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Pitting Our Youth Against Each Other: Moving School Harassment and Bullying Policy from a Zero Tolerance Discipline to Safe School Environment Framework

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Pitting Our Youth Against Each Other: Moving School Harassment and Bullying Policy from a Zero Tolerance Discipline to Safe School Environment Framework

Khin Mai Aung*

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INTRODUCTION

In a 2004 study of over 1300 California sixth graders, Asian Americans were found to be the most frequently victimized, regardless of the school's ethnic composition.¹ A broader 2012 study by the National Center for Education

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1. See Michele Mouttapa et al., *Social Network Predictors of Bullying and Victimization*, 39 *ADOLESCENCE* 315, 321, 329 (2004) (discussing a survey of more than 1300 sixth graders in California schools with predominantly Latino or Asian American students; the survey found that Asian Americans were the most frequently victimized ethnic group regardless of a school's racial composition); Jin Y. Shin et al., *Bullying and Discrimination Experiences Among Korean-American Adolescents*,

Statistics found that nearly the same percentage of Asian American students (31%) reported seeing hate-related graffiti targeting their race as African American students (29%) and Hispanic students (32%).² Furthermore, seventeen percent of participants in a longitudinal study of almost 750 Asian American middle and high school students had reported being violently victimized at least once in the previous year.³

As the director of the Asian American Legal Defense and Education Fund's (AALDEF) Educational Equity Program, I find such information alarming, but not at all surprising. We advocate on a broad range of issues on behalf of students of Asian descent in kindergarten through twelfth grade public schools and higher education, with a particular focus on those from immigrant or lower income backgrounds. Anti-Asian harassment, anti-immigrant harassment, and post-9/11 targeting of South Asian and Muslim students, are all too regularly a part of our client intake stream and policy advocacy docket. At our community education presentations for Asian American and Pacific Islander youth groups across the country, students have reported that school staff often turn a blind eye to harassment and bullying, which only allows the problem to fester and escalate.

Through this work, I have seen how conditions deteriorate when schools and districts fail to appropriately address "minor" bias-based incidents and prevent their recurrence. After years of escalating violence against immigrant Asian students at Lafayette High School in Brooklyn, New York, the United States Department of Justice intervened in 2004 by filing suit claiming a denial of those students' equal protection rights. This resulted in a three-year consent decree defining and prohibiting bias-based harassment, and mandating that the school and district, among other things, implement a clear postincident investigation and reporting system.⁴ Four years later, AALDEF and allies successfully lobbied the New York City Department of Education to issue Chancellor's Regulation A-832, discussed later in this Article, which defines bias-based harassment and sets forth investigation protocols.⁵ If well implemented and enforced, the presence of such a regulation before the Lafayette attacks might well have rendered the consent decree unnecessary.

Six years after the Lafayette lawsuit in 2010, the Department of Justice sued

34 J. ADOLESCENCE 873, 876 (2011) (stating that, among Korean American high school students in New York and New Jersey, 29.2% reported being bullied).

2. SIMONE ROBERS ET AL., NAT'L CTR. FOR EDUC. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, at 41 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs11.pdf>.

3. Cara S. Maffini et al., *The Potential Impact of Violent Victimization on Somatic Symptoms Among Asian American Adolescents: A National Longitudinal Study*, 2 ASIAN AM. J. PSYCHOL. 157, 160, 162 (2011).

4. Consent Decree at 18–23, 25–26, *United States v. N.Y.C.*, No. CV-04-2248 (E.D.N.Y. June 29, 2004).

5. N.Y.C. DEP'T OF EDUC., REGULATIONS OF THE CHANCELLOR A-832 (2008), http://rems.ed.gov/docs/repository/rems_000056_0002.pdf.

and entered into another consent decree for a strikingly similar pattern of escalating violence against immigrant Asian students at South Philadelphia High School in Pennsylvania.⁶ The Philadelphia School District does have antibullying and antiharassment policies, but unfortunately they fell short. One policy defines and prohibits “harassment” alone, defining that term consistently with federal law on unlawful harassment.⁷ A separate policy defines and prohibits “bullying” alone, but lumps “racial slurs” as well as “harassment” into a single category of “verbal” bullying, along with nonbias offenses like “name-calling, teasing, taunting, . . . gossiping, [and] spreading rumors.”⁸ Philadelphia’s bullying policy does set forth a skeletal procedure for reporting and investigating bullying. However, it defines bullying as “carried out repeatedly over time,” which by definition excludes single incidents regardless of severity.⁹ Therefore, Philadelphia’s bullying policy presumably only requires reporting and investigation of those incidents known to be part of a pattern of “aggressive behavior or intentional harm doing [sic].”¹⁰

Furthermore, while all forms of verbal bullying must be taken seriously, Philadelphia’s definition ignores particular harms to the school community caused by bias-related bullying such as racial slurs. By ignoring the distinction between bias-based and non-bias-based bullying, the policy fails to give school and district staff proper guidance on how to prevent minor bias-based incidents from escalating into full-scale harassment. Finally, while it is helpful that Philadelphia’s policies do acknowledge the difference between bullying and harassment, the inclusion of the entire category of “harassment” as an example of a certain type of bullying (specifically, “verbal bullying”) is confusing and circular.

Fortunately, school harassment and bullying prevention efforts are gaining momentum. The United States Department of Education has launched the educational website [StopBullying.gov](http://www.stopbullying.gov)¹¹ and hosts annual Federal Partners in Bullying Prevention Summits,¹² while state and local legislatures and departments of education have increasingly passed laws and policies specifically addressing

6. Settlement Agreement at 9–25, *United States v. Sch. Dist. of Phila.*, No. 2:10-CV-07301-SD (E.D. Pa. Dec. 15, 2010).

7. SCH. DIST. OF PHILA., UNLAWFUL HARASSMENT (2010), *available at* <http://www.phila.k12.pa.us/offices/administration/policies/248.pdf>; *see infra* notes 28–32.

