

CHILDREN AND THE DUTY TO REPORT: THE DOUBLE STANDARD OF CHILD ABUSE AND ANTI-BULLYING LAWS

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INTRODUCTION

In September 2010, fifteen-year-old Billy Lucas took his own life after being bullied at his Indiana high school.¹ Less than a month later another Indiana teenager, fourteen-year-old Jamaricus Bell, did the same after being subjected to a similar pattern of bullying.² In May 2012, a Bloomington High School North student, fifteen-year-old Tori Swoape, took her life as a result of incessant bullying at school.³ In 2012, in response to such bullying incidents, one Indiana mom launched a campaign urging schools, parents, and legislators to be tougher on bullying.⁴ However, despite such individual and legislative efforts,⁵ bullying remains a problem in Indiana.

Bullying is not confined solely to Indiana. It affects nearly thirty percent of school-aged youth each month in the United States.⁶ In response, forty-nine states have enacted anti-bullying legislation in one form or another.⁷ While these laws are an important step to combat bullying, a recent study by the National Education Association (NEA) questions their effectiveness.⁸ The NEA study surveyed 5064 NEA members, including 2153 professional staff (mainly

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1. See Richard Essex, *Bullying May Have Pushed 15-Year-Old to Suicide*, WTHR EYEWITNESS NEWS (Sep. 13, 2010, 11:15 PM), <http://www.wthr.com/Global/story.asp?S=13147899>, archived at <http://perma.cc/3UXG-CMNE> (noting that friends reported Lucas took his own life due to bullying).

2. Daniel Miller, *Memorial Remembers HSE Bullying Victim*, NEWS 8 WISH TV (Oct. 25, 2010, 10:58 PM), http://www.wishtv.com/dpp/news/local/hamilton_county/memorial-rememebrs-hse-bullying-victim, archived at <http://perma.cc/EF4S-JYWP>.

3. Aishah Hasnie, *Ind. Mom Says Daughter was Bullied Before Committing Suicide*, SUN SENTINEL (May 10, 2012, 9:41 PM), <http://www.sun-sentinel.com/news/broward/wxin-ind-mom-says-daughter-was-bullied-before-committing-suicide-20120510,-11,2171509.column>, archived at <http://perma.cc/B472-GHSQ>.

4. Jenny Inglee, *Fed Up Indiana Mom Fights for Stronger Anti-Bullying Laws*, TAKE PART (Jun. 11, 2012), <http://www.takepart.com/article/2012/06/11/fed-indiana-mother-fights-stronger-anti-bullying-laws>, archived at <http://perma.cc/6X6S-EZ3W>.

5. See IND. CODE §§ 20-33-8-0.2, -13.5 (2012).

6. CATHERINE P. BRADSHAW ET AL., NAT'L EDUC. ASS'N, FINDINGS FROM THE NATIONAL EDUCATION ASSOCIATION'S NATIONWIDE STUDY OF BULLYING: TEACHERS' AND EDUCATION SUPPORT PROFESSIONALS' PERSPECTIVES, at vii (2011), available at http://www.nea.org/assets/docs/Nationwide_Bullying_Research_Findings.pdf, archived at <http://perma.cc/UPT2-UV3Z>.

7. See BULLY POLICE USA, <http://www.bullypolice.org> (noting that Montana is the only state without anti-bullying legislation) (last visited June 11, 2014).

8. BRADSHAW ET AL., *supra* note 6, at vii-viii.

teachers) and 2901 education support professionals (ESPs) (school employees who are not teachers).⁹ Of the NEA members surveyed, forty-three percent stated that bullying was a “moderate or major problem at their school.”¹⁰ In addition, sixty-two percent had witnessed bullying “two or more times in the last month.”¹¹

This Note evaluates anti-bullying legislation both nationally and in Indiana. Due to the similarities between bullying and child abuse, this Note advocates for the creation of a mandatory duty to report bullying that is similar to the existing child abuse reporting laws in most states. Part I discusses the current framework on bullying, the costs of bullying, and current efforts to combat the bullying problem. Part II considers the duty to report and how it is used with respect to child abuse. Finally, Part III proposes a duty to report with regard to bullying and discusses its implementation, with the ultimate goal of significantly reducing the number of bullying incidents.

I. THE CURRENT FRAMEWORK ON BULLYING

To understand the current framework on bullying, it is important to understand the definition of bullying. Although this definition varies from state to state,¹² the United States Department of Health and Human Services defines bullying as “unwanted, aggressive behavior among school aged children.”¹³ This part of the definition supplies the mens rea for bullying as “[h]uman aggression is any behavior directed toward another individual that is carried out with the proximate (immediate) intent to cause harm.”¹⁴ Furthermore, bullying also involves two key components: imbalance of power and repetition.¹⁵

The imbalance of power exists between the bully and the victim.¹⁶ In other words, the bully has power over the victim through “physical strength, access to embarrassing information, or popularity” and uses that power “to control or harm others.”¹⁷ Repetition is defined as bullying behavior that happens more than

9. *Id.* at vii.

10. *Id.* at vii-viii.

11. *Id.* at viii.

12. DENA T. SACCO ET AL., AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS 4-5 (2012), available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf, archived at <http://perma.cc/8CR7-4KT5>.

13. U.S. DEP'T OF HEALTH & HUMAN SERV., *Bullying Definition*, STOPBULLYING.GOV, <http://www.stopbullying.gov/what-is-bullying/definition/index.html>, archived at <http://perma.cc/AT22-6LXE> (last visited June 11, 2014).

14. CRAIG A. ANDERSON & BRAD J. BUSHMAN, *Human Aggression*, 53 ANN. REV. PSYCHOL. 27, 28 (2002), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev.psych.53.100901.135231>, archived at <http://perma.cc/CA5F-8JWZ>.

15. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 13.

16. *Id.*

17. *Id.*

once, or has the possibility of happening more than once.¹⁸ These two requirements are important to distinguish bullying from mere teasing, which is a lesser form of abuse between students.

Bullying can be categorized into three different types: verbal, social or relational, and physical.¹⁹ Verbal is defined as “saying or writing mean things,” which includes “teasing, name-calling, inappropriate sexual comments, taunting, [and] threatening to cause harm.”²⁰ Social or relational bullying involves “hurting someone’s reputation or relationships,” which includes intentionally excluding someone, telling other children not to befriend someone, contributing to rumors about someone, and embarrassing someone in public.²¹ Finally, physical bullying involves causing injury to a “person’s body or possessions,” such as spitting, stealing or breaking someone’s possessions, and making rude hand gestures.²²

These definitions are closest to a national definition of bullying, and are used by various researchers in nationwide bullying publications and studies.²³ Despite the wide use of this definition at a national level, however, most anti-bullying statutes at the state level either leave bullying undefined or define it inconsistently with the national definition.²⁴

Specifically, although forty-two states define bullying or similar conduct, only four states mention an imbalance of power between the bully and victim.²⁵

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. BRADSHAW ET AL., *supra* note 6, at 1 (“Bullying is broadly defined as intentional and repeated acts of a threatening or demeaning nature that occur through direct verbal (e.g., threatening, name calling), direct physical (e.g., hitting, kicking), and indirect (e.g., spreading rumors, influencing relationships, cyberbullying) means and that typically occur in situations in which there is a power or status difference.”) (internal citations omitted); DAVID P. FARRINGTON & MARIA M. TFOI, THE CAMPBELL COLLABORATION CRIME AND JUSTICE GROUP, SCHOOL-BASED PROGRAMS TO REDUCE BULLYING AND VICTIMIZATION 4 (2009), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/229377.pdf>, *archived at* <http://perma.cc/A6UF-NN5M> (“The definition of school bullying includes several key elements: physical, verbal, or psychological attack or intimidation that is intended to cause fear, distress, or harm to the victim; an imbalance of power (psychological or physical), with a more powerful child (or children) oppressing less powerful ones; and repeated incidents between the same children over a prolonged period. School bullying can occur in school or on the way to or from school.”); RANA SAMPSON, U.S. DEP’T OF JUSTICE, BULLYING IN SCHOOLS, 12 PROBLEM-ORIENTED GUIDES FOR POLICE SERIES 1, at 2 (2002), *available at* <http://www.cops.usdoj.gov/pdf/e12011405.pdf>, *archived at* <http://perma.cc/8E3F-DUCN> (“Bullying has two key components: repeated harmful acts and an imbalance of power. It involves repeated physical, verbal or psychological attacks or intimidation directed against a victim who cannot properly defend him- or herself because of size or strength, or because the victim is outnumbered or less psychologically resilient.”).

