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## NOTES

### IT'S BULLYING THAT KILLED ME: HOW TO COMBAT BULLYING IN INDIANA SCHOOLS THROUGH EFFECTIVE LEGISLATION

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#### INTRODUCTION

Kind-hearted, always happy, the sweetest person I ever met—these were phrases used to describe 15-year-old Roman Kellough.<sup>1</sup> Roman, a student at Central High School in Evansville, Indiana, was the friend who looked out for everybody and focused on helping others.<sup>2</sup> He tried to lift people up with humor and could turn any situation into a joke.<sup>3</sup> He had a big group of friends, and he always wanted to help them, but then the bullying started.<sup>4</sup>

Roman was outed as bisexual, and after word got out, students at Central High School began calling him names and mocking him for his sexual orientation.<sup>5</sup> The bullying was not a secret; Roman's best friend, Anna, knew it was going on but could not stop the daily harassment.<sup>6</sup> While Anna could not see the full toll the bullying exerted on Roman, she saw enough.<sup>7</sup> She knew Roman would rather be at work or at home, anywhere but school.<sup>8</sup> As the bullying continued, Roman withdrew from his friends and later withdrew from Central High School, choosing instead to be homeschooled where the bullies could no

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1. Abbey Doyle, *Friends: Suicide Victim Was Funny, Kind-Hearted; Mom Paints Picture of Bullying*, COURIER & PRESS (Jan. 7, 2017, 8:16 AM), <https://www.courierpress.com/story/news/local/2017/01/06/friends-suicide-victim-funny-kind-hearted-mom-paints-picture-bullying/96271962/> [<https://perma.cc/9AED-Q3J2>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.*

8. *Id.*

longer get to him.<sup>9</sup> Withdrawing from school did not solve the problem though, and Roman was eventually hospitalized at a mental health facility.<sup>10</sup> Roman's mother thinks he "kind of snapped and flipped out"; he was just tired of dealing with the bullying.<sup>11</sup>

Roman made one last trip back to Central High School on January 3, 2017.<sup>12</sup> This time he showed up with two 9mm handguns, a .38-caliber handgun, and dozens of bullets.<sup>13</sup> Police are unsure whether Roman intended to use the guns on the classmates who bullied him; but what they do know is instead of striking back at his tormenters, Roman turned one gun on himself.<sup>14</sup> He fired a single shot to the head, choosing suicide over dealing with the bullying for one more day.<sup>15</sup> Students at Central High School were returning from winter break when one found Roman's lifeless body outside a school entrance.<sup>16</sup> School officials chose not to send students home or cancel classes.<sup>17</sup> Despite the suicide, Central High School carried on with the school day; it was business as usual.<sup>18</sup>

Roman's friends never thought he would commit suicide, but according to them, the bullying eventually got to him.<sup>19</sup> Roman's mother claimed she alerted the school to the bullying before Roman's suicide, but Central High School tells a different story.<sup>20</sup> According to school officials, there were no official reports or evidence of Roman being bullied.<sup>21</sup>

Roman's "bullycide" is not a unique story in this country.<sup>22</sup> Jordan Bythwood, a fifteen-year-old at Southmont High School in Indiana, was bullied at school daily for being biracial.<sup>23</sup> When Bythwood tried to fight back, he was

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9. *Id.*

10. *Id.*

11. *Id.*

12. Lauren Leslie, *Police Recover Loaded Firearms on Suicide Victim*, 44 NEWS (Jan. 4, 2017), <http://44news.wevv.com/police-discover-multiple-loaded-firearms-suicide-victim/> [<http://perma.cc/YJP3-6TQW>].

13. Jordan Vandenberg, *Family: Teen Was Bullied Prior to Committing Suicide*, TRISTATE (Jan. 6, 2017, 4:10 AM), <https://www.tristatehomepage.com/news/local-news/family-teen-was-bullied-prior-to-committing-suicide/636431572> [<http://perma.cc/X8D6-2M6A>].

14. *See id.*

15. *See* Leslie, *supra* note 12.

16. *Body of Former Student Found Outside Evansville School*, DAILY HERALD (Jan. 3, 2017, 4:28 PM), <https://www.dailyherald.com/article/20170103/news/301039920> [<http://perma.cc/U4XK-JD8R>].

17. *See id.*

18. *See id.*

19. Doyle, *supra* note 1.

20. *Id.*

21. *Id.*

22. *See* Deborah Serani, *Bullycide*, PSYCHOL. TODAY (June 2, 2018), <https://www.psychologytoday.com/us/blog/two-takes-depression/201806/bullycide> [<http://perma.cc/F39T-5WRZ>].

23. Nick Hedrick, *Lawsuit: South Did Nothing to Stop Bullying*, JOURNAL REVIEW (July 3,

suspended from school and charged with delinquency. Shortly thereafter, Bythwood committed suicide.<sup>24</sup> Billy Lucas, a fifteen-year-old at Greensburg Community High School in Indiana, was bullied mercilessly at school for being gay.<sup>25</sup> He hanged himself in his grandmother's barn.<sup>26</sup> Kameron Jacobsen, a fourteen-year-old at Monroe-Woodbury High School in New York, was bullied by other students for being too small. The bullying started online as virtual-bullies tormented him with messages, until one day at school those bullies broke his jaw.<sup>27</sup> He took his life in his own bedroom.<sup>28</sup> Megan Meier, a thirteen-year-old at Fort Zumwalt West Middle School in Missouri, was bullied online after falling for a cyber hoax.<sup>29</sup> She hanged herself in her bedroom closet after the demeaning messages were posted online.<sup>30</sup> Amanda Cummings, a fifteen-year-old at New Dorp High School in New York, was targeted for bullying by a group of girls because their leader had a crush on Amanda's boyfriend.<sup>31</sup> After he dumped Amanda, she jumped in front of a bus.<sup>32</sup> Phoebe Prince, a fifteen-year-old at South Hadley High School in Massachusetts, was ridiculed for being an Irish immigrant and was constantly called a slut.<sup>33</sup> She hanged herself in a closet to escape the constant barrage of name-calling.<sup>34</sup> Jamel Myles, a nine-year-old at Joe Shoemaker Elementary School in Colorado, came out as gay to his mom and classmates.<sup>35</sup> It took only days of bullying at school for Jamel to be driven to

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2018), <https://www.journalreview.com/stories/girls-and-boys-invited-to-sign-up-to-play-hockey,5299> [<http://perma.cc/9NSE-HUTR>].

24. *Id.*

25. Dan Savage, *Bullied Gay Teenager Commits Suicide—Will His Tormentors Face Charges?*, SLOG (Sept. 14, 2010), <https://www.thestranger.com/slog/archives/2010/09/14/bullied-teenager-commits-suicide> [<https://perma.cc/7SK7-XBU9>].

26. *Id.*

27. Maurice DuBois, *New York 14-Year-Old Kameron Jacobsen Bullied To Death*, CBS N.Y. (Sept. 15, 2011, 9:06 PM), <https://newyork.cbslocal.com/2011/09/15/exclusive-new-york-14-year-old-bullied-to-death/> [<http://perma.cc/W9BC-RXZC>].

28. *Id.*

29. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES (Nov. 28, 2007), <https://www.nytimes.com/2007/11/28/us/28hoax.html> [<https://perma.cc/T8GM-FXDU>].

30. *Id.*

31. Ben Chapman and Christina Boyle, *Staten Island Teen Amanda Cummings Kills Self by Jumping in Front of Bus After Being Bullied*, N.Y. DAILY NEWS (Jan. 4, 2012, 4:48 AM), <https://www.nydailynews.com/new-york/staten-island-teen-kills-jumping-front-bus-family-cites-bullies-article-1.1000243> [<http://perma.cc/LC7G-H2HR>].

32. *Id.*

33. Kealan Oliver, *Phoebe Prince "Suicide by Bullying": Teen's Death Angers Town Asking Why Bullies Roamed the Halls*, CBS NEWS (Feb. 5, 2010), <https://www.cbsnews.com/news/phoebe-prince-suicide-by-bullying-teens-death-angers-town-asking-why-bullies-roam-the-halls/> [<http://perma.cc/2CY9-6QHM>].

34. *Id.*

35. Michael Nedelman, *9-Year-Old Died by Suicide After He Was Bullied, Mom Says*, CNN

suicide.<sup>36</sup> Angel Green, a fourteen-year-old at Battle Ground Middle School in Indiana, was called countless names by bullies at school.<sup>37</sup> She hanged herself at her bus stop so the bullies would be sure to see what they drove her to do.<sup>38</sup> She left her family a note to explain her decision; the ending was as tragic as it was succinct: “it’s bullying that killed me.”<sup>39</sup>

Bullying does not always lead to suicide, but it always presents major issues for schools across the nation.<sup>40</sup> Some researchers suggest the key to combatting bullying is dealing with victims, not prevention,<sup>41</sup> but schools with proactive anti-bullying programs generally see a 50 percent decline in bullying incidents.<sup>42</sup> According to a survey of students, telling an adult or teacher is the most effective strategy for countering bullying.<sup>43</sup> While students may think these strategies are successful, these solutions are reactive rather than proactive, and their implementation allows bullying to happen before anything is done to stop it.<sup>44</sup> Proactive bullying strategies are a better alternative because they prevent bullying before it starts; however, they need to be implemented by educators, students, *and* school districts in order to be most effective.<sup>45</sup> This need has some school districts looking to state legislatures for guidance on how to adopt effective anti-bullying measures.<sup>46</sup>

For Indiana to pass effective anti-bullying legislation, it must give schools the proper tools to identify and proactively prevent bullying. In addition, the state must hold schools accountable by rewarding schools who implement effective

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(Aug. 29, 2018, 5:26 PM), <https://www.cnn.com/2018/08/28/health/preteen-suicide-jamel-myles/index.html> [http://perma.cc/CM2N-QV5K].