8. SCH. DIST. OF PHILADELPHIA, BULLYING/CYBERBULLYING 2 (2010), <http://www.phila.k12.pa.us/offices/administration/policies/249.pdf>.

9. *Id.* at 1.

10. *Id.*

11. STOPBULLYING, <http://www.stopbullying.gov> (last visited Oct. 15, 2012).

12. Press Release, U.S. Dep’t of Educ., Federal Partners Celebrate Anti-Bullying Efforts and Pledge to Continue Work at Second Annual Bullying Prevention Summit (Sept. 21, 2011), <http://www.ed.gov/news/press-releases/federal-partners-celebrate-anti-bullying-efforts-and-pledge-continue-work-second>.

school harassment and bullying.¹³ These efforts are commendable and helpful, but more work is necessary on the specific issue of bias-based harassment.

While definitions are not always consistent in laws and policies across jurisdictions, in general “bullying” is a broad term encompassing a range of “aggressive behavior that involves an imbalance of power and that purposefully inflicts harm on the bullying victim.”¹⁴ “Harassment,” by contrast, is generally considered a subset of bullying “motivated by characteristics of the targeted victim.”¹⁵ In addition, harassment is generally considered a form of unlawful discrimination that violates federal civil rights laws.¹⁶ Unfortunately, the two concepts are frequently conflated and sometimes used interchangeably in state and local legislation, school policies, and bullying prevention efforts.¹⁷ The confusion of these distinct concepts has obscured the need for responses specifically tailored to incidents of harassment.

Because harassment is motivated by an element of the victim’s identity (such as, but not limited to, race, ethnicity, immigrant status, religion, sexual orientation, and expression)¹⁸ it has a particular impact on the school community distinct from incidents of general bullying. For example, it has an impact on students and teachers other than the individual victim (especially, but not limited to, those who share the targeted identity characteristic),¹⁹ it can harm overall intergroup relations,²⁰ and it can perpetuate negative stereotypes.²¹ In our experience at both Lafayette and South Philadelphia, rampant anti-Asian harassment prior to Department of Justice intervention had a toxic effect on the school environment.

13. U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 16 (2011), <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>.

14. *Id.* at 1.

15. *Id.* at 17; see also Michael B. Greene & Randy Ross, *The Nature, Scope, and Utility of Formal Laws and Regulations that Prohibit School-Based Bullying and Harassment*, 2005 PERSISTENTLY SAFE SCHOOLS 92, 93, <http://gwired.gwu.edu/hamfish/merlin-cgi/p/downloadfile/d/16896/n/off/other/1/name/greeneandross5237paperpdf>.

16. U.S. DEP’T OF EDUC., *supra* note 13, at 17. However, in the author’s opinion, a broad definition of harassment should also encompass bias-based acts of bullying motivated by the victim’s personal characteristics that do not rise to the level of actionable discrimination under current laws.

17. *Id.* at 18.

18. Different state and local antiharassment laws and policies vary in scope of coverage, but may include personal characteristics such as these. *Id.* at xiii, 28.

19. See ELIZABETH J. MEYER, *Gender and Sexual Diversity in Schools*, in 10 EXPLORATIONS OF EDUCATIONAL PURPOSE 101, 102, 115 (Joe Kincheloe et al. eds., 2010) (discussing the physical and emotional tolls that hostile environments caused by bias-based bullying and harassment can have on individuals).

20. See Gianluca Gini, *Who Is Blameworthy?: Social Identity and Inter-Group Bullying*, 28 SCH. PSYCHOL. INT’L 77, 83–85 (2007) (finding that perception of a physical bullying incident made intergroup biases more entrenched).

21. See Belle Liang et al., *Chinese American Middle School Youths’ Experiences of Discrimination and Stereotyping*, 4 QUALITATIVE RES. PSYCHOL. 187, 190, 196 (2007) (describing the way teasing and exclusion from peers and peer stereotypes of Asian Americans as socially awkward and deficient in communication skills may challenge Asian American teens’ sense of belonging and competence).

Immigrant Asian students often feared for their safety, even if they were never personally harassed. Some informed us that students and staff alike throughout the school community were so desensitized that they began to regard ongoing harassment as “normal.” Students harbored negative or one-dimensional stereotypes of other races. When an alum of our Lafayette Asian American student group returned for a visit, bringing along an African American college classmate, one member was stunned that the African American college student was troubled by anti-Asian harassment at Lafayette and supported our work. Lacking African American friends himself and having witnessed harassment of Asian peers by certain students who were African American, this was apparently his first positive interaction with an African American person.

Incidents of harassment may also require tailored responses depending on the victim’s status. Based on our work at Lafayette and South Philadelphia, and on other cases of individual harassment, victims of anti-immigrant harassment may require interpretation and translation assistance if they have limited English proficiency. We have also found that victims who are undocumented may be afraid to report an incident for fear of immigration consequences. Victims of harassment on account of sexual orientation or expression may also require particular sensitivity, especially if they are not out as lesbian, gay, bisexual, transgender, or queer (LGBTQ) to their families or the school community.

Such implications and consequences of harassment must be addressed specifically in harassment and bullying laws, policies, and prevention efforts. With laws that clearly define “bullying” and “harassment” and spell out prevention and response protocols, schools and districts will be better equipped to address incidents of each. Furthermore, if laws spell out which personal characteristics can be the basis of harassment, school officials can identify and appropriately address initial, minor incidents where individuals are targeted on account of these characteristics. By so doing, they can prevent escalation into legally actionable harassment, as well as address the specific harms described above which stem from bias-based targeting. Among other things, this could include holistic, community-building approaches that can repair the broader harm caused by bias-based targeting and harassment, as well as the provision of specialized follow-up services to victims.

More broadly, our current school harassment and bullying laws must move away from a focus on zero tolerance discipline and move toward community building to create a safe and supportive school environment. Only by so doing will schools and districts be able to truly address and effectively prevent both bullying and harassment.

