

# **Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California’s Public Schools: Contemporary Issues in Prevalence, Response and Prevention**

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## I. Introduction

Matthew Gilman, just twelve years old, committed suicide in January of 2005 in order to escape the relentless homophobic taunting of his classmates.<sup>1</sup> In November of 2005, brothers Shawn Paul Kelly and Christopher Paul Kelly allegedly hurled racial slurs at a Hispanic classmate, and then attacked him with a crowbar.<sup>2</sup> Other recent media reports indicate that hate has gone digital, with Costa Mesa police investigating a middle-school student's message posted on the social networking website MySpace.com as a possible hate crime due to anti-Semitic and threatening language directed toward a fellow student.<sup>3</sup> Incidents such as these present a

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<sup>1</sup>A poem written by Matthew is telling of the emotional effects of bullying: "It was a dark and cool night/At night I am in my bedroom/No one goes to school at night." *Boy's Suicide Prompts Push for New Anti-Bullying Policy*, 10NEWS.COM, Apr. 28, 2005, <http://www.10news.com/news/4427116/detail.html>. See Robert DeKoven, Commentary, *Local Boy's Hanging Prompted by Anti-gay Harassment*, GAY & LESBIAN TIMES, Aug. 21, 2003, available at <http://www.gaylesbiantimes.com/?id=4928&issue=906>. See also *Anti-bullying Policy Heads to Carlsbad School Board*, SIGNONSANDIEGO.COM, Apr. 23, 2005, <http://www.signonsandiego.com/news/education/20050423-9999-1mi23bully.html> ("[C]lassmates...indicated that the boy had been the target of verbal taunts for years.").

<sup>2</sup>*Twins Arrested in Alleged Hate Crime*, SIGNONSANDIEGO.COM, Nov. 17, 2005, <http://www.signonsandiego.com/news/metro/20051117-9999-2m17ecrime.html>. While this incident occurred off campus and outside of school hours, the victim as well as the offenders were students at the same high school.

<sup>3</sup>*California Middle-Schoolers Suspended for Viewing Myspace Posting With Alleged Threat*, SIGNONSANDIEGO.COM, Mar. 2, 2006, <http://www.signonsandiego.com/news/nation/20060302-1140-myspace-suspensions.html>. Although the posting to MySpace.com was not made from a campus computer, it is foreseeable that bias-motivated harassment involving the internet is likely to affect the targeted student while on campus. See *Schools Act to Short-Circuit Spread of 'Cyberbullying'*, WSJ.COM, Jan. 24, 2007, <http://online.wsj.com/public/article/>

troubling picture of the prevalence of bias-motivated harassment and violence, such as hate crime incidents, in California's public schools.

This article examines the pervasiveness of bias-motivated incidents in California public schools. Attention will be given not only to hate crimes, but also to the less serious behaviors collectively known as hate incidents.

There is no uniformly accepted definition of what sort of conduct constitutes a "hate crime"; on the contrary, numerous definitions abound. Black's Law Dictionary defines a hate crime as any crime "motivated by the victim's race, color, ethnicity, religion, or national origin."<sup>4</sup> Broader definitions of hate crime exist, such as that defining a hate crime as "[a]ny act of intimidation, harassment, physical force or threat of physical force...motivated either in whole or in part by hostility to...real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation . . . ."<sup>5</sup>

Hate incidents are generally non-criminal, and the term encompasses such behaviors as "bigoted insults, taunts, [and] slurs."<sup>6</sup> Collectively, these actions and behaviors shall be

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SB116960763498685883-dqgu1nMDweJcpi9mqbQ48rsKWjY\_20080124.html?mod=blogs ("Now, emboldened by the anonymity available online, a bully can be nastier—and with the click of a mouse, have a far broader audience—than in the past. What may once have been snickers in the hallway can now be an excruciatingly public humiliation spread via email, text messaging and online teen forums.").

<sup>4</sup> BLACK'S LAW DICTIONARY 378 (7th ed. 1999).

<sup>5</sup> CALIFORNIA ATTORNEY GENERAL'S COMMISSION ON RACIAL, ETHNIC, RELIGIOUS AND MINORITY VIOLENCE, FINAL REPORT 4 (1986), *quoted in* CALIFORNIA ATTORNEY GENERAL'S CIVIL RIGHTS COMMISSION ON HATE CRIMES, REPORTING HATE CRIMES 5 (2001).

<sup>6</sup> Defined as "an act or attempted act which constitutes an expression of hostility against a person or property or institution because of the victim's real or perceived race, religion, disability, gender, nationality, or sexual orientation. This may include using bigoted insults, taunts, or slurs, distributing or posting hate group literature or posters, defacing, removing, or destroying posted materials or announcements, posting or circulating demeaning jokes or leaflets." CAL. PENAL CODE § 628.1(b)(1) (West,

referred to as bias-motivated behavior and, in the alternative, as bias-motivated incidents.<sup>7</sup>

Bias-motivated incidents are a common occurrence in California schools, and students are not adequately protected from this sort of attack.<sup>8</sup> This article discusses existing legislative measures intended to protect students from bias-motivated behavior, and addresses several deficiencies with respect to these existing statutory protections. Several policy recommendations aimed at remedying the limitations identified are presented and discussed. These recommendations center on the need to obtain a more accurate understanding of the extent and prevalence of bias-motivated incidents in California's schools, and the need for a mandated response to these types of incidents. Specifically, this article recommends that teachers and other school officials should be subject to criminal sanctions for failing to properly respond to known incidents of bias-motivated behavior.

Part II of this article addresses the peculiar sensitivity of children to bias-motivated behavior and the consequential need for and importance of minimizing such behavior at schools. Part III examines the prevalence of hate crimes and hate incidents in California public schools, and includes a discussion of the methods by which statistical information is obtained along with the implications that these data gathering methods have on the accuracy of available statistics. Part IV discusses existing legislation aimed at minimizing bias-motivated behaviors in schools, and examines the ineffectiveness of current legislation. Finally, Part V provides and discusses a number of policy recommendations aimed at remedying the deficiencies identified and discussed in Parts III and IV.

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repealed 2005).

<sup>7</sup> The term bias-motivated behavior will be used when the discussion does not necessitate drawing a distinction between hate crimes and hate incidents. When such distinction is necessary (e.g., when discussing legislation particular to hate crimes), the most applicable term shall be used.

<sup>8</sup> See discussion *infra* Part III.

## II. On the Need to Protect Children at Schools

### A. *The Right to Attend a Safe School*

Every child has the right to attend a safe school.<sup>9</sup> Education is “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. These days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>10</sup> Echoing the sentiments of the U.S. Supreme Court in *Brown v. Board of Education*, the California Constitution guarantees that “[a]ll students . . . of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses that are safe, secure, and peaceful.”<sup>11</sup>

Recent media reports of bias-motivated incidents in California schools, such as those discussed earlier,<sup>12</sup> paint a disturbing picture of the prevalence of bias-motivated behavior in California’s public schools. Such news reports, when considered along with official statistics,<sup>13</sup> indicate that an alarming number of California’s children are being denied their constitutional right to an education.

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<sup>9</sup> CAL. CONST. art. I, § 28. (“All students and staff of public primary, elementary, junior high, and senior high schools have the inalienable right to attend campuses that are safe, secure, and peaceful.”). *See also* Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. Ct. App. 1971) (recognizing the fundamental right to a public education as guaranteed by the California Constitution).

<sup>10</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

<sup>11</sup> CAL. CONST. art. I, § 28.

<sup>12</sup> *See* discussion *supra* Part I.

<sup>13</sup> *See* discussion *infra* Part III.