36. *Id.*

37. Sasha Goldstein, *Indiana Girl’s Public Suicide and Heartbreaking Note Sparks Anti-Bullying Legislation in the State*, N.Y. DAILY NEWS (Apr. 4, 2013, 5:07 PM), <https://www.nydailynews.com/life-style/health/indiana-girl-suicide-heartbreaking-note-spark-anti-bullying-legislation-article-1.1308060> [http://perma.cc/F5WX-FRYV].

38. *Id.*

39. *Id.*

40. See *Bullying Statistics*, PACER (last updated Dec. 27, 2017), <https://www.pacer.org/bullying/resources/stats.asp> [http://perma.cc/77U3-XX8C].

41. Hans Villarica, *An Alternate Approach to Stop School Bullying: Fix the Victims*, ATLANTIC (Nov. 2, 2011), <https://www.theatlantic.com/health/archive/2011/11/an-alternate-approach-to-stop-school-bullying-fix-the-victims/247548/> [http://perma.cc/LL3L-84VA].

42. *School Bullying Affects Us All*, STOP BULLYING NOW FOUNDATION, <http://www.stopbullyingnowfoundation.org/main/> [http://perma.cc/C7AL-2XUB] (last visited Mar. 23, 2020).

43. Stan Davis & Charisse Nixon, *The Youth Voice Research Project: Victimization & Strategies*, YOUTH VOICE PROJECT (Mar. 2010), <http://njbullying.org/documents/YVPMarch2010.pdf> [http://perma.cc/7EZ9-LS56].

44. *Id.*

45. *School Bullying Affects Us All*, *supra* note 42.

46. See generally Victoria Stuart-Cassel, Ariana Bell & J. Fred Springer, *Analysis of State Bullying Laws and Policies*, U.S. DEP’T OF EDUC. (Dec. 2011), <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> [http://perma.cc/BMN7-E8FV].

procedures and punishing schools who fail to meet the same standard. Part I of this Note will examine the steps the Indiana General Assembly has already taken to prevent bullying in Indiana schools. Part II will explain why Indiana's current anti-bullying law fails to effectively address bullying issues Indiana students face inside and outside of school. Part III will look at effective anti-bullying measures used in other states. These strategies will be the basis for model legislation for an Indiana anti-bullying law that would more effectively address in-school bullying and cyberbullying, improve reporting procedures, and hold schools accountable for the implementation of anti-bullying programs.

## I. THE BULLYING PROBLEM AND INDIANA'S LEGISLATIVE RESPONSE

### *A. The Bullying Problem Nationally and in Indiana*

The list of bullying stories in this Note's introduction is lengthy, tragic, and far from exhaustive; but it does demonstrate the widespread nature of America's bullying problem. Because no federal anti-bullying legislation exists, the role of protecting students from bullies currently lies with the states.<sup>47</sup> Since the turn of the century, state legislatures have tried to prevent bullying in schools by passing anti-bullying laws.<sup>48</sup> According to a Department of Education ("DOE") report, states enacted 120 anti-bullying laws between 1999 and 2010.<sup>49</sup> These laws helped schools reduce bullying.<sup>50</sup> According to the Centers for Disease Control and Prevention ("CDC"), the percentage of students who reported being bullied in school dropped from around 30 percent of the overall K–12 population to 20 percent over the same time period.<sup>51</sup> But since 2010, state legislatures and schools have been unable to reduce the percentage of students being bullied at school below about 20 percent.<sup>52</sup> This plateau is especially concerning with the increased prevalence of technology, as cyberbullying allows bullies to reach their victims even when they are away from school grounds.<sup>53</sup>

Tragic, newsworthy suicides like the examples in this introduction are not the only problem bullying brings to schools. Every day approximately 160,000 teens skip school to avoid bullying.<sup>54</sup> Eight percent of middle school students have

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47. See *Laws, Policies & Regulations*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Sept. 8, 2017), <https://www.stopbullying.gov/laws/index.html> [<http://perma.cc/8MBK-MT89>].

48. Stuart-Cassel, Bell & Springer, *supra* note 46.

49. *Id.*

50. *Youth Risk Behavior Survey: Data Summary & Trends Report, 2007–2017*, CTRS. FOR DISEASE CONTROL & PREVENTION 38, <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/trendsreport.pdf> [<http://perma.cc/3NJ8-HR3X>] (last visited Mar. 23, 2020).

51. *Id.*

52. *Id.*

53. Maria Konnikova, *How the Internet Has Changed Bullying*, NEW YORKER (Oct. 21, 2015), <https://www.newyorker.com/science/maria-konnikova/how-the-internet-has-changed-bullying> [<http://perma.cc/5BJ9-M5K4>].

54. Stacey Grissom, *Nation's Educators Continue Push for Safe, Bully-Free Environments*,

skipped school at least once to avoid a bully.<sup>55</sup> In addition to skipping school, bullied students are at a higher risk of dropping out of school altogether than students who are not bullied.<sup>56</sup> Because bullied students either do not feel connected to their school or outright despise school, the likelihood of vandalism also increases with bullying.<sup>57</sup> Bullying can also lead students to commit violent acts; a 2011 study of thirty-seven school shootings found almost 75 percent of student shooters felt bullied or threatened.<sup>58</sup> Students skipping school, dropping out, and committing vandalism or violent crimes alone would be reason enough to fight bullying, but these symptoms also impact schools economically.<sup>59</sup> Between the lost funds due to truancy and drop outs and costs associated with disciplining students who act out, the expected financial impact bullying has on K–12 schools nationwide is an estimated \$2,314,600 annually.<sup>60</sup>

Bullying can also cause long-term psychological and emotional effects in students. According to a 2013 study by the Association for Psychological Science, victims of bullying are more likely to experience poverty, struggle long-term academically, and fail to maintain employment after high school.<sup>61</sup> The study also concluded that students who bully others are more likely to suffer from those same issues.<sup>62</sup> Bullies and bullied students are also more likely to commit crimes and abuse drugs and alcohol.<sup>63</sup> According to the National School Safety Center, 60 percent of students identified as school bullies have a criminal record by the age of twenty-four.<sup>64</sup>

The national bullying problem affects Indiana. In 2011, prior to the General Assembly's first concerted effort to pass comprehensive anti-bullying laws, the CDC ranked Indiana third in the nation in cyberbullying and bullying incidents on K–12 school campuses.<sup>65</sup> During that time period, 25 percent of Indiana

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NEA (Oct. 8, 2012), <http://www.nea.org/home/53298.htm> [<http://perma.cc/WMA5-3K9N>].

55. Rick Phillips, *The Financial Costs of Bullying, Violence, and Vandalism*, ECONOMISTS FOR PEACE & SECURITY (Feb. 20, 2011), <http://www.epsusa.org/publications/newsletter/2013/sep13/phillips.html> [<https://perma.cc/9GCW-NH3N>].

56. Dewey Cornell et al., *Perceived Prevalence of Teasing and Bullying Predicts High School Dropout Rates*, J. OF EDUC. PSYCHOL. 105, 138 (2013).

57. Phillips, *supra* note 55.

58. Sue Loughlin, *Hoosier Students 3rd Most-Bullied*, TRIB. STAR (June 23, 2014), [https://www.tribstar.com/news/local\\_news/hoosier-students-rd-most-bullied/article\\_183584a5-fe4d-58e1-a08f-b316e2001b0e.html](https://www.tribstar.com/news/local_news/hoosier-students-rd-most-bullied/article_183584a5-fe4d-58e1-a08f-b316e2001b0e.html) [<http://perma.cc/NXM6-Q7X9>] [hereinafter Loughlin, *Hoosier Students*].

59. Phillips, *supra* note 55.

60. *Id.*

61. Dieter Wolke et al., *Impact of Bullying in Childhood on Adult Health, Wealth, Crime, and Social Outcomes*, PSYCHOL. SCI. (Aug. 19, 2013), <http://journals.sagepub.com/doi/10.1177/0956797613481608> [<https://perma.cc/S4ZT-2CY6>].