I. STATE OF THE LAW—SCHOOL HARASSMENT
AND BULLYING PREVENTION POLICIES

This Part will provide a rough overview of existing federal, state, and local laws and policies addressing school harassment and bullying. This will be done with an eye to pinpointing trends and gaps in the current legal framework to determine how bias-based harassment investigation and prevention, as well as community building efforts, can be reformed, improved, and expanded.

A. Federal Law

Currently, there is no federal legislation generally defining and addressing school harassment and bullying. However, various civil rights statutes such as Title VI of the Civil Rights Act of 1964,²² Title IX of the Education Amendments of 1972,²³ Title II of the Americans with Disabilities Act of 1990,²⁴ and Section 504 of the Rehabilitation Act of 1973²⁵ address discrimination by federally funded agencies on account of various characteristics such as race, color, national origin, sex, or disability. These federal laws and related jurisprudence define harassment narrowly as a form of discrimination that violates these and other civil rights statutes.²⁶

Specific federal antibullying legislation concerning public education, named the Safe School Improvement Act, was proposed in 2011 but to date has not passed.²⁷

1. Federal Antiharassment Laws

Title VI of the Civil Rights Act of 1964 prohibits discrimination by federally funded agencies on the basis of race, color, or national origin.²⁸ In the context of public schools, an incident rises to the level of actionable harassment (which constitutes a form of discrimination) when the school knows of and “condones, tolerates or allows” a “hostile environment.”²⁹ According to the United States

22. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

23. Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

24. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2006).

25. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012).

26. 20 U.S.C. § 1681 (2012); 29 U.S.C. § 794 (2012); 42 U.S.C. § 2000d (2006); 42 U.S.C. § 12132 (2006); U.S. DEP'T OF EDUC., *supra* note 13, at 17.

27. Safe Schools Improvement Act of 2011, H.R. 1648, 112th Cong. (1st Sess. 2011).

28. 42 U.S.C. § 2000d (2006). Also, although Title VI does not directly cover religion per se, religious harassment may be based on shared ancestry of ethnic characteristics, which are covered. Furthermore, the United States Department of Justice has direct jurisdiction over religion under Title IV of the Civil Rights Act of 1964. *Federal Laws, STOPBULLYING* <http://www.stopbullying.gov/laws/federal> (last visited Nov. 19, 2012).

29. Office of Civil Rights, *Frequently Asked Questions About Racial Harassment*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/ocr/qa-raceharass.html> (last visited Oct. 22, 2012); see also *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994) (stating that a violation of Title VI may be

Department of Education Office for Civil Rights website, a hostile environment “may be created by oral, written, graphic or physical conduct related to an individual’s race, color or national origin that is sufficiently severe, persistent or pervasive so as to interfere with or limit the ability of an individual to participate in or benefit from” the school’s programs and activities.³⁰

Similarly, Title IX of the Education Amendments of 1972 prohibits discrimination by education programs and activities on the basis of sex.³¹ According to the United States Department of Education Office for Civil Rights website, “[s]exual harassment can take two forms: quid pro quo and hostile environment.”³² “Quid pro quo” sexual harassment occurs when a school employee causes a student to believe he or she must submit to unwelcome sexual conduct in order to participate in a school program or activity.³³ It also occurs when a school employee causes a student to believe that an educational decision will hinge on the student’s submission to unwelcome sexual conduct.³⁴ “Hostile environment” harassment occurs when unwelcome sexual conduct (by any party or group of parties—not just school employees) is so “severe, persistent, or pervasive that it affects a student’s ability to participate in or benefit from an education program or activity, or creates an intimidating, threatening or abusive educational environment.”³⁵

Finally, Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 prohibit discrimination by covered educational entities on the basis of disability. The United States Department of Education Office for Civil Rights website states that disability harassment under Title II or Section 504 consists of “intimidation or abusive behavior” toward a student based on disability that is “sufficiently severe, persistent, or pervasive” as to create “a hostile environment by interfering with or denying a student’s

found if a recipient of federal financial assistance has created or is responsible for a racially hostile environment).

30. Office of Civil Rights, *supra* note 29.

31. 20 U.S.C. § 1681 (2012).

32. Office of Civil Rights, *Frequently Asked Questions About Sexual Harassment*, U.S. DEP’T EDUC., <http://www2.ed.gov/about/offices/list/ocr/qa-sexharass.html> (last visited Oct. 22, 2012); *see also* Klemencic v. Ohio State Univ., 263 F.3d 504, 510 (6th Cir. 2001) (stating that in order to establish a claim of sexual harassment a plaintiff must establish she was subjected to either quid pro quo sexual harassment or a sexually hostile environment).

33. Office of Civil Rights, *supra* note 32; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998) (finding that a school could be liable for the sexual harassment of a student under Title IX only with a showing of actual notice and deliberate indifference).

34. Office of Civil Rights, *supra* note 32.

35. *Id.*; *see also* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (concluding that an action lies “for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 258 (6th Cir. 2000) (citing the Supreme Court’s rule on severe, pervasive, and objectively offensive harassment).

participation in or receipt of benefits, services, or opportunities” at the covered entity.³⁶

2. Proposed Legislation—Safe School Improvement Act

The Safe School Improvement Act, last introduced in 2011, would create consistent definitions of the terms “harassment” and “bullying.” It would also require schools and districts receiving federal funding to take particular measures to address bullying and harassment. Among other things, it would mandate the prohibition of targeting based on a student’s actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity, or religion.³⁷ These measures would include implementation and public notice of antiharassment and antibullying provisions within school discipline policies, and the creation and public notice of procedures and timelines to investigate complaints of harassment and bullying.³⁸ The Safe Schools Improvement Act would further require states to conduct needs assessments on bullying prevention efforts and provide technical assistance to school districts on such efforts, as well as mandate the reporting of data on harassment and bullying incidents to both the public and the United States Department of Education.³⁹

Passage of the Safe Schools Improvement Act would significantly extend the reach of existing federal law on harassment. As described above, current federal law prohibits harassment on account of covered characteristics that rise to the level of actionable discrimination. Depending on the statute, such conduct must either be significant enough to create a hostile environment or constitute quid pro quo harassment—attempting to force a student to submit to unwelcome sexual conduct.⁴⁰ These statutes already impose a duty on covered educational entities to prevent, curb, and address such harassment.⁴¹ However, the Safe Schools Improvement Act would further clarify what those efforts require and provide much needed uniformity in the definitions of “harassment” and “bullying,” as well

36. *Prohibited Disability Harassment*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> and related links (last visited Oct. 22, 2012); see also *Fox v. General Motors Corp.*, 247 F.3d 169, 176 (4th Cir. 2001) (concluding that the Americans with Disabilities Act creates a cause of action for hostile work environment harassment).