*B. The Peculiar Sensitivities of Children to Bias-Motivated Behavior*

Children are particularly sensitive to the harmful effects of hateful language and bias-motivated harassment.<sup>14</sup> Schoolchildren who are victims of bias-motivated behavior are less likely to obtain a quality education than children who are not so victimized.<sup>15</sup> Students who are harassed because of actual or perceived sexual orientation feel less connected to their school, and tend to feel that they receive less support from their teachers.<sup>16</sup> These students are more likely to carry a weapon to school, and are more likely to report depression.<sup>17</sup> They are also more likely to use illicit substances,<sup>18</sup> and thus to suffer the sorts of harm associated with substance abuse. Compared to the overall student population, gay, lesbian and bisexual students are more likely to report being threatened or injured with a weapon, and to skip school because of fear of harm.<sup>19</sup>

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<sup>14</sup> NAT'L MENTAL HEALTH ASS'N, BULLYING IN SCHOOLS: HARASSMENT PUTS GAY YOUTH AT RISK 1, *available at* <http://www1.nmha.org/pbedu/backtoschool/bullyingGayYouth.pdf> (last visited Mar. 25, 2007). *See* Harper v. Poway Unified Sch. Dist., No. 04-57037, 2006 WL 1043082, at \*5 (9th Cir. Apr. 20, 2006) ("Almost all young Americans attend public schools. During the time they do—from first grade through twelfth—students are discovering what and who they are. Often, they are insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others."). For an excellent and concise review of the literature addressing the detrimental effects of bias-motivated verbal and physical abuse on students, *see id.* at \*7.

<sup>15</sup> NAT'L MENTAL HEALTH ASS'N, *supra* note 14.

<sup>16</sup> CALIFORNIA SAFE SCHOOLS COALITION & 4-H FOR YOUTH DEVELOPMENT, SAFE PLACE TO LEARN: CONSEQUENCES OF HARASSMENT BASED ON ACTUAL OR PERCEIVED SEXUAL ORIENTATION AND GENDER NON-CONFORMITY AND STEPS FOR MAKING SCHOOLS SAFER 1 (2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Robert Garofalo, R. Cameron Wolf, Shari Kessel, Judith Palfrey & Robert H. DuRant, *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, 101 PEDIATRICS 895, 897 (1998), *available at* <http://pediatrics.aappublications.org/cgi/reprint/101/5/895>.

All students are harmed by being in a school environment where discriminatory behavior is allowed,<sup>20</sup> not just those students who are singled out for such harassment and victimization. Students who witness repeated incidents of abuse of a fellow student or students can suffer psychological effects equal to that of the direct victim of the crime or harassment.<sup>21</sup> Each hate crime causes a “ripple effect” and “tear[s] at the fabric of our democratic society, creating fear and tensions that ultimately affect us all.”<sup>22</sup> Thus, when even one single child becomes the victim of a hate crime or hate incident while at school, not only are that child’s constitutional rights trampled on, but so are those of his or her peers.<sup>23</sup>

Racial difference is a common motivation of bias-motivated behavior in schools in the United States, and California is no exception.<sup>24</sup> The most frequently reported

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<sup>20</sup> See *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) (recognizing “[a] nondiscriminatory [school] environment [as] essential to maximum intellectual growth and...therefore an integral part of the educational benefits that a student receives”). See also *Harper v. Poway Unified Sch. Dist.*, No. 04-57037, 2006 WL 1043082, at \*6 (9th Cir. Apr. 20, 2006) (recognizing that “vulgar, lewd, obscene, indecent, and plainly offensive ‘by definition may well ‘impinge[ ] upon the rights of other students,’ even if the speaker does not directly accost individual students with his remarks” (quoting *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992))).

<sup>21</sup> Dr. Richard J. Hazler of Penn State University and Dr. Gregory R. Janson of Ohio University have found that the impact of being witness to repeated incidents abuse can result in a “psychological and physiological stress” equal to that of the direct victim of the abuse. The study considered “such forms of repetitive abuse as bullying, racism, homophobia, corporal punishment by parents, teachers or other authority figures, and sexual harassment,” making the findings particularly applicable to incidents of bias-motivated behavior. Press Release, Pennsylvania State University, *Impact Of Repeated Abuse Can Be As Severe For Bystanders As Victims* (Dec. 14, 2004), <http://www.psu.edu/ur/2004/bystander.html>.

<sup>22</sup> U.S. DEPT. OF JUSTICE, *PREVENTING YOUTH HATE CRIME: A MANUAL FOR SCHOOLS AND COMMUNITIES 1* (1998), available at <http://www.usdoj.gov/crs/pubs/prevyouthatecrim.pdf>.

<sup>23</sup> See CAL. CONST. art. I, § 28.

<sup>24</sup> In a study of 1,865 high school students in grades ten, eleven and twelve, over half of respondents reported having witnessed racial confrontations

reasons for bias-motivated harassment in California schools are race and ethnicity, with fourteen percent of students reporting such harassment.<sup>25</sup> Harassment based on actual or perceived sexual orientation is also pervasive, with seven and one-half percent of student respondents to the 2001-2002 California Healthy Kids Survey reporting to have been the target of harassment for this reason.<sup>26</sup> Extrapolation of the results of the 2001-2002 California Healthy Kids Survey to the overall California population indicates that over 200,000 students are harassed for their actual or perceived sexual orientation each year.<sup>27</sup>

Given children's particular sensitivities to bias-motivated behavior, a legislatively mandated response to bias-motivated behavior in schools is necessary.<sup>28</sup> Younger or otherwise less sophisticated students are sometimes unable to recognize when they are being made the victims of bias-motivated behavior, necessitating a more active role on the part of educators in both identifying and responding to such

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either "very often" or "once in awhile," and one in four respondents reported having been the victim of such incidents. CTR. FOR THE STUDY OF SPORT IN SOCIETY, *YOUTH ATTITUDES ON RACISM* (1990), *cited in* JACK LEVIN & JACK McDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 117 (1993).

<sup>25</sup> CALIFORNIA OFFICE OF THE ATTORNEY GENERAL & WESTED, 2001-2002 CALIFORNIA STUDENT SURVEY: VIOLENCE AND SAFETY 1 (2002), <http://www.safestate.org/documents/factsheet-violence&safety.pdf>.

Victim reports to the National Crime Victimization Survey of the Bureau of Justice Statistics between July 2000 and December 2003 indicate that race is the primary motivating factor of all hate crimes, not only those committed within schools. CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, *HATE CRIME REPORTED BY VICTIMS AND POLICE* 1 (2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf>.

<sup>26</sup> CALIFORNIA SAFE SCHOOLS COALITION & 4-H FOR YOUTH DEVELOPMENT, *supra* note 16, at 1. Victim reports to the National Crime Victimization Survey of the Bureau of Justice Statistics between July 2000 and December 2003 indicate that sexual orientation was the motivating factor in one of six hate crimes reported by respondents. HARLOW, *supra* note 25, at 1.

<sup>27</sup> CALIFORNIA SAFE SCHOOLS COALITION & 4-H FOR YOUTH DEVELOPMENT, *supra* note 16, at 1.

<sup>28</sup> Stephen L. Wessler, *Sticks and Stones*, EDUCATIONAL LEADERSHIP, Dec. 2000 – Jan. 2001, at 28.

behavior.<sup>29</sup> As to perpetrators of bias-motivated behavior, teaching children at a young age that discriminatory behaviors are unacceptable is necessary given that bias is an attitude developed in childhood.<sup>30</sup> By the age of three, children have developed the ability to discern racial differences between individuals, and by age twelve are capable of formulating stereotypical attitudes regarding members of different racial and ethnic groups.<sup>31</sup>

Policies aimed at reducing the numbers of hate incidents committed in California schools are also needed. Owing to the “distinct effect of hateful words and symbols,” hate incidents, even when unaccompanied by violence, can have serious and long-lasting implications.<sup>32</sup> Verbal attacks make it difficult for children to concentrate at school, and for some students, the hateful atmosphere becomes so overwhelming that they drop out of school entirely.<sup>33</sup>

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<sup>29</sup> Results of the “8th Biennial Survey of California Students in Grades 7, 9 and 11” yielded a noticeably lower self-reported harassment rate in 7th grade respondents compared to respondents from other grades. The authors of the survey posited as a possible explanation that the 7th graders were less aware of what constituted harassment and of whether they were harassed for the reasons given in the survey questionnaire. CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, VIOLENCE AND SAFETY AMONG CALIFORNIA YOUTH FROM 8TH BIENNIAL SURVEY OF CALIFORNIA STUDENTS IN GRADES 7, 9 AND 11 14 (2002).