24. SACCO ET AL., *supra* note 12, at 4-6; *see also* S.B. 130, 87th Legis. Assemb. (S.D. 2012).

25. SACCO ET AL., *supra* note 12, at 5.

Additionally, just nine states define bullying as only behavior that is “repetitive, systematic, or continuous,” with five states defining bullying as only encompassing “severe or pervasive conduct.”²⁶ This prevalent disconnect between the national and state level definitions of bullying may lead to confusion among teachers who are in charge of protecting students against bullying and make it difficult to collect data on bullying at a national level.

Indiana’s bullying definition, while including some elements of the national definition, omits other key elements.²⁷ The definition is codified in Indiana Code section 20-33-8-0.2 and defines bullying as “overt, unwanted repeated acts or gestures,” which include “(1) verbal or written communications or images transmitted; (2) physical acts committed; or (3) any other behaviors, that are committed by a student or group of students against another student with the intent to harass, ridicule, humiliate, intimidate, or harm the targeted student.”²⁸ The key omission by Indiana, and many other states, is the lack of a provision addressing the imbalance of power between bully and victim.²⁹ This omission may lead to confusion among teachers applying the statute and the misclassification of student-on-student altercations as incidences of bullying.

A. *The Effects of Bullying*

This Note adopts a definition of bullying from the “national” definition—unwanted, aggressive behavior involving an imbalance of power that is repeated or has the potential to be repeated. With a precise definition, it is now possible to discuss the effects of bullying on the children involved.

The first and most obvious child affected is the victim. Victimization increases the likelihood of depression, anxiety, health complaints, decreased academic achievement, and decreased school participation.³⁰ Bullying victims are also more likely to “miss, skip, or drop out of school.”³¹ Other effects of victimization, particularly violent victimization, include higher risk of subsequent victimization, substance abuse, and other criminal behavior.³² Victims of bullying may also lash out against others: of the fifteen school shootings in the

26. *Id.* at 4-5.

27. IND. CODE § 20-33-8-0.2 (2012).

28. *Id.*

29. SACCO ET AL., *supra* note 12, at 5.

30. U.S. DEP’T OF HEALTH & HUMAN SERV., *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/effects/index.html> archived at <http://perma.cc/994M-HAP2> (last visited Apr. 28, 2014); see also Susan M. Swearer Napolitano et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 EDUC. RES. 38, 38 (2010), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1140&context=edpsychpapers>, archived at <http://perma.cc/9JDF-CWDE>; SCOTT MENARD ET AL., U.S. DEP’T OF JUSTICE, EVALUATION OF BULLY-PROOFING YOUR SCHOOL: FINAL REPORT 3-4 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221078.pdf>, archived at <http://perma.cc/T7SX-8VZN>.

31. U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 30.

32. MENARD ET AL., *supra* note 30, at 3-4.

1990s, twelve shooters had a history of being bullied.³³

The effects of bullying, however, are not limited to the child victims. Perpetrators of bullying are more likely to abuse substances in both adolescence and adulthood, fight, commit acts of vandalism, drop out of school, engage in early sexual activity, have criminal convictions, and be abusive towards romantic partners.³⁴ Increased suicidal ideation has also been reported for bullies, specifically bullies who are also victims of bullying.³⁵

Student bystanders are also affected by bullying; children who witness bullying are more likely to experience many of the same effects as victims and bullies, which include increased use of tobacco, alcohol, and other drugs, mental health problems, and delinquency from school.³⁶ One study found that elementary school students who attended schools with a bullying prevention program, which had been in place for two or more years, had higher achievement than a similar group of students in control schools.³⁷ Notably, students who transferred from a school with a bullying prevention program to one without experienced decreased academic achievement.³⁸

B. Current Legal Efforts to Combat Bullying

The widespread prevalence of bullying and its well-documented negative effects have spurred a variety of legislation designed to combat bullying.³⁹ Most of this legislation, however, is at the state level because the federal government likely lacks authority to enact such legislation.⁴⁰

Despite the lack of a federal anti-bullying statute, the United States Department of Education (DOE) issued a letter in 2010 stating that some peer abuse in schools may fall under one or more federal antidiscrimination statutes enforced by the DOE's Office for Civil Rights.⁴¹ Notably, these statutes would only take effect when the bullying is based on "race, color, national origin, sex,

33. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 30.

34. *Id.*; see also Napolitano et al., *supra* note 30, at 38-40; MENARD ET AL., *supra* note 30, at 3-4.

35. U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 30.

36. *Id.*

37. Napolitano et al., *supra* note 30, at 39.

38. *Id.*

39. See *supra* Part I.A; see also, e.g., IND. CODE § 20-33-8-13.5 (2012).

40. U.S. DEP'T OF HEALTH & HUMAN SERV., *Federal Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/federal> archived at <http://perma.cc/QS8H-SBDG> (last visited Apr. 28, 2014); see also *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress lacked the authority to regulate guns in schools under the Commerce Clause because allowing it to do so would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

41. Russlynn Ali, *Dear Colleague Letter: Harassment and Bullying*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>, archived at <http://perma.cc/K942-CHJG>.

or disability,” and the discrimination is “sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”⁴² Among the statutes that may be implicated by the DOE’s letter in this way and provide a framework to combat bullying are Title IX of the Education Amendments Act of 1972,⁴³ Title VI of the Civil Rights Act of 1964,⁴⁴ Section 504 of the Rehabilitation Act of 1973,⁴⁵ Title II of the Americans with Disabilities Act,⁴⁶ the Individuals with Disabilities Education Act,⁴⁷ the No Child Left Behind Act,⁴⁸ and the Safe and Drug-Free Schools and Communities Act.⁴⁹

This federal legislative framework addressing bullying is limited, however, in that it only addresses severe, discriminatory bullying in schools. This may change soon given that several federal bills addressing bullying are currently pending.⁵⁰ Two bills, the Bullying Prevention and Intervention Act of 2011⁵¹ and the Empowering Local Educational Decisionmaking Act of 2011,⁵² would provide funding for educational programs designed to combat bullying.⁵³ Additionally, the Safe Schools Improvement Act of 2011⁵⁴ and the Anti-Bullying and Harassment Act of 2011⁵⁵ would require states to report incidences of bullying in schools.⁵⁶ However, as of November 2012, none of the aforementioned bills has been enacted.

The absence of a specific and comprehensive federal anti-bullying law, combined with the widespread problem of bullying, has prompted forty-nine states to enact some form of anti-bullying legislation.⁵⁷ Nevertheless, these statutes vary greatly from state to state.⁵⁸ The DOE noted that state legislation generally “emphasize[s] traditional approaches to managing bullying misconduct that involve[s] reporting and investigating bullying complaints and imposing disciplinary actions.”⁵⁹ Thirty-six states either require or encourage the “creation

42. *Id.*

43. 20 U.S.C. §§ 1681-88 (2006).

44. 42 U.S.C. §§ 2000d-2000d-7 (2006).

45. 29 U.S.C. § 794 (2006).

46. 42 U.S.C. §§ 12131-12165 (2006).

47. 20 U.S.C. §§ 1400-1482 (2006).

48. *Id.* §§ 7101-7165.

49. SACCO ET AL., *supra* note 12, at 18-19.

50. *Id.* at 14-16.

51. Bullying Prevention and Intervention Act, H.R. 83, 112th Cong. (2011-2012).

52. Empowering Local Educational Decisionmaking Act, S. 1569, 112th Cong. (2011-2012).

53. SACCO ET AL., *supra* note 12, at 14-15.

54. Safe Schools Improvement Act of 2011, S. 506, 112th Cong. (2011-2012).

55. Anti-Bullying and Harassment Act of 2011, H.R. 975, 112th Cong. (2011-2012).

56. SACCO ET AL., *supra* note 12, at 15-16.

57. BULLY POLICE USA, *supra* note 7.

58. See SACCO ET AL., *supra* note 12, at 4-13 (discussing differences in state anti-bullying legislation).

59. *Id.* at 7 (citing U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES,

of school procedures for investigating incidents of bullying.”⁶⁰ Similarly, thirty-seven states require or encourage school districts to provide disciplinary consequences for bullying.⁶¹ Reporting provisions are not as prevalent, however, with only seventeen states mandating staff report bullying incidents of which they are aware.⁶²

While these state statutes are a good start to combat bullying, there remains room for improvement. Bully Police USA, a watchdog organization, reports on state anti-bullying laws and assigns a grade to each.⁶³ Grades are based on a number of factors including the use of the word “bullying” with a definition and the inclusion of reporting procedures.⁶⁴ According to Bully Police USA, only thirteen states received a perfect A++ rating for their bullying laws and thirty-one states received an A- or better.⁶⁵ Indiana is one of those thirty-one states to receive an A-, showing that improvement is possible.⁶⁶

Indiana has two statutes addressing bullying: the definitional statute, Indiana Code section 20-33-8-0.2, discussed above,⁶⁷ and Indiana Code section 20-33-8-13.5, titled “Discipline rules prohibiting bullying required.” This statute is divided into three main parts.⁶⁸ The first part requires school corporations adopt rules that “(1) prohibit bullying; and (2) include provisions concerning education, parental involvement, reporting, investigation, and intervention.”⁶⁹ The second part discusses when the statute applies, which generally includes any activities on school grounds or the use of school property during or around school hours.⁷⁰ The third part extends the protection offered by the statute to cyberbullying.⁷¹ The statute also has a provision noting that the statute does not give rise “to a cause of action against a person or school corporation based on an allegation of noncompliance.”⁷²

Bully Police USA points out a number of areas for improvement for Indiana.⁷³ The first area is the inclusion of a provision protecting against

at xvi (2011)).