37. Safe Schools Improvement Act of 2011, H.R. 1648, 112th Cong. (1st Sess. 2011).

38. *Id.*

39. *Id.*

40. 20 U.S.C. § 1681 (2012); 29 U.S.C. § 794 (2012); 42 U.S.C. § 2000d (2006); 42 U.S.C. § 12132 (2006).

41. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994); see, e.g., *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 933 (10th Cir. 2003) (holding that when school administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable under Title VI). See generally *Race and National Origin Discrimination: Overview of the Law*, U.S. DEP’T EDUC., <http://www2.ed.gov/policy/rights/guid/ocr/raceoverview.html> (last visited Oct. 22, 2012) (outlining Title VI regulations).

as enumerate a minimum list of personal characteristics covered by the definition of bias-based harassment.⁴² It would also specify schools', districts', and states' obligations to conduct postincident investigations and support prevention efforts.

B. State and Local Laws and Policies on School Bullying and Harassment

State and local laws addressing school bullying and harassment have grown exponentially over the past fifteen years. In the decade between 1999 and 2010, over 120 separate state bills were enacted to introduce or revise antibullying provisions in education or criminal codes.⁴³ Twenty-one bills were passed in 2010 alone.⁴⁴ This section will provide an overview of common elements, inconsistencies, and emerging trends across those laws, as well as provide a detailed example by delving into the framework of school harassment law and policy in New York State and City.

1. National Trends Across Jurisdictions

State and local harassment and bullying policies have generally been enacted as state legislation, local district regulations, or nonmandatory state-level model policies.⁴⁵ While these laws and policies vary widely in scope and coverage, some common components include a statement of scope and prohibited behavior, enumeration of protected characteristics to define bias-based harassment, a directive to create and implement local school district policies and required components thereof, provisions for notifying the school community (parents, students, and staff) of the policy, a training and prevention component, a provision for monitoring and reporting incidents, and a statement of the victims' right to seek legal redress where appropriate.⁴⁶

One notable trend in antiharassment and bullying laws has been increasing expansion of the role played by law enforcement in regulating school harassment and bullying, which traditionally has been done by school personnel. Relatedly, some antiharassment provisions have been incorporated into juvenile and criminal justice statutes, instead of education codes.⁴⁷ This is consistent with a broader general trend toward increasingly punitive "zero tolerance" school disciplinary policies,⁴⁸ broadly defined as "policies that mandate predetermined and typically

42. Safe Schools Improvement Act of 2011, H.R. 1648, 112th Cong. (1st Sess. 2011).

43. U.S. DEP'T OF EDUC., *supra* note 13, at 16.

44. *Id.*

45. *Id.* at x.

46. *Id.* at 6.

47. *Id.* at 19–20.

48. See MICHAEL D. SUMNER ET AL., SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND 7 (2010), http://www.law.berkeley.edu/files/11-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf; see also ADVANCEMENT PROJECT, *Test, Punish, and Push Out: How "Zero*

harsh consequences or punishments (such as suspension and expulsion) for a wide variety of and broadly defined school rule violations.⁴⁹ This trend has also been accompanied by the relative lack of provisions addressing rehabilitative measures such as mental health referrals for perpetrators (or, for that matter, victims) of harassment and bullying.⁵⁰

Two major inconsistencies across harassment and bullying laws are also worth noting. One concerns the conflation of bias-based harassment with more general bullying, as discussed in the Introduction. According to an analysis by the United States Department of Education in 2011, seventeen state laws use the two terms synonymously and interchangeably (along with a third term, “intimidation”), while fourteen refer exclusively to “bullying” and two prohibit “harassment” without mentioning bullying at all.⁵¹ Nine laws use both terms but define them differently.⁵² These inconsistencies led the Department of Education to conclude that there is “a high degree of legislative and policy diversity in how bullying behavior is defined across states and school districts, and how definitions of prohibited conduct are applied within their school settings. They also reflect a lexicon that has not yet reached consensus on the use of specific terms.”⁵³ This has various implications in practice, including confusion regarding schools’ responsibility to respond to various claims of harassment and/or bullying,⁵⁴ and concerns regarding the appropriateness of enumerating various personal characteristics for protection from bias-based harassment.

Whether or not to enumerate specific personal characteristics such as race, gender, disability, sexual orientation, or religion for protection from bias-based harassment is another major area of contention in our current harassment and bullying jurisprudence.⁵⁵ Overall, only seventeen out of over forty current state harassment and bullying laws specifically enumerate personal characteristics for which antiharassment protection is extended.⁵⁶ The legislative history of various school harassment and bullying prevention laws and policies reveals significant debate over whether to enumerate characteristics, and if so, which characteristics

Tolerance” and High-Stakes Testing Funnel Youth into the School-to-Prison Pipeline, ADVANCEMENT PROJECT 9–12 (Mar. 2010), http://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf.

49. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 301 (2005); see also PHILLIP KAUFMAN ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY, 1998, at 121 (1998) (defining zero tolerance policy as one that “mandates predetermined consequences or punishments for specific offenses”).

50. U.S. DEP’T OF EDUC., *supra* note 13, at 39.

51. *Id.* at 18.