62. *Id.*

63. *Id.*

64. See Loughlin, *Hoosier Students*, *supra* note 58.

65. *Id.*

students reported that they had been bullied at school within the last year, and 20 percent reported being cyberbullied within the last year.<sup>66</sup> As a result of bullying, 20 percent of Indiana students claim to have skipped school at least once in the past month for safety concerns.<sup>67</sup>

According to the Indiana Department of Education's ("IDOE") annual bullying report, those numbers decreased drastically over the last five years.<sup>68</sup> The IDOE reports there were only 5,604 total bullying incidents in all K–12 Indiana public schools during the 2017–2018 school year, meaning less than 1 percent of Indiana students were bullied during that school year.<sup>69</sup> These official statistics are misleading, though.<sup>70</sup> According to Dr. Anita Thomas, a professor and child expert at the University of Indianapolis, these numbers merely show the flaws in Indiana's approach to reporting bullying and gathering data.<sup>71</sup> Dr. Thomas claims the data does not represent an actual drop in bullying incidents across the state.<sup>72</sup>

### *B. The Evolution of Indiana's Anti-bullying Law*

1. *Indiana's 2013 Anti-bullying Law.*—In 2013, then-Governor Mike Pence signed the state's first comprehensive anti-bullying bill into law.<sup>73</sup> The 2013 law had two key components. The first expanded Indiana's definition of bullying.<sup>74</sup> Under the original bullying definition adopted by the state in 2005, bullying was narrowly defined as "verbal, written, or physical acts or behaviors intended to harass, ridicule, humiliate, intimidate, or harm another student."<sup>75</sup> While the 2013 law keeps much of the 2005 language, it includes electronic acts and begins to define bullying through the impact on the bullied student.<sup>76</sup> The law specifically states an act or communication is bullying if the alleged bullying behavior:

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66. *Id.*

67. *Id.*

68. See *Student Safety/Bullying Reporting*, IND. DEP'T OF EDUC. (Aug. 25, 2018, 11:06 AM), <https://www.doe.in.gov/safety/student-safetybullying-reporting> [http://perma.cc/W826-ETXC].

69. *Id.*

70. Kara Kenney, *Child Expert at UIndy Says Indiana's Bullying Numbers Are Still Underreported*, RTV6 INDIANAPOLIS (Aug. 15, 2018, 6:01 AM), <https://www.theindychannel.com/news/call-6-investigators/child-expert-at-uindy-says-indiana-s-bullying-numbers-are-still-underreported> [http://perma.cc/2746-DB9U] [hereinafter Kenney, *Child Expert at UIndy*].

71. *Id.*

72. *Id.*

73. Matt Adams, *Schools Adjust to New Anti-Bullying Law*, FOX59 (Oct. 14, 2013, 6:55 PM), <https://fox59.com/2013/10/14/educators-discuss-changes-in-bullying-law/> [http://perma.cc/H9YP-LHQ5].

74. See Rich Van Wyk, *New Indiana Law Targets Bullying in Schools*, WTHR (Apr. 14, 2016, 8:50 PM EDT), <https://www.wthr.com/article/new-indiana-law-targets-bullying-in-schools> [http://perma.cc/MEW3-9AZU].

75. IND. CODE § 20-33-8-0.2 (2005).

76. IND. CODE § 20-33-8-0.2 (2018).

- (1) places the targeted student in reasonable fear of harm to the targeted student's person or property;
- (2) has a substantially detrimental effect on the targeted student's physical or mental health;
- (3) has the effect of substantially interfering with the targeted student's academic performance; or
- (4) has the effect of substantially interfering with the targeted student's ability to participate in or benefit from the services, activities, and privileges provided by the school.<sup>77</sup>

While these are not concrete examples of bullying behavior, these general descriptions were the General Assembly's first attempt to define bullying behavior in a detailed manner.<sup>78</sup> More importantly, by clarifying the 2013 definition of bullying, the state hoped to make it easier to bring criminal charges against bullies when necessary.<sup>79</sup>

The second major component of the 2013 anti-bullying law requires all public K–12 schools to have appropriate response systems for when a bullying incident occurs.<sup>80</sup> The law mandates schools set up anonymous and personal reporting systems.<sup>81</sup> Schools also have to contact the parents of all students involved in a reported incident, school counselors, school administrators, and, when appropriate, law enforcement.<sup>82</sup> Schools also have to set up discipline procedures for students who file false reports or faculty who fail to investigate reported bullying incidents.<sup>83</sup>

The law also includes several smaller components. The state already required schools to develop a plan for bullying, but public K–12 schools now must develop age-appropriate, research-based guidelines for dealing with bullies.<sup>84</sup> These plans must contain a bullying prevention program and establish investigative and reporting procedures.<sup>85</sup> The 2013 law also requires school districts train employees on their school's bullying prevention and reporting policies.<sup>86</sup> The law also mandates all students grades 1–12 be given age-appropriate, research-based instruction about bullying no later than October 15 every school year.<sup>87</sup>

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77. *Id.*

78. *Id.*

79. Emily Longnecker, *Pence Signs Anti-Bullying Legislation*, WTHR (June 4, 2013, 6:08 PM), <https://www.wthr.com/article/pence-signs-anti-bullying-legislation> [http://perma.cc/PG4G-QBL2].

80. IND. CODE § 20-33-8-13.5 (2018).

81. *Id.*

82. *Id.*

83. *Id.*

84. IND. CODE § 5-2-10.1-12 (2018).

85. *Id.*

86. IND. CODE § 20-26-5-34.2 (2018).

87. IND. CODE § 20-30-5-5.5 (2018).



2. *Indiana's 2014 Anti-bullying Law.*—One year after passing the first anti-bullying bill, the General Assembly amended the 2013 law, requiring schools to report bullying incidents to the state.<sup>88</sup> The IDOE compiles the bullying data from every public school in Indiana and issues a report on the agency's website.<sup>89</sup> According to Indiana Safe Schools coordinator David Woodward, the state uses the data to better understand the bullying problem in Indiana so that it can decide on future action to prevent it.<sup>90</sup> After accumulating enough data, schools and the state could observe trends and possibly have the state take further action.<sup>91</sup> The IDOE uses the data to look for districts with high bullying rates, districts with no reported bullying, and districts having success combating bullying.<sup>92</sup>

3. *Indiana's 2018 Anti-bullying Law.*—Then-Governor Pence signed the first anti-bullying bill to great applause from legislators, parents, and educators, but it had flaws not addressed in the 2014 amendments; specifically, the 2013 law contained no incentives to report and no punishment for lack of reporting.<sup>93</sup> Many schools reported zero bullying incidents, while others filed no report at all.<sup>94</sup> In 2014, the first year of reporting, close to 25 percent of Indiana K–12 public schools reported zero bullying incidents.<sup>95</sup> By the 2016–2017 school year, over half of schools, 55 percent, were reporting zero bullying incidents.<sup>96</sup> As of 2017, 14 percent of public schools in Indiana had still never reported a bullying incident in their school.<sup>97</sup>

In addition to lack of reporting, inaccurate reporting was also an issue.<sup>98</sup> During the 2015-16 school year, two thirds of Indianapolis Public Schools

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88. IND. CODE § 20-34-6-1 (2018).

89. *Id.* at (c).

90. Eric Weddle, *9,396 Bullying Incidents Reported at Indiana Schools Last Year*, INDY STAR (Aug. 8, 2014), <https://www.indystar.com/story/news/education/2014/08/08/bullying-incidents-reported-ind-schools-last-year/13802395/> [http://perma.cc/QA42-AGCS].

91. *Id.*

92. Kara Kenney, *Despite Law, Indiana Schools are Misreporting Their Bullying Data, Call 6 Investigation Finds 60% of IN Schools Reported No Bullying Last Year*, RTV6 INDIANAPOLIS (Oct. 30, 2017), <https://www.theindychannel.com/longform/despite-law-indiana-schools-are-misreporting-their-bullying-data-call-6-investigation-finds> [http://perma.cc/2HKP-MVS7] [hereinafter Kenney, *Indiana Schools Misreporting*].

93. IND. CODE § 20-33-8-13.5 (2018).

94. Kenney, *Indiana Schools Misreporting*, *supra* note 92.

95. Rachel Morello, *Indiana Releases First Statewide Report on School Bullying*, STATEIMPACT (Aug. 12, 2014, 4:58 PM), <https://indianapublicmedia.org/stateimpact/2014/08/12/indiana-releases-statewide-report-school-bullying/> [http://perma.cc/HJ5E-SFG2].

96. Quinn Fitzgerald, *Indiana's New Anti-Bullying Law Compels Schools to Report Incidents*, NEWS & TRIB. (Mar. 27, 2018), [https://www.newsandtribune.com/news/education/indiana-s-new-anti-bullying-law-compels-schools-to-report/article\\_a5b301f2-31e2-11e8-9bfb-63e08fb3382e.html](https://www.newsandtribune.com/news/education/indiana-s-new-anti-bullying-law-compels-schools-to-report/article_a5b301f2-31e2-11e8-9bfb-63e08fb3382e.html) [http://perma.cc/7L79-ZWZF].