<sup>30</sup> SOUTHERN POVERTY LAW CENTER, TEN WAYS TO FIGHT HATE: A COMMUNITY RESPONSE GUIDE 22 (3d ed. 2005), *available at* [http://www.tolerance.org/pdf/ten\\_ways.pdf](http://www.tolerance.org/pdf/ten_ways.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> Wessler, *supra* note 28, at 39. *See also* HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 35 (2001), *available at* <http://www.hrw.org/reports/2001/uslgbt/toc.htm> (“‘Words hurt,’ [Melanie S.] added. ‘A gay kid could be on the brink, ready to give up, and hears that word all the time. I can be in a conversation down the hall, and I can hear it. It grabs me. You can’t avoid it.’”).

<sup>33</sup> HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 35 (2001).

Hateful language often serves as the starting point for what becomes an “escalating pattern of harassment.”<sup>34</sup> Exposure to hateful language and symbols carries the threat of violence, creating feelings of fear in the children exposed.<sup>35</sup> This fear can lead to physiological and emotional problems, and makes it difficult for some students to concentrate in school, leading to declining grades.<sup>36</sup> Many students who endure repeated incidents of bias-motivated harassment eventually succumb to feelings of rage and fight back at the initial aggressor.<sup>37</sup> The student who succumbs to rage, despite not being the initial aggressor, might be perceived as more deserving of disciplinary procedures than the true initial aggressor.<sup>38</sup> The student who engaged in the bias-motivated behavior is viewed as less culpable, while the student victim who succumbed to rage is subjected to the discipline of the school administration and the criminal justice system.<sup>39</sup>

For other students, a “loss of spirit” comes from being repeatedly made the target of bias-motivated harassment.<sup>40</sup> As Stephen L. Wessler notes, “[t]oo many gay and lesbian students drop out of school, too many students of color lose faith in a system that they expect to educate them, and too many girls lost faith and confidence in themselves.”<sup>41</sup> The suicide of Matthew Gilman illustrates one possible outcome of such “loss of spirit.”<sup>42</sup>

The story of P.S., whose experiences were the subject of litigation in the case of *Shore Regional High School Board of Education v. P.S.*, illustrates the effect of bias-motivated

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<sup>34</sup> Wessler, *supra* note 28, at 30.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Wessler, *supra* note 28, at 30.

<sup>41</sup> *Id.*

<sup>42</sup> *Boy's Suicide Prompts Push for New Anti-Bullying Policy*, 10NEWS.COM, Apr. 28, 2005, available at <http://www.10news.com/news/4427116/detail.html>.

behavior on school-age children.<sup>43</sup> Beginning in elementary and continuing throughout middle school, P.S. was harassed both physically and verbally by classmates because of his “lack of athleticism, his physique, and his perceived effeminacy.”<sup>44</sup> P.S. became depressed and his school performance began to decline.<sup>45</sup> P.S. was eventually deemed eligible for special education, although the team responsible for developing individualized treatment options for special education students believed that P.S.’s difficulties were the result of bullying, rather than any psychiatric disorder.<sup>46</sup>

When it came time for P.S. to make the transition to high school, P.S.’s parents, as well as the team responsible for developing P.S.’s individual education plan, agreed that it would be unwise to send P.S. to the community high school, fearing that the harassment would likely continue.<sup>47</sup> The District disagreed, and argued that Shore Regional High School (“Shore”) could provide for P.S.’s needs.<sup>48</sup> Following a failed attempt at mediating the disagreement, a “due process hearing” was held before the New Jersey Office of Administrative Law.<sup>49</sup> The administrative law judge ruled that Shore would be unable to provide P.S. with the free public education to which he was entitled due to the “‘legitimate and real fear that the same harassers who had followed P.S. through elementary and middle school would continue [to bully him.]’”<sup>50</sup> Shore was ordered to reimburse P.S. for tuition costs incurred in attending an out-of-district school,

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<sup>43</sup> Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004).

<sup>44</sup> *Id.* at 195. “Bullies constantly called P.S. names such as ‘faggot,’ ‘gay,’ ‘homo,’ ‘transvestite,’ ‘transsexual,’ ‘slut,’ ‘queer,’ ‘loser,’ ‘big tits,’ and ‘fat ass.’” *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 195-96.

<sup>47</sup> *Id.* at 196.

<sup>48</sup> *Id.*

<sup>49</sup> Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194, 197 (3d Cir. 2004).

<sup>50</sup> *Id.* (citing App. at 41).

which Shore challenged by commencing an action in the federal courts.<sup>51</sup>

The Third Circuit sided with P.S. Supreme Court Justice Alito, then seated with the Third Circuit, wrote the majority opinion addressing P.S.'s plight.<sup>52</sup> The school district was obligated to financially provide for all costs associated with P.S.'s out-of-district education, said Alito.<sup>53</sup> The court reasoned that since New Jersey received federal education funds under the Individuals with Disabilities Education Act,<sup>54</sup> the state was required provide to all disabled children with a "free appropriate public education."<sup>55</sup> Although unable or unwilling to provide a safe and supportive environment in which P.S. could learn, in the end the school district remained financially responsible for his education.

### **III. On Prevalence: Determining the Extent of Bias-Motivated Behavior in California's Public Schools**

#### *A. The Need for Accurate Statistics*

Hate crimes and hate incidents occur in all areas of contemporary American society, including schools.<sup>56</sup> In 2004, 155 reported hate crime offenses—almost ten percent of reported hate crimes in California that year—occurred in schools and colleges.<sup>57</sup> As school age children spend a substantial portion of their day at school, official statistics must present an accurate portrayal of the prevalence of hate crime incidents in schools.

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 194.

<sup>53</sup> *Id.* at 201-02.

<sup>54</sup> See 20 U.S.C. §§ 1400-1487 (2000).

<sup>55</sup> See 20 U.S.C. § 1412(1) (1975).

<sup>56</sup> Public spaces served as the setting for sixty-two percent of all violent hate crimes that occurred in California between July 2000 and December 2003. HARLOW, *supra* note 25, at 9.

<sup>57</sup> CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA 2004 23 (2004), available at <http://ag.ca.gov/cjsc/publications/hatecrimes/hc04/preface.pdf>.

Bias-motivated behavior largely goes unreported to law enforcement.<sup>58</sup> Victims of bias-motivated behavior do not report the incidents to law enforcement for a number of reasons, including the fear of retaliation by the perpetrator, shame for being a victim, and fear of being exposed as a homosexual.<sup>59</sup> Children who are the victims of bias-motivated behaviors committed on school grounds neglect to report the incident to school officials and law enforcement for these and similar reasons.<sup>60</sup> Although schools are one of the main locations where reported hate crimes occur,<sup>61</sup> student under-reporting yields statistics that fail to capture the true extent of hate crimes and bias-motivated incidents in schools. In order for the legislature to implement policies that will be successful at curbing youth hate violence in schools, an accurate picture of the prevalence of hate crime violence in California schools is a necessary tool to have.<sup>62</sup>

*B. On the Need for a Mandated Collection of Hate Crime and Hate Incident Statistics*

The gathering of hate crime statistics is a relatively recent development, and began with the passage of the Hate Crime Statistics Act of 1990.<sup>63</sup> Accurate statistics on school

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<sup>58</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, HATE CRIME REPORTED BY VICTIMS AND POLICE 1 (Nov. 2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf> (reporting that “[a]pproximately 44% of hate victimizations [occurring from July 2000 through December 2003] were reported to police.”).

<sup>59</sup> CALIFORNIA ATTORNEY GENERAL'S CIVIL RIGHTS COMMISSION ON HATE CRIMES, *supra* note 5, at 11.

<sup>60</sup> *See* discussion *infra* Part III.C. *See also* NAT'L MENTAL HEALTH ASS'N, *supra* note 14; Wessler, *supra* note 28, at 30.

<sup>61</sup> CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEPT. OF JUSTICE, *supra* note 57, at 9.

<sup>62</sup> The California legislature itself recognized that “[b]etter data collection of hate motivated incidents and hate crimes will provide useful information, locally and at the state level, to assist in targeting limited resources with greater effectiveness.” 2000 Cal. Stat. 955 (codified as amended at CAL. PENAL CODE §§ 628, 628.1, 628.2 and 628.5 and at CAL. EDUC. CODE §§ 233, 32228, 32228.1, 44253.2, and 44253.3 ).

