

**Court of Appeals**  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

*Appellee,*

—against—

MARQUAN W. MACKEY-MEGGS,

*Appellant.*

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**BRIEF OF *AMICI CURIAE* ADVOCATES FOR CHILDREN OF NEW  
YORK, EMPIRE STATE PRIDE AGENDA, NATIONAL SCHOOL  
CLIMATE CENTER, ROBERT F. KENNEDY CENTER FOR JUSTICE  
AND HUMAN RIGHTS, AND STUDENT PRESS LAW CENTER**

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## **CORPORATE DISCLOSURE STATEMENT**

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, proposed *amici curiae* hereby disclose that they are nonprofit organizations organized under Section 501(c)(3) of Title 26 of the United States Code and they do not have any corporate parents, subsidiaries, or affiliates.

## **PRELIMINARY STATEMENT**

There is no question that cyber-bullying is a problem but the answer is not Albany County's Cyber-bullying Law ("Cyber-bullying Law"). We already know, from study after study, that zero tolerance policies are not effective in curbing bullying. To take these policies a step further by criminalizing so called "bullies"—who are often children themselves—results in even a worse impact. The Cyber-bullying Law not only feeds directly into the School-to-Prison pipeline but studies show that these policies discriminate greatly against students of color, students with disabilities, and LGBT youth.

Further, the Cyber-bullying Law does nothing to get at the root of the problem. The National School Climate Center has studied this issue at length and identifies both school climate reform and restorative practices as proven methods for preventing cyber-bullying in the first place and for humanely addressing incidences

of cyber-bullying in ways that strengthen the school environment and support the students.

As a content-based penalty for speech, the Cyber-bullying Law is subject to the most demanding constitutional scrutiny, and can survive only if no less speech-restrictive alternative would address the government's objectives. Research and experience demonstrate that alternatives far more effective than criminal prosecution are readily available.

What students do not need is a legislative knee-jerk reaction to a problem that will result in more children in prison with no impact on the original issue. What the students do need is for lawmakers to look at the research that shows the harm of policies such as the Cyber-bullying Law and for everyone to approach alternative and more productive measures with the shared passion of curbing cyber-bullying and helping *all* children to be in productive school environments with opportunities to learn and grow.

### **INTEREST OF *AMICI***

For over forty years, Advocates for Children of New York (“AFC”) has worked with low-income families to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, such as assisting students who are being removed from school for disciplinary reasons, and also works on institutional reform of educational



policies and practices through advocacy and litigation. AFC advocates for positive alternatives to discipline, such as using behavior modification techniques rather than having the student removed from school for an extended period of time.

Founded in 1990, the Empire State Pride Agenda (the “Pride Agenda”) is New York’s statewide civil rights and advocacy group committed to winning equality and justice for lesbian, gay, bisexual, and transgender (“LGBT”) New Yorkers and their families. The Pride Agenda has offices in New York City and Albany and is one of the largest statewide LGBT organizations in the country. It is dedicated to ensuring that all New Yorkers are protected from discrimination and bias-motivated harassment and violence, and as part of its core priorities has worked to secure measures that protect teachers and other staff from employment discrimination based on sexual orientation and gender identity and expression. The Pride Agenda was instrumental in the passage of New York’s Sexual Orientation Non-Discrimination Act, which in 2003 added sexual orientation to the state’s Human Rights Law. The Pride Agenda was also among the lead groups advocating for the Dignity for All Students Act passed in 2010 to prevent and address bias-based bullying and discrimination in the New York State’s public schools.

The National School Climate Center (“NSCC”) is one the nation’s leading centers in school climate reform and social, emotional, and civic education. NSCC’s goal is to promote a positive and sustained school climate: a safe, supportive

environment that nurtures social and emotional, ethical, and academic skills. In furtherance of that goal, NSCC helps schools integrate crucial social and emotional learning with academic instruction. In doing so, NSCC enhances student performance, reduces drop outs, reduces physical violence and bullying, and develops healthy and positively engaged adults. For more than a decade NSCC has worked together with the entire academic community—administrators, teachers, staff, school-based mental health professionals, students and caregivers/parents—to improve the climate for learning. NSCC helps translate research into practice by establishing meaningful and relevant guidelines, programs and services that support a model for whole school improvement with a focus on school climate.