60. *Id.*

61. *Id.* at 8.

62. *Id.* at 7.

63. BULLY POLICE USA, *supra* note 7.

64. *See Making the Grade*, BULLY POLICE USA, <http://www.bullypolice.org/grade.html> (last visited Apr. 25, 2014).

65. BULLY POLICE USA, *supra* note 7.

66. *Id.*

67. *See* IND. CODE § 20-33-8-0.2 (2012).

68. *Id.* § 20-33-8-13.5.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Indiana*, BULLY POLICE USA, http://www.bullypolice.org/in_law.html (last visited Apr. 25, 2014).

“reprisal, retaliation or false accusation.”⁷⁴ This section is intended to provide for more accurate reports by punishing false ones and to protect the victim from being victimized twice, once initially and once in retaliation, for discussing his abuser.⁷⁵ The second area of improvement is a greater focus on bullying victims with a provision for counseling victims.⁷⁶ Lastly, Bully Police USA suggests a provision for accountability reports and consequences for noncompliant schools.⁷⁷ These measures are designed to evaluate school performance and to suggest improvements to school policies.⁷⁸ Although all of these are helpful suggestions for improvement, this Note will focus on reporting, specifically in the context of a mandatory duty to report bullying, because of the potentially significant impact of reporting on decreasing bullying, as illustrated by the child abuse reporting laws.

II. THE DUTY TO REPORT

The duty to report is not a new legal concept. As early as the Thirteenth Century, Anglo-Saxon law recognized a duty to report felonies to authorities.⁷⁹ These early laws also made it a felony, called misprision, for failing to report a felony of which the individual had knowledge.⁸⁰ Although the law eventually made its way to the United States, federal courts have narrowed the law’s effect by interpreting it to require active concealment of the felony.⁸¹ However, more recently, state legislatures have begun codifying statutes that require people to disclose their knowledge of certain crimes.⁸²

A. *The Duty to Report Generally*

Today, reporting statutes in the United States generally fall into two categories: protecting helpless victims and preventing widespread or systematic harms.⁸³ In the first category, “helpless” means the individuals “are not capable of protecting themselves from further harm either by escaping from their assailants or by seeking the protection of law enforcement.”⁸⁴ Two groups, children and the elderly, are most commonly singled out for protection by these statutes because they are perceived to be physically weaker and dependent on

74. *Making the Grade*, *supra* note 64.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Alison M. Arcuri, *Sherrice Iverson Act: Duty to Report Child Abuse and Neglect*, 20 PACE L. REV. 471, 474 (2000).

80. *Id.*

81. *Id.* at 475-76.

82. Sandra Guerra Thompson, *The White-Collar Police Force: “Duty to Report” Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 9 (2002).

83. *Id.* at 11.

84. *Id.* at 13.

others.⁸⁵ The category of people required to report varies from state to state, but most statutes include some kind of “reasonable suspicion” before the duty to report triggers.⁸⁶

The second category of reporting statutes imposes mandatory reporting duties on persons who have knowledge of actions that may have far reaching consequences. Examples of these statutes include requiring financial institutions to report suspicions of fraud and requiring persons to report the release hazardous materials.⁸⁷ These laws differ from those in the first category in that they are triggered by any suspicion of illegal activity, and are not limited by the “reasonable” qualifier.⁸⁸ Because of the similarities between bullying and child abuse,⁸⁹ this Note will focus on the first category of reporting laws, specifically mandatory child abuse reporting laws.

B. The Duty to Report in the Child Abuse Context

Child abuse, unfortunately a perpetual problem,⁹⁰ has been combated by various legal remedies over the centuries.⁹¹ As early as 1642, Massachusetts had a law allowing magistrates to “remove children from parents who did not ‘train up’ their children properly.”⁹² In the 1800s, abusive parents were subjected to criminal prosecutions.⁹³ Even without child protection statutes, judges had inherent authority to stop child abuse.⁹⁴ However, one of the largest breakthroughs in child abuse prevention came in 1875 with the establishment of the first organization devoted “entirely to child protection”: the New York Society for the Prevention of Cruelty to Children (NYSPCC).⁹⁵

As news of the NYSPCC spread, other nongovernmental child protection agencies began to spring up that mirrored the NYSPCC. The first juvenile court was established in 1899, and twenty years later all but three states had juvenile courts.⁹⁶ It was not until the Great Depression, however, that child protection switched from nongovernmental agencies to those sponsored by the government.⁹⁷

85. *Id.*

86. *Id.* at 14-16.

87. *Id.* at 24-33.

88. *Id.* at 25.

89. *See infra* Part III (discussing the similarities between bullying and child abuse).

90. Thompson, *supra* note 82, at 13.

91. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 450 (2008), available at http://www.americanbar.org/content/dam/aba/publishing/insights_law_society/ChildProtectionHistory.authcheckdam.pdf, archived at <http://perma.cc/L2RC-4TQ8>.

92. *Id.*

93. *Id.* at 449-50.

94. *Id.* at 450.

95. *Id.* at 449.

96. *Id.* at 452.

97. *Id.* at 452-53.

The Great Depression crippled many nongovernmental child protection organizations as their primary source of income was from charitable contributions.⁹⁸ The number of such organizations continued to decline: at the beginning of the Twentieth Century, there were nearly three hundred nongovernmental child protection agencies and by 1956 that number had declined to eighty-four; by 1967, only ten remained.⁹⁹ Instead, governmental agencies started to assume responsibility for the protection of children as early as 1912 with the creation of the federal Children's Bureau,¹⁰⁰ although it was not until 1962 that child abuse received one of the most important reforms to date: mandatory reporting laws.¹⁰¹

The mandatory reporting laws arose following publication of *The Battered-Child Syndrome*,¹⁰² a pivotal article that brought national media attention to the problem of child abuse. The Children's Bureau held "two meetings to determine how the Bureau could more effectively help states respond to child abuse."¹⁰³ At these meetings, attendees recommended that states require doctors to report suspicions of child abuse to the police or child welfare services.¹⁰⁴ This meeting marked the beginning of child abuse reporting laws with the first four enacted in 1963; by 1967, all fifty states had reporting laws.¹⁰⁵ To put into perspective how quickly these statutes were adopted, "it takes an average of 25.6 years for a new legal concept with broad public support to diffuse across the fifty states."¹⁰⁶ Child abuse reporting laws, however, took only four years for all states to adopt them.

Many states consulted the Children's Bureau's model child abuse reporting law when creating their own, which "mandated that physicians report child abuse to the appropriate police authority."¹⁰⁷ However, as states expanded and reformed their reporting laws, different approaches to combating child abuse emerged.¹⁰⁸ In response, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.¹⁰⁹

CAPTA provides funding for child abuse prevention to states that meet certain conditions.¹¹⁰ After CAPTA, state laws became more uniform partially

98. *Id.* at 453.

99. *Id.* at 453-54.

100. *Id.* at 453.

101. *Id.* at 455-56.

102. See C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962).

103. Myers, *supra* note 91, at 455-56.

104. *Id.* at 456.

105. *Id.*

106. Thomas L. Hafemesiter, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 840-41 (2010).

107. *Id.* at 839.

108. See *id.* at 841-43.

109. *Id.* at 842.