<sup>63</sup> 28 U.S.C. § 534 (2000). The Hate Crime Statistics Act of 1990 mandated that the U.S. Attorney General collect data “about crimes that

violence are a valuable resource for schools.<sup>64</sup> Statistics alert school administrators to alarming trends, and are a useful tool for the development of policies aimed at reducing undesirable behaviors.<sup>65</sup> As discussed herein, the methods used to gather statistics on bias-motivated incidents committed in schools are ineffective, and yield inaccurate and unreliable figures. Because of these inaccuracies, difficulties arise when one attempts to make sense of the statistical information available as it relates to hate crime and hate incidents in the school setting.<sup>66</sup>

California was among the first states to require the collection of statistics on crimes committed in schools.<sup>67</sup> In 1984, legislation was passed that required the mandatory reporting of crimes committed at schools to the California Department of Education.<sup>68</sup> However, the methods by which data were collected proved to be inadequate, yielding unreliable and inaccurate results.<sup>69</sup> This was partly due to a lack of consistent methods for data collection amongst reporting school districts.<sup>70</sup> The lack of any consistent method

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manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.” *Id.*

<sup>64</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, REPORTING SCHOOL VIOLENCE 2 (Jan. 2002), available at [http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/n\\_cj189191.pdf](http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/n_cj189191.pdf).

<sup>65</sup> *Id.*

<sup>66</sup> Professor William B. Rubenstein of UCLA has examined the manner in which the federal government collects and calculates hate crime statistics, and has identified a number of ways in which these official statistics fail to accurately capture the extent of hate crime in the United States. William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004).

<sup>67</sup> MARCUS NIETO, SECURITY AND CRIME PREVENTION STRATEGIES IN CALIFORNIA PUBLIC SCHOOLS 14 (1999), available at <http://www.library.ca.gov/crb/99/12/99-012.pdf>.

<sup>68</sup> 1994 Cal. Stat. 1607 (codified at CAL. PENAL CODE §§ 628, 628.1, and 628.2 (West, repealed 2005)).

<sup>69</sup> NIETO, *supra* note 67.

<sup>70</sup> *Id.*

of data collection resulted in over-reporting and under-reporting by schools, harming the reputations of some schools and deterring others from reporting to the Department.<sup>71</sup> The legislation was subsequently suspended in 1993 until a more accurate method of data collection could be developed.<sup>72</sup>

In 1995, the California legislature again attempted to create a uniform reporting system with the establishment of the California Safe Schools Assessment program.<sup>73</sup> The aim of this program was to compile data on the types and frequency of crimes committed on school campuses.<sup>74</sup> Several provisions of the California Penal Code were amended to require all schools to submit crime data to the California Department of Education on a yearly basis.<sup>75</sup> The California Safe Schools Assessment program required a “management team” comprised of state and private agencies to check the numbers reported by schools and school districts to ensure that there was uniform reporting of crime data.<sup>76</sup>

Five years later, Chapter 955 further amended several sections of the Penal Code, as well as several provisions of the Education Code.<sup>77</sup> The amendments were aimed at addressing the problem of bias-motivated behavior in schools. The amended statutes communicated the intent of the legislature to provide public schools with the resources necessary to “combat bias on the basis of race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.”<sup>78</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* citing CALIFORNIA DEPARTMENT OF EDUC., UNDERSTANDING AND REPORTING SCHOOL CRIME: A REPORT OF THE CALIFORNIA SAFE SCHOOLS ASSESSMENT (1997)).

<sup>73</sup> 1995 Cal. Stat. 410 (codified at CAL. PENAL CODE §§ 628.1, 628.2, 628.4, 628.5, and 628.6 (West, repealed 2005)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> NIETO, *supra* note 67.

<sup>77</sup> 2000 Cal. Stat. 955 (codified as amended at CAL. PENAL CODE §§ 628, 628.1, 628.2 and 628.5 and at CAL. EDUC. CODE §§ 233, 32228, 32228.1, 44253.2, and 44253.3 ).

<sup>78</sup> CAL. EDUC. CODE § 32228 (West 2006).

The legislature directed the State Board of Education to develop guidelines aimed at “discouraging the development of discriminatory attitudes and practices.”<sup>79</sup> Most importantly, hate crimes and hate incidents were added to the standard form used by schools to report crimes to the State Department of Education.<sup>80</sup> Although existing law required school districts to report crimes committed on school grounds,<sup>81</sup> there had been no mandated collection of statistics on hate crimes and hate incidents.

Due to a lack of funding for the California Safe School Assessment program, the relevant statutory provisions were repealed in 2005.<sup>82</sup> This left the Biennial California Student Survey, legislatively mandated since 1991,<sup>83</sup> as the only source of official statistics concerning the prevalence of hate crimes in California public schools.<sup>84</sup> Although the survey is only required to collect information on student substance use, the survey has been expanded to collect information on

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<sup>79</sup> 2000 Cal. Stat. 955 (codified as amended at CAL. PENAL CODE §§ 628, 628.1, 628.2 and 628.5 and at CAL. EDUC. CODE §§ 233, 32228, 32228.1, 44253.2, and 44253.3 ).

<sup>80</sup> CAL. PENAL CODE § 628.1 (West, repealed 2005).

<sup>81</sup> See 1995 Cal. Stat. 410 (codified at CAL. PENAL CODE §§ 628.1, 628.2, 628.4, 628.5, and 628.6 (West, repealed 2005)).

<sup>82</sup> CAL. PENAL CODE §§ 628, 628.1, 628.2, 628.4, 628.5 and 628.6 (West, repealed 2005).

<sup>83</sup> CAL. HEALTH & SAFETY CODE § 11605 (West 2006).

<sup>84</sup> The California Healthy Kids Survey (CHKS), which also collects information on bias-motivated harassment, is a local survey. WESTED, LOOKING FOR THE HEALTHY KIDS SURVEY RESULTS, [http://www.wested.org/pub/docs/hks\\_results.html](http://www.wested.org/pub/docs/hks_results.html) (last visited Mar. 27, 2006). The results of CHKS are not representative on the state level. *Id.* CHKS is “a voluntary survey administered annually to 400,000 students in grades 5, 7, 9, and 11. Over 600 school districts, whose total enrollment represents 87 percent of California’s school population, participate. School districts are not required to administer the survey, but it is a requirement if districts want to be considered for additional federal funding through Title IV of the Improving America’s Schools Act (IASA). The core module for 7th, 9th and 11th grade students includes a question about how many times in the past 12 months the student has been harassed on school property because of race, ethnicity, gender, sexual orientation, or disability.” CALIFORNIA ATTORNEY GENERAL’S CIVIL RIGHTS COMMISSION ON HATE CRIMES, *supra* note 5, at 26.

violence perpetration and victimization.<sup>85</sup> The protective categories addressed in these surveys are similar, but not identical, to the protective classes covered by the definition of a hate crime as recognized in the California Penal Code.<sup>86</sup>

The 8th Biennial California Student Survey, conducted in 1999-2000, consisted of a sample group of 12,777 students from grades seven, nine and eleven.<sup>87</sup> Approximately one-fifth of respondents reported being harassed or bullied because of their race, ethnicity, gender, sexual orientation or disability.<sup>88</sup> In addition, sixty percent of those students who reported being the victim of bias-motivated bullying or harassment reported multiple occurrences.<sup>89</sup> The survey failed to inquire into whether the students were targeted on multiple occasions by the same aggressor, and thus the figures fail to indicate whether or not these were isolated incidents of bias-motivated behavior with respect to the perpetrator.

More recent survey results indicate that bias-motivated harassment is on the rise. The 9th Biennial California Student Survey was conducted in the 2001-02 school year.<sup>90</sup> The sample for this survey consisted of 8238 students in grades seven, nine and eleven.<sup>91</sup> Approximately one-fourth of respondents, or approximately 2000 students, reported being bullied or harassed on school property because of their race, ethnicity, gender, religion, sexual orientation or disability.<sup>92</sup> The increase in bias-motivated behavior seen between the 8th Biennial California Student Survey and the

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<sup>85</sup> *Id.*

<sup>86</sup> CAL. PENAL CODE § 422.55(a) (West 2006) (recognizing as protected classes (1) disability, (2) gender, (3) nationality, (4) race or ethnicity, (5) religion, (6) sexual orientation, or (7) association with a person or group with one or more of these actual or perceived characteristics).