The Robert F. Kennedy Center for Justice and Human Rights was established in 1968 to further Robert Kennedy’s vision for a just and peaceful world. This work includes RFK Project SEATBELT (Safe Environments Achieved Through Bullying prevention, Engagement, Leadership, and Teaching respect), a bullying prevention initiative focusing on creating safe environments for all youth, ensuring their rights to an education and to be free from discrimination and persecution. RFK Project SEATBELT focuses on preventing bullying before it begins and utilizing effective response when it does occur. The goal is to change attitudes and behaviors around bullying so that treating each other with respect becomes as automatic as putting on a seat belt. In order to achieve this goal, RFK Project SEATBELT advocates for

effective programs, practices, and policies that focus on creative positive climates.

This work compliments the work of RFK Partners for Human Rights, which litigates internationally on the right to education without discrimination and seeks to ensure that educational policies and practices do not unintentionally violate the rights of students.

The Student Press Law Center (“SPLC”) is a national nonprofit organization established in 1974 as a center of research and support for students engaged in journalistic and creative expression across all mediums. The SPLC has presented expert testimony on bullying legislation in several states, and frequently appears in state and federal courts as amicus in support of legal protection for the rights of students to express themselves without fear of reprisal on matters of public concern.

## **ARGUMENT**

### **I. CRIMINALIZING CYBER-BULLYING IS COUNTERPRODUCTIVE AND HARMFUL**

#### **A. Zero-Tolerance Policies Have Been Proven to be Ineffective**

Zero-tolerance policies, often resulting in a student’s suspension or expulsion, are the precursor to laws that criminalize non-physical behavior by minors and they are proven not to work. Specifically, zero tolerance policies have not actually been shown to cause a decline in school violence or a decrease in school bullying.<sup>1</sup>

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<sup>1</sup> R. Skiba, A. Cohn, & A. Canter, *Zero Tolerance and Alternative Strategies*, in *HELPING CHILDREN AT HOME AND SCHOOL II: HANDOUTS FOR FAMILIES AND EDUCATORS*, S4:103-S4:106 (A. Canter, L. Paige, et al., eds. 2004); National Association of School Psychologists, *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, NASP ONLINE, [http://www.nasponline.org/resources/factsheets/zt\\_fs.aspx](http://www.nasponline.org/resources/factsheets/zt_fs.aspx) (last accessed April 24, 2014);

The American Psychological Association convened a task force to evaluate the evidence of a 20-year history of implementation of zero-tolerance policies and its effect on the education system.<sup>2</sup> The task force made several conclusions including that “[r]ather than reducing the likelihood of disruption . . . school suspension in general appears to predict higher future rates of misbehavior and suspension among those students who are suspended.”<sup>3</sup> The task force also found that evidence contradicted the presumption that the removal of students who violate school rules will create a school climate more conducive to learning for those students who remain.<sup>4</sup> “Although the assumption is strongly intuitive, data on a number of indicators of school climate have shown the opposite effect, that is, that schools with higher rates of school suspension and expulsion appear to have *less* satisfactory ratings of school climate, to have less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matter.”<sup>5</sup>

By expanding zero-tolerance policies, which are proven not to work, to the next level of criminalizing students, not only is nothing being done to effectively deal with the problem, but the school environment is made worse for the remaining students.

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K. Borgwald & H. Theixos, *Bullying the bully: Why zero-tolerance policies get a failing grade*, SOCIAL INFLUENCE, Vol. 8, Nos. 2-3, 149-160 (2013) (hereinafter “*Bullying the bully*.”)

<sup>2</sup> American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, AMERICAN PSYCHOLOGIST, Vol. 63, No. 9, 852–862 (Dec. 2008) (hereinafter “*Are Zero Tolerance Policies Effective in the Schools?*”)

<sup>3</sup> *Id.* at 854.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (emphasis in original) (internal citations omitted).