110. *Id.* at 842-43 ("[A] state was required to meet ten conditions, which included establishing provisions for the reporting of known or suspected child abuse; granting immunity to good faith

due to the conditional funding by CAPTA, but also due to efforts to create model legislation to guide the states.¹¹¹ Today, most child abuse reporting statutes follow a similar formula: “(1) purpose of the statute; (2) definitions; (3) professionals required to report; (4) standard of certainty reporters must attain; (5) penalties for failure to report; (6) immunity for good faith reports; (7) abrogation of certain communication privileges; and (8) reporting procedures.”¹¹²

Despite the wide use of these mostly uniform statutes, mandatory child abuse reporting laws are not without critics.¹¹³ Most of these criticisms focus on the low rate of substantiation of child abuse referrals: only three in five referrals to Child Protective Services (CPS) agencies were investigated,¹¹⁴ and of those investigated, seven in ten were found to be unsubstantiated.¹¹⁵ Nevertheless, child abuse referrals may not be investigated for a number of reasons, including the fact that the “alleged victim was older than 18 years” or “response by another service agency was deemed more appropriate.”¹¹⁶ The number of substantiated reports of child abuse is, however, high: over 435,000 reports concluded the allegation or risk of maltreatment was “supported or founded by State law or policy.”¹¹⁷

Although state CPS agencies received an estimated 3.3 million referrals in 2010,¹¹⁸ many incidents of child abuse never reach CPS.¹¹⁹ Recognizing this,

reporters; ensuring the confidentiality of reports; implementing mechanisms that ensure the prompt investigation of reports and the delivery of needed services; enhancing cooperation among law enforcement, courts, and state agencies providing services; appointing guardians ad litem to represent the children in judicial proceedings; and disseminating to the public information about child abuse and the mechanisms available to combat it.”).

111. *Id.* at 843.

112. Thompson, *supra* note 82, at 14. See, e.g., (1) IND. CODE § 31-33-1-1 (2012); (2) IND. CODE § 31-9-2-14 (2012); (3) IND. CODE §§ 31-33-5-1 to -3 (2012); (4) IND. CODE § 31-33-5-1 (2012); (5) IND. CODE § 31-33-22-1 (2012); (6) IND. CODE §§ 31-33-6-1 to -3 (2012); (7) IND. CODE § 31-32-11-1 (2012); and (8) IND. CODE §§ 31-33-5-17-4 to -4, 31-33-7-4 and 31-33-7-5 to -6.6 (2012).

113. See Hafemesiter, *supra* note 106, at 899-908. Various chapters of Victims of Child Abuse Laws (VOCAL) and other similar organizations have also sprung up around the country. See, e.g., FIGHTING CHILD PROTECTIVE SERVICES FALSE ACCUSATIONS, <http://www.fightcps.com> archived at <http://perma.cc/978V-DBHB> (last updated Mar. 1, 2013).

114. U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2010, at 5 (2011), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>, archived at <http://perma.cc/W27Q-L9Q4> (“60.7 percent [of referrals] were screened in.”).

115. *Id.* at 7 (“Of the 1,793,724 reports that received an investigation, . . . 1,262,118 were found to be unsubstantiated.”).

116. *Id.* at 5.

117. *Id.* at 6-7.

118. *Id.* at 5.

119. KENNETH BURGDORF, U.S. DEP’T OF HEALTH & HUMAN SERV., RECOGNITION AND REPORTING OF CHILD MALTREATMENT: FINDINGS FROM THE NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 4 (1980), available at <http://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/18254.pdf?w+=NATIVE%28%27IPDET+PH+IS+%27>

Congress mandated the first National Incidence Study (NIS-1) of child maltreatment in 1974, which was designed to estimate all incidences of child abuse in the United States, as opposed to just those received by CPS.¹²⁰ Since NIS-1, three similar studies have been done with the purpose of “provid[ing] updated estimates of the incidence of child abuse and neglect in the United States and measur[ing] changes in incidence from the earlier studies.”¹²¹ The study uses a sentinel survey method,¹²² and measures child maltreatment using two definitional standards: the Harm Standard and the Endangerment Standard.¹²³

The Harm Standard, in use since NIS-1, is “relatively stringent in that it generally requires that an act or omission result in demonstrable harm in order to be classified as abuse or neglect.”¹²⁴ The Endangerment Standard, in use since NIS-2, includes all children under the Harm Standard but also “counts children who were not yet harmed by abuse or neglect if a sentinel thought that the maltreatment endangered the children or if a CPS investigation substantiated or indicated their maltreatment.”¹²⁵

Each standard has its own advantages and disadvantages,¹²⁶ but under the more lenient Endangerment Standard, it was estimated that nearly three million

%27nis-1%27%27%27%29&upp=0&rpp=-10&order=+NATIVE%28%27year%2Fdescend%27%29&r=1&m=6, archived at <http://perma.cc/6X42-7Z3E> (“although(“[A]lthough substantial numbers of abused and neglected children are recognized as such and are reported to the state and/or local Child Protective Services (CPS) agency, reported children . . . represent only ‘the top of the iceberg.’”).

120. ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUMAN SERV., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 1 (2010), available at http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf, archived at <http://perma.cc/3E7L-P5SZ>.

121. *Id.*

122. *Id.* at 2 (“In [the sentinel survey method], community professionals who work in certain categories of agencies and who typically encounter children and families in the course of their job duties serve as lookouts for victims of child abuse and neglect. In each county, these professionals, called ‘sentinels,’ represent all staff that have contact with children and families in police and sheriffs’ departments, public schools, day care centers, hospitals, voluntary social service agencies, mental health agencies, the county juvenile probation and public health departments, public housing, and shelters for runaway and homeless youth and for victims of domestic violence. . . . [The sentinels] submitted data forms on any children they encountered who were maltreated during the study data period.”).

123. *Id.* at 3.

124. *Id.*

125. *Id.*

126. *Id.* The Harm Standard has the advantage of strong objectivity and consistency in that it has been in use since NIS-1. *Id.* However, the Harm Standard is so stringent that it excludes “many children whom CPS substantiates or indicates as abused or neglected.” *Id.* Conversely, the Endangerment Standard lacks the strong objectivity of the Harm Standard, but includes a “broader array of perpetrators, including adult caretakers other than parents in certain maltreatment categories and teenage caretakers as perpetrators of sexual abuse.” *Id.*

children experienced maltreatment during the study year.¹²⁷ The Child Maltreatment report from the same year, which uses data collected by CPS agencies, estimated the number of victims of child abuse or neglect at 905,000 based on substantiated reports.¹²⁸ These numbers suggest that CPS agencies handle nearly one third of all cases of child abuse in the United States.¹²⁹ While the percentage of substantiated reports received by CPS is low, the number of cases of child maltreatment handled by CPS is significant based on the total estimated incidences.

However, both proponents and critics of mandatory child abuse reporting laws agree that the implementation of these laws has increased the reported and investigated incidences of suspected child abuse.¹³⁰ In 1974, approximately 60,000 cases were reported; by 1980, over one million cases were reported.¹³¹ The number increased to nearly three million in 2000,¹³² and has remained relatively constant at an estimated 3.3 million since 2005.¹³³ These numbers suggest that the reporting laws brought the problem of child abuse and neglect into focus.¹³⁴

The reporting laws also allowed better tracking of child abuse. In 1963, one researcher noted that “[t]he amount of systematic research on the problem of child abuse and neglect is conspicuously scant.”¹³⁵ However, the body of research using statistics gathered from reporting laws grew rapidly soon after the

127. *Id.* at 6.

128. U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2006, at iii (2008), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf>, archived at <http://perma.cc/LZ86-8WKA>.

129. SEDLAK ET AL., *supra* note 120, at 1. The two thirds of children who were not handled by CPS were recognized by community professionals as maltreated, but were either not reported to CPS or were screened out without investigation. *Id.*

130. Myers, *supra* note 91, at 456; see also Reena Kapoor & Howard Zonana, *Forensic Evaluations and Mandated Reporting of Child Abuse*, 38 J. AM. ACAD. PSYCHIATRY L. 49, 51 (2010), available at <http://www.jaapl.org/content/38/1/49.full.pdf+html>, archived at <http://perma.cc/ZZ7M-UGUR> (questioning “the efficacy of reporting laws in achieving their ultimate goal: protecting children from harm,” but stating “[t]here is no question that mandated reporting laws have led to an increase in the number of cases of suspected child abuse that are reported and investigated each year”. . . . Nevertheless, there remains some question about the efficacy of reporting laws in achieving their ultimate goal: protecting children from harm.”).

131. Myers, *supra* note 91, at 456.

132. *Id.*

133. Compare U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2005, at 5 (2007), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf>, archived at <http://perma.cc/37U2-M6GH> (“Approximately 3.3 million allegations of child abuse and neglect including 6.0 million children were made to CPS agencies.”), with U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., *supra* note 114, at 65 (“CPS agencies received an estimated 3.3 million referrals during FFY 2010.”).