<sup>87</sup> CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, *supra* note 29.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> CALIFORNIA OFFICE OF THE ATTORNEY GENERAL & WESTED, *supra* note 25.

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* The increase in reported incidents compared to the 8th Biennial California Student Survey is possibly a result of the addition of religion to the list of bias motivations. *Id.*

9th Biennial California Student Survey provides further support for the immediate need for policies and initiatives aimed at minimizing such undesirable behavior.

*C. Impediments to the Accurate Collection of Statistics*

Two factors account for the inaccuracies of available statistics on hate crime and hate incidents in schools. The first is primary under-reporting, or sometimes non-reporting, by victims of bias-motivated behavior. The second is secondary under-reporting and misreporting by school officials.

There are a number of reasons why victims of hate crimes and hate incidents might choose not to report the incident to school officials or law enforcement.<sup>93</sup> For some students, “the fear that slurs, degrading language, and harassment will get worse if they tell anyone about them leads them to deny that the incidents ever occurred.”<sup>94</sup> Other students choose to let harassment go unreported out of feelings of shame or embarrassment.<sup>95</sup> With homosexual students specifically, some students choose to carry the burden of the abuse alone rather than risk their parents learning of their sexual orientation.<sup>96</sup> In addition, parents of targeted students sometimes let hate crimes and hate incidents perpetrated against their children go unreported for fear that their children will be “re-victimized” by school staff or students.<sup>97</sup>

Additionally, even when the victim does report the incident to school officials, there is no guarantee that it will be reported to the agency or agencies responsible for compiling official statistics. California’s first attempt at mandated

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<sup>93</sup> NAT’L MENTAL HEALTH ASS’N, *supra* note 14.

<sup>94</sup> Wessler, *supra* note 28, at 30.

<sup>95</sup> NAT’L MENTAL HEALTH ASS’N, *supra* note 14.

<sup>96</sup> A federal judge recently ruled that a homosexual student may file suit against her Orange County school district for violation of her privacy rights stemming from the disclosure of her homosexuality to her mother by her principal. *Ruling Lets Student Sue Over Her Outing*, SIGNONSANDIEGO.COM, Dec. 3, 2005, [http://www.signonsandiego.com/uniontrib/20051203/news\\_1n3outed.html](http://www.signonsandiego.com/uniontrib/20051203/news_1n3outed.html).

<sup>97</sup> CALIFORNIA ATTORNEY GENERAL’S CIVIL RIGHTS COMMISSION ON HATE CRIMES, *supra* note 5, at 28.

reporting of hate crime incidents was hampered by schools' tendencies to underreport such incidents in order to avoid incurring a reputation as a problem school.<sup>98</sup>

The No Child Left Behind Act of 2001<sup>99</sup> allows any child who attends a "persistently dangerous school" or who is the victim of a violent criminal offense to transfer to a safe school.<sup>100</sup> Each state is permitted to create its own definition of a "persistently dangerous school."<sup>101</sup> In California, a school is considered "persistently dangerous" when it "has a federal or state gun-free schools violation or a violent criminal offense has been committed by a student or a non-student on school property" and the "number of expulsions for violent criminal offenses (delineated in the policy) for students enrolled in the school exceeds [a certain ratio based on size of student body]."<sup>102</sup> Both conditions must be satisfied for a period of three consecutive fiscal years.<sup>103</sup>

Hate violence is one of the enumerated acts used to identify a "persistently dangerous school" under the No Child Left Behind Act.<sup>104</sup> The implications of being labeled a "persistently dangerous school," such as the loss of funding that accompanies the transfer of students to other schools, are serious and cause principals to under-report the number of violent criminal offenses committed on school grounds.<sup>105</sup>

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<sup>98</sup> NIETO, *supra* note 67.

<sup>99</sup> No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 et seq. (Supp. 2001).

<sup>100</sup> 20 U.S.C. § 7912 (Supp. 2001).

<sup>101</sup> *Id.*

<sup>102</sup> CALIFORNIA DEPT. OF EDUC., PROVISIONS AND DEFINITION: UNSAFE SCHOOL CHOICE PROVISIONS AND DEFINITION, <http://www.cde.ca.gov/ls/ss/se/uscoattch1.asp>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> National School Safety and Security Services, School Safety Implications of No Child Left Behind Law's "Persistently Dangerous School" Definitions, [http://www.schoolsecurity.org/trends/persistently\\_dangerous.html](http://www.schoolsecurity.org/trends/persistently_dangerous.html) (last visited Apr. 5, 2006).

#### IV. Responding to Bias-Motivated Behavior in Schools

##### *A. Existing Legislation Intended to Protect Students from Bias-Motivated Behavior in California's Public Schools*

A special relationship exists between the school district and students due in part to the compulsory nature of education.<sup>106</sup> This special relationship places an affirmative duty on the school to take whatever reasonable steps are necessary to protect its students.<sup>107</sup> The extent of the duty of care owed to any individual student depends on whether any particular manner of harm to that student is reasonably foreseeable.<sup>108</sup> The duty to exercise control over the students entrusted to the tutelage of public schools has been expanded by statute to impose such a duty upon teachers.<sup>109</sup>

The California legislature has declared that all students in public schools are entitled to the same rights and opportunities regardless of “sex, ethnic group identification, race, national origin, religion, mental or physical disability, or regardless of any actual or perceived characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code.”<sup>110</sup> A number of statutory

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<sup>106</sup> See *Rodriguez v. Inglewood Unified Sch. Dist.*, 230 Cal. Rptr. 823, 826 (Cal. Ct. App. 1986) (a special relationship between a school district and its students arises from the “compulsory character of school attendance, the expectation and reliance of parents and students on schools and staff for safe buildings and grounds, and the importance to society of the learning activity which is to take place in public schools”). See also *M.W. v. Panama Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d 673, 679 (Cal. Ct. App. 2003) (recognizing that a “special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students”); 6 B.E. WITKIN, WITKIN SUMMARY OF CALIFORNIA LAW, Torts § 864 (9th ed. 2004).

<sup>107</sup> See *Rodriguez*, 230 Cal. Rptr. at 826.

<sup>108</sup> *M.W.*, 1 Cal. Rptr. 3d at 679.

<sup>109</sup> CAL. EDUC. CODE § 44807 (West 2006) (in relevant part reads: “Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess.”).

<sup>110</sup> CAL. EDUC. CODE § 200 (West 2006) (“It is the policy of the State of California to afford all persons in public schools, regardless of their sex,

provisions embody this aim of ensuring equal access to education to all students.

The California Schools Hate Violence Reduction Act of 1995 requires the State Board of Education to adopt policies aimed at fostering school environments free of discriminatory and bias-motivated behavior.<sup>111</sup> The Act was intended to promote the establishment of guidelines that would allow schools to both prevent and respond to incidents of hate violence in an effective manner.<sup>112</sup> The Act provided that any student that “caused, attempted to cause, threatened to cause, or participated in an act of, hate violence” would be subject to expulsion or suspension based on a determination by the principal or superintendent.<sup>113</sup>

With the California Student Safety and Violence Prevention Act of 2000, the legislature further amended the California Education Code. Sexual orientation and gender identity were added to the list of protected classes.<sup>114</sup> In addition to sex, ethnicity, race, national origin, religion, color, and mental or physical disability, schools now have an affirmative duty to protect students from harassment on the basis of real or perceived sexual orientation or gender

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ethnic group identification, race, national origin, religion, mental or physical disability, or regardless of any actual or perceived characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts which are contrary to that policy and to provide remedies therefor.”). The individual characteristics contained in Section 422.55 of the Penal Code are disability, gender, nationality, race or ethnicity, religion, sexual orientation, as well as association with an individual with one of these characteristics. CAL. PENAL CODE § 422.55 (West 2006).

<sup>111</sup> California Schools Hate Violence Reduction Act of 1995, 1994 Cal. Stat. 1198(2) (codified in scattered sections of CAL. EDUC. CODE).

<sup>112</sup> *Id.*

<sup>113</sup> CAL. EDUC. CODE § 48900.3 (West 2006).

