any requirement that policies be implemented, schools who do act on bullying incidents will be viewed as having problems compared with those schools who make no reports because they have no policy. Further, statutes give immunity to those staff members who report bullying behavior, but these same statutes do not create any causes of action on behalf of a victim of a serious bullying incident. Weddle asks an appropriate question: Without a cause of action available to bullying victims, what good is immunity from them? Finally, most anti-bullying statutes fail to require teachers, administrators, and parents to receive training in identifying bullying. Many statutes “encourage” making community training a requirement of the school’s anti-bullying policy, but whether this training actually will be implemented is based solely upon the funding available to any given school. When the statutes fail to require training, it creates the assumption that training is unnecessary or unneeded. As one bullying expert points out:

The statutes seem to be based on the premise that bullying is easily discovered and that a list of consequences for bullying will address the problem. Those premises, as the educational research has demonstrated repeatedly, are false: bullying is largely an underground phenomenon, and only a cultural shift for everyone involved is likely to produce the kind of supervision by school officials that will bring it to the light and stop it.

Thus, while anti-bullying legislation is necessary in order to prevent bullying, current and future anti-bullying statutes need to be reformed in order to prevent

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96 Weddle, supra note 2, at 676 stating “The difficulty, however, is that written policies are only as effective as the efforts to enforce them, and those efforts generally turn on whether the school culture has embraced the policies...Model policies may be helpful in guiding conversations among members of a school community, but they are just as likely—perhaps more likely—to encourage boards to adopt the policies with little real involvement of the school community.” Id.

97 Id. at 676.

98 Susan Kosse & Robert Wright, How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?, 12 DUKE J. GENDER L. & POL’Y 53, 67 (2005).

99 Weddle, supra note 2, at 677.

100 Id. at 677.

101 Weddle, supra note 2, at 678; For example, Louisiana provides “[a] school may, upon approval of its governing authority, develop and offer youth development and assistance programs that employ violence prevention and intervention initiatives for students in kindergarten and the elementary grades.” La. Stat. Ann. § 17-416.17 (2007). Thus, the schools are encouraged to create prevention programs, but again, no requirement or funding is given to school districts for this purpose.

102 Id. at 679.
future bullying occurrences and to compensate the injuries of bullying victims. Section VII of this article will discuss a model anti-bullying statute in more detail.

B. “Zero Tolerance” Approaches

In addition to anti-bullying legislation, many schools have adopted “zero tolerance” approaches to school bullying and harassment within their student conduct and discipline plans. Zero tolerance policies discipline students for any action of violence, regardless of the rationale behind the action. While zero tolerance began as a Congressional response to students with guns, gun cases are often the smallest category of school discipline cases. Zero tolerance covers a large range of student misbehavior, from threats in class, sexual harassment, to drugs and weapons. Some critics have argued that zero tolerance has become a one-size-fits-all solution to all the problems that schools confront. Although zero tolerance policies theoretically are directed at students who misbehave intentionally, they also apply to those who misbehave unintentionally. As a result, there is never any option under the policies for explanations about what happened or about more holistic ways to prevent the occurrence from happening in the future.

“Zero tolerance” approaches do not prevent bullying— they only place a band-aid on the problem. Under “zero tolerance” approaches to bullying, a student who engages in a bullying act is either suspended or expelled. Thus, “zero tolerance” approaches fail to remedy bullying behavior in schools because they are incident specific and do not address the prevention of bullying. Further, “zero tolerance” policies prevent educators from asking the most important questions: Why did the child engage in the bullying behavior? How has the victim of the bullying suffered? What is the class dynamic that allows the bullying behavior to occur? Under “zero tolerance,” the perpetrator of bullying is simply expelled and will likely go on to a new school to act out in the same way. As Weddle points out:

104 James M. Peden, Through a Glass Darkly: Educating with Zero Tolerance, 10 Kan. J.L. & Pub. Pol’y 369, 371, 372 (2001). Most state and local zero tolerance school policies have their genesis in the Gun Free School Act of 1994. See 20 U.S.C. 8921 (2000). When drafting this Act, the legislature intended that it “be the policy of the United States that a high quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and [will] improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.” Peden, infra, at 372 (quoting Improving America’s School Act of 1994, 103-761, § 1001(a)(1) (1994)).
105 Id. at 373 (stating that schools tend to lump different behaviors together in terms of punishment).
106 Id.
107 Weddle, supra note 2, at 679;
108 Simpson, supra note 98, at 442.
Students may learn a great deal about punishment for particular behaviors, but they learn little about rethinking the values and motivations that inspired those behaviors or, in fact, about what makes those behaviors wrong in the first place. Unlike whole-school approaches to bullying prevention—which force a sustained discussion about bullying in all its forms, its roots and its effects—zero tolerance approaches simply remove the offender without teaching anyone anything deeper than that the rules had better be observed.\textsuperscript{110}

With “zero tolerance” policies, schools are only temporarily “fixing” the situation because neither the bully nor his/her fellow students are learning how and why the bully’s behavior was wrong.

Additionally, “zero tolerance” approaches are undesirable because of their strict liability enforcement. Regardless of a student’s reason for violating the policy, schools will penalize the student.\textsuperscript{111} Since the enactment of zero tolerance approaches, several applications of the policies have lead to ridiculous results.\textsuperscript{112} Further, zero tolerance policies may do more harm than good in the fight against bullying. Rather than allow students to discuss violence or bullying, schools just classify the issue of violence as taboo and an important opportunity for growth and learning is taken away from students.