134. Myers, *supra* note 91, at 456.

135. Elizabeth Elmer, *Identification of Abused Children*, 10 CHILD. 180, 180 (1963).

enactment of these reporting laws. Part of CAPTA created a National Center on Child Abuse and Neglect (NCCAN) and instructed it to “make a full and complete study and investigation of the national incidence of child abuse and neglect.”¹³⁶ The result of this study is the NIS-1, which used data from both CPS and non-CPS agencies.¹³⁷

Another effort by the Children’s Division of the American Humane Association, the National Study on Child Neglect and Abuse Reporting, began collecting data from all fifty states in 1976.¹³⁸ This study “collect[ed] and analyze[d] statistical information from all 50 states about reports of suspected child abuse and neglect received by Child Protective Services agencies.”¹³⁹ In 1988, the National Data Archive on Child Abuse and Neglect (NDACAN) began collecting data from “leading researchers and national data collection efforts,” making them available to the research community for further analysis.¹⁴⁰ More recent efforts have included the Child Maltreatment report series beginning in 1995¹⁴¹ and the Child Welfare Outcomes Report, last updated December 2010.¹⁴²

The large body of research using these statistics has given state legislatures the opportunity to modify their child abuse reporting laws based on what approaches have been effective in other jurisdictions or instances. Initially, “only physicians were required to report suspected child abuse.”¹⁴³ However, states gradually expanded the category of mandated reporters, and by the end of the 1970s, many states included nurses, teachers, school officials, social workers, and police officers.¹⁴⁴ These professions were added as mandatory reporters to discover child abuse at an earlier stage because they were thought to come into contact with children more often than other professions.¹⁴⁵ Today, research shows that the most frequent reporters of child abuse are “teachers (16.9%), police officers or lawyers (16.3%), and social services staff (10.6%).”¹⁴⁶

In the 1980s and 1990s, “public awareness of the scope and impact of child abuse increased,” which was brought about by published reporting statistics¹⁴⁷

136. BURGDORF, *supra* note 119, at 3.

137. *Id.* at 12.

138. *Id.* at 4.

139. *Id.*

140. NAT’L DATA ARCHIVE ON CHILD ABUSE & NEGLECT, Bronfenbrenner Ctr. for Translational Research, *Nat’l Data Archive on Child Abuse & Neglect*, COLL. OF HUMAN ECOLOGY, CORNELL UNIV., <http://www.ndacan.cornell.edu/>, archived at <http://perma.cc/8GJ6-ANDE> (last visited Apr. 28, 2014).

141. Admin. for Children & Families, *Children’s Bureau*, U.S. DEP’T OF HEALTH & HUMAN SERV., [http://www.acf.hhs.gov/programs/cb/resource-library/search?topic\[3493\]=3493](http://www.acf.hhs.gov/programs/cb/resource-library/search?topic[3493]=3493), archived at <http://perma.cc/693F-LPUN> (last visited Apr. 28, 2014).

142. *Id.*

143. Hafemeister, *supra* note 106, at 851.

144. *Id.*

145. *Id.* at 852.

146. *Id.*

147. *Id.* at 842 nn.157-59, 867 n.321.

and a series of widely publicized cases.¹⁴⁸ Current reporting laws reflect this literature by being “more likely to assign at least some responsibility to both social services and criminal justice agencies for responding to child abuse reports.”¹⁴⁹

In sum, although mandatory child abuse reporting laws have been criticized,¹⁵⁰ these laws have resulted in a large number of substantiated investigations by CPS agencies¹⁵¹ and raised awareness of the problem of child abuse.¹⁵² This has allowed statistics to be gathered, research to be presented, and laws to be adjusted in response to this research. Recognizing these benefits of mandatory reporting laws, as well as their limitations, Part III discusses how to apply mandatory reporting to bullying.

III. APPLYING THE DUTY TO REPORT TO BULLYING

Given the importance of reporting in the field of child abuse, it is useful to add a duty to report in the bullying context. However, this raises the question of what a model reporting statute for bullying should look like. First, the creation of a duty to report bullying should not be an exact replica of existing mandatory child abuse reporting laws. There are certainly sound ideas to be borrowed from child abuse reporting laws, and while bullying and child abuse are similar¹⁵³ the two are different enough to warrant their own specialized statutes.¹⁵⁴ Second, the duty to report bullying should both aid the discovery and investigation of bullying incidents, as well as collect data on the prevalence of bullying. It is important to have empirical research to suggest areas of improvement.

This Part proposes that the Indiana Code should include a new duty to report bullying. Currently, eighteen states have provisions requiring school staff to report incidents of bullying.¹⁵⁵ However, besides limiting mandatory reporters to school staff, or sometimes students and staff, sixteen states do not define bullying as requiring an imbalance of power,¹⁵⁶ and one state, Delaware, leaves

148. *Id.* at 844 n.177.

149. *Id.* at 867.

150. *Id.* at 899-908.

151. *See* U.S. DEP’T OF HEALTH & HUMAN SERV. ET AL., *supra* note 114, at 6-7.

152. Hafemeister, *supra* note 106, at 829 (“Mandatory reporting laws . . . have to some extent exposed the prevalence of child abuse in the nation and raised public awareness of its existence.”).

153. *See infra* Part III.B.

154. One key difference between the two is that bullying generally happens at school, which means reporters such as social workers won’t be exposed to such incidents as often and therefore should not be mandated reporters. Mandatory child abuse reporting laws also have their own flaws. *See supra* Part II.

155. SACCO ET AL., *supra* note 12, at A-30-A-31 (noting that Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Kentucky, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, and West Virginia. Alaska, Rhode Island, and South Carolina also require that students report incidents of bullying).

156. *Id.* at 5.

out the element of repetition from its definition.¹⁵⁷ This is a key omission, as one study noted “the provision of a definition [of bullying] (or not) would yield different prevalence rates in self-reported bullying.”¹⁵⁸ Massachusetts has one of the most comprehensive anti-bullying statutes¹⁵⁹ which creates a model prevention and intervention plan.¹⁶⁰ Nevertheless, even the Massachusetts statute has two important flaws: there is no intent requirement for bullying¹⁶¹ nor is there any requirement for the “reporting of bullying incidents or statistics summarizing such incidents.”¹⁶² These flaws are important because intent is a necessary element of bullying¹⁶³ and without statistics, legislatures will not be able to determine what anti-bullying methods have been effective.

A. Proposed Duty to Report Bullying in Indiana

Before considering any new statutory provisions in Indiana, the existing problems in the current definitional statute must be addressed. Additionally, where possible, efforts can be made to minimally alter the existing statute without completely rewriting it, and to address any pending substantive amendments.¹⁶⁴

Several amendments have been proposed to Indiana’s definitional bullying statute, Indiana Code section 20-33-8-0.2.¹⁶⁵ One such proposal would add “in any manner (including digitally or electronically)” after “verbal or written

157. *Id.* at A-1.

158. Napolitano et al., *supra* note 30, at 41 (“How one defines bullying has important implications for assessing the construct. Indeed, Vaillancourt et al. (2008) examined . . . [m]ore than 1,700 students (ages 8-18) [whom] were randomly assigned to either a definition or no definition condition and asked to report on their experiences with bullying as a victim or perpetrator. Provision of a standardized definition of bullying was related to different prevalence rates – students who were provided a definition reported being bullied less and bullying others more than students who were not given a definition.”).

159. *See* MASS. GEN. LAWS ch. 71, § 37O (2010); *see also* Emily Bazelon, *Bullies Beware*, SLATE, Apr. 30, 2010, http://www.slate.com/articles/life/bulle/2010/04/bullies_beware.html, archived at <http://perma.cc/Y87K-YS3C> (“[L]awmakers unanimously passed a bullying prevention law . . . that is probably the most comprehensive one in the country.”).

160. MASS. DEP’T OF ELEMENTARY AND SECONDARY EDUC., MODEL BULLYING PREVENTION AND INTERVENTION PLAN, (2010), available at <http://www.doe.mass.edu/bullying/ModelPlan.pdf>, archived at <http://perma.cc/K48Q-EBAB>.

161. SACCO ET AL., *supra* note 12, at A-2-A-3.

162. *See id.* at A-53-A-56; *but see* H.B. 4063, 2011, 187th Gen. Court 2011 (Ma. 2012) (“SECTION 1. Section 37O of chapter 71 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by inserting after the word ‘retaliation,’ in line 89, the following words:- ‘including procedures for collecting, maintaining and reporting bullying incident data required under subsection (k).’”).

163. *See supra* notes 13-14 and accompanying text.