97. Kenney, *Indiana Schools Misreporting*, *supra* note 92.

98. *Id.*

(“IPS”) reported zero incidents.<sup>99</sup> However, after outside questioning about its data, IPS eventually reported 689 bullying incidents.<sup>100</sup> IPS called its misreporting an “unfortunate oversight,” but the IDOE, which wants to use the state’s bullying data to evaluate and refine the state’s anti-bullying measures, can take no punitive or corrective action when schools commit these types of “oversights.”<sup>101</sup>

After realizing the flaws in the 2013 law, the Indiana General Assembly attempted to correct the reporting issues in 2018.<sup>102</sup> To ensure reporting, the IDOE is now required to send every school a notification via email or letter at the beginning of each school year.<sup>103</sup> The notification reminds schools of their duty to report bullying statistics to the state.<sup>104</sup> The IDOE will also survey all K–12 public schools to solicit feedback on why incidents are either not reported or misreported.<sup>105</sup> This survey will be shared with the General Assembly and posted on the IDOE website with the goal of increasing school reporting long-term.<sup>106</sup>

The General Assembly also wanted to deal with inaccurate reporting.<sup>107</sup> Because the 2013 law did not require systematic data review, the state was powerless to counter even obviously incorrect reporting numbers.<sup>108</sup> To increase reporting accuracy, the state gave the IDOE the ability to audit any public school corporation.<sup>109</sup> To further hold public schools accountable, if the IDOE finds any discrepancies in bullying incidents between the school’s official reported number and the IDOE’s number after the audit, the differences are to be posted on the IDOE website.<sup>110</sup>

The 2018 anti-bullying law had one other small but important update: it strengthened cyberbullying language by adding cell phones and wireless devices as official mechanisms for bullying.<sup>111</sup> Prior to the 2018 update, Indiana’s stance on cyberbullying was weak when compared to others nationally.<sup>112</sup> While the

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99. *Id.*

100. *Id.*

101. *Id.*

102. Kara Kenney, *Governor Holcomb Signs Anti-Bullying Law Prompted by Call 6 Investigation into Misreported Numbers*, RTV6 INDIANAPOLIS (June 4, 2018, 6:45 PM), <https://www.theindychannel.com/news/call-6-investigators/governor-holcomb-signs-anti-bullying-law-prompted-by-call-6-investigation-into-school-bullying> [http://perma.cc/9GAG-UP7N] [hereinafter Kenney, *Governor Holcomb Signs*].

103. IND. CODE § 20-34-6-2(a) (2018).

104. *Id.*

105. Kenney, *Governor Holcomb Signs*, *supra* note 102.

106. *Id.*

107. *Id.*

108. *See* Kenney, *Indiana Schools Misreporting*, *supra* note 92.

109. IND. CODE § 20-34-6-2(b) (2018).

110. *Id.*

111. IND. CODE § 20-33-8-13.5(c) (2018).

112. *See* Ben Skirvin, *Indiana Cyberbullying Law Less Comprehensive Than Many Other States*, STATEIMPACT (July 28, 2011, 12:01 PM), <https://indianapublicmedia.org/stateimpact/2011/07/28/indiana-cyberbullying-law-less-comprehensive-than-many-other-states/>

2013 anti-bullying law allowed schools to report actions as bullying even if they did not happen on school premises, failing to specify the means of bullying left the enforcement of the law ambiguous.<sup>113</sup> By officially adding cellular and wireless devices to the 2018 anti-bullying law, schools now have a wider swath of power to label and report incidents as cyberbullying no matter where the bullying occurs so long as it meets the state's official definition of bullying.<sup>114</sup>

## II. PROBLEMS WITH INDIANA'S CURRENT ANTI-BULLYING LAW

### A. Defining Bullying

While Indiana's 2018 law begins to recognize the growing threat of cyberbullying by adding technology components,<sup>115</sup> it does not go far enough, and the entire IDOE needs to modernize to adapt to technology.<sup>116</sup> Indiana's anti-bullying law mentions cyberbullying and covers the technology used to do it, but it does not specifically define cyberbullying as a separate form of bullying.<sup>117</sup> Rather than distinguishing cyberbullying from traditional bullying, Indiana uses its definition for traditional bullying and then applies it to cyberbullying by banning traditional bullying activities done using different types of technology.<sup>118</sup> This stands in stark contrast to other states that use a tactic similar to Indiana's as a base then build on their cyberbullying definition by adding components specific to cyberbullying such as online stalking, sharing naked pictures, revenge pornography, etc.<sup>119</sup> Indiana did not make that addition, keeping its statute a simple repeat of traditional bullying through technology.<sup>120</sup>

A clear and separate definition for cyberbullying from the General Assembly is especially important due to the potential conflicts with students' First Amendment rights.<sup>121</sup> Students do not have First Amendment protections for comments that disrupt the learning environment, and this would reasonably

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[<http://perma.cc/H5ZW-MZWL>].

113. See IND. CODE § 20-33-8-13.5 (2018).

114. Sue Loughlin, *Bills would strengthen anti-bullying efforts in Indiana*, HERALD BULL. (Mar. 8, 2018), [http://www.heraldbulletin.com/news/local\\_news/bills-would-strengthen-anti-bullying-efforts-in-indiana/article\\_cd27b4e9-0002-54a0-b549-582db624daa7.html](http://www.heraldbulletin.com/news/local_news/bills-would-strengthen-anti-bullying-efforts-in-indiana/article_cd27b4e9-0002-54a0-b549-582db624daa7.html) [<http://perma.cc/MRK9-8KTE>] [hereinafter Loughlin, *Bills Strengthen Efforts*].

115. See IND. CODE § 20-33-8-13.5 (2018).

116. See Loughlin, *Bills Strengthen Efforts*, *supra* note 114.

117. See IND. CODE § 20-33-8-13.5 (2018); see IND. CODE § 20-33-8-0.2 (2020).

118. IND. CODE § 20-33-8-13.5(c).

119. Ashley Folk, *Cyberbullying Laws by State*, LEGALMATCH (July 31, 2018, 2:04 PM), <https://www.legalmatch.com/law-library/article/cyberbullying-laws-by-state.html> [<http://perma.cc/TEN6-EVYB>].

120. IND. CODE § 20-33-8-13.5(c).

121. See Benjamin A. Holden, *Unmasking the Teen Cyberbully: A First Amendment-Compliant Approach to Protecting Child Victims of Anonymous, School-Related Internet Harassment*, 51 AKRON L. REV. 1, 16 (2017).

extend to cyberbullying done at school.<sup>122</sup> But the danger of cyberbullying is that it does not have to be done at school.<sup>123</sup> The Supreme Court has had multiple opportunities to define the relationship between First Amendment rights and a school's ability to discipline students for cyberbullying off school grounds, but has yet to grant certiorari to establish its own standards for acceptable regulation by states or schools.<sup>124</sup> Each federal circuit court has held schools can punish students for cyberbullying done off campus; however, each circuit uses different reasoning and boundaries, so until the Supreme Court weighs in to provide a unified opinion on the legal allowances for punishing off-campus bullying, nothing is legally certain.<sup>125</sup> Because of this concern, Indiana's bullying definition specifically carves out a First Amendment exception.<sup>126</sup> While this protects students, it does not give schools or educators guidance so that they can be proactive in preventing bullying. Just like with traditional bullying, the lack of guidance from the General Assembly hurts schools who try to proactively prevent bullying, and by not defining what qualifies as cyberbullying, the state is failing to give schools the support they need to combat off-campus cyberbullying.

### *B. Enforcement and Implementation*

The 2018 anti-bullying law also has issues enforcing its reporting requirements and implementation of anti-bullying policies at schools. Representative Greg Porter, who represents Indiana House District 96, wrote the original anti-bullying bill.<sup>127</sup> He claims the purpose of the data-gathering element of the law is to "give schools tools to address [bullying]."<sup>128</sup> Because accurate data is important for the state to identify problem areas and possibly determine who is using best practices, ensuring the data is accurate and complete will be essential for the success of the anti-bullying law.<sup>129</sup>

Indiana's K–12 public schools reported only 5,604 bullying incidents for the entire 2017–2018 school year.<sup>130</sup> Indiana's reported bullying rate of less than one-half of a percent<sup>131</sup> is significantly lower than the national average of around 20

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122. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

123. Konnikova, *supra* note 53.

124. *See J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3rd Cir. 2011), cert. denied, 565 U.S. 1156 (2012); *Kowalski v. Berkeley City Schs.*, 652 F.3d 565 (4th Cir. 2011), cert. denied, 565 U.S. 1173 (2012); *Doninger v. Niehoff*, 642 F.3d 334 (2nd Cir. 2011), cert. denied, 565 U.S. 976 (2011); *Bell v. Itawamba City Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), cert. denied, 136 S. Ct. 1166 (2016).

125. *See Holden*, *supra* note 121, at 17.

126. IND. CODE § 20-33-8-0.2(b)(3) (2020).

127. Fitzgerald, *supra* note 96.

128. Weddle, *supra* note 90.

129. *See id.*

130. *Indiana Schools Safety Staffing, Arrests, And Bullying Report*, IND. DEP'T OF EDUC. 4 (Aug. 2019), <https://www.doe.in.gov/sites/default/files/safety/indiana-schools-bullying-safety-staffing-and-arrests-report-2019-v2.pdf> [<https://perma.cc/JYJ5-XWD2>].