## **B. The Cyber-bullying Law Will Have Negative Adverse Effects**

Criminalizing bullying behavior has significant adverse effects. “The detrimental impact of [criminalizing bullies] . . . and the lasting stigma associated with such adjudication would yield only long-term negative consequences.”<sup>6</sup>

Exclusionary disciplinary policies and practices can lead to numerous serious educational, psychological, economic, social, and behavioral problems, including: school avoidance and diminished school engagement, decreased academic achievement, truancy, acting out, self-defense, psychological trauma and mental health consequences, increased likelihood of school dropout, substance abuse, and involvement with juvenile justice systems.<sup>7</sup> The punishment of a criminal arrest can forever change a student’s life prospects.<sup>8</sup>

### **1. The Cyber-bullying Law Reinforces the School-to-Prison Pipeline**

Criminalizing cyber-bullying reinforces and perpetuates the School-to-Prison Pipeline, putting “bullies” on the fast track to school dropout and incarceration. The School-to-Prison Pipeline is a disturbing national trend wherein children are pushed out of school and into the criminal justice system. “It is the emphasis of punitive

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<sup>6</sup> M. Theriot, C. Dulmus, K. Sowers, & S. Bowie, *The Criminal Bully – Linking Criminal Peer Bullying Behavior in Schools to a Continuum of Delinquency*, JOURNAL OF EVIDENCE-BASED SOCIAL WORK, Vol. 1, Nos. 2-3, 77-92, 81 (2004.)

<sup>7</sup> *Are Zero Tolerance Policies Effective in the Schools?*; C. Lhamon & J. Samuels, *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014) (hereinafter “*Dear Colleague Letter*.”)

<sup>8</sup> J. Feierman, R. Kleinman, D. Lapp, et al., *Stemming the Tide: Promising Legislation to Reduce School Referrals to the Courts*, KEEPING KIDS IN SCHOOL AND OUT OF COURTS – A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS, organized by the New York State Permanent Judicial Commission on Justice for Children, 111-127, 117-119 (2012.)

consequences, student exclusion, and justice-system intervention over students' right to an education.”<sup>9</sup> The School-to-Prison Pipeline can be the indirect result of schools suspending or expelling students or the direct result of laws that police certain behavior and result in arrests, juvenile detention referrals, and criminal charges and incarceration.

The Cyber-bullying Law directly perpetuates the problem of the School-to-Prison Pipeline because it sends youth into the juvenile and criminal system by criminalizing a wide variety of student behavior. Most offenses that will result in youth being sent to jail under the Cyber-bullying Law do not pose a serious, ongoing threat to school safety. A joint position paper studying the effects of the No Child Left Behind Act on the School-to-Prison Pipeline recognized that many, if not most, school-based arrests were for actions that did not pose a serious or on-going threat to the school.<sup>10</sup> Because the Cyber-bullying Law is amorphous and covers even the most minor behavior, the direct impact on the School-to-Prison Pipeline will be significant. Already, over 70% of teachers and school counselors opt to utilize punitive consequences in cases of even minor bullying.<sup>11</sup>

There exist additional issues regarding whether cyber-bullying will be reported and reported consistently under the Cyber-bullying Law. Unfortunately, only one in

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<sup>9</sup> Advancement Project, Education Law Center, et al., *Federal Policy, ESEA Reauthorization, and the School-to-Prison Pipeline*, at 2 (March 2011), available at [http://b3cdn.net/advancement/51d51e76dc0ae9e1fe\\_nam6baeap.pdf](http://b3cdn.net/advancement/51d51e76dc0ae9e1fe_nam6baeap.pdf) (hereinafter “*Advancement Project*.”)

<sup>10</sup> See *Advancement Project* at 2.

<sup>11</sup> S. Bauman, K. Rigby, & K. Hoppa. *US teachers' and school counsellors' strategies for handling school bullying incidents*, EDUCATIONAL PSYCHOLOGY, Vol. 28, No. 7, 837-856 (Dec. 2008.)

three bullied youth has reported being bullied to an adult.<sup>12</sup> When the severity of consequences is greatly disproportional to the severity of an incident, it can discourage reporting by students and encourage inaction and dismissal by teachers and school officials, who lack ability to address cyber-bullying outside the bounds of the law.