164. H.B. 1259, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012).

165. *Id.*

communications transmitted.”¹⁶⁶ This provision would clarify the inclusion of cyberbullying in the overarching definition of bullying, a necessary component to receive the highest rating by Bully Police USA.¹⁶⁷ However, Indiana already partially address cyberbullying in Indiana Code section 20-33-8-13.5(c).¹⁶⁸

The second proposed amendment adds a significant portion to the end of the statute:

and create for the other student an objectively hostile school environment that: (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 the student’s academic performance; or (4) has the effect of substantially interfering with the student’s ability to participate in or benefit from the services, activities, and privileges provided by the school.¹⁶⁹

This language tracks that of other state statutes¹⁷⁰ and incorporates language similar to federal discrimination laws.¹⁷¹ This provision is likely designed to separate minor incidents of teasing from major ones that have a significant negative effect on the victimized student.

Nonetheless, these amendments still omit a necessary component of bullying: an imbalance of power between the perpetrator and the victim.¹⁷² Without this crucial, limiting component, incidents, which may still require a response by staff, will be incorrectly labeled as bullying. This will lead to an over-reporting of bullying incidents, which makes finding actual incidences of bullying more difficult and biases data.

166. *Id.* (“As used in this chapter, ‘bullying’ means overt, repeated acts or gestures, including (1) verbal or written communications transmitted in any manner (including digitally or electronically) . . .”).

167. *Making the Grade*, *supra* note 64 (“States with a cyberbullying clause will receive a plus after obtaining an A rating.”).

168. IND. CODE § 20-33-8-13.5 (2012) (“The discipline rules described in subsection (a) must prohibit bullying through the use of data or computer software that is accessed through a: (1) computer; (2) computer system; or (3) computer network; of a school corporation.”).

169. H.B. 1259, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012). *See supra* notes 27-28 and accompanying text.

170. *See e.g.*, MASS. GEN. LAWS ch. 71, § 37O (2010) (“‘Bullying’, the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: . . . (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim . . .”).

171. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18-19 (1993) (considering the “definition of a discriminatorily ‘abusive work environment’ (also known as a ‘hostile work environment’) under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1988 ed., Supp. III).”).

172. U.S. DEP’T OF HEALTH & HUMAN SERV., *supra* note 13.

With the definition of bullying amended in this way, the duty to report can be implemented. The proposed reporting statute attempts to follow Indiana's mandatory child abuse reporting statute to ensure ease of implementation, but deviates where necessary to avoid the flaws mentioned in Part II. The proposed statute includes provisions regarding who shall report, to whom the report shall be made, when the report shall be made, what shall be included in the report, and penalties for failing to report.

1. *Who Shall Report.*—Indiana has the broadest possible list of mandatory child abuse reporters, requiring any “individual” to make a report of suspected child abuse.¹⁷³ However, the majority of reports of child abuse made to CPS, nearly sixty percent, are still made by professionals.¹⁷⁴ More importantly, professionals accounted for over seventy percent of substantiated or indicated¹⁷⁵ child abuse reports made to CPS.¹⁷⁶ Nonprofessionals and other sources,¹⁷⁷ on the other hand, accounted for nearly forty-five percent of unsubstantiated reports and over two-thirds of intentionally false reports.¹⁷⁸ Professionals are most likely better at identifying child abuse because of their training and expertise, and they are also less likely to abuse the reporting system. As a result, the bullying reporting statute should not include all individuals as mandatory reporters, and should limit the professionals classified as mandatory reporters.

For example, school administrators, teachers, and ESPs should all be required to report bullying and should receive training to help them identify it. These individuals should be mandated reporters for the same reasons doctors were the first mandated reporters of child abuse: they have the “requisite training and expertise to identify abuse and [are] ideally situated to discern the existence of this abuse.”¹⁷⁹

173. IND. CODE § 31-33-5-1 (2012).

174. U.S. DEP'T OF HEALTH & HUMAN SERV. ET AL., *supra* note 114, at 7-8 (“Professional report sources are persons who encountered the child as part of their occupation, such as child daycare providers and medical personnel. . . . Nonprofessional report sources are persons who did not have a relationship with the child based on their occupation, such as friends, relatives, and neighbors.”).

175. *Id.* at 7 (“Substantiated: An investigation disposition that concludes that the allegation of maltreatment or risk of maltreatment was supported or founded by State law or State policy. Indicated: An investigation disposition that concludes that maltreatment could not be substantiated under State law or policy, but there was reason to suspect that the child may have been maltreated or was at-risk of maltreatment. This is applicable only to States that distinguish between substantiated and indicated dispositions.”).

176. U.S. DEP'T OF HEALTH & HUMAN SERV. ET AL., CHILD MALTREATMENT 2008 9 fig. 2-3 (2010), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>, archived at <http://perma.cc/9SJM-73K4>.

177. *Id.* at 6-7 (explaining the category of “other” is for unknown sources or sources that do not fit into the professional or nonprofessional category, which may include “clergy members, sports coaches, camp counselors, bystanders, volunteers, and foster siblings”).

178. *Id.* at 9 fig. 2-3.

179. Hafemesiter, *supra* note 106, at 851; see also Marc Edelman, *How to Prevent High*

Proper training for school personnel is important, but according to an NEA study, only about half of ESPs and school professionals received training on bullying policies and prevention.¹⁸⁰ Indiana requires each school corporation to have a school safety specialist.¹⁸¹ To be certified, each school safety specialist must complete a curriculum created by the Indiana Department of Education that “must include training in identifying, preventing, and intervening in bullying.”¹⁸² The school safety specialist and the Department of Education work with the safe school committees to develop a plan that addresses bullying and provides training to school staff.¹⁸³ Nevertheless, by making all school personnel mandatory reporters of bullying, proper training is crucial and the efficacy of this training should be evaluated after an initial period.

The only other category of mandated reporters for bullying that should be included are health care professionals, but with some limitations. Most notably, health care professionals should only be required to report physical bullying that is visible on the patient. There is already an Indiana statute requiring health care providers to “photograph, x-ray and physically examine trauma visible on [a] child”¹⁸⁴ in the case of child abuse, and a similar one should be enacted for bullying. A similar statute would ensure the most severe, physical cases of bullying are investigated without placing an onerous burden on health care professionals that may conflict with patient confidentiality.¹⁸⁵

There is also the question of anonymous reporting. While students should certainly not be mandated reporters,¹⁸⁶ there should be a mechanism in place for

School Hazing: A Legal, Ethical and Social Primer, 81 NOTRE DAME L. REV. 309, 330 (2005) (“Applying a duty to report hazing to school personnel is reasonable because school personnel are in an authoritative position, which provides them with legal authority to restrict the freedom of minors.”). Although Edelman is discussing hazing, defined as “any activity expected of someone that joins a group, which humiliates, degrades, abuses, or endangers its victims,” the reasoning behind using school personnel as reporters applies to bullying as well. *Id.* at 310.

180. BRADSHAW ET AL., *supra* note 6, at 14 fig. 7.

181. IND. CODE § 5-2-10.1-9 (2012).

182. *Id.* § 5-2-10.1-11.

183. *Id.* § 5-2-10.1-12 (“(a) Each school within a school corporation shall establish a safe school committee. . . . [A] safe school committee [develops] a plan and policy for the school that addresses . . . bullying . . . [and] professional development needs for faculty and staff to implement methods that decrease [bullying].”).

184. *Id.* § 31-33-10-1.

185. U.S. DEP’T OF HEALTH & HUMAN SERV., *HIPAA Frequent Questions*, HHS.GOV, <http://www.hhs.gov/hipaafaq/permitted/require/909.html> archived at <http://perma.cc/KMB-5HCD> (last updated Aug. 8, 2005). See generally Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. § 160 and 164 (2013) (protecting the privacy of individually identifiable health information).

186. See Edelman, *supra* note 179, at 329 (“Society cannot realistically expect high school students to act as whistleblowers. Student victims are too often ashamed to report hazing, and student witnesses often fear that hazers will retaliate against them if they report.”). Although this article concerns hazing, the reasoning behind not requiring students to be mandatory reporters

anonymous reporting by students. On the other hand, although school personnel will have a duty to report, they cannot be everywhere at once. Furthermore, studies indicate that bullied students often do not tell anyone about instances of bullying.¹⁸⁷ An amendment to the Indiana Code was proposed that would allow for anonymous reporting, but as of January 2013, it has not passed.¹⁸⁸ Allowing for anonymous reporting by students would provide another avenue to discover, and therefore help eliminate, bullying.