Finally, zero tolerance policies may inhibit the recognition and reporting of bullying behavior. Teachers and students may not identify instances of bullying out of a fear of the consequences to the child who bullies. “The average teacher will be reluctant to address the harsh teasing and taunting...if the consequences for the offender are excessive and unjust.”\textsuperscript{113} With the litigation that may ensue from parents challenging a student’s expulsion, such a response from school officials is not unlikely.\textsuperscript{114} Accordingly, “zero tolerance” approaches are not an effective means of stopping bullying in our schools.

C. Tort Liability

Finally, under state law, bullying victims can attempt to hold a school tortiously liable for failing to prevent the bullying behavior. Under state tort law, students can raise

\textsuperscript{110} Weddle, supra note 2, at 682.

\textsuperscript{111} See Mistake with Lunch Box Results in Expulsion, N.Y. TIMES, Feb. 7, 1988, at A13 (seven year old who turns in knife finds in lunch box suspended from school); Yolanda Rodriguez, Cobb School Calls Wallet Chain a Weapon, Suspends Girl, 11, ATLANTA JOURNAL-CONSTITUTION, Sept. 28, 2000, at A1 (girl with wallet chain suspended under “zero tolerance” policy).

\textsuperscript{112} For example, a girl took a knife from a friend after talking her out of committing suicide. The knife was found in the girl’s locker, and she was suspended for sixteen weeks. Weddle, supra note 2, at 680. An even more extreme example involves a student who, during a discussion of Columbine, expressed understanding how the perpetrators could “‘snap’ under the pressure of relentless teasing.” She was also expelled.

\textsuperscript{113} Id. at 682.

\textsuperscript{114} Id. at 680.
negligent supervision claims against schools. However, “[i]mmunity and problems with foreseeability and causation doom most attempts by victims to obtain remedies from schools that have allowed the victimization to occur.” Two obstacles face bullying victims raising state tort claims: (1) schools and their officials are most often immune from tort liability; and (2) it is extremely difficult for victims of bullying to prove the causation element of a tort claim by showing the bullying incident was foreseeable to school officials.

1. The Obstacle of Immunity

In order to protect schools from an onslaught of lawsuits, states have given schools sovereign immunity from tort claims. Under the doctrine of sovereign immunity, regardless of the degree of negligence, school officials are shielded from tort claims. The doctrine of sovereign immunity is established by the state and generally extends to schools. Sovereign immunity is extended by states to schools because:

[with]out immunity for ordinary negligence in everyday decision-making, the sheer number of educators in any state’s public system would create a potentially devastating liability exposure that could ultimately leave the state incapable of providing a free public education system to its citizens. The second rationale is also rooted in a legitimate need to free teachers from the fear of liability as they take on the significant responsibilities of educating large groups of young people.

However, while sovereign immunity is extended to schools, immunity is not always extended to school officials or to school board members. School officials receive a “qualified” immunity applying “only to acts that can be considered ‘discretionary’ or to acts performed negligently as opposed to those performed with gross negligence, recklessness, malice, etc.” However, most disciplinary decisions fall within this discretion immunity extension. Thus, regardless of the ability to establish negligence against a school or its officials, the school administrators and/or teachers are barred from suit.

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116 Id. note 108; Weddle, supra note 2, at 683.
117 Id., supra note 2, at 683.
118 Id.
119 Id.
120 Id.
121 Id. at 687.
122 Id. at 684.
123 Id.
124 Id.
2. The Obstacle of Foreseeability

Even if immunity does not bar the tort claim, victims of bullying may have difficulty showing the bullying was foreseeable to school officials. Bullying acts are largely viewed by courts as unanticipated, impulsive acts. Thus, schools evade tort actions because if they are unable to foresee the bullying event, why should they be liable for it? The inability to foresee bullying events as a means of escaping tort liability is two-fold: (1) schools have no duty to protect the student from an unforeseeable event and (2) a school’s inaction is not the cause of an unforeseeable event.

Schools escape tort liability under the first premise because they have no duty to protect students from unforeseeable events. While schools can reasonably be viewed as knowing the threat of bullying is possible, courts are “careful to point out that schools are not insurers of their students’ safety against all possible harms.” Liability does not attach to schools unless the victim/student can show specifically that the school was warned that a threat to the student existed or that the school could have done something specific to have prevented the injury. Thus, unless students are able to establish the school knew about the bullying threat prior to its occurrence, the student’s claim will be unsuccessful.

Schools further escape negligence liability because it is extremely difficult for victims of bullying to prove causation. In order for a school to be liable in tort, its negligent supervision must be the legal cause of the student’s injury. “Even if a court concludes that a student’s tortious act was foreseeable, it may nevertheless conclude that the negligent supervision is still not the legal cause of the victim’s injury because the student’s tortious conduct was the predominant factor in causing the injury…” Thus, a claim against a school for failure to supervise, lacking legal cause, will not succeed in state court.

Accordingly, there are few if any federal and state legal remedies available to bullying victims. If the legal system offers little support for victims of bullying, schools need to find alternative ways of preventing bullying and protecting its students from bullying behavior.

125 Earhart, supra note 108. “[C]ourts focus on foreseeability as the primary determinant for grounds of school liability, holding that bullying behavior is often unknown to school officials and escalation to violence, particularly by previously non-violent students, is unforeseeable.” Id.; see also Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992); Canty v. Old Rochester Regl. Sch. Dist., 54 F. Supp. 2d 66 (D. Mass. 1999); C.M. v. Southeast Delco Sch. Dist., 828 F. Supp. 1179 (E.D. Pa. 1993); Marquay v. Eno, 662 A.2d 272 (N.H. 1995).
126 Weddle, supra note 2, at 688.
127 Id. at 688-689.
128 Weddle, supra note 2, at 689; Earhart, supra note 108; see Wallmuth v. Rapides Parish Sch. Bd., 813 So. 2d. 341 (La. 2002).
129 Weddle, supra note 2, at 690; Earhart, supra note 108.
130 Weddle, supra note 2, at 690.
131 Id. at 693.
III. THE TRADITIONAL APPROACH TO CONFLICT RESOLUTION IN SCHOOLS: PEER MEDIATION PROGRAMS