<sup>114</sup> California Student Safety and Violence Prevention Act of 2000, 1999 Cal. Stat. 587 (codified in scattered sections of CAL. EDUC. CODE). The Code already explicitly prohibited discrimination and harassment on the basis of sex, ethnicity, race, national origin, religion, color, or mental or physical disability. *Id.*

identification.<sup>115</sup> The California Student Safety and Violence Prevention Act of 2000 placed California amongst the first states to take affirmative steps to protect children from harassment motivated by real or perceived sexual orientation and gender.<sup>116</sup>

Available federal remedies have proven to be no more effective at reducing the prevalence of bias-motivated harassment than the state remedies addressed above. Provisions of the No Child Left Behind Act provide the illusion of a remedy to victims of bias-motivated violence at school by allowing student victims of violent criminal offenses to transfer to a different, safer school.<sup>117</sup> However, nothing in the Act requires schools to take any affirmative steps towards remedying the underlying problem of the presence of such undesirable behavior in the school, other than to allow the student to transfer to a different school.<sup>118</sup> The victim is the one who is required to leave his or her original school and all of his or her friends behind while the perpetrator is allowed to remain, thus placing the burden of

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<sup>115</sup> California Student Safety and Violence Prevention Act of 2000, 1999 Cal. Stat. 587 (codified in scattered sections of CAL. EDUC. CODE). *See also* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1150 (C.D. Cal. 2000) (In issuing preliminary injunction forbidding school district to interfere with student-formed Gay-Straight Alliance Club, the court recognized that in “passing the California Student Safety and Violence Prevention Act of 2000, the California Legislature found that ‘violence is the number one cause of death for young people in California and has become a public health problem of epidemic proportion’ and ‘the fastest growing, violent crime in California is hate crime.’ The Legislature felt that ‘it is incumbent upon us to ensure that all students attending public school in California are protected from potentially violent discrimination. The California Penal Code already contained a prohibition on hate crimes based on sexual orientation.’”) (internal citations omitted).

<sup>116</sup> CALIFORNIA SAFE SCHOOLS COALITION & 4-H FOR YOUTH DEVELOPMENT, *supra* note 16, at 4.

<sup>117</sup> 20 U.S.C. § 7912 (Supp. 2001).

<sup>118</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 672 (2004).

seeking the corrective action available under the Act entirely on the victim.<sup>119</sup>

*B. Limitations of the Existing Civil Remedy Available to Children Who Are Harmed by Bias-Motivated Behavior in Schools*

When a school district fails to protect a student from bias-motivated behavior, the only liability that the school incurs is civil liability,<sup>120</sup> and the affected student's only avenue for redress is the court system. This is an ineffective remedy. For the reasons discussed below, the civil remedy fails to protect the needs of student victims of bias-motivated behavior, and does nothing to ensure that schools enact effective policies aimed at protecting students.

Title IX of the Education Amendments of 1972 has served as grounds for a number of lawsuits brought against school districts and involving bias-motivated harassment on the basis of sex by students.<sup>121</sup> Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>122</sup> The application of Title IX to the school environment “does not hold a school accountable for the harassing conduct of students, ‘but rather for its own discrimination in failing to

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<sup>119</sup> *Id.* at 673.

<sup>120</sup> Persons classified as mandated reporters, however, are subject to prosecution for a misdemeanor for failure to report known or reasonably suspected child abuse or neglect. *See* CAL. PENAL CODE § 11166 (West 2006). Teachers, instructional aides, teachers' aides or teachers' assistants, and classified employees of a public school are mandated reporters under the code. CAL. PENAL CODE § 11165.7(a)(1)-(4) (West 2006).

<sup>121</sup> For a sample of such cases, *see* *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Oona, R. S. v. McCaffrey*, 143 F.3d 473, 478 (9th Cir. 1998); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Doe v. Univ. of Illinois*, 138 F.3d 653 (7th Cir. 1998); and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>122</sup> 20 U.S.C. § 1681(a) (2000).

remedy it once the school has notice.”<sup>123</sup> The protections that Title IX affords gay students are limited, as only actions or language involving some degree of sexual conduct are prohibited by the statute.<sup>124</sup> Title IX is not concerned with hateful language alone, even language attacking the sexual orientation of a student.<sup>125</sup>

In the case of *Davis v. Monroe County Board of Education*, the Supreme Court held that a private damages cause of action may be brought against a school board, as a recipient of Title IX funding, where the school board acted “with deliberate indifference to known acts of [student-on-student] harassment in its programs or activities.”<sup>126</sup> The Court limited Title IX’s application, concluding that districts would be liable under Title IX only when they are “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>127</sup>

Although *Davis* involved a female victim of harassment at the hands of male offenders, other cases involving same-sex victims and perpetrators have been made under Title IX. In *Montgomery v. Independent School District*

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<sup>123</sup>Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997), *quoted in* Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN’S L.J. 159 (1999).

<sup>124</sup> Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN’S L.J. 159 (1999).

<sup>125</sup> *Id.*

<sup>126</sup> *Davis*, 526 U.S. at 633.

<sup>127</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). *See also* *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (“[Statistics indicate] that school districts are on notice that student-to-student sexual harassment is very likely in their schools, particularly in junior high school. In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment.”).

*No. 709*, student-on-student harassment based on the victim's "failure to meet masculine stereotypes" was held as a permissible basis for a private claim under Title IX.<sup>128</sup> The plaintiff alleged that his harassers "called him names targeted at homosexuals and spread rumors about his sexual orientation, as well as subjecting him to more severe forms of misconduct such as asking him for sexual favors, grabbing his buttocks and inner thighs, and subjecting him to acts of pretended anal rape."<sup>129</sup> The court found the plaintiff's young age at the time of the harassment to be a significant point of consideration.<sup>130</sup>

In *Ray v. Antioch Unified School District*, the plaintiff brought suit under Title IX against both the school district of the school he attended, and one of the students he accused of harassing him.<sup>131</sup> The plaintiff alleged that the school district were aware of the "widespread, general perception" on campus that he was a homosexual, were aware that he was being harassed for his perceived sexual orientation, and did nothing to stop the harassment.<sup>132</sup> The court found that a finder of fact could reasonably believe that the school district acted "(1) deliberately indifferent, (2) to sexual harassment, (3) of which they have actual knowledge, (4) that is so severe, pervasive, and objectively offensive, (5) that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school," thus meeting the basis of a complaint alleging a cause of action under Title IX.<sup>133</sup>

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<sup>128</sup> *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000).

<sup>129</sup> *Id.* at 1093.

<sup>130</sup> *Id.* at 1090 ("Moreover, the Court finds important the fact that plaintiff's peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be 'homosexual' or 'heterosexual.'").

<sup>131</sup> *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

<sup>132</sup> *Id.* at 1167.

<sup>133</sup> *Id.* at 1169, 1171-1172 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999)).

Other cases have been brought based on the violation of rights guaranteed to students by the U.S. Constitution. In *Nabozny v. Podlesny*, Jamie Nabozny, who had been harassed and abused throughout middle school and high school by his fellow students because of his sexual orientation, brought suit against the school district.<sup>134</sup> The student had reported the harassment to school officials, who failed to protect the student or take any corrective action against the students who had harassed him.<sup>135</sup> The Seventh Circuit Court of Appeals recognized a school district's failure to enforce its own anti-harassment policies as sufficient grounds for a private action against the district and school officials pursuant to 42 U.S.C. § 1983, where the student had alleged violation of his or her rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>136</sup>

A multitude of factors render this civil remedy unavailable to the majority of students who suffer due to the deliberate indifference of a school district. Most minors lack the financial ability to retain counsel to sue on their own, and might be unable to amass the financial resources necessary even with the support and assistance of their parents.<sup>137</sup> However, many students are hesitant to involve their parents in such matters.<sup>138</sup> Homosexual students oftentimes do not want their parents to learn of their sexual orientation, and

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<sup>134</sup> *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996). Nabozny filed suit not only against the Ashland Public School District, but against several school officials as well. *Id.*

<sup>135</sup> *Id.* Although "school administrators had a policy of investigating and punishing student-on-student battery and sexual harassment, they allegedly turned a deaf ear to Nabozny's requests." *Id.*

<sup>136</sup> *Id.* at 460-61. (Student was harassed and physically abused by other students throughout middle school and high school because of his sexual orientation. The student reported harassment to school officials, who failed to respond to the student's complaint. The Seventh Circuit Court of Appeals held that the Fourteenth Amendment requires schools to take measures to combat hate crimes.).