131. The bullying rate was calculated by dividing the total number of reported incidents (5,604)

percent<sup>132</sup> and is likely a product of underreporting by schools.<sup>133</sup>

When Indiana amended its anti-bullying law in 2014 to include reporting, some legislators feared schools would not accurately report bullying statistics due to the possible impact on a school's funding or public perception.<sup>134</sup> When reporting became an issue, Representative Porter attributed the reporting problems to school administrations' fear the data would negatively affect annual performance reports.<sup>135</sup> The 2018 update attempted to assuage those fears by striking out requirements that bullying statistics be reported as part of a school's annual performance report.<sup>136</sup> While decoupling bullying statistics from the annual report that helps determine school funding is a positive step, it does nothing to deal with the issue of schools misreporting to avoid a negative public image, a concern Representative Porter expressed when the bill was debated.<sup>137</sup> Because Indiana's anti-bullying law does not have any potential rewards or punitive measures to hold schools accountable for misreporting, the law has a serious issue accumulating accurate data for the IDOE and General Assembly to use in crafting future anti-bullying policies and legislation.<sup>138</sup>

The state's new auditing powers are also not guaranteed to enforce proper reporting. The IDOE can now investigate suspicious reports, like the statistics IPS reported following the 2015–2016 school year.<sup>139</sup> While this power is certainly useful, David Woodward, the IDOE's director of school building security and safety, does not think the audits will be an effective counter to misreporting.<sup>140</sup> According to Woodward, if the IDOE were to audit a school, the investigation would examine bullying incidents that would have taken place months or possibly years ago.<sup>141</sup> While the IDOE auditors could uncover unreported incidents, they would struggle to get a true accounting of overall numbers and specific incidents because, unlike the school, they would not be able to investigate at the ideal time, immediately after the incident or report.<sup>142</sup> According to Woodward, the audits will only undermine local authority and add "a level of bureaucracy to something that is already hard to measure."<sup>143</sup> While the addition of the IDOE's auditing

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by the total number of enrolled students in 2018 (4,053,778) as reported by the IDOE to receive a 0.00138 percent bullying rate for 2018. See *Corporation Enrollment by Ethnicity and Free/Reduced Price Meal Status*, IND. DEP'T OF EDUC. (Nov. 28, 2018), <https://www.doe.in.gov/accountability/find-school-and-corporation-data-reports> [http://perma.cc/V7VH-JZ26].

132. *Youth Risk Behavior Survey*, *supra* note 50.

133. See Kenney, *Child Expert at UIndy*, *supra* note 70.

134. Weddle, *supra* note 90.

135. Fitzgerald, *supra* note 96.

136. IND. CODE § 20-20-8-8(a)(11) (2018).

137. Weddle, *supra* note 90.

138. IND. CODE § 20-33-8-13.5 (2018).

139. Kenney, *Indiana Schools Misreporting*, *supra* note 92.

140. See Fitzgerald, *supra* note 96.

141. *Id.*

142. See *id.*

143. *Id.*

power is a positive step in theory, if it is not used to increase the accuracy of school reporting, then it will not solve any of the issues with Indiana's anti-bullying law.

The reporting aspect of the anti-bullying law has one other major flaw: its implementation. Even after the updates in 2018, the law does not apply to private or charter schools, meaning only public K–12 schools report their bullying data to the state.<sup>144</sup> This problem is not lost on Representative Porter, who wants to “hold everyone accountable.”<sup>145</sup> But, as he points out, private schools have always been able to remain exempt from these types of reporting requirements.<sup>146</sup> This is partially due to opposition from conservative groups like the Indiana Family Institute, who opposed Representative Porter's anti-bullying legislation from the onset.<sup>147</sup> Representative Porter has acknowledged the push back from private schools, but without private school participation, Indiana's reporting numbers will never show the full picture of bullying in Indiana.<sup>148</sup>

There is one final factor that hurts Indiana's ability to both enforce and implement its anti-bullying law. Indiana's anti-bullying law concludes with a specific disclaimer: “This section may not be construed to give rise to a cause of action against a person or school corporation based on an allegation of noncompliance with this section. Noncompliance with this section may not be used as evidence against a school corporation in a cause of action.”<sup>149</sup> This non-compliance waiver bars anyone from bringing a claim against a school for either not implementing or not following the required components of the anti-bullying law.<sup>150</sup> The state is eliminating this evidence for use in any litigation, which is one of the biggest incentives school districts would have to follow civil codes generally.

### III. MODEL LEGISLATION FOR INDIANA

#### A. Anti-bullying Laws Outside of Indiana

Even though there is no federal anti-bullying law, the Department of Health and Human Services (“HHS”) has analyzed states' anti-bullying laws and recommended best-practice elements.<sup>151</sup> HHS has identified several key elements

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144. Kenney, *Governor Holcomb Signs*, *supra* note 102.

145. *Id.*

146. *Id.*

147. Christine Salek, *Angel Green: Teen's Suicide Moves Indiana Anti-Bullying Initiative Forward*, MIC (Apr. 7, 2013), <https://mic.com/articles/33439/angel-green-teen-s-suicide-moves-indiana-anti-bullying-initiative-forward#.DYN3rsOH5> [<http://perma.cc/6LPE-TSKR>].

148. Kenney, *Governor Holcomb Signs*, *supra* note 102.

149. IND. CODE § 20-33-8-13.5(d) (2018).

150. *Id.*

151. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, U.S. DEP'T OF HEALTH AND HUM. SERVS., <https://www.stopbullying.gov/laws/key-components/index.html> [<http://perma.cc/RV59-EXS6>] (last visited Mar. 21, 2020).

to a state's anti-bullying law including: (1) a purpose statement, (2) a definition of bullying that includes characteristics and conduct, (3) clear policies for proactive prevention and the reporting and investigating of bullying incidents, and (4) training for all adults who will be working in schools on how to proactively identify and prevent bullying incidents.<sup>152</sup> Colorado, Virginia, Delaware, Vermont, and Massachusetts rank at the top of national anti-bullying rankings, and their anti-bullying statutes all incorporate the key anti-bullying legislation elements that HHS encourages states to adopt.<sup>153</sup>

A strong purpose statement will outline the range of detrimental effects bullying can have on students, stressing the importance of the law for schools and the General Assembly's intent to declare all forms of bullying unacceptable.<sup>154</sup> Vermont's anti-bullying law starts with a strong purpose statement that serves as an overview for the policies that follow.<sup>155</sup> It begins:

It is the policy of the State of Vermont that all Vermont educational institutions provide safe, orderly, civil, and positive learning environments. Harassment, hazing, and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school.<sup>156</sup>

This statement both demonstrates the state's interest in holding schools accountable and states its intent to provide students a school environment that is free from bullying.<sup>157</sup>

The law should also define bullying in a way that is relevant to the current student experience.<sup>158</sup> This can best be achieved by providing general characteristics of bullying and listing examples of specifically prohibited behaviors.<sup>159</sup> The Delaware anti-bullying law begins by describing the general characteristics of bullying behavior.<sup>160</sup> It describes bullying as any behaviors that:

a. Place a student, school district or charter school volunteer, or school district or charter school employee in reasonable fear of substantial harm to the student's, volunteer's, or employee's emotional or physical well-being or substantial damages to the student's, volunteer's, or employee's property.

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152. *Id.*

153. Adam McCann, *States with the Biggest Bullying Problems*, WALLETHUB (Sept. 6, 2018), <https://wallethub.com/edu/best-worst-states-at-controlling-bullying/9920/#main-findings> [http://perma.cc/57QJ-UZWP].

154. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 152.

155. *See* VT. STAT. ANN. tit. 16, § 570 (2014).

156. *Id.*

157. *See id.*

158. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 152.

159. *Id.*

160. *See* DEL. CODE ANN. tit. 14, § 4161 (2017).

- b. Create a 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.
- c. Interfere with a student having a safe school environment that is necessary to facilitate educational performance, opportunities, or benefits.
- d. Perpetuate 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 district or charter school volunteer, or school district or charter school employee.<sup>161</sup>

While the state declines to list specific behaviors, it does allow school districts to list examples.<sup>162</sup> The Delaware DOE publishes the anti-bullying rules for every school district and several districts have taken the state characteristics further by either listing specific actions or further refining characteristics by the type of bullying (e.g., physical bullying, verbal bullying, relational bullying, cyberbullying, and sexual bullying).<sup>163</sup> Florida's anti-bullying law is an example of a specific list of bullying acts being used statewide:

- (a) "Bullying" includes cyberbullying and means systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve:
  - 1. Teasing;
  - 2. Social exclusion;
  - 3. Threat;
  - 4. Intimidation;
  - 5. Stalking;
  - 6. Physical violence;
  - 7. Theft;
  - 8. Sexual, religious, or racial harassment;
  - 9. Public or private humiliation; or
  - 10. Destruction of property.<sup>164</sup>

By listing acts of bullying, the definition is easily understood and interpreted by school districts, school administrators, and perhaps most importantly, students.<sup>165</sup> Massachusetts has taken its anti-bullying definition one step further by including a specific list of prohibited behaviors related to cyberbullying.<sup>166</sup> The state defines cyberbullying as:

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161. *Id.*

162. *Id.*

163. *See, e.g., District/Charter School Bullying Policies*, DEL. DEP'T OF EDUC. (July 31, 2018), <https://www.doe.k12.de.us/Page/3323> [http://perma.cc/BN89-SQQJ].