## **2. School Disciplinary Policies Disproportionately Target Students of Color, Students with Disabilities, and LGBT Students**

Data consistently indicate that school discipline disproportionately targets students of color, students with disabilities, and LGBT youth.<sup>13</sup> There is “extensive documentation suggesting that Black students are disciplined more severely for less serious offenses.”<sup>14</sup> The School-to-Prison Pipeline falls hardest on students of color and with disabilities.<sup>15</sup> According to the Department of Education’s Office for Civil Rights, “[a]lthough African-American students represent 15% of students in the CRDC [the Civil Rights Data Collection conducted by the U.S. Department of

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<sup>12</sup> U.S. Department of Education – National Center for Education Statistics, *Indicators of School Crime and Safety: 2012*, Table 11.4, [http://nces.ed.gov/programs/crimeindicators/crimeindicators2012/tables/table\\_11\\_4.asp](http://nces.ed.gov/programs/crimeindicators/crimeindicators2012/tables/table_11_4.asp) (last accessed April 30, 2014.)

<sup>13</sup> See *Are Zero Tolerance Policies Effective in the Schools?* at 854-855; *Advancement Project* at 3; *Bullying the bully* at 152; U.S. Department of Education, *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, 16-18 (Jan. 2014), available at <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>; R. Skiba & M.K. Rausch, *The Relationship Between Achievement, Discipline, and Race: An Analysis of Factors Predicting ISTEP Scores*, CHILDREN LEFT BEHIND POLICY BRIEFS – CENTER FOR EVALUATION AND EDUCATION POLICY (July 2004); R. Skiba, R. Michael, A.C. Nardo, & R. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, THE URBAN REVIEW, Vol. 34, No. 4, 317-342 (Dec. 2002); J. Wallace, S. Goodkind, C. Wallace, & J. Bachman, *Racial, Ethnic, and Gender Differences in School Discipline among U.S. High School Students: 1991 – 2005*, NEGRO EDUC. REV., Vol. 59, Nos. 1-2, 47-61 (2008.)

<sup>14</sup> Voices of Youth in Chicago Education, *Failed Policies, Broken Futures. The True Cost of Zero Tolerance in Chicago*, 19 (July 2011), available at <http://www.publicinterestprojects.org/wp-content/uploads/downloads/2011/08/VOYCE-report-2011.pdf>.

<sup>15</sup> See *Advancement Project* at 2.

Education], they make up 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled. Further, over 50% of students who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.”<sup>16</sup> Data has also shown that LGBT youth are up to three times more likely to be more severely disciplined than their heterosexual counterparts.<sup>17</sup> When viewed in the light of potential criminal punishment this data provide even greater evidence of the discriminatory harm that could result from the Cyber-bullying Law.

## **II. BETTER ALTERNATIVES EXIST FOR DEALING WITH CYBER-BULLYING**

### **A. By Turning “Bullies” Into Criminals, Children Do Not Learn How to Change Their Behavior**

Statutes that criminalize speech based on the content of the speaker’s message are subject to “exacting First Amendment scrutiny.” *United States v. Alvarez*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2537, 2546 (2012). Criminal penalties for speech are constitutional only if they represent the “least restrictive means among available, effective alternatives.” *Id.* at 2551 (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004)). Prosecution and the potential of jail time for behavior intended to “taunt” or “annoy” another person cannot conceivably constitute the least restrictive means of achieving the government’s objective of promoting

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<sup>16</sup> *Dear Colleague Letter* at 3-4.

<sup>17</sup> K. Himmelstein & H. Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Logitudinal Study*, PEDIATRICS, Vol. 127, No. 1, 49-57, 54 (Jan. 2011.)



civility in online social interactions. Indeed, New York has chosen the *most* drastic and *most* restrictive response, having made no findings that less-restrictive alternatives are inadequate and having ignored the consensus of authorities in the field.