52. *Id.*

53. *Id.*

54. *Id.* at 17.

55. *Id.* at 27–29.

56. *Id.* at 27.

to include.⁵⁷ While advocates for enumeration argue that it creates “a clear directive [to school officials to protect those populations most vulnerable to harassment],” others argue that bullying “should be defined solely based on behavior and not on the characteristics of [those targeted].”⁵⁸ Arguably, one reason for this controversy is the underlying conflation of bias-based harassment and general bullying in current jurisprudence.

2. Example—New York City and State

In 2010, the New York State legislature passed into law the Dignity for All Students Act (Dignity Act), which took effect on July 1, 2012.⁵⁹ Like the federal civil rights statutes discussed above, the Dignity Act defines harassing activity in terms of creating “a hostile environment,”⁶⁰ but broadens the protected characteristics to cover “actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.”⁶¹ It also explicitly covers acts of discrimination or harassment by school staff.⁶²

Further, the Dignity Act requires local school districts to develop and implement antiharassment policies, as well as to develop guidelines on school training programs to combat discrimination and harassment by raising staff awareness and by providing a framework for responding to incidents.⁶³ Finally, it requires the State Board of Education to create procedures for annual reporting regarding incidents of discrimination and harassment,⁶⁴ as well as to act as a resource for school districts on model policies concerning discrimination and harassment.⁶⁵

In New York City, the Dignity Act is supplemented by Regulation of the Chancellor A-832, which was created in 2008.⁶⁶ Chancellor’s Regulation A-832 explicitly states the New York City Department of Education’s prohibition of bias-based student-on-student harassment, defines protected characteristics, provides instructions for students to report incidents of harassment, sets forth procedures and a timeline for investigating and following up on such incidents,

57. *Id.* at 29.

58. *Id.*

59. *The Dignity Act*, NYSED, <http://www.p12.nysed.gov/dignityact> (last visited Oct. 29, 2012).

60. Dignity for All Students Act, N.Y. EDUC. LAW art. 2, § 11 (2012), <http://public.leginfo.state.ny.us/lawsseaf.cgi?querytype=laws+&querydata=@sledn0t1a2+&list>.

61. *Id.*

62. *Id.* § 12.

63. *Id.* § 13.

64. *Id.* § 15.

65. *Id.* § 14.

66. N.Y.C. DEP’T OF EDUC., *supra* note 5.

and creates obligations for notification and training of students, parents, and staff about the regulation and underlying policies.⁶⁷

Chancellor's Regulation A-832 overlaps largely with and essentially implements the Dignity Act, but also differs in some respects. Overall, the Dignity Act is more expansive than the regulation in two crucial ways. First, it covers harassment perpetrated by both students and staff, while the regulation only addresses student-on-student harassment.⁶⁸ Second, the Dignity Act mandates reporting of "material incidents" of harassment to the State Education Department, while the Chancellor's Regulation lacks a public reporting component.⁶⁹ However, unlike the Dignity Act, Chancellor's Regulation A-832 includes "citizenship/immigration status" as a protected characteristic within its scope.⁷⁰

II. MOVING FORWARD—CRITIQUES AND RECOMMENDATIONS

Recent years have clearly seen great leaps forward in our harassment and bullying prevention jurisprudence. However, as many of these laws are still new and developing, we have a long way to go in establishing a coherent and cohesive body of law. The concerns and recommendations outlined below relate to a fundamental confusion of terminology, leading both to controversy and debate over inclusion of certain terms and requirements, as well as a paucity of policies relating specifically to addressing specific harms of bias-based harassment.

A. *The Limits of Current Jurisprudence*

As discussed above, the very definitions of basic terms like "harassment" and "bullying" are not consistent across and sometimes even within jurisdictions.⁷¹ These inconsistencies must be resolved in order for legal practitioners and school officials to have clarity of communication, and to know how to categorize particular incidents for follow up investigation, action, and reporting.⁷² Furthermore, the confusion of general bullying with bias-based harassment has also unnecessarily fostered a debate over appropriateness of enumerating specific

67. *Id.*

68. EDUC. § 12; N.Y.C. DEP'T OF EDUC., *supra* note 5, at I.A; THE SIKH COAL. ET AL., BULLYING IN NEW YORK CITY SCHOOLS: EDUCATORS SPEAK OUT 11 (2010).

69. EDUC. § 15; N.Y.C. DEP'T OF EDUC., *supra* note 5, at II; THE SIKH COAL. ET AL., *supra* note 68, at 12.

70. EDUC. § 12; N.Y.C. DEP'T OF EDUC., *supra* note 5, at I.A; THE SIKH COAL. ET AL., *supra* note 68, at 13. Another difference between the two laws is that while both cover harassment on account of gender identity and expression, Chancellor's Regulation explicitly names "gender identity" and "gender expression" as protected characteristics, while the Dignity Act incorporates identity and expression into the very definition of gender. THE SIKH COAL. ET AL., *supra* note 68, at 15 n.22.

71. *See* U.S. DEP'T OF EDUC., *supra* note 13, at 18 (discussing diversity in definitions across states and school districts).

72. *See id.* at 17–18 (noting how varying definitions may lead to confusion in determining proper responses).

personal characteristics for protection.⁷³ Arguments against enumerating characteristics because all students should enjoy equal protection from bullying or that the response to bullying should be based solely on behavior—not the victim’s traits—altogether miss the mark that bias-based harassment is inherently and intrinsically linked to the victim’s status. In contrast to general bullying, harassment must be defined in terms of an enumerated protected characteristic for which the victim is targeted.

A clear and coherent antibullying and antiharassment law, which defines the two terms and enumerates personal characteristics covered by harassment, would greatly help schools and districts fashion appropriate, consistent responses to both. Such a law could also help prevent the escalation of minor incidents into full-scale harassment. School officials would be able to identify minor incidents where students are targeted on account of enumerated characteristics and direct attention to prevent their escalation. Furthermore, school officials would also be able to fashion specific responses to prevent harms caused by bias-based harassment to students other than those directly targeted and to the entire school community. Among other things, they would be better aware of the potential impact on classmates who share an enumerated personal trait targeted in a bias incident, as well as the potential for harming overall intergroup relations and perpetuating stereotypes. One possible response would be to implement a multicultural studies or tolerance-building curriculum in order to head off any deterioration in school climate.