164. FLA. STAT. § 1006.147(3) (2019).

165. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 151.

166. *See* MASS. GEN. LAWS ch. 71, § 37O (2014).



(i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages . . . the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons[.]<sup>167</sup>

The law also includes characteristics of cyberbullying and lists devices as well.<sup>168</sup>

There is a potential downside to including a list of bullying behaviors; a court could interpret the list as exhaustive and narrow the scope of a school's power to intervene and in extreme cases limit the ability of a court to interpret a non-listed behavior as bullying for criminal purposes. According to HHS, the purpose of including a list of behaviors is for educators and other adults to have a clearer understanding of the behaviors they should be identifying and preventing.<sup>169</sup> The list's primary purpose is to aid adults—it is not to be seen as an exhaustive list in the eyes of a court.<sup>170</sup> Because this distinction is important, a state should make its legislative intent clear and include language stating that the list is meant to aid schools, not serve as a legally exhaustive list of punishable behavior.

State anti-bullying laws should also state policy goals for school district plans.<sup>171</sup> The policy goals should be distinct from the purpose statement.<sup>172</sup> The purpose statement demonstrates the state's intent in implementing anti-bullying laws, whereas the policy goals should be guidelines for implementation in schools.<sup>173</sup> Ideally, district plans should focus on instituting proactive prevention plans and a formal method for reporting and investigating any alleged bullying incidents.<sup>174</sup> Delaware requires all schools design and employ some type of prevention plan.<sup>175</sup> The state also requires supervision of non-academic settings such as hallways, restrooms, and cafeterias.<sup>176</sup> The Massachusetts anti-bullying law requires the state to conduct research annually and publish best practices for all schools to consider.<sup>177</sup> These proactive measures could see great success if adopted statewide in Indiana.

One of the most proactive states is Colorado, where the state's anti-bullying law establishes grants for schools to pilot programs to discover new ways to combat bullying.<sup>178</sup> Any public school can apply for a grant and they are awarded

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167. *Id.*

168. *See id.*

169. *Key Components in State Anti-Bullying Laws, Policies and Regulations, supra* note 151.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. DEL. CODE ANN. tit. 14, § 4164 (2017).

176. *Id.*

177. MASS. GEN. LAWS ch. 71, § 37O (2014).

178. COLO. REV. STAT. § 22-93-102 (2011).

by Colorado's DOE based on the program presented.<sup>179</sup> By allowing and funding pilot programs, the state encourages schools to innovate and promote new activities designed to reduce bullying.<sup>180</sup>

While new, this program has already made an impact. In 2017, 34,423 students were impacted by the program's nearly \$2 million in annual grant money.<sup>181</sup> At Skinner Middle School in Denver, the school instituted a restorative justice program where students handle bullying grievances.<sup>182</sup> Students mediate problems and conduct role-playing activities with bullying students to teach empathy.<sup>183</sup> The results have been staggering: despite increased access to reporting mechanisms, bullying incidents dropped from 59 percent to 25 percent by the end of the first year.<sup>184</sup> Adam Collins, the Colorado DOE's bullying prevention grant coordinator, credits giving the schools choice and letting them pick the strategy that best suits them.<sup>185</sup> Skinner's success is not isolated; schools that received grant money found that, on average, in the year prior to receiving state money, 37 percent of their students had been bullied.<sup>186</sup> After receiving grant money, the average from those schools dropped to 19 percent in the first year of their experimental programs.<sup>187</sup>

While prevention of bullying is important, state anti-bullying laws should also include provisions for investigating and reporting bullying when it does occur.<sup>188</sup> The Massachusetts anti-bullying law makes the role of the investigator clear:

A member of a school staff . . . shall immediately report any instance of bullying or retaliation the staff member has witnessed or become aware of to the principal or to the school official identified in the plan as responsible for receiving such reports or both. Upon receipt of such a report, the school principal or a designee shall promptly conduct an investigation.<sup>189</sup>

By assigning the investigator role to the principal or pre-appointed school official, the Massachusetts anti-bullying law also demonstrates another theme of

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179. *Id.*

180. *See id.*

181. Monte Whaley, *Colorado Anti-Bullying Program, Fueled by Pot Tax Dollars, Considered One of the Best in the Country*, DENVER POST (Nov. 17, 2018), <https://www.denverpost.com/2018/11/17/colorado-anti-bullying-program-pot-dollars/> [<http://perma.cc/A88U-D9CW>].

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 151.

189. MASS. GEN. LAWS ch. 71, § 37O(g) (2014).

successful anti-bullying laws: expedient reporting.<sup>190</sup> Delaware requires all schools to report any bullying incident to the state within five days.<sup>191</sup> Virginia also requires all public schools to notify the parents of every student involved in a reported bullying incident within five days of any initial report.<sup>192</sup> Prompt investigations and reporting are essential to any effective anti-bullying program; instituting a specific time limit will help schools proactively prevent ongoing bullying.<sup>193</sup>

Finally, ensuring all faculty are properly trained is an integral part of identifying and preventing bullying.<sup>194</sup> In Massachusetts, the state mandates annual bullying training:

(e)(2) The faculty and staff at each school shall be trained annually on the plan applicable to the school. Relevant sections of the plan relating to the duties of faculty and staff shall be included in a school district or school employee handbook.<sup>195</sup>

Unlike some states, Massachusetts requires annual training for all faculty in the state, including those in charter schools and private schools.<sup>196</sup> In Massachusetts, “faculty and staff” includes all non-teachers who work in the building as well.<sup>197</sup> All building employees, not just teachers, are trained and encouraged to identify and report bullying observed on school premises.<sup>198</sup>

State anti-bullying laws should ensure the state is promoting best practices for educators to implement.<sup>199</sup> The Colorado DOE is required to promote best practices:

[T]he department shall create a page on its public website at which the department shall continuously make publicly available evidence-based best practices and other resources for educators and other professionals engaged in bullying prevention and education . . . . The department shall solicit evidence-based best practices and other resources from the school safety resource center . . . ; from school districts; from the state charter school institute . . . ; and from other state and federal agencies that are concerned with school bullying prevention and education.<sup>200</sup>

By accumulating data from federal agencies, other states, public and private

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190. *See id.*

191. DEL. CODE ANN. tit. 14, § 4164 (2017).

192. VA. CODE ANN. § 22.1-279.6 (2017).

193. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 151.

194. *Id.*

195. MASS. GEN. LAWS ch. 71, § 37O (2014).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 152.

200. COLO. REV. STAT. § 22-93-106 (2011).

Colorado schools, and their pilot programs; the Colorado DOE ensures it provides schools with up-to-date methods, studies, and data for anti-bullying programs and techniques.

*B. Model Legislation for Indiana*

Crafting effective model legislation to combat bullying is difficult.<sup>201</sup> Any anti-bullying law would be akin to legislating what many consider to be normal adolescent behavior. Ideally, the law will contain the essential elements recommended by HHS, and those elements will proactively prevent bullying in schools.<sup>202</sup> In addition, the law should set up thorough and mandatory procedures for reporting individual bullying incidents to schools and reporting school-wide data to the state to be used to determine areas for improvement and schools that are using successful techniques.<sup>203</sup>

Indiana's anti-bullying law should start with a clear purpose statement.<sup>204</sup> Indiana currently has no purpose statement in its anti-bullying law. Vermont's purpose statement provides an accurate and effective purpose statement Indiana can emulate and adopt.<sup>205</sup> The Vermont purpose statement states the goals of their anti-bullying laws and clearly shows the legislature's intent.<sup>206</sup> The only important element of the model purpose statement that Vermont's is missing is an emphasis on proactive prevention, and adding that component would make a model purpose statement for Indiana read as such:

It is the policy of the State of Indiana that all Indiana educational institutions provide safe, orderly, civil, and positive learning environments. Harassment, hazing, and bullying, both in-person and online, have no place, serve no educational purpose, and will not be tolerated in any Indiana schools. No Indiana student should feel threatened or be discriminated against while enrolled in an Indiana school. The state will encourage schools to adopt a consistent, proactive approach to prevent bullying in all forms.

This purpose statement is clear, concise, and properly conveys the General Assembly's intent for Indiana's anti-bullying laws.

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201. Izzy Kalman, *What We're Not Being Told About Anti-Bullying Laws*, PSYCHOL. TODAY (Feb. 11, 2016), <https://www.psychologytoday.com/us/blog/resilience-bullying/201602/what-we-re-not-being-told-about-anti-bullying-laws> [http://perma.cc/DAN3-N63Z].

202. *Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 152.