One way many schools have chosen to deal with teasing and bullying is through the use of peer mediation programs. Peer mediation is a negotiation-based strategy that uses student mediators to resolve conflicts among their peers.\(^\text{132}\) When there is a dispute at school, the mediators, usually in student teams, become neutral third parties and work with the disputants through conflict resolution.\(^\text{133}\) Over the last decade, many schools have chosen to establish peer mediation programs on their campuses as a safeguard and a structured mechanism to prevent and to handle peer-to-peer student conflict. There is some evidence that peer mediation programs help with bullying, but more recently experts have questioned the effectiveness of these programs.\(^\text{134}\) Critics of peer mediation have argued that the programs are too reactive instead of proactive and focus too intensely on the perpetrator instead of seeking to change the school climate as a whole. This section will briefly describe peer mediation programs and discuss their potential limitations.

The goal of peer mediation programs is to help students learn how to deflate a minor conflict before it escalates into a more serious incident.\(^\text{135}\) In its simplest form, peer mediation involves training a small group of students to help resolve school disputes.\(^\text{136}\) One goal of peer mediation programs is to resolve conflict in a positive way.\(^\text{137}\) Peer mediation programs accomplish this by giving students, mediators and disputants nonviolent tools and skills to deal with these daily conflicts that could otherwise lead to self-destructive and violent behaviors.\(^\text{138}\)

Although peer mediation programs have “acquired almost saintly status in today’s elementary, middle and high schools,” they may not always be the ideal solution.\(^\text{139}\) Professor John Braithwaite suggests that peer mediation programs to resolve bullying in schools may be ineffective from a restorative justice perspective based upon the current educational research.\(^\text{140}\) In contrast, “whole school” approaches that confront bullying by involving parents and teachers have shown fifty percent reductions in bullying.\(^\text{141}\) Research reviewing the effectiveness of school peer mediation programs found that programs “which simply train children to resolve disputes when conflicts arise among

\(^{132}\) Blitz, supra note 35, at *3.
\(^{133}\) Id.
\(^{134}\) See infra note 59 and 64.
\(^{135}\) See Blitz, supra note 35, at *4.
\(^{137}\) Blitz, supra note 35, at 4.
\(^{138}\) Id.
\(^{139}\) Haft and Weiss, supra note 59 at 213.
\(^{141}\) Id.
students,” had “nonsignificant or weak effects” on bullying behavior. Further, only one of four studies found peer mediation to be associated with a decrease in aggressive behavior. Professor Braithwaite commented:

It appears a whole-school approach is needed that tackles not just individual incidents but that links incidents to a change program for the culture of the school, in particular to how seriously members of the school community take rules about bullying. Put another way, the school must not only resolve the bullying incident; it must use it as a resource to affirm the disapproval of bullying in the culture of the school.

Professor Braithwaite points out that for most crimes, there are actors with the power to prevent it. The same is true for bullying. “The victimization of a child by a fourth-grade bully can be prevented by the intervention of every child in the playground in grade five or above who observes it.” According to Braithwaite, this is why peer mediation may not be as effective as it could be. Peer mediation programs that target primarily the bully are not as effective as those programs that are based upon the disapproval directed at the bystanders of bullying, i.e., those who have the power to intervene to prevent bullying before it gets out of hand. Further, it may be unrealistic for students, particularly those in younger grades, to actually be the mediator in a difficult case.

In addition, a traditional peer mediation program may attempt to resolve a dispute by having both students involved at the same time, i.e., the target of the bullying behavior and the child who is bullying. In some situations, this may serve to re-victimize the target of the bullying. Imagine a child who has already been beaten down by a bully forced to encounter the bully in a mediation session. Like a victim of crime in Victim-Offender Mediation (VOM), peer mediation in a bullying context may not address a victim’s real concerns and may, in fact, make the situation worse. In a critique of VOM’s, Professor Jennifer Brown asserts that given the vital emotional issues at stake for most victims, VOM may actually harm victims recovering from crime rather than help them.

This same situation may occur with children who are the victims of bullying. The bullying experience itself, because it is usually repetitive and continues over a longer

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143 Id.
144 Id.
145 Id. at 56.
146 Id.
147 Id.
148 Id. at 57.
150 Id.
period of time, has disturbing effects on any child.\textsuperscript{152} Not only have victims suffered the immediate pain and suffering of being the target of a bully’s torment, they have also suffered emotional and psychological effects that can remain with them well into their adult lives.\textsuperscript{153}

Under traditional theories of mediation, we expect the parties to come to mediation with equal bargaining power.\textsuperscript{154} The basic elements of mediation are voluntary participation, roughly equal bargaining power, mediator neutrality, a non-binding outcome, and confidentiality. However, the victim of bullying is rarely on equal footing with the abuser. Accordingly, this may dramatically affect the resolution of the dispute.\textsuperscript{155} However, if peer mediation is not the best solution for schools attempting to control and eliminate bullying amongst their students, then what can the school community do? One approach may be Payne’s Social Inclusion Approach.

IV. THE SOCIAL INCLUSION APPROACH: CHANGING THE SCHOOL CLIMATE

This next section of the paper will describe the practical application of the Social Inclusion Approach in today’s schools. Although the Social Inclusion Approach is not the only “whole school” approach to deal with conflict resolution within schools, this Article will use it as an example to illustrate practically how such a program works. The central question for all schools struggling with teasing and bullying is: How can schools change their culture with regard to conflict? Under the Social Inclusion Approach, there are four practical steps that a school would undertake to alter the school’s culture toward bullying: First, invoke a community commitment towards the practice of inclusion, not exclusion; Second, define teasing and bullying explicitly within the school and the community; Third, “teach” teachers to identify a child in need; and Fourth, develop specific support networks for children who are targets of bullying.