Criminalizing cyber-bullying is a mere stopgap measure that does nothing to get at the root cause of the bullying. It labels bullies as “bad actors” and fails to teach them why their behavior is inappropriate or harmful and how to change it. It also misses an opportunity to create healthier, safer, and more productive learning environments for all students.<sup>18</sup> Student behavioral problems that result in suspensions or arrests typically signal unmet needs. Punishment in these cases does not help, and worse, tends to engender resentment and/or shame and/or isolation. “Bullies” themselves are often victims who come from physically and/or emotionally abusive families.<sup>19</sup> When one treats bullying as a crime and removes children from their schools, one is in essence treating them as quasi-adults, as opposed to children with behavioral problems.<sup>20</sup> “It is unjust to expel children for exhibiting behaviors they have learned, especially if these behaviors can be unlearned with the right

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<sup>18</sup> See Advancement Project, The Alliance for Educational Justice, et al., *Two Wrongs Don't Make a Right: Why Zero Tolerance is Not the Solution to Bullying* (June 2012), available at <http://www.schoolclimate.org/climate/documents/policy/Two-wrongs-dont-make-a-right.pdf>.

<sup>19</sup> *Bullying the bully* at 152-153.

<sup>20</sup> *Id.*

intervention.”<sup>21</sup> To go to the most extreme level by criminalizing this behavior, we not only turn our backs on a child but we take away an opportunity to right a path.

The concept of employing justice system responses that remove students from school for lengths of time is inconsistent with New York’s efforts to decrease absenteeism and improve educational achievement.<sup>22</sup> When children are relegated to detention facilities it increases the chances that they will become further involved in the justice system after their release and have difficulty in school and at home. One large study of juvenile offenders over a ten-year period suggested that juvenile incarceration resulted in significant decreases in likelihood of high school completion and significant increases in the likelihood of adult incarceration.<sup>23</sup> Typically juvenile justice facilities cannot provide the types of services and support children need to address the underlying reasons for their behavioral problems and prevent reoccurrence. When children are separated from the dynamics and problems they encounter at school, at home, and in their community, they are unable to work on them and frequently fall further behind in school as a result. In addition, the

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<sup>21</sup> *Id* at 152.

<sup>22</sup> H. Davidson, K. Nash, & P. Weckstein, *American Bar Association Policies on Keeping Children in School*, KEEPING KIDS IN SCHOOL AND OUT OF COURTS – A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS, organized by the New York State Permanent Judicial Commission on Justice for Children, 222-239 (2012.)

<sup>23</sup> A. Aizer & J. Doyle, *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* (Nat’l Bureau of Econ. Research, Working Paper No. 19102, at 3, June 2013.)

experience can bring with it long-term stigmatization, as well as increasing barriers to education and work opportunities.<sup>24</sup>

## **B. School Climate Reform and Restorative Practices Identify Better Ways to Prevent Cyber-bullying Based on Educational and Behavioral Science**

Harsh and exclusionary punishments undermine efforts to provide a positive school climate and other measures that have been shown to decrease the need for such punitive responses. Educational and behavioral science has identified better alternatives for dealing with the issue of cyber-bullying. Alternatives fall into two categories: school climate reform and restorative practices.

### **1. School Climate Reform**

One of the most effective strategies for improving student behavior and reducing the need for disciplinary actions is creating a positive and sustained “school climate.” School climate refers to “the quality and character of school life. It is based on patterns of school life experiences and reflects norms, goals, values, interpersonal relationships, teaching, learning and leadership practices, and organizational structures.”<sup>25</sup> A positive school climate is a school environment that is safe, supportive, engaging and welcoming.

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<sup>24</sup> D. Domenici & J. Forman, *What It Takes to Transform a School Inside a Juvenile Justice Facility: The Story of the Maya Angelou Academy*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM (Nancy Dowd ed., NYU Press 2011); see also G. Hansen, *Meeting the Educational Needs of Incarcerated Youth*, RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM – AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY TASK FORCE ON JUVENILE JUSTICE REFORM, Chapter IX, 47-51 (Oct. 2001.)

<sup>25</sup> National School Climate Center, Center for Social and Emotional Education, et al., *The School Climate Challenge: Narrowing the Gap Between School Climate Research and School Climate Policy, Practice Guidelines and Teacher Education Policy*, 5 (2007), available at <http://www.ecs.org/school-climate>.