An overall trend toward punitive, zero tolerance discipline measures is also reflected in harassment and bullying laws, with the effect of leaving out positive behavioral supports or other more rehabilitative or community-building measures. Research has established a myriad of benefits that flow from nonpunitive approaches utilizing restorative justice concepts and other holistic approaches. Restorative justice is generally defined as “a set of principles and practices grounded in the values of showing respect, taking responsibility, and strengthening relationships.”⁷⁴ Restorative justice approaches hold individuals accountable for their actions, but focus on repairing any damage caused by harmful acts and preventing such acts from recurring instead of on punishment.⁷⁵ Among other things, restorative justice incorporates practices like mediated nonconfrontational discussions,⁷⁶ actual classroom coursework in conflict management, or positive

73. See Marc A. Fajer, *A Better Analogy: “Jews,” “Homosexuals,” and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL’Y REV. 37, 37 (2001) (discussing the 1990s movement in state legislatures, municipal councils, public elections on state or local initiatives and repeal measures, and even in the U.S. Congress, regarding enumeration of homosexuality as a protected characteristic).

74. SUMNER ET AL., *supra* note 48, at 2.

75. See *id.* at 4 (describing the general philosophy behind restorative justice).

76. See *id.* (describing the use of “circles” in gathering parties to respectfully discuss problems and concerns).

character development and social-emotional skill building.⁷⁷ Restorative justice methods have been shown to strengthen feelings of community and belonging, prevent future conflicts, and reduce future violations.⁷⁸ Such efforts, when done correctly, can address both the underlying tensions in a school community and any potential discomfort among the student body caused by a school's racial, ethnic, or religious diversity.⁷⁹ Restorative justice methods appear well suited to address the unique types of harms caused by bias-based harassment.

Similarly, a range of strategies loosely called Positive Behavioral Interventions and Supports (PBIS) can be used to improve school safety and effectiveness by positively reinforcing good behavior and preventing negative behavior through constructive intervention.⁸⁰ Like restorative justice approaches, PBIS methods focus away from punishment, instead stressing counseling and mediation.⁸¹ By reducing reliance on disciplinary methods (like suspension and expulsion) that, by definition, exclude perpetrators from school, PBIS methods can also increase overall school effectiveness by expanding all of the students' opportunities to learn while simultaneously creating a more overall supportive school environment.⁸² Like restorative justice approaches, PBIS strategies appear well positioned to address the particular harms of bias-based harassment.

Unfortunately, less than one-third of state antiharassment/bullying laws even include provisions for mental health referrals for perpetrators, let alone wholly incorporate restorative justice or PBIS approaches.⁸³ Of twenty local district level policies examined in detail by the United States Department of Education's 2011 study, only half included provisions regarding various "nonpunitive responses"⁸⁴ to discipline code violations such as "referrals to counseling" and "education for

77. See CHRISTOPHER BOCCANFUSO & MEGAN KUHFIELD, CHILD TRENDS, MULTIPLE RESPONSES, PROMISING RESULTS: EVIDENCE-BASED, NONPUNITIVE ALTERNATIVES TO ZERO TOLERANCE 5–7 (Harriet J. Scarupa ed., 2011), <http://www.childtrends.org/?publications=multiple-responses-promising-results-evidence-based-nonpunitive-alternatives-to-zero-tolerance> (discussing various character education and socio-emotional learning programs and their effects in schools).

78. See SUMNER ET AL., *supra* note 48, at 16–18 (discussing student and teacher reactions to restorative justice methods); see also Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 859 (2008) [hereinafter *APAZITF Report*] (stating that alternative approaches such as restorative justice can help reduce the impact of serious disruptive behavior).

79. SUMNER ET AL., *supra* note 48, at 14.

80. See BOCCANFUSO & KUHFIELD, *supra* note 77, at 8 (explaining the three-tiered approach of Positive Behavioral Interventions and Support).

81. See *id.* (describing how PBIS improves discipline by rewarding positive behavior and using targeted interventions to address behavioral problems).

82. See *id.* at 9 (noting that nonpunitive approaches can minimize negative behaviors and promote positive development and skills that extend beyond the classroom).

83. U.S. DEPT OF EDUC., *supra* note 13, at 55. However, nonmandatory state model policies addressing harassment and bullying are more likely to include mental health referrals. A little over half (51%) of all state model policies include a provision for mental health referrals. *Id.*

84. *Id.* at 59, 70.

perpetrators” or other more specific interventions.⁸⁵ Furthermore, the United States Department of Education found provisions for mental health referrals for victims to be among the weakest and least expansive of components among antiharassment/bullying laws.⁸⁶ Of twenty local school district policies reviewed in detail in that study, only four (one of which is New York City Regulation A-832) included any provision regarding mental health support for bullied students.⁸⁷ However, a handful of school districts around the country have begun to implement both restorative justice and PBIS approaches in their school discipline laws and policies, with positive results overall.⁸⁸

The 2011 United States Department of Education study also found that in most state legislation, “programmatically components” like “training and prevention” were likely to be discretionary, in contrast to the mandatory nature of various other definitional, directional, and procedural components.⁸⁹ Unfortunately, without mandatory and rigorous training and prevention measures, provisions defining, prohibiting, and creating investigation protocols may merely serve to address individual incidents of harassment and bullying after they occur without preventing new incidents or fully addressing the harms caused by the incidents. While these definitional and procedural elements of harassment and bullying laws are both necessary and helpful, they may merely act as temporary bandages to a larger problem with the school’s climate unless they are paired with broader prevention efforts. This is particularly the case with bias-based harassment, incidents of which uniquely affect not just the direct victim but the entire school community. As discussed above, bias-based harassment negatively impacts other students and teachers (especially, but not limited to, individuals who share the targeted characteristic),⁹⁰ damages overall intergroup relations,⁹¹ and perpetuates negative stereotypes.⁹²

Arguably, the lack of a robust infrastructure of rehabilitative or community-building measures is also caused by an overly narrow definition of “harassment”

85. *Id.* at 70.