A. The First Step: A Community Commitment to Social Inclusion\textsuperscript{156}

When schools first make the decision to use a Social Inclusion Approach or any other whole-school approach to deal with issues of bullying and teasing, they are likely committing to several years of work to lay the foundation for the program. Typically, a group of parents, teachers and community members form a Social Inclusion Committee to review and consider the needs of the school and their commitment to the approach. During the first year, the Social Inclusion Committee meets weekly or bi-weekly until a workable school policy is written. The policy is reviewed and approved by faculty and

\textsuperscript{152} Weddle, supra note 2, at 646.
\textsuperscript{153} Id. at 646-647.
\textsuperscript{154} This is certainly not always true. For example, in family mediation, parties rarely have equal bargaining power, but mediation can serve to promote resolution of complex family issues.
\textsuperscript{155} Id.
\textsuperscript{156} The narrative in this section is largely my interpretation of the Social Inclusion process and theory. I gained this information from attending Payne’s training sessions, and using the materials on his website, http://thechildtoday.com.
parents. Through the initial meetings, the community, including faculty and staff at the school, consider their attitudes towards social inclusion. Parents of the community are asked to do the same. This initial process is important to lay the groundwork for the success of the approach. Social Inclusion must become a foundation within a school’s philosophy as opposed to a responsive action that is used to “treat” specific situations. Schools who have adopted the Social Inclusion Approach admit that it requires work, attention and a commitment to change.

Once the program has been adopted and instituted (over a period of approximately three years), the flow of events that result from a teasing and bullying incident typically occur as follows. After an incident is reported by a parent, teacher or child to the class teacher, the teacher notifies the Social Inclusion Committee. The choices for responses to the incident are typically: (1) A private word from the teacher to both parties (either together or independently); (2) An informal conference (usually at the time the incident occurred) between teacher and each student separately; (3) A “Ready For Change” meeting; and/or (4) A Formal “No Blame”/Restorative Justice Meeting. These concepts will be described in more detail below.

B. Changing the School Climate: Defining Teasing and Bullying Explicitly

One of the most important steps towards changing the culture of the school is to define teasing and bullying explicitly for students, teachers and parents. Because the Social Inclusion Approach seeks to create a community where bullying is not tolerated, the first step is to ensure that all community members, particularly the teachers and students, develop an explicit understanding of acceptable and unacceptable behavior. Although this concept appears simplistic at first, it turns out to be revolutionary. Defining the behavior explicitly provides all members of the community with an understanding of where an incident of teasing crosses the line. Further, it gives bystanders the authority to identify bullying behavior so that they can intervene in a bullying incident as soon as they recognize it.

The research suggests that children who bully are significantly lacking in empathy, impulse control, perspective, and imagination and fantasy.157 This has resulted in these children having difficulty being able to put themselves in the shoes of other children; refrain from reacting quickly; take into account others’ point of view; and imagine a different way they could have reacted.158 Payne asserts that “if these four foundational emotional qualities are deeply cultivated within members of the community, then a situation of social difficulty stands a very good chance of being resolved before it escalates.”159

158 Id.
159 Id.
A significant challenge is to break from a “class habit” of verbal responses that automatically become “put downs” or teasing. In order to change the school culture, the community needs to become more aware of language and how words and gestures can be interpreted by others. Payne encourages school communities to develop their own definitions of teasing and bullying behavior. It is estimated that only two out of ten “put downs” are actually witnessed or heard by adults. In order to shift this behavior, Payne recommends that each teacher hold a class parent meeting and a meeting with the students separately to brainstorm definitions of teasing and bullying.

Consider the following example of how students might define teasing and bullying in a class exercise. The teacher asks a simple question: When does “joking around” go too far? The list on the blackboard might read as follows:

“Joking Around Becomes Teasing When . . . .”

• “Everyone doesn’t think it is funny . . . .”
• “When someone asks for it to stop and it doesn’t”
• “When the person teasing reacts badly when they are teased”
• “When it becomes a habit
• When no one will help because they think they will be teased
• When it is meant to hurt or put down another person

“Teasing Becomes Bullying When . . . .”

• “Someone is constantly excluded”
• “When there is ganging up”
• “When there is physical abuse or hitting”
• “When someone is being ignored”
• “When there is a disrespect of property or stealing”
• “Where there are malicious and hurtful rumors”
• “When there is an intolerance of differences”
• “When there is an attempt to get someone else to do any of the actions stated above”

This simple exercise begins the process of defining teasing and bullying in ways in which children at all levels can understand. By creating a community definition of teasing and bullying, the community gives itself the right to interrupt “put downs” and teasing before it transforms into bullying.

Another step towards changing the school climate is to give students the confidence to interrupt bullying behavior. How can we do this? Payne advises that each classroom develop a specific plan of how children should stop “put downs.” Payne calls

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160 Id. at 14.
161 Id. at 14 (citing Olweus, supra note 18, at ___).
this the “Put Down Diet” and suggests the following three-step plan to give children the language to break the habit of verbal “put downs.”

Interrupting “put downs” has three steps:

1. **Disapprove**: Expressing disapproval. “It’s not OK to do/say things like that in this family/school. It makes things worse when you do/say things like that.”

2. **Discover**: Asking in an age appropriate way: “What’s the problem?” “What’s bothering you?” “What can we do about it?”

3. **Do-Over/Rephrase**: Give an opportunity for the student to rephrase. “Let’s work out how to do/say that in a better way.”