School climate reform is a comprehensive prevention effort that recognizes and helps coordinate a range of school-wide, instructional, and one-on-one practices that support educators, students and parents/guardians learning and working together to promote safer, more supportive, engaging and flourishing schools.<sup>26</sup> There are empirically-based effective methods for engaging in school climate reform. For example, the National School Climate Center has developed a “School Climate Improvement Process” that is based on a cyclical and continuous process of “preparation, evaluation, understanding the evaluation findings and action planning, implementing the action plan, and re-evaluation and continuing the cycle of improvement efforts.”<sup>27</sup>

School climate reform is an effective alternative to the criminalization of youth who cyber-bully. Research has shown that when students feel engaged, supported, and safe, they are less likely to misbehave.<sup>28</sup> Having a positive school climate results in higher levels of student engagement and self-discipline, fewer incidences of school violence, and increased staff and student feelings of safety, among other positive

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<sup>26</sup> T. Dary & T. Pickeral (eds.), *School Climate: Practices for Implementation and Sustainability*, SCHOOL CLIMATE PRACTICE BRIEFS, No. 1 (2013), available at <http://www.schoolclimate.org/publications/documents/SchoolClimatePracticeBriefs-2013.pdf>.

<sup>27</sup> National School Climate Center, *School Climate Improvement Process*, SCHOOL CLIMATE, <http://schoolclimate.org/climate/process.php> (last accessed April 16, 2014); National School Climate Center, *The School Climate Improvement Process: Essential Elements*, SCHOOL CLIMATE BRIEF, No. 4 (Nov. 2012), available at <http://www.schoolclimate.org/climate/documents/policy/sc-brief-v4.pdf>.

<sup>28</sup> A. Thapa, J. Cohen, A. Higgins-D'Alessandro, & S. Guffey, *A Review of School Climate Research*, REVIEW OF EDUCATIONAL RESEARCH, Vol. 83, No. 3, 357-385, 363-364 (2013.)

outcomes.<sup>29</sup> The net result is that a positive school climate decreases the need for disciplinary actions. Creating a positive school climate will, to a large extent, prevent the need for punishment by decreasing incidence of cyber-bullying before they occur.

## 2. Restorative Practices

A restorative practices (RP) disciplinary approach is one that shifts the dialogue away from punishment and blame and towards learning and healing.<sup>30</sup> It focuses on forgiveness, responsibility, community participation, and respectful dialogue.<sup>31</sup> It is based on the premise that human beings are social animals who thrive in contexts of social engagement as compared to control, and focuses on the needs of both the bullied students and the bullying students.<sup>32</sup>

With RP, students are taught the social skills necessary to problem solve and deescalate conflict.<sup>33</sup> Both bullied students and bullying students play a role in remediating incidences, with bullying students being encouraged to take responsibility for their actions and repair the harm their behavior has caused.<sup>34</sup> The

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<sup>29</sup> M.J. Karcher, *Connectedness and School Violence: A Framework for Developmental Interventions*, in HANDBOOK OF SCHOOL VIOLENCE, 7-40 (E. Gerler ed., 2004); R. Skiba, A. Simmons, R. Peterson, J. McKelvey, S. Forde, & S. Gallini, *Beyond Guns, Drugs and Gangs: The Structure of Student Perceptions of School Safety*, JOURNAL OF SCHOOL VIOLENCE, Vol. 3, No. 2/3, 149-171 (2004); M.T. Wang, R. Selman, T. Dishion, & E. Stormshak, *A Tobit Regression Analysis of the Covariation Between Middle School Students' Perceived School Climate and Behavioral Problems*, JOURNAL OF RESEARCH ON ADOLESCENCE, Vol. 20, No. 2, 274-286 (2010.)

<sup>30</sup> B. Morrison & D. Vaandering, *Restorative Justice: Pedagogy, Praxis, and Discipline*, JOURNAL OF SCHOOL VIOLENCE, Vol. 11, 138-155 (2012) (hereinafter "*Restorative Justice*").

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

<sup>32</sup> *Id.*

<sup>33</sup> See T. Wachtel, *Defining Restorative* (International Institute for Restorative Practices 2013), available at <http://www.iirp.edu/pdf/Defining-Restorative.pdf>.

<sup>34</sup> J. Cohen, *Oversight: Examining School Climate and Safety*, Comments before the Committee on Public Safety jointly with the Committee on Education and the Committee on Juvenile Justice (April 15, 2013), available at <http://www.schoolclimate.org/documents/ACLU.pdf>.

methods frequently employed include conducting mediations for the bullied student and bullying student, community/restorative conferences