2. *To Whom Shall the Report Be Made.*—Although it is difficult to predict how many reports will be generated by these mandatory reporting laws, and therefore it is difficult to predict how many people will be needed to handle the reports, a logical recipient and investigator of reports is the safe school committee.¹⁸⁹ First, each school already has a safe school committee in place, as required by Indiana law.¹⁹⁰ Second, the safe school committee develops and implements the plan to reduce bullying,¹⁹¹ so the committee is familiar with the subject matter. Lastly, and perhaps most importantly, the safe school committee is accustomed to the standards, procedures, and personnel at the specific school.¹⁹² Staff will be more comfortable dealing with people with whom they are familiar and will be available to answer any questions the safe school committee may have about their reports. Accordingly, almost all bullying incidents would be handled within the school, and law enforcement intervention should be unnecessary in all but the rarest of cases.¹⁹³

The safe school committee would investigate and handle any reported bullying incidents, but data concerning these incidents must also be collected to evaluate and improve anti-bullying measures. To accomplish this, all bullying reports from a school corporation should be sent to its school safety specialist for collection and analysis. This would allow the school safety specialist to determine which areas of the anti-bullying procedure need the most improvement and to adjust the safety plan¹⁹⁴ of the school corporation accordingly. Ultimately, these reports should then be sent to the Indiana Department of Education to determine the effectiveness of the mandatory reporting law and anti-bullying

applies to bullying as well.

187. FARRINGTON & TIOFI, *supra* note 23, at 84.

188. H.B. 1259, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012).

189. *See* IND. CODE § 5-2-10.1-12 (2012) (discussing the establishment of a safe school committee).

190. *Id.*

191. *Id.*

192. *Id.* (discussing that the safe school committee is established within the school corporation and “may be a subcommittee of the committee that develops the strategic and continuous school improvement and achievement plan”).

193. One example of an incident requiring law enforcement intervention would be the federal hate crime laws. *See* SACCO ET AL., *supra* note 12, at 20-21 (mentioning the possible applicability of 18 U.S.C. § 245 and 18 U.S.C. § 249 to severe cases of bullying involving discrimination based on “race, color, religion, or national origin”).

194. *See* IND. CODE § 5-2-10.1-9 (2012) (discussing school safety plans).

legislation in general. Accordingly, the Indiana Department of Education would be able to determine the school corporations with the most effective anti-bullying policies and should use this information to make improvements in other school corporations that have a higher incidence of bullying.

3. *When Shall the Report Be Made.*—Reports of bullying incidents by school staff should be made as soon as they are witnessed in order to ensure a prompt response. In theory, the more quickly these incidents are addressed, the less harm will come to the students involved. However, the reports from the safe school committee should not be sent to the school safety specialist until the incident has been resolved. There are multiple reasons for this, but one of the most important is to determine if the report concerned an actual incidence of bullying. If mandatory child abuse reporting laws are any indication,¹⁹⁵ there will inevitably be some unsubstantiated bullying reports. The number of bullying incidents received by school safety specialists would therefore seem artificially high if they did not contain a final resolution.

To strike a balance between efficiency and quantity of data, reports by school safety specialists to the Department of Education should be made at the end of each school year. School safety specialists already have other duties to perform,¹⁹⁶ and requiring a semiannual or quarterly report may be too burdensome. Furthermore, any changes in anti-bullying policy will take some time to implement, and the positive or negative effects of these changes may not be apparent for a few months or even a year. Notably, the reports to the Department of Education function solely to evaluate statewide anti-bullying policies, and school safety specialists should be focusing primarily on preventing and dealing with bullying.

4. *What Shall Be Included in the Report.*—The Department of Education should disseminate a standard, statewide bullying report form to schools, which would include various sections. The first, and possibly most important section, should be a checklist of the definition of bullying.¹⁹⁷ Providing a definition and requiring that school personnel and anonymous students check the elements off a list will help eliminate reports that do not involve bullying.¹⁹⁸ School staff should be free to handle minor teasing incidents that do not rise to the level of bullying on their own without having to write a report. The type of bullying—verbal, physical, or relational—should also be included in the report.

The second section on the report should indicate the location where the bullying occurred. Since bullying is a phenomenon that is repeated or has the potential to be repeated, bullying may span several locations. However, by indicating the location on the report, if applicable, schools will be able to identify problem areas where bullying is most likely to occur. Once these areas are identified, schools can increase their supervision, which is “perhaps the greatest

195. See *supra* notes 114-17 and accompanying text.

196. See IND. CODE § 5-2-10.1-9 (2012) (mandating safety specialist duties).

197. See discussion *supra* Part I.

198. See *supra* notes 158-59 and accompanying text.

deterrent to bullying behavior.”¹⁹⁹

The last necessary section on the bullying report form should include a description of the bullying incident. This section should include the students involved, any relevant statements by those involved, injuries sustained by the victimized student, and an overall description of what happened. If the report is made by school personnel, the name of the person making the report should also be included, allowing the safe school committee to contact the staff member if they need additional information.

Reports made to the school safety specialist and then to the Department of Education should include information in addition to that which is included in the report to the safe school committee. These reports should include demographic items, such as the school name and location, the involved students’ age and gender, whether the bully is a repeat offender, whether the victim has been bullied before, the profession of the person who made the initial report, and the disposition of the incident. In the words of Sherlock Holmes, “Data! Data! Data! . . . I can’t make bricks without clay.”²⁰⁰ By knowing which schools and age groups have the most problems, whether bullies and victims are receiving help, and which reporters are the most effective, school safety specialists and the Department of Education will be able to improve anti-bullying efforts.

5. *Penalties for Failure to Report.*—Indiana classifies the failure to report child abuse as a Class B misdemeanor,²⁰¹ which is punishable by not more than 180 days in jail and a fine of not more than \$1,000.²⁰² However, the penalty for not reporting bullying may be nuanced.

School personnel should not be subject to criminal penalties for failing to report bullying. The distinction is that child abuse can occur anywhere, and therefore criminal penalties are one of the few means of enforcing a mandatory reporting duty. Bullying, on the other hand, is typically confined to school grounds and related areas, such as buses and school sponsored field trips. Therefore, discipline for staff members’ failure to report a bullying incident should be relegated to the school’s administration. The school should propagate a list of penalties for failing to report bullying to school personnel, which would include increasing penalties for repeat offenders. Handling discipline this way will also decrease the number of unsubstantiated reports because teachers will not be concerned about being subjected to criminal penalties.

Healthcare personnel, however, should be subjected to the same penalties for failing to report bullying as they are for failing to report child abuse. First,

199. See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 656-57 (2004) (noting “[w]here adults are absent or inattentive, intervention cannot take place, and those students who are willing to bully are going to be waiting for opportunities to do so without incurring the consequences of a staff member willing and ready to intervene”).

200. ARTHUR CONAN DOYLE, *The Adventure of the Copper Beeches*, in THE COMPLETE SHERLOCK HOLMES, VOLUME I, at 377, 383 (2004).

201. IND. CODE § 31-33-22-1 (2012).

202. *Id.* § 35-50-3-3.

healthcare personnel are outside the school administration's control, and any school penalties imposed would be ineffective. Second, healthcare personnel are not being asked to report a new type of abuse, but rather abuse similar to that which they must report now except from a different perpetrator: the student's peers. Third, the number of severe, physical bullying cases that healthcare personnel must report should be small, so few healthcare workers will be affected by the imposition of this penalty. The overall impact on healthcare workers by adding bullying to the list of reportable conditions should be minimal, but it is crucial to stop the most severe, physical cases of bullying.

B. Reasons to Expect This Scheme to Work

Although there is no anti-bullying scheme that is guaranteed to work, there are a number of reasons to expect the proposed duty to report will be effective. One reason is that bullying and child abuse are remarkably similar.²⁰³ Both forms of abuse involve an imbalance of power, which the perpetrator uses to inflict physical and psychological harm.²⁰⁴ Additionally, victims of child abuse and bullying suffer similar physical and psychological effects.²⁰⁵ These similarities lend themselves to a similar legal framework.

The principal difference between bullying and child abuse is the identity of the perpetrator: in the former the perpetrator is a fellow student, and in the latter the perpetrator is an adult.²⁰⁶ Since school personnel must already report suspicions of child abuse, however, "it seems logical they should be required to report abuse that occurs right in the school itself, and bullying at school involves abuse of a child."²⁰⁷

Mandatory reporting laws in the child abuse context have already proven to be effective in raising awareness, collecting data, and preventing instances of

203. Weddle, *supra* note 199, at 657 ("[Bullying] is, in fact, a form of child abuse perpetrated by the child's peers.").

204. *See supra* notes 15, 83-85 and accompanying text.