Payne asserts that it is “extraordinarily powerful when we create communities of consciousness. Our children feel safe yet challenged to grow.” Payne has a message for parents as well. He implores the community as a whole, i.e., parents, administrators and teachers, to look at their own social habits. Are there ways in which we could change our behavior? Payne reminds us: “All through this process of change the most important thing of all is to look at our own social habits and also strive to be worthy of imitation.”

C. “Teaching” the Teachers to Identify a Target of Bullying

The third step to changing the school climate is to educate teachers to be able to identify students who are the targets of bullying. There are many signs that a child is being bullied. Research shows that there are often stages of reactions to bullying as a child tires to cope with this aggression. This “Descending Continuum of Harassment” incorporates the classical “fear” reactions of flight, fight and freeze. It is only in the final stages that children tell their parents and then tell a teacher. This is why teachers need to be trained to watch for the signs that a child is being targeted and do their best to catch it sooner. This is also why our schools need to develop a culture in which bullying behavior seems “out of place” by everyone.

Some signs of a child who is being targeted and bullied: taking an unusual route around the playground or on their way home; an abrupt lack of interest in school or refusing to go to school; bullying of younger children; torn or missing clothing; out of character withdrawing from family or school activities; excessively hungry or difficulty focusing on any one task.

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162 Payne, supra note 20, at 15.
163 Id.
164 Id.
165 Id. at 40 (citing KEN RIGBY, NEW PERSPECTIVE ON BULLYING (2002)).
166 Payne, supra note 20, at 38.
The effects of bullying can be far reaching and prevent the full and healthy development of everyone involved; the child that bullies, the child that has been targeted and the children that have been active or inactive bystanders. We all lose when that happens.

D. The Circle of Friends: A Support Network for the Victim of Bullying

Once a child has been identified as a target, Payne advises the school to build specific support for this child: the Circle of Friends. The research shows that support from peers and older students have been bound to be highly effective in breaking the patterns of bullying and teasing. The Circle of Friends is a method for building relationships around a student who is vulnerable to social exclusion because of disruptive behavior, a behavioral difficulty, or peer relationship difficulties in their lives.

This method aims to provide the following for a vulnerable student: (1) increase the active attempts of the peer group to intervene positively in that student’s life; (2) increase the level of acceptance and inclusion of a student; (3) increase opportunities for the student to make friends in or outside the Circle itself; and (4) increase insight and understanding for the student into his or her own feelings and behavior.

In addition to supporting the focus child, this approach also aims to positively impact on relationship and organizational factors within schools. Experienced leaders comment frequently on the depth and richness of the support offered by Circle members. Payne reminds us that children are ingenious in devising practical strategies for defusing potentially difficult situations involving the target child. Case study evaluations confirm that Circle of Friends is a flexible and creative method to form a peer network for individuals who experience difficulties in their relationships and behavior.

The teacher sets up the circle very explicitly. The teacher can approach a few class members or older students to ask if they will be part of the Circle. Another method is for the teacher to bring up the Circle in a class meeting. The class discusses the problem openly and non-judgmentally. If the Circle is thought to be a good idea, its members are chosen. Another way is for the target child to write down five names of classmates that she/he feels would be a good match for the situation. The teacher collects the papers and then approaches the children who the class feels would be best. Sometimes the Circle involves students from older grades chosen by the teacher/s particularly if they have been involved in the Social Inclusion meeting process. The Circle can be as small as two and as large as six students.

The task of the Circle members is to meet together and discuss how they can support the students in the best way without seeming to interfere or take sides. Who, what, when and how, are key questions. A regular weekly time is set for a check-in

167 Id. at 22.
168 Id. at 22.
169 Id.
170 Id.
meeting. Sometimes the Circle can meet separately and then ask the students being supported to join afterwards. The Circle is in place as long as the students feel it is helpful, but if its task is done, this is spoken and recognized in a meeting.

V. THE “NO BLAME” APPROACH TO SOCIAL INCLUSION: A PRACTICAL APPLICATION OF RESTORATIVE JUSTICE AND MEDIATION

Once a bullying situation is identified, there needs to be some intervention. While the Social Inclusion Approach does not seek to blame, it does seek to bring all students involved in a social difficulty to an awareness of the implications of their actions. The “no blame” mentality under this whole-school approach to bullying adopts a Restorative Justice approach to solving conflict within schools. This section will explore the two types of “meetings” or mediations that are instrumental to Payne’s approach.

A. The “Ready for Change” Meeting

The first level of intervention is the “Ready for Change” meeting which is an informal meeting that is held between a teacher and a child, or a parent and a child when a conflict is first noticed. The children involved in the conflict do not meet together initially. Present at the meeting could be the class teachers/advisors, the students involved (they will be interviewed individually), and possibly the student helpers. The purpose of the “Ready for Change” meeting is to help the child who bullies consider the consequences of her actions. For the child who is the target of the bullying, the “Ready for Change” meeting begins the process of understanding and support. In addition, the meeting will attempt to humanize both children for each other.

Each child is asked to fill out a questionnaire (with a parent or teacher) to find out more about the problem. Instead of seeking to blame parties within the social conflict, the “Ready for Change” meeting seeks to have the students understand the implications of their actions and the possibility for changing the situation for the better. The “Ready for Change” meeting seeks to have the students realize: (1) that the adults understand and will listen to their side without judgment; (2) that by changing the situation, things can get better or worse; (3) that everyone involved has valid feelings and can be respected for their differences; and (4) that the students often succeed in not reacting or saying hurtful things.