86. *Id.* at 52, 54.

87. *Id.* at 59, 69.

88. See SUMNER ET AL., *supra* note 48, at 13–21, 30–32 (discussing teacher, student, and parent reactions to the use of restorative justice methods at Cole Middle School and correlations to declining expulsion and suspension rates); see also BOCCANFUSO & KUHFIELD, *supra* note 77, at 9 (noting positive impacts on student behavior and academic achievement); *APAZTTF Report*, *supra* note 78, at 857 (noting the promising results of Positive Behavioral Interventions and Supports).

89. U.S. DEPT OF EDUC., *supra* note 13, at 15.

90. See MEYER, *supra* note 19, at 102, 115 (discussing the physical and emotional tolls that hostile environments caused by bias-based bullying and harassment can have on individuals).

91. See Gini, *supra* note 20, at 83–85 (finding that perception of a physical bullying incident made intergroup biases more entrenched).

92. See Liang et al., *supra* note 21, at 190 (describing the way that Asian American adolescents’ responses to teasing and exclusion from peers may exacerbate stereotypes of Asian Americans as socially awkward and deficient in communication skills).

drawn exclusively from federal antidiscrimination legislation. While the use of federal civil rights laws on discrimination to hold a school district legally responsible for fostering harassment that is severe enough to constitute a “hostile environment” is an appropriate and well-established legal concept,⁹³ more must be done to define school responsibility to address lower-level bias-based offenses well before conditions escalate to a hostile environment.

B. Legal and Policy Recommendations

At the federal level, one important policy advancement would be to pass a version of the Safe School Improvement Act or other legislation defining and prohibiting harassment and bullying, as well as creating a framework of minimum measures that schools and districts receiving federal funding must take to address harassment and bullying. Simply creating consistent definitions of the terms “harassment” and “bullying” for use in state and local policies, even without more, would go a long way in eliminating the current confusion over harassment and bullying laws and establishing a much needed common vocabulary for use in legal, school, and community contexts. Such legislation should clarify the broader use of “bullying” as a general, more inclusive term, and harassment as a narrower term where the victim is targeted based on certain enumerated personal characteristics. Ideally, the legislation—or regulations promulgated to implement such legislation—should also clarify and delineate the duty of schools and districts to respond, address, and prohibit both major and minor bias-based violations, including smaller bias-based incidents that do not yet rise to a level of harassment that constitutes a hostile environment in violation of federal civil rights laws.

Given the current narrow working definition of “harassment” to denote actionable discrimination, such efforts are often lumped into a broader category of “prevention” efforts. Whatever we call such efforts, harassment and bullying legislation and policies need to include detailed, mandatory requirements for school responses to harassment or bullying incidents, including but not limited to timelines and protocols for investigation, follow-up, and documentation of findings. In addition, these procedures must be supplemented by support for both victims and accused perpetrators, mental health and counseling referrals, as well as access to community building programs, and other efforts including restorative justice and PBIS approaches.⁹⁴

93. See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 10, 1994) (detailing the standards and procedures for identifying a “hostile environment” in a school).

94. See U.S. DEP’T OF EDUC., *supra* note 13, at 69 (citing Yiping C. Sherer & Amanda B. Nickerson, *Anti-Bullying Practices in American Schools: Perspectives of School Psychologists*, 47 PSYCHOL. SCH. 217, 219 (2010)) (noting the importance of psychological supports in bullying prevention and intervention approaches).

Furthermore, the above measures must be supplemented by efforts to integrate learning about diverse communities into the school curriculum. Studies about the unique experiences and contributions of diverse racial groups, immigrants, the LGBTQ community, and other discrete social groups especially targeted by bias-based harassment must be a regular part of school curricula for all students in order to build understanding and acceptance of every constituency in our diverse community. While these issues are somewhat outside the traditional purview of harassment and bullying laws and policies, they are nonetheless an integral part of the prevention efforts that districts and schools must undertake.⁹⁵

Strong and mandatory professional development and training of all school site staff is another crucial component of harassment and bullying prevention. These training measures must include both teaching and support staff, including school safety officers, who in some jurisdictions are employed by local law enforcement or private security agencies rather than the school district itself.⁹⁶ Independent monitoring of New York City Chancellor's Regulation A-832 conducted by local advocates (including my organization, AALDEF) has revealed that lack of staff training has hampered the overall effectiveness of an otherwise strong regulation.⁹⁷ A survey of more than 1000 students in 2009 revealed that despite Chancellor's Regulation A-832's requirement that each principal "must ensure that the policy and procedures set forth in this regulation are discussed with student and staff members at the beginning of each year"⁹⁸ in addition to certain more specific training requirements for staff,⁹⁹ just under twenty percent of students surveyed reported participating in a training regarding the regulation.¹⁰⁰ A survey of teachers a year later in 2010 revealed that well less than a third (26.9%) of respondents were even offered such training.¹⁰¹ One teacher reported in 2010 that "I do not know how to enact [the] Chancellor's Regulations in my classroom

95. See Khin Mai Aung & Christina Mei-Yue Wong, *Advancing Diverse Learning for Asian Pacific Islanders*, 15 ASIAN AM. L.J. 205, 212–15 (2008) (discussing the benefits of integrated school environments).