203. U.S. DEP'T OF HEALTH AND HUM. SERVS., *Respond to Bullying*, STOPBULLYING.GOV (Sept. 28, 2017), <https://www.stopbullying.gov/respond/on-the-spot/index.html> [http://perma.cc/N2JE-A89R] [hereinafter U.S. DEP'T OF HEALTH AND HUM. SERVS., *Respond to Bullying*].

204. *See Key Components in State Anti-Bullying Laws, Policies and Regulations*, *supra* note 151.

205. *See* VT. STAT. ANN. tit. 16, § 570 (2014).

206. *Id.*

The next important component of Indiana's model anti-bullying legislation is a clear definition with an emphasis on its use for bullying prevention policies. Indiana's bullying definition gives a good overview for bullying but lacks two key components: a non-exhaustive list of examples of bullying behavior and a separate definition for cyberbullying with its own non-exhaustive list of examples.<sup>207</sup> Listing examples of actions considered in-person bullying or cyberbullying will give educators notice of which behaviors to look for. Dr. Alana Vivolo-Kantor, who conducts bullying research for the CDC, has stated, "Consistent terminology with standardized definitions is necessary to improve public health surveillance of bullying and inform efforts to address bullying."<sup>208</sup>

Indiana's anti-bullying law should also contain separate definitions for in-person bullying and cyberbullying. According to Dr. Vivolo-Kantor, the lack of a uniform definition for the types of bullying hinders data collection and the ability to track data over time.<sup>209</sup> Dr. Vivolo-Kantor's research also indicates that identifying the different forms of bullying is an important first step in prevention.<sup>210</sup> Data collection and prevention are two primary goals of the law, so drafting separate definitions for the two different forms of bullying should help improve results. Creating a unique definition for cyberbullying also allows the General Assembly to address its First Amendment issues. Cyberbullying can be done at any time from any location, but it undoubtedly interferes with student performance and so should be addressed by school officials. Stating this in the cyberbullying definition will give school officials a clear mandate to combat cyberbullying, even when it does not fit within the parameters of traditional school bullying.

The third component of Indiana's model legislation should be standardized policies for all Indiana school's proactive anti-bullying policies, guidelines for reporting, and procedures for investigating. Indiana currently has mandatory anti-bullying curriculum as part of its anti-bullying laws.<sup>211</sup> Indiana requires "each public school [to] provide age appropriate, research based instruction" on bullying.<sup>212</sup> Indiana also requires every school to develop and implement an anti-bullying plan.<sup>213</sup> Schools must then provide training on their bullying prevention plan to all faculty and any volunteers with ongoing contact with students,<sup>214</sup> and they must provide faculty with further anti-bullying professional development opportunities.<sup>215</sup> The model law would make only one small change to Indiana's existing law: starting anti-bullying instruction in pre-K instead of grade 1.

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207. IND. CODE § 20-33-8-0.2 (2013).

208. Gail McCallion & Jody Feder, *Student Bullying: Overview of Research, Federal Initiatives, and Legal Issues*, CONG. RESEARCH SERV. R43254 1, 1 (2013).

209. *Id.*

210. *Id.*

211. IND. CODE § 20-30-5-5.5 (2013).

212. *Id.*

213. IND. CODE § 5-2-10.1-12(d)(1) (2017).

214. IND. CODE § 20-26-5-34.2 (2013).

215. IND. CODE § 5-2-10.1-12(b)(2) (2018).

Bullying can begin in classrooms with students as young as three to six years old.<sup>216</sup> Starting anti-bullying instruction earlier could prevent preschool students from assuming traditional bullying roles and reduce bullying as students transition to primary school.<sup>217</sup>

The lone external program the model legislation should adopt is creating a grant program similar to the one created in Colorado in order to encourage schools to pilot new and innovative anti-bullying programs.<sup>218</sup> The program would aim to reduce bullying rates like Colorado's grant program.<sup>219</sup> It would also financially reward districts based on the originality, innovativeness, and the likelihood of success of their pilot program. While the temptation may be to give grants to schools with the best anti-bullying statistics, this would only encourage schools to falsify data in lieu of implementing real change. Also, funding based on performance data can often lead to additional money being given to school districts in areas that are already well-off at the expense of poorer school districts as it has done with standardized testing and graduation rates.<sup>220</sup> Rewarding schools with grants based on the anti-bullying programs they wish to test, not on their current bullying rates, will also help the IDOE determine best practices to share with all schools.

Indiana's anti-bullying law should also lay out a system for reporting school data to the IDOE and procedures for students or teachers reporting individual bullying incidents to school administrators. Indiana already has a clear law regarding the school collection of bullying data; it mandates schools submit all required information by July 1 of each year and does not need to be changed for the purposes of this model law.<sup>221</sup> However, if the state were to adopt Delaware's policy, which requires schools to report any incident to the state within five days, it would likely increase the accuracy of the overall data sent to the state.<sup>222</sup> The five-day data may not be useful for drawing long-term conclusions, as some reported incidents may prove false after investigation, but the five-day data could help IDOE auditors ensure school compliance.<sup>223</sup>

Indiana currently only requires schools to have a procedure for reporting bullying incidents to administrators and a procedure for investigating reports, but the law should go further.<sup>224</sup> Specifically, the law should lay out guidelines for

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216. Marina Camodeca et al., *Bullying in Preschool: The Associations Between Participant Roles, Social Competence, and Social Preference*, WILEY ONLINE LIBRARY (May 28, 2014), <https://onlinelibrary.wiley.com/doi/full/10.1002/ab.21541>.

217. *See id.*

218. COLO. REV. STAT. § 22-93-102 (2011).

219. Whaley, *supra* note 181.

220. Chelsea Schneider and Stephanie Wang, *Teacher Bonus Pay Favors Wealthy Districts*, INDY STAR (Dec. 14, 2016), <https://www.indystar.com/story/news/education/2016/12/14/teacher-bonus-pay-favors-wealthy-districts/95422658/> [http://perma.cc/WN3X-YXQ9].

221. IND. CODE § 20-34-6-1(a)(8) (2018).

222. DEL. CODE ANN. tit. 14, § 4164 (2017).

223. IND. CODE § 20-34-6-2 (2019).

224. IND. CODE § 5-2-10.1-12(d)(2) (2017).

schools to craft both their incident reporting procedures and investigative methods.

Schools should be allowed to continue to develop their own specific reporting mechanisms; however, the state should add some requirements.<sup>225</sup> For both in-person bullying and cyberbullying, schools should ensure the identity of someone reporting an incident remains confidential so that students do not fear retaliation or further bullying.<sup>226</sup> Schools should also be required to create procedures for anonymous reporting. Students can be reluctant to report bullying incidents, therefore anonymous reporting should allow for more accurate reporting from bullied teenagers.<sup>227</sup> In the case of reported cyberbullying incidents, schools should preserve any evidence including emails, texts, or other electronic communications.<sup>228</sup> If the cyberbullying was done on a platform such as Facebook or Twitter, the school should notify that service as well.<sup>229</sup> Also, if a school receives a report of a threat of serious bodily harm, sexual abuse, or use of a weapon; it should be referred to the proper authorities immediately.<sup>230</sup> Other than these requirements, Indiana schools should be able to continue to develop their own incident reporting procedures.

Investigation will be a key element of reporting in an effective anti-bullying law, and a quick, targeted response sends an important message to students about bullying.<sup>231</sup> According to Sameer Hinduja, a professor at Florida Atlantic University, for bullying investigations to be most effective, they should “be specific to the type of bullying.”<sup>232</sup> Indiana’s anti-bullying law should adopt Massachusetts’s law requiring schools to mandate an administrator to oversee all bullying claims.<sup>233</sup> This will force schools to have an administrator who is accountable for the investigation of all bullying claims. The law should require the appointed administrator to contact the parents or guardians of every child involved in the report within five days, as Virginia law requires.<sup>234</sup> Currently,

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225. *Id.*

226. U.S. DEP’T OF HEALTH AND HUM. SERVS., *Set Policies & Rules*, STOPBULLYING.GOV (Sept. 28, 2017), <https://www.stopbullying.gov/prevention/at-school/rules/index.html#Establish%20a%20Reporting%20System> [http://perma.cc/FRU2-6MLW].

227. Amanda B. Nickerson, Dewey G. Cornell, J. David Smith, & Michael J. Furlong, *School Antibullying Efforts: Advice for Education Policymakers*, JOURNAL OF SCHOOL VIOLENCE, 12:3, at 270-71 (2013).

228. U.S. DEP’T OF HEALTH AND HUM. SERVS., *Report Cyberbullying*, STOPBULLYING.GOV (Feb. 8, 2018), <https://www.stopbullying.gov/cyberbullying/how-to-report/index.html> [http://perma.cc/JU6K-Y43G].

229. *Id.*

230. U.S. DEP’T OF HEALTH AND HUM. SERVS., *Respond to Bullying*, *supra* note 203.

231. *See id.*

232. *See* Jennifer O’Neill, *After Her Son Was Bullied, Mom Sues the School District*, YAHOO PARENTING (Apr. 21, 2015), <https://www.yahoo.com/news/after-her-son-was-bullied-mom-sues-the-school-117012252382.html> [http://perma.cc/D8H9-FGGR].