The questionnaire asks the students to consider not only what happened, but also who their classmate is as a person. This is particularly important to build empathy within the child who bullies so that the student sees his peer as a person rather than a target. The questionnaire asks each student to consider the other student’s hobbies, brothers or sisters, or where she lives. There is an explicit attempt to re-humanize the target of the

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171 Once again, this narrative is my interpretation of these meetings based upon my attending Payne’s training in May of 2006.
172 Payne, supra note 20, at 42.
bullying in the eyes of the child who bullies. The following is an example of the “Ready for Change” Plan created by Kim John Payne.173

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An important note to the adult helping the student work through these questions: Please make sure all questions are answered in a thoughtful, NO BLAME way. This Change Plan form usually 25 minutes to complete and often needs some discussion with the student. After it’s completed please make sure it is given to the Social Inclusion Coordinator who will make copies for the appropriate people (e.g., The Social Inclusion Coordinator, the class teacher, the parent and the student.)

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An actual “Ready for Change” meeting takes approximately 25 minutes. Payne reminds the mediators to begin the meeting with the reminder that “No one is being blamed.” This is the core of the restorative justice approach. The next stage is to

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173 Payne, supra note 20, at 17-18.
uncover the stories. The adult mediator listens to the stories and prompts the students to summarize how the student sees the situation. The “Ready for Change” meeting seeks to build empathy between the students. Payne states: “Exclusion cannot thrive in a climate where we view each other with empathy.” The students also explore what impact the conflict is having on each of their lives. It is crucial to help the children see that this situation can have a potentially negative or positive impact on everyone’s lives depending on how they handle it. At this point, the group explores alternatives through a series of suggestions. The crux of the meeting comes when the group asks the important question: “Do you want to change?” By now, most children realize change is possible. Payne reminds adults to be willing to wait for an answer. Let the child convince you that he wants to change. Then, what help do you need to change?

\[174\] Id. at 44.
B. “No Blame” Mediation: A Restorative Justice Approach

The second meeting or mediation occurs after a series of one or two successful “Ready for Change” meetings with each of the students individually. The “No Blame” mediation is more structured and involves additional members of the school community, i.e., the teacher, a member of the social inclusion committee, trained peers (student helpers), the two students most centrally involved, the students identified as being in support of the child bullying, and two “neutrals” from the class that the targeted child and the child bullying agree can be present.

One interesting dynamic within the Social Inclusion Approach is that the story is usually never what it appeared to be at first. The children know something is not right and they do not want it to continue going on in that way. Nobody is happy with hurting another person, certainly not with being hurt, even if it seems as if the children involved have become immune to its effect. Payne asserts that children need tools, different modes of communication, and adult interaction in order to realize the significance of their actions and to work together so that everyone is heard and valued.\(^\text{175}\)

Consider the template for “No Blame” Mediation:\(^\text{176}\)

1. **Setting the Scene**
   - The parents of the key children were notified by the Social Inclusion Coordinating Group before the Ready for Change meeting.
   - Present at the meeting: Mediator(s) & Class Teacher/Advisor; Student Helpers; Students Interviewed in Ready for Change meeting; A neutral student from the class involved.

2. **The Introduction**
   - The mediator welcomes everyone and emphasizes that no one is in trouble; the purpose of the meeting is work on a positive resolution of the conflict.

3. **Gathering Stories**
   - The mediator encourages those in the Circle to share their experiences of social conflict.

4. **The Issues**
   - The mediator invites the student helpers to outline the issue/conflict emphasizing the feelings/effects on those involved. The student helpers first outline the issues concerning the child bullying; next, the child colluding; third, the child targeted. After each outline, the mediator asks the key child if she/he would like to add anything.

5. **Opening and Going Deeper**
   - The mediator tells the group that they need to explore the situation more deeply. Key questions: “What are you concerned about?” “When did this begin?”

6. **Foundations for Agreement**
   - The mediator summarizes the Key Students Needs and reasons. E.g., “What Sarah wants is . . .”; “The reason Sarah wants it is . . .”
   - The mediator initiates a short brainstorming phase.

7. **Building Toward Agreement**
   - The students agree first about one thing, and then about another and another, until in the end they have created a satisfactory agreement that includes all of their issues.

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\(^{175}\) See id. at 22.

\(^{176}\) Payne, supra note 20, at 49-51.
8. **Make an Action Plan.**
   Decide who will do what and when they will do it. Let the key students know they can seek help during the days to come from anyone in the Circle. Make a check-in time within a week.

9. **Communicate with the class/es.**
   Agree what is to be kept confidential and what can be shared outside the meeting. Student helpers report only the agreements to the class/es.

10. **Communicating with the class parents.**
    In class, all students write down, on a sheet of paper entitled, “Our Common Concern,” the ideas that were reported. The students then take this home and write at least two paragraphs, with the help of their parent/s, answering three questions.
    
    What can I do to help this situation continue to improve?
    
    What will I try and do if I see something like this happening again?
    
    What support do I need to do this?
    
    The parents sign the family homework sheet and it is returned the next morning. The class teacher reviews the homework and leads a discussion about the responses that day.

11. **Communication with Faculty**
    The mediator reports the agreements to the Social Inclusion Coordinating Group and also to the faculty and support staff (bus drivers, playground supervisors, lunch room personnel).

    One important aspect of this Restorative Justice approach is the full class participation in a solution following the mediation. Having the whole classroom involved, and therefore, responsible for a solution is a key aspect of Payne’s approach. The research appears to support this type of conflict resolution process: programs that are “incorporated into the life of the school . . . encourage students to take responsibility for themselves and their own learning.”177 In addition to resolving the immediate conflict, Payne’s “No Blame” approach can become a part of the “life of the school” and it teaches students how to become respectful and meaningful citizens in our society.178 “They develop peacemaking and peace-building skills. Peace is no longer an abstraction or some vague notion; it takes on concrete content.”179 Payne’s Social Inclusion Approach gives students, teachers, administrators and parents tools and strategies to combat the epidemic of teasing and bullying in a positive and constructive way.