96. See THE SIKH COAL. ET AL., BIAS-BASED HARASSMENT IN NEW YORK CITY PUBLIC SCHOOLS: A REPORT CARD ON THE DEPARTMENT OF EDUCATION'S IMPLEMENTATION OF CHANCELLOR'S REGULATION A-832 11–13 (2009) (recommending that the policies and requirements of the Dignity for All Students Act be added to Chancellor's Regulation A-832); see also Michael Fickes, *Pros and Cons of Security Outsourcing*, SCH. PLANNING & MGMT., http://www.peterli.com/spm/resources/articles/archive.php?article_id=1777 (last visited Oct. 30, 2012) (discussing security outsourcing in the school environment context); Steve Yoder, *Outsourcing the Police*, CRIME REPORT (Mar. 10, 2011, 12:23 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2011-03-outsourcing-the-police>.

97. See THE SIKH COAL. ET AL., *supra* note 68, at 8–9 (discussing schools' lack of training on diversity).

98. N.Y.C. DEP'T OF EDUC., *supra* note 5, at V.C.; see *id.* at VI (requiring certification of training and provision of information).

99. See *id.* at VI.

100. THE SIKH COAL. ET AL., *supra* note 68, at 5.

101. THE SIKH COAL. ET AL., *supra* note 68, at 5, 7.

...I do not feel I get all of the consistent support I need from [the] administration to make things happen.”¹⁰²

The New York City surveys also raise concerns about the need to train and better oversee school safety agents, who in that district are employed by the police department and are not school district employees.¹⁰³ A national trend toward outsourcing of responsibility for school security to police (who themselves sometimes outsource these tasks to private security companies) has led to the presence of safety agents who are neither supervised by nor fundamentally accountable to the district.¹⁰⁴ Alarming, the 2009 student survey revealed that among those who reported being personally targeted by harassment, sixteen percent said the perpetrators were staff. Of those, almost one-third of those (five percent of the total) reported that school safety agents were the perpetrators.¹⁰⁵

A report produced by AALDEF and other advocates compiling results of the 2009 New York City student survey concluded that “[t]he language about training in the Regulation is far too vague. It is unclear what kind of training is expected of schools and what is the most effective [training] to create an inclusive, bias-free learning environment in schools.”¹⁰⁶ An effective training mechanism must mandate ongoing training to all students, staff, and safety officers with the dual goals of both raising awareness and sensitivity about harassment and bullying, and better enabling staff and safety officers to respond to incidents with a clear delineation of post-incident investigation and follow up procedures.¹⁰⁷ Similarly, students must be trained to become more aware and sensitive about harassment, as well as provide the necessary support to develop empathy and empathetic conduct. As discussed above, restorative justice and PBIS-based curricula are promising strategies for this endeavor.

Public reporting of incidents of harassment is also an important component of harassment and bullying prevention and monitoring. Advocates and teachers alike have identified the importance of transparency about the occurrence and types of incidents of harassment and bullying for keeping schools and districts accountable for maintaining a safe school environment.¹⁰⁸ For maximum effectiveness at revealing patterns and points of concern, such reports should

102. *Id.* at 8.

103. *See* THE SIKH COAL. ET AL., *supra* note 98, at 12–13 (discussing the need for expanded scope and requirements in training); *see also* THE SIKH COAL. ET AL., *supra* note 68, at 11 (arguing Chancellor’s Regulation A-832 must be extended to include protection from harassment by adult staff members).

104. *See* Fickes, *supra* note 96 (stating that outsourcing both the security director and security guards would relieve schools’ liability risks).

105. THE SIKH COAL. ET AL., *supra* note 68, at 8.

106. *Id.* at 12.

107. *See id.* at 12–13 (discussing the need for regular and sustained training on diversity issues and incident investigation and follow-up procedures).

108. *See* THE SIKH COAL. ET AL., *supra* note 68, at 12 (discussing the need to share information about bias-based harassment in the interests of transparency).

disaggregate incidents by whether they are bias-based incidents motivated by the victim's status, and if so by the targeted characteristic (race, sex, disability, sexual orientation, etc.). Disaggregation by school (or possibly region in the case of large school districts) can also help identify problems for follow-up and prevention efforts. For example, to know that a particular school has a high concentration of sexual harassment incidents, and another a large number of anti-immigrant harassment incidents, would be invaluable for tailoring future prevention efforts. Such data would create a useful roadmap for what kinds of community education and prevention activities are most appropriate for particular schools or regions.

CONCLUSION

Now is an exciting time to conduct antiharassment and antibullying work. With the explosion of harassment and bullying legislation and policies at both state and local levels, and serious potential for the passage of comprehensive federal bullying legislation on the horizon, students, parents, and community members have an unprecedented number of tools to hold schools accountable for keeping students safe. This is particularly helpful for Asian American students in light of studies showing that they are most likely of all racial groups to be subjected to verbal abuse on account of race, ethnicity, or religion, and that almost one in three Asian American students has reported seeing hate graffiti targeting their race.¹⁰⁹

However, as with any new and growing body of law, significant gaps remain, including among others the lack of a consistent lexicon (including core terms like "harassment" and "bullying"), confusion over which personal characteristics, if any, to enumerate for protection from bias-based harassment, and the scope of schools and districts' duty to prevent the escalation of harassment and bullying before discipline is warranted or the harassment becomes legally actionable. In the near future, we must utilize the current momentum on battling school harassment and bullying to close these gaps.

The obligations must include, at a minimum, clearly enumerated protected characteristics defining bias-based harassment, strong and mandatory training of all school staff (including safety officers) and students about harassment laws, policies, and procedures, integrated learning about diverse communities in school curricula, and comprehensive public reporting about incidents of harassment. We must also move away from inflexible zero tolerance discipline and safety policies, and toward holistic approaches that include rehabilitative measures and positive behavioral supports for perpetrators, as well as tailored counseling and support for victims. Only by incorporating such principles will we be able to not only address single, isolated incidents of harassment, but also the broader harm wreaked by bias-based harassment upon entire school communities. By so doing, schools and

109. ROBERS ET AL., *supra* note 2, at 41.

districts will significantly reduce the likelihood of tragedies like the Lafayette and South Philadelphia High School attacks occurring yet again.