<sup>137</sup> Interview with Robert R. DeKoven, Professor of Law, California Western School of Law, in San Diego, Cal. (Apr. 3, 2006).

<sup>138</sup> *Id.*

other students feel ashamed for being the target of bias-motivated attacks.<sup>139</sup>

The civil remedy for student victims of hate violence is insufficient also because it generally addresses only the needs of the victim, and entirely ignores the needs of the perpetrator.<sup>140</sup> Bias-motivated behaviors, “[u]nlike most of the actions for which tort law provides redress to the victim, racial labeling and racial insults directly harm the perpetrator. Bigotry harms the individuals who harbor it by reinforcing rigid thinking, thereby dulling their moral and social senses.”<sup>141</sup> For these reasons, the existing civil remedy for students whose schools fail to protect them from bias-motivated behavior serves as no remedy at all.

## V. Recommendations

### *A. Resume the Collection of Statistical Information Concerning the Prevalence of Bias-Motivated Incidents in Schools*

An effective response to bias-motivated behavior in California’s public schools requires an accurate understanding of the extent of the problem. An accurate method of obtaining official statistics regarding the prevalence of hate crimes and hate incidents is therefore necessary as this information will assist in the development of effective solutions to the problem of bias-motivated behavior in schools.<sup>142</sup> California’s current

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<sup>139</sup> *Id.* See also CALIFORNIA ATTORNEY GENERAL’S CIVIL RIGHTS COMMISSION ON HATE CRIMES, *supra* note 5, at 11.

<sup>140</sup> The most successful programs aimed at reducing bias-motivated behaviors in schools will consider not only the needs of the targets of bias-motivated behaviors, but the perpetrators as well. According to a school psychologist whose clients include hate crime victims and perpetrators alike, the perpetrators are “alienated kids with low self-esteem—and family members with displaced anger who think minorities get opportunities they themselves don’t get.” Mary Faber, *When Hate Turns Violent*, NEA TODAY, May 1992, at 6.

<sup>141</sup> MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 92 (1993).

<sup>142</sup> U.S. DEPT. OF JUSTICE, REPORTING SCHOOL VIOLENCE 3 (2002),

means of obtaining statistics on this matter are inaccurate and unreliable.<sup>143</sup> The California legislature must adopt legislation aimed at ensuring the collection of such statistics, or resurrect the California Safe Schools Assessment program, this time making available the level of funding necessary to ensure the collection of accurate statistics.

*B. Clearly Mandated Duty to Report Bias-Motivated Incidents to Law Enforcement*

At the present time, school officials and employees in California public schools are under no clearly mandated legal obligation to report hate crimes to law enforcement.<sup>144</sup> Mandatory reporting is necessary, as the official report of an incident of hate crime is “the necessary and crucial first step in a larger process that can lead to the prosecution and sentencing of hate crime perpetrators.”<sup>145</sup> Children who perpetrate hate crimes against other students while at school face criminal sanctions only when the offense is brought to the attention of law enforcement. With school officials under no clearly mandated duty to notify law enforcement of bias-motivated incidents involving students, juvenile perpetrators are brought to the attention of law enforcement only when the incident is reported by the victim. As discussed in the preceding pages of this article, this is an ineffective method of gathering data, as there are a number of reasons why the victims of hate crimes and hate incidents might choose to let the incident go unreported.<sup>146</sup>

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available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/ncj189191.pdf>.

<sup>143</sup> See discussion *supra* Part III.

<sup>144</sup> California law does require school officials and employees to report certain types of criminal behavior to law enforcement, but not hate crimes. See discussion *infra* Part IV.B.

<sup>145</sup> CALIFORNIA SENATE OFFICE OF RESEARCH, PROTECTING CALIFORNIANS FROM HATE CRIMES: A PROGRESS REPORT 11-12 (2004), [http://www.sen.ca.gov/sor/reports/reports\\_by\\_subj/public\\_safety\\_judiciary/hatecrimereport804.pdf](http://www.sen.ca.gov/sor/reports/reports_by_subj/public_safety_judiciary/hatecrimereport804.pdf) (quoting from a 2003 study conducted by the University of California).

<sup>146</sup> See discussion *supra* Part III.

Such change can be accomplished by shifting the burden of reporting hate motivated incidents to law enforcement from the victim of the offense to school officials. Rather than continuing to place the onus to report such victimization on the student, who is often hesitant or unable to make such a report, the duty to report such incidents should be shifted to the educators. School officials should be required respond to all bias-motivated incidents that take place on school grounds by reporting the offense to law enforcement authorities.

Current law makes school administrators legally obligated to notify law enforcement of certain types of conduct by or involving students.<sup>147</sup> The principal of a school or the principal's designee must notify law enforcement prior to suspending or expelling a student for any incident involving assault with a deadly weapon or involving assault by force likely to produce great bodily injury.<sup>148</sup> Law enforcement must also be notified prior to suspending or expelling a student for the use, possession or distribution of certain controlled substances.<sup>149</sup> Law enforcement must also be notified of any incidents involving possession or distribution of certain narcotics or other intoxicants,<sup>150</sup> or incidents involving the possession of guns<sup>151</sup> or certain other weapons.<sup>152</sup> The willful violation of these duties constitutes a misdemeanor punishable by a fine.<sup>153</sup>

While the California Education Code requires school principals to report certain actions by students to police, hate crimes are excluded from this list. Like the possession, use or

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<sup>147</sup> CAL. EDUC. CODE § 48902 (West 2006).

<sup>148</sup> CAL. EDUC. CODE § 48902(a) (West 2006); CAL. PENAL CODE § 245 (West 2006).

<sup>149</sup> CAL. EDUC. CODE § 48902(a) (West 2006); CAL. EDUC. CODE §§ 48900(b) & 48900(c) (West 2006); CAL. HEALTH & SAFETY §§ 11053 et seq. (West 2006).

<sup>150</sup> CAL. EDUC. CODE § 48902(c) (West 2006).

<sup>151</sup> *Id.*; CAL. PENAL CODE § 626.9 (West 2006).

<sup>152</sup> CAL. EDUC. CODE § 48902(c) (West 2006); CAL. PENAL CODE § 626.10 (West 2006).

<sup>153</sup> CAL. EDUC. CODE § 48902(e) (West 2006).

sale of intoxicants,<sup>154</sup> causing or threatening to cause a hate crime is grounds for suspension or expulsion of a student.<sup>155</sup> A student who has committed sexual harassment is also subject to expulsion or suspension.<sup>156</sup> However, the Education Code imposes no legal obligation on school principals to report these offenses to law enforcement.

Additionally, the Child Abuse and Neglect Reporting Act<sup>157</sup> requires educators to report any suspected child abuse to authorities when they have knowledge of or observe a child who they know or have reason to suspect has been abused.<sup>158</sup> Clearly defined categories serve to designate those individuals whom are obligated to make such reports.<sup>159</sup> These include teachers,<sup>160</sup> instructional aides,<sup>161</sup> teachers' aides or teachers' assistants,<sup>162</sup> along with classified employees of a public school.<sup>163</sup> Any such person who fails to report an instance of child abuse which he or she knows to exist, or reasonably should know to exist, is guilty of an infraction punishable by a fine not to exceed five thousand dollars.<sup>164</sup>

Under the Act, "reasonable suspicion" means "that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect."<sup>165</sup> The term "child abuse or neglect" encapsulates any "physical injury inflicted by other than accidental means upon a child by another person," as well as the "willful harming or injuring of

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<sup>154</sup> CAL. EDUC. CODE § 48902(b) (West 2006); CAL. EDUC. CODE §§ 48900(b) & 48900(c) (West 2006); CAL. HEALTH & SAFETY §§ 11053 et seq. (West 2006).

<sup>155</sup> CAL. EDUC. CODE § 48900.3 (West 2006).

<sup>156</sup> CAL. EDUC. CODE § 48900.2 (West 2006).

<sup>157</sup> CAL. PENAL CODE §§ 11164 et seq. (West 2006).

<sup>158</sup> CAL. PENAL CODE § 11166(a) (West 2006).

<sup>159</sup> CAL. PENAL CODE § 11165.7 (West 2006).