**VII. LEGISLATION TO PROMOTE CHANGE**

In addition to having schools adopt whole school approaches to end bullying, we need to reform anti-bullying statutes to require schools to address bullying thoughtfully and competently. This section will compare two anti-bullying statues and examine how these statutes might be revised in order to prevent and remedy bullying more effectively.

As mentioned previously, while anti-bullying legislation has been in place for many years, the current statutes fail to require the enforcement of anti-bullying policies at schools.180 Further, the statutes often fail to require an inclusive conflict resolution program that seeks to change the culture of the school—the only way to reduce the actual

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178 *Id.*
179 *Id.*
180 *See Section III infra.*
prevalence of bullying in schools.\textsuperscript{181} Under most statutory schemes, schools need only create general anti-harassment policies. Although many school administrators adopt these policies (with all good intentions), the schools may not implement the policies within their schools. There is no doubt that the implementation of anti-bullying policies takes tremendous effort and time on the part of the whole school community. In addition, school administrators may be reluctant to publicize their anti-bullying policies fearing that any publicity will suggest to the larger community that the school has a bullying and violence problem. However, without a statutory requirement that schools implement and enforce anti-bullying policies, there is a good chance that schools will not undertake the effort to implement a whole school approach.

In addition, anti-bullying statutes need to define bullying more comprehensively so that the definition captures the subversive nature of bullying behavior as opposed to a single bullying incident.\textsuperscript{182} Any definition of harassment or bullying must recognize “that severe, pervasive harassment is damaging regardless of the bully’s motive.”\textsuperscript{183} Thus, anti-bullying statutes need to provide relief for students by defining bullying to include a broad spectrum of harassing behavior consistent with the current educational research.\textsuperscript{184} Additionally, anti-bullying statutes should require that schools enforce the anti-bullying policies and that the schools involve the community in the implementation of their whole-school programs.\textsuperscript{185} “To the extent the policies are developed without the intensive involvement of the whole school community, they will likely be enforced only in egregious situations.”\textsuperscript{186} Anti-bullying statutes also need to require that teachers, administrators and other school personnel receive training to recognize bullying so that they teach others in the school community, including student bystanders, to identify bullying as well.\textsuperscript{187}

In the past five years, several states have created anti-bullying statutes that have adopted many of these suggestions. However, as a review of two such statutes reveals, current legislative efforts still do not mandate the adoption of whole-school approaches to bullying. Delaware and Iowa have each enacted statutes that are more progressive than many states because they require not only that their schools adopt anti-bullying policies, but that the schools implement the policies as well. In addition, both the Delaware and Iowa statutes have a comprehensive definition of bullying. Delaware defines bullying as:

\begin{quote}
Any intentional written, electronic, verbal or physical act or actions against another student, school volunteer or school employee that a reasonable person under the circumstances should know will have the effect of: (1) placing a student, school volunteer or school employee in reasonable fear of substantial harm to his or her emotional or physical well-being or substantial damages to his or her property; (2) creating a
\end{quote}

\begin{itemize}
\item \textsuperscript{181} Weddle, supra note 2, at 674.
\item \textsuperscript{182} Weddle, supra note 2, at 674.
\item \textsuperscript{183} Id. at 675.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id. at 676.
\item \textsuperscript{186} Id. at 676.
\item \textsuperscript{187} Id. at 679.
\end{itemize}
hostile, threatening, humiliating or abusive educational environment due to the pervasiveness or persistence of actions or due to a power differential between the bully and the target; or (3) interfering with a student having a safe school environment that is necessary to facilitate educational performance, opportunities or benefits; or (4) perpetuating bullying by inciting, soliciting or coercing an individual or group to demean, dehumanize, embarrass or cause emotional, psychological or physical harm to another student, school volunteer or school employee.  

Similarly, Iowa defines bullying as:

any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that meets one or more of the following conditions: (1) Places the student in reasonable fear of harm to the student’s person or property. (2) Has a substantially detrimental effect on the student’s physical or mental health. (3) Has the effect of substantially interfering with a student’s academic performance. (4) Has the effect of substantially interfering with the student’s ability to participate in or benefit from the services, activities, or privileges provided by a school.

In addition to these comprehensive definitions of bullying behavior, both Delaware and Iowa require school districts to develop policies prohibiting bullying. These anti-bullying policies must include school-wide policies on

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[each] school district and charter school shall establish a policy which, at a minimum, includes the following components: (a) A statement prohibiting bullying of any person on school property or at school functions or by use of data or computer software that is accessed through a computer, computer system, computer network or other electronic technology of a school district or charter school from kindergarten through grade 12…(b) A definition of bullying no less inclusive than that in subsection (a) of this section. (c) Direction to develop a school-wide bullying prevention program. (d) A requirement that each school establish a site-base committee that is responsible for coordinating the school’s bullying prevention program…(e) A requirement that any school employee that has reliable information that would lead a reasonable person to suspect that a person is a target of bullying shall immediately report it to the administration. (f) A requirement that each school have a procedure for the administration to promptly investigate in a timely manner and determine whether bullying has occurred. (g) A requirement that, to the extent that funding is available, each school develop a plan for a system of supervision in non-classroom areas…(h) An identification of an appropriate range of consequences for bullying. (i) A procedure for a student and parent, guardian or relative caregiver…to provide information on bullying activity…(j) A requirement that a parent, guardian…of any target of bullying or person who bullies another as defined herein, is notified. (k) A requirement that all bullying incidents be reported to the Department of Education within 5 working days…(l) A statement prohibiting retaliation following a report of bullying. (m) A procedure for communication between school staff members and medical professionals who are involved in treating students for bullying issues. (n) A requirement
bullying prevention programs.\textsuperscript{191} For example, an anti-bullying policy in Iowa must include a description of the type of behavior expected by employees, volunteers, parents, guardians and students relative to prevention measures.\textsuperscript{192} Further, the policy requires school employees, including teachers, to report incidents of bullying to school administrators.\textsuperscript{193} However, by including reporting requirements, Delaware and Iowa also grant immunity to school officials who report incidents of bullying in good faith.\textsuperscript{194}

While these two statutes illustrate that legislators are taking school bullying more seriously than before, there is still more to do. The remainder of this section will describe additional requirements that a model anti-bullying statute might contain to prevent bullying and change the culture within a school.