233. MASS. GEN. LAWS ch. 71, § 37O(g) (2014).

234. VA. CODE ANN. § 22.1-279.6(D) (2019).

Indiana requires school officials to work with parents, but those requirements are vague and do not set firm dates or requirements.<sup>235</sup> The five-day rule gets the adults involved early in the process, which should expedite the investigation. The model anti-bullying law should require schools to have standardized procedures for investigating bullying claims. Schools should be free to design their own procedures; however, the law should mandate that all questioning of students about a reported bullying incident be done one-on-one with the administrator, rather than in groups and never with both the victim and alleged bully both present, which could potentially hinder the investigation or subject the victim to additional bullying.<sup>236</sup>

The final element is a requirement that the IDOE actively use the data it accumulates annually, as well as outside research, to promote and recommend best practice and training. The IDOE is required to collect annual bullying reports and develop guidelines for bullying policies and bullying definitions.<sup>237</sup> The IDOE website makes available model bullying policies, model reporting procedures, and staff training specifically tailored for various employees including teachers, bus drivers, cafeteria workers, janitors, and other staff.<sup>238</sup> That requirement should remain, but an ideal anti-bullying law requires the IDOE do more to assist schools with bullying policies. Like the Massachusetts DOE, the IDOE should be required to conduct research on best practices for preventing bullying and to conduct research using the annual bullying data.<sup>239</sup> The IDOE would not have to endorse any policies or studies, but it would post studies showing successful anti-bullying policies so schools could see examples and choose one that best fits their school district. If the Colorado model grant program is adopted, the IDOE would be able to post the results of those pilot programs as well. The point of these studies is not to find a one-size-fits-all solution, but to present schools with the ability to look at as many studies as possible and find a successful policy from a similarly situated school.

### *C. Hold Schools Accountable for Bullying Prevention*

After crafting model anti-bullying legislation, the state should ensure it is implemented and enforced. Indiana does not allow bullying victims to use a school's non-compliance with anti-bullying laws as evidence in litigation, but courts have recently begun to hold schools responsible for not proactively combating or reporting bullying.<sup>240</sup> In *Meyers v. Cincinnati Board of Education*, the District Court allowed the plaintiff to move forward with a claim that the

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235. See IND. CODE § 20-26-5-32 (2018).

236. U.S. DEP'T OF HEALTH AND HUM. SERVS., *Respond to Bullying*, *supra* note 203.

237. IND. CODE §§ 5-2-10.1-12(d)(e) (2017), 20-34-6-1(a)(8) (2018).

238. *Bullying & Cyberbullying Prevention and Response*, IND. DEP'T OF EDUC. (June 1, 2018), <https://www.doe.in.gov/student-services/bullying-cyberbullying-prevention-and-response> [http://perma.cc/GNP9-VU3R].

239. MASS. GEN. LAWS ch. 71, § 37O(d)(4), (l) (2014).

240. IND. CODE § 20-33-8-13.5(d) (2018).



school was liable for not reporting bullying incidents and failing to properly train personnel.<sup>241</sup> In *Zeno v. Pine Plains Central School District*, the Second Circuit held that mere punishment for bullying behavior is not enough for a school to escape liability; rather, schools must have procedures in place to deal with bullying incidents and must administer *effective* punishment.<sup>242</sup> The emergence of cyberbullying has led some states to hold parents liable for cyberbullying done at the home, which could potentially lead to schools or faculty being held liable for cyberbullying done on the school's network or computers.<sup>243</sup>

Courts are holding schools accountable when they fail to properly address bullying. This should motivate the state to fix the implementation and enforcement problems it has experienced since passing the 2013 anti-bullying law.<sup>244</sup> By implementing and executing the model legislation, schools will immunize themselves against future claims. However, the General Assembly should go further and also eliminate the noncompliance language.<sup>245</sup> The state currently forbids a claim against a school for not complying with anti-bullying laws and does not allow non-compliance to be admitted as evidence against a school.<sup>246</sup> But if courts continue to hold schools accountable, this clause may provide insufficient protection, especially in cases like *Meyer* where the plaintiff claims that defendant's actions "shock the conscience."<sup>247</sup> The best option for the state and schools is full implementation and enforcement of legislation that eliminates liability and provides effective definitions, procedures, training, and data collection.

The threat of legal action will motivate schools to implement anti-bullying policies, but it may not incentivize accurate reporting to the IDOE. Because reporting is a key element of the law,<sup>248</sup> the state has an interest in accurate annual data reporting.<sup>249</sup> Granting the IDOE auditing power is a positive first step if the IDOE uses the power to ensure accurate reporting.<sup>250</sup> The General Assembly should expand the IDOE's auditing power by adopting Delaware's plan, which allows the Delaware DOE to conduct random audits of schools and reward schools with exemplary reporting programs.<sup>251</sup> The Indiana anti-bullying law should specify that schools will be rewarded for the accuracy of their reporting as judged by the audit, not for their state-mandated bullying statistics. This gives

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241. *Meyers v. Cincinnati Bd. of Educ.*, 343 F. Supp. 3d 714, 728–29 (S.D. Ohio 2018).

242. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669–671 (2d Cir. 2012).

243. Ashley Folk, *Parental Responsibility for Juvenile Crime*, LEGAL MATCH (July 16, 2018), <https://www.legalmatch.com/law-library/article/parental-responsibility-for-juvenile-crime.html> [http://perma.cc/7YNA-4YPN].

244. See Kenney, *Indiana Schools Misreporting*, *supra* note 92.

245. IND. CODE § 20-33-8-13.5(d) (2018).

246. *Id.*

247. *Meyers v. Cincinnati Bd. of Educ.*, 343 F. Supp. 3d 714, 723 (S.D. Ohio 2018).

248. Weddle, *supra* note 90.

249. See Kenney, *Indiana Schools Misreporting*, *supra* note 92.

250. Fitzgerald, *supra* note 96.

251. DEL. CODE ANN. tit. 14, § 4164(d)(3)–(4) (2017).

schools a financial incentive to properly report data to the state without incentivizing false reporting or unfairly favoring school districts with pre-existing financial advantages. There is no need to financially punish schools if auditors find discrepancies, but the IDOE should continue posting discrepancies on their website to hold schools publicly accountable.<sup>252</sup>

The final thing Indiana should consider is applying its anti-bullying laws to private and charter schools. Since 2013, private and charter schools have been able to avoid anti-bullying laws; however, Representative Porter wants to change that if a legislative solution can be reached.<sup>253</sup> The model legislation includes proposals that involve rewarding schools with state funds, a clear violation of the Indiana Constitution for schools that are religious institutions.<sup>254</sup> But the state has a strong interest in ensuring students attend schools with an effective anti-bullying plan, and the statewide data gathering would be strengthened by including the over 1,200 private schools currently operating in Indiana.<sup>255</sup>

There are two possible solutions the state could employ. The first solution would require adoption of the anti-bullying laws as a condition for accreditation.<sup>256</sup> It would force most private schools in the state to adopt the anti-bullying laws, but this approach would fail to address the constitutional issue of state funds going to a religious institution. The second solution is to make adoption of Indiana's anti-bullying laws a condition for nonpublic schools to be defined as a "participating school" in Indiana's voucher program.<sup>257</sup> This approach may not be as effective because the voucher program is voluntary for schools.<sup>258</sup> But the state would circumvent the constitutional issue of providing state funds to religious institutions because the vouchers legally come from the family of the students, not the state.<sup>259</sup> A straightforward solution that pleases everyone is unlikely, but if the goal of anti-bullying laws is to protect all Indiana students and gather data for the entire state, then private and charter schools must take part.

#### CONCLUSION

Since its inception in 2013, Indiana's anti-bullying law has been plagued by ineffective implementation and enforcement. Indiana's 2018 anti-bullying law begins to correct some of those problems but does not go far enough in either strengthening anti-bullying policies or forcing schools to comply with the law.

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252. IND. CODE § 20-34-6-2 (2019).

253. Kenney, *Governor Holcomb Signs*, *supra* note 102.

254. IND. CONST. art. 1, § 6 ("No money shall be drawn from the treasury, for the benefit of any religious or theological institution.")

255. *See generally Nonpublic Schools*, IND. DEP'T OF EDUC. (last updated Dec. 20, 2018) <https://www.doe.in.gov/accountability/nonpublic-schools> [<http://perma.cc/PFC6-C75S>].

256. *Contra* 511 IND. ADMIN CODE 6.1-1-4 (2020).

257. *Contra* IND. CODE § 20-51-1-6 (2017).

258. *Meredith v. Pence*, 984 N.E.2d 1213, 1220 (Ind. 2013).

259. *Id.* at 1228-29.

By examining states that have been successful in combating bullying—states like Delaware, Vermont, Colorado, and Virginia—Indiana can craft model legislation that will give its schools clear and effective definitions and procedures to implement statewide. These procedures will proactively work to prevent bullying in schools. When bullying does happen, schools will have effective methods for reporting and investigation. The state can then take steps to implement and enforce the law in every school. This would give all schools legal protection and ensure every student in Indiana attends a school that proactively works to prevent the next Roman Kellough from taking his own life.