205. Mitali R. Vyas, *School Shooters: Perpetrators or Victims? The Need for Expanding Battered Child Syndrome to Include Peer Harassment in School-Violence Prosecutions*, 41 STETSON L. REV. 215, 238, 242 (2011) ("The lasting psychological effects for those who are victims of chronic bullying, [and] those who are diagnosed with battered child syndrome . . . are extremely similar, as is the nature and extent of the abuse . . ."; "the nature of the abuse is the same [for bullying and child abuse]: incessant intentional harm through physical, emotional, and psychological means. Victims of peer harassment and victims of parental abuse also experience similar psychological consequences that affect the way they function in society and react to external stimuli.").

206. *Id.* at 244 ("With battered child syndrome, the abuse is from parents or guardians; with bullying victims, the abuse is from peers."); *see also* Jill Grim, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 173 (2008) ("The only difference between child abuse and peer harassment is that with peer harassment the child is abused by other students and not someone outside of the school.").

207. Grim, *supra* note 206, at 173.

child abuse.²⁰⁸ The similarities between bullying and child abuse indicate that a similar reporting duty for bullying would also be effective. However, despite the effectiveness of child abuse reporting laws, these laws have also been criticized.²⁰⁹ The proposed mandatory reporting duty for bullying aims to address these criticisms while preserving the effectiveness of mandatory child abuse reporting laws.

One of the main arguments against mandatory child abuse reporting laws is the small number of reports that are actually substantiated.²¹⁰ There are two likely explanations for this: 1) reports are being filed by people who are inexperienced at identifying child abuse, and 2) when an incident questionably involves child abuse, reports are being filed to avoid criminal liability. The proposed reporting scheme for bullying attempts to deal with this concern in three ways.

First, a clear definition is provided on the reporting form, which clearly states what constitutes bullying. Second, only school personnel are required to report all types of bullying; healthcare professionals are required to report only physical bullying. As noted above, many of the unsubstantiated child abuse reports come from nonprofessionals,²¹¹ but school personnel would be trained to identify bullying as part of the program implemented by the Department of Education and the school safety specialist. Notably, healthcare professionals are already trained to identify and report child abuse, which is substantially similar to physical bullying. Third, criminal penalties would not be imposed on school personnel for failing to report. School personnel would therefore be more cautious about filing a bullying report rather than filing one just to avoid liability.

Another reason to expect this scheme to be effective is that it is relatively easy to implement. Where possible, efforts should be made to modify existing statutes rather than to create entirely new ones. This involves modifying not only Indiana's bullying statutes, but also adopting and modifying some of Indiana's child abuse statutes to apply to bullying, such as the reporting requirements and penalties for healthcare personnel. Additionally, existing school personnel, including safe school committee members and the school safety specialist, would be used to handle reports of bullying. Although personnel may have to be added depending on the volume of bullying reports, no completely new positions must be created and reports will not be delegated to "already-taxed child protection agencies."²¹²

208. See *supra* Part II.B.

209. See *supra* note 113 and accompanying text. But see Jessica Martin, *Scathing Critiques of Mandated Reporting Laws, Child Protective Services Have "Little Basis in Reality," Say Child Welfare Experts*, WASHINGTON UNIV. IN ST. LOUIS, June 19, 2007, <http://news.wustl.edu/news/Pages/9635.aspx>, archived at <http://perma.cc/RNJ9-SBJD>.

210. See *supra* note 113 and accompanying text.

211. See *supra* notes 177-78 and accompanying text; see also Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 141, 164 (1986) (noting the inclusion of "any person" as a mandated reporter for child abuse was "controversial" and that "substantiation rates for reports from nonprofessionals are very low").

212. Jessica R. Givelber, *Imposing Duties on Witnesses to Child Sexual Abuse: A Futile*

Ultimately, this reporting scheme should be effective because of the importance of both school-wide and nation-wide awareness of the problem of bullying. Nation-wide awareness refers to the public's knowledge and understanding of the problem.²¹³ For child abuse, nation-wide awareness began with Dr. John Caffey, whose publication entitled *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, suggested that the children under study suffered from abuse.²¹⁴ Medical interest in child abuse grew and culminated in the publication of *The Battered Child Syndrome* by Henry Kempe and his colleagues in 1962.²¹⁵ As medical research on child abuse grew, so did the media's interest in the problem.²¹⁶ With the problem of child abuse now widely publicized, laws were quickly created to address it.²¹⁷ Despite criticism of these laws,²¹⁸ hundreds of thousands of cases of child abuse are dealt with each year because of the laws.²¹⁹

Although bullying received similar national media attention after a string of school shootings allegedly caused by bullying that began in 1999 with Columbine High School, "there is a growing recognition that many current laws do not adequately address harassment and bullying."²²⁰ The problem with much of the anti-bullying legislation is that it appears to be a knee-jerk reaction to the gruesome school shootings rather than sound policy based on research. In a review of bullying-related cases in the United States, one author noted that "employed piecemeal, punitive tactics such as progressive discipline, mediation, conflict resolution, and so-called 'zero tolerance' policies, if unsupported by the entire school community, do not reduce bullying."²²¹ This comment not only illustrates the deficiencies of current anti-bullying legislation, but also suggests a way to fix them: school-wide support for anti-bullying strategies.

The goal of the proposed mandatory reporting scheme for bullying is to reduce or eliminate bullying, and it has been designed with that goal in mind. Most of the research up to this point has shown one method to be consistently effective in reducing bullying: a school climate that is hostile to bullying

Response to Bystander Indifference, 67 *FORDHAM L. REV.* 3169, 3188 (1999).

213. Myers, *supra* note 91, at 454-55.

214. *Id.*

215. *Id.* at 455.

216. *Id.*

217. *Id.*

218. *See supra* note 113 and accompanying text.

219. *See supra* note 117 and accompanying text.

220. John Dayton et al., *Model Anti-Bullying Legislation: Promoting Student Safety, Civility, and Achievement Through Law and Policy Reform*, 272 *ED. LAW REP.* 19, 23 (2011).

221. Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 *ALB. L. REV.* 147, 152 (2009); *see also* Weddle, *supra* note 199, at 679 ("The [anti-bullying] 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 . . .").

partially due to the involvement and supervision by school personnel;²²² the mandatory reporting duty seeks to establish such a climate. All school personnel will be required to intervene in bullying situations, which will have a multiplicative effect on intervention since school personnel feel more comfortable intervening if others are likely to as well.²²³ Problem areas for bullying in the schools will be identified, so supervision may be increased. Even in areas without school personnel, bullies will be under the constant threat of an anonymous report by the victim or another student. It is not the severity of penalties that will stop bullying, but a school environment that declares bullying will be discovered and not tolerated.

CONCLUSION

Bullying is a problem that has plagued the United States for some time now, and its negative effects on those involved have spurred various forms of legislation. Much of the current legislation, however, does not reflect research-based strategies to reduce bullying. The result has been laws that seem effective in theory, but in reality have little to no effect.

In contrast, a mandatory duty to report has already proven to be effective in the child abuse context, and the similarities between the two imply it would also be effective when applied to bullying. Nevertheless, as the research suggests, this is not the only strategy that would be effective; it is merely one means of establishing a school climate that is hostile to bullying, albeit an important one.

The real advantage of a mandatory duty to report bullying is its proven effectiveness in the child abuse context and its ease of implementation. In proposing such a duty, adjustments must be made to avoid the missteps of mandatory child abuse reporting laws, while preserving their core effectiveness. The nature of reporting laws also allows data to be collected on a large scale.

222. See Weddle, *supra* note 199, at 656-57 (“[T]eachers and administrators must actively supervise, constantly alert for indications that bullying is going on behind their backs and constantly ready to stop bullying in its initial stages. Perhaps the greatest deterrent to bullying behavior is the presence of adults who are watching and are willing to intervene . . . intervention must take place early in the development of bullying relationships if it is to be truly effective.”). See also BRADSHAW ET AL., *supra* note 6, at viii (“Staff who were more connected to their school were more likely to feel comfortable intervening in all forms of bullying. Staff with higher feelings of connectedness were also more likely to report being comfortable intervening in several different types of bullying situations.”), and Napolitano et al., *supra* note 30, at 39 (“[L]ess structure and supervision are associated with concomitant increases in student bullying, particularly in locations such as playgrounds, lunchrooms, and hallways.” (citations omitted)).

223. BRADSHAW ET AL., *supra* note 6, at ix (“Two factors were significantly correlated with greater comfort intervening in bullying situations: 1) having effective strategies and 2) perceiving that others in the school were also likely to intervene.”).

Therefore, a mandatory duty to report bullying is not only likely to be the most effective strategy and the easiest to implement, but it also facilitates the collection of data that may be used to evaluate its effectiveness based on empirical research. This is exactly the type of law that must be implemented to protect this nation's students from bullying.