\textbf{A. Additional Components of Anti-Bullying Statutes}

In addition to the positive aspects of the Delaware and Iowa anti-bullying legislation, there are additional components to a model anti-bullying statute that states should adopt. First, a model anti-bullying statute might provide a greater incentive for schools to adopt and implement anti-bullying policies by allowing victims of serious bullying to sue schools under certain circumstances. The statute could provide a victim of bullying with a cause of action against school officials \textit{if} the school has failed to adopt and implement an anti-bullying policy. Those schools that do implement an appropriate

\begin{quote}
that the school bullying prevention program be implemented throughout the year, and integrated with the school’s discipline policies…
\end{quote}

Similarly, Iowa requires school to adopt a policy prohibiting bullying.

Each policy shall, at a minimum, include all of the following components: (a) A statement declaring harassment and bullying to be against state and school policy. The statement shall include but not be limited to the following provisions: (1) School employees, volunteers, and students in school, on school property, or at any school function or school-sponsored activity shall not engage in harassing and bullying behavior. (2) School employees, volunteers, and students shall not engage in reprisal, retaliation, or false accusation against a victim, witness, or an individual who has reliable information about such an act of harassment or bullying. (b) A definition of harassment and bullying as set forth in this section. (c) A description of the type of behavior expected from school employees, volunteers, parents or guardians, and students relative to prevention measures, reporting, and investigation of harassment of bullying. (d) The consequences and appropriate remedial action for a person who violates the anti-harassment and anti-bullying policy. (e) A procedure for reporting an act of harassment or bullying, including the identification by job title of the school official responsible for ensuring that the policy is implemented, and the identification of the person or persons responsible for receiving reports of harassment or bullying. (f) A procedure for the prompt investigation of complaints, either identifying the school superintendent or the superintendent’s designee as the individual responsible for conducting the investigation…(g) A statement of the manner in which the policy will be publicized.

Iowa Code § 280.28(3) (2007).

\textsuperscript{191} See Del. Code Ann. tit. 14 § 4112D(b)(2)(C) (2007); Iowa Code § 280.28(4) (2007) which provides schools “are encouraged to establish programs designed to eliminate harassment and bullying in schools.”

\textsuperscript{192} Iowa Code § 280.28(3)(2)(c) (2007).


anti-bullying policy as required by the statute could then have a rebuttable presumption that the school has met its duty of care to the student in the event the student suffers injury as a result of bullying. In order to qualify for the presumption, however, schools would be required to adopt an appropriate, whole school approach. “The presumption of reasonable supervision should arise only upon sufficient evidence that practices and outcomes exist [at the schools] that are characteristic of competent, good-faith implementation of effective programs.”  

In the same way, a school’s failure to implement an acceptable bullying program would be viewed as the proximate cause of a bullying victim’s injuries. 196 Hopefully, this liability-shifting framework would compel school officials to act decisively in accordance with the anti-bullying policy developed by the school community. 197 “Where such a culture exists, bullies are likely to be discovered and thwarted at several points.” 198

Another suggestion that might influence schools to implement anti-bullying policies is to condition state and/or federal funding on their implementation. 199 By requiring schools to document specifically how they have implemented their anti-bullying policies in order to receive state and/or federal funds, schools would enforce anti-bullying policies. Anti-bullying programs are not costly:

Several proven, cost-effective programs are available that can reduce episodes of bullying and school violence. These programs are effective not only in teaching children and youth how to deal with bullying, but they also impart broader social and problem-solving skills consistent with the whole-school, comprehensive approach advocated by researchers. 200

Payne’s Social Inclusion Approach is one such whole-school approach that any school can adopt to dramatically alter the bullying culture in a school.

CONCLUSION

When conflict resolution programs, like peer mediation, are initially introduced by schools, they are often seen as a means of managing conflict and behavioral problems within the school. Peer mediation can sometimes be adopted as a way “of keeping kids in line, of running a smooth sailing ship, and of preserving an outward appearance of clam.” 201 However, to truly support all students, schools need to do more. Whole-school approaches, like the Social Inclusion Approach, seek to change the climate of the school and give the bystanders to school bullying the power to say, “Stop.” Further, state anti-bullying statutes need to require schools to adopt research-based, whole-school

195 Weddle, supra note 2, at 701.
196 Id. at 699.
197 Id.
198 Id.
199 Kathleen Hart, Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence, 29 GA. L. REV. 1109, 1151 (2005);
200 Hart, supra note 188, at 1151.
201 Palmer, supra note ___ at (Id.fn. 154).
approaches to bullying. It is only in a school environment where teasing and bullying are out of place that we can truly get a handle on this subversive, difficult community problem. Finally, we need to reconsider how we deal with the child who bullies. Kim John Payne, an international educator and counselor, encourages us to adopt a “No Blame” approach to teasing and bullying based upon a theory of restorative justice. Restorative justice is slowly being rediscovered because it seeks to hold the wrongdoer accountable by helping her understand the real consequences of her behavior. Both parties play a role in coming to a resolution. The child who bullies takes responsibility for the wrongdoing. The target of the bullying is supported by adults and peers. And the process allows both children to become a part of the larger community once again.