<sup>160</sup> CAL. PENAL CODE § 11165.7(a)(1) (West 2006).

<sup>161</sup> CAL. PENAL CODE § 11165.7(a)(2) (West 2006).

<sup>162</sup> CAL. PENAL CODE § 11165.7(a)(3) (West 2006).

<sup>163</sup> CAL. PENAL CODE § 11165.7(a)(4) (West 2006).

<sup>164</sup> CAL. PENAL CODE § 11166.01 (West 2006).

<sup>165</sup> CAL. PENAL CODE § 11166(a)(1) (West 2006).

a child or the endangering of the person or health of a child.”<sup>166</sup> A “mutual affray between minors” is specifically exempted from the definition and is not considered child abuse.<sup>167</sup>

Hate crimes between students clearly do not fall into the category of “mutual affrays.” Hate crimes are thus not explicitly exempted from the definition of “child abuse” as recognized by the Child Abuse and Neglect Reporting Act. This means that although no California court has yet to recognize hate crimes as such, hate crimes are in fact child abuse and hate crime incidents must be reported to the proper authorities. Hate incidents which result in the “willful infliction of unjustifiable suffering” are also incidents of child abuse under the Act. Those hate incidents that meet the definition of child abuse must as well be reported to law enforcement under the Child Abuse and Neglect Reporting Act.

The Child Abuse and Neglect Reporting Act<sup>168</sup> also states that mandated reporters as defined in the Act<sup>169</sup> who have knowledge of or who reasonably suspect that a child is either suffering serious emotional damage or is at a risk of serious emotional damage may make a report to certain designated authorities.<sup>170</sup> Evidence of serious emotional abuse may come from such behaviors or characteristics as “severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others.”<sup>171</sup> Even absent any knowledge of bias-motivated behavior directed toward the

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<sup>166</sup> CAL. PENAL CODE § 11165.6 (West 2006). The “willful harming or injuring of a child or the endangering of the person or health of a child” includes any “situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered.” CAL. PENAL CODE § 11165.3 (West 2006).

<sup>167</sup> *Id.*

<sup>168</sup> CAL. PENAL CODE §§ 11164 et seq. (West 2006).

<sup>169</sup> CAL. PENAL CODE § 11165.7 (West 2006).

<sup>170</sup> CAL. PENAL CODE § 11166.05 (West 2006).

<sup>171</sup> *Id.*

child displaying signs of emotional damage, this provision provides a mechanism by which the mandated reporter can alert officials to possible problems and begin necessary investigations into the cause of such emotional damage.

The compulsory reporting of hate crimes and hate incidents to law enforcement would be guaranteed if school officials who knowingly failed to make the required reports were subject to criminal sanctions.<sup>172</sup> Certain individuals already have a legal duty to report certain incidents to law enforcement. Requiring school officials to report hate crimes to law enforcement would only add to the existing list of acts which officials have an existing duty to report. Together with the civil remedies that are already available to students when their school fails to protect them from bias-motivated behavior, the threat of criminal sanctions would motivate school officials to respond to bias-motivated incidents on campus.

The main difficulty likely to arise out of the mandatory reporting of bias-motivated behaviors is in distinguishing genuine bias-motivated behavior from general bullying behavior. Existing legislation already addresses this foreseeable difficulty. Mandated reporters as specified in the Child Abuse and Neglect Reporting Act are protected from any civil or criminal liability for any report authorized by the Act.<sup>173</sup> A party who files a false report does not risk civil or criminal liability as long as the reporting party either did not know that the report was false or make the report with reckless disregard as to the accuracy of the report.<sup>174</sup>

As hate crimes and many hate incidents clearly fall under the definition of child abuse as defined in the Child Abuse and Neglect Reporting Act, the Act should be modified so that this inclusion is made clear. Modest amendment of the

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<sup>172</sup> It is to be expected that educators will be troubled at the prospect of criminal sanctions. However, educators and other designated individuals are under an existing duty to notify law enforcement of certain conduct involving students entrusted to their care. The expansion of duties imposed upon educators would be slight.

<sup>173</sup> CAL. PENAL CODE § 11172 (West 2006).

<sup>174</sup> *Id.*

Child Abuse and Neglect Reporting Act is necessary in order to make the reporting requirements under the Act indisputably applicable to hate crimes and hate incidents.

## VI. Conclusion

California must do more to bring about the institutional changes called for by the California Student Safety and Violence Prevention Act of 2000.<sup>175</sup> Sixty percent of school districts in the state lack policies that specifically prohibit harassment motivated by the victim's gender identity, appearance or behavior.<sup>176</sup> Sixty percent of school districts in the state are thus in direct violation of California law.<sup>177</sup> School districts are aware that hate is a problem in their schools, but the litany of cases winding their way through California dockets indicates that they are either unwilling or unable to respond.<sup>178</sup> As schools and neighborhoods grow more diverse, there is little reason to believe that such bias-motivated behavior will decrease absent the implementation of forward-looking policies aggressively aimed at curbing such activity "in furtherance of the government's

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<sup>175</sup> 1999 Cal. Stat. 587 (codified in scattered sections of CAL. EDUC. CODE).

<sup>176</sup> CALIFORNIA SAFE SCHOOLS COALITION, SAFE SCHOOLS RESEARCH BRIEF 1 (2004), available at <http://www.casafeschools.org/distpolicies.pdf>.

<sup>177</sup> *Id.*

<sup>178</sup> *See Doe By & Through Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) ("[The availability of statistics indicates] that school districts are on notice that student-to-student sexual harassment is very likely in their schools, particularly in junior high school. In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment."). For a thoughtful discussion of this systemic failure to achieve an adequate response in the face of overwhelming data indicating the urgency of action to combat bullying (and equally applicable to bias-motivated behaviors), see Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004).

responsibilities...as guardian and tutor of children entrusted to its care.”<sup>179</sup>

Every instance of bias-motivated behavior is an important incident that must be recorded and dealt with. Incidents which on the surface appear to be isolated incidents frequently are not.<sup>180</sup> Rather, such incidents are oftentimes the culmination of a lengthy history of bias-motivated aggression and harassment between the parties to the incident.<sup>181</sup> Furthermore, even in that rare situation where a hate crime is, in fact, a single isolated event between two individuals without any history of conflict, evidence indicates that hate crimes may provoke retaliation by the victim, harming the parties to the encounter as well as the community.<sup>182</sup>

An accurate understanding of the extent of the problem of bias-motivated behavior is necessary to develop policies likely to effectively minimize such behavior.<sup>183</sup> Accurate figures are a necessary tool for measuring the effectiveness of policies and programs. The California legislature must adopt legislation aimed at ensuring the collection of accurate statistics that capture the true extent of bias-motivated behavior in schools.

In addition to obtaining an accurate statistical understanding of the prevalence of hate crimes and hate incidents in schools, reporting hate crimes and hate incidents to law enforcement must be made mandatory. This is already

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<sup>179</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

<sup>180</sup> Wessler, *supra* note 28, at 30.

<sup>181</sup> *Id.* (“I learned from seven years of investigating and prosecuting hate crimes in colleges, high schools and middle schools that the violence was never the beginning of anything. Rather, the violence was the end of something, and that something was an escalating pattern of harassment that started with degrading language and slurs.”). See also CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, *supra* note 29 (60 percent of those students who reported being the victim of bias-motivated bullying or harassment indicated that it had occurred two or more times).

<sup>182</sup> Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 15 PSYCHOL. PUB POL’Y & L. 250, 267 (2004).

<sup>183</sup> U.S. DEPT. OF JUSTICE, REPORTING SCHOOL VIOLENCE 3 (2002), available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/ncj189191.pdf>.

required by provisions in the Child Abuse and Neglect Reporting Act.<sup>184</sup> The Act is not being enforced with respect to the mandatory reporting of hate crimes and certain hate incidents that are required by the Act.<sup>185</sup> Law enforcement must be involved early so that more minor bias-motivated behaviors are not allowed to escalate into violence.<sup>186</sup>

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<sup>184</sup> CAL. PENAL CODE §§ 11164 et seq. (West 2006).

<sup>185</sup> See *supra* Part IV.

<sup>186</sup> Wessler, *supra* note 28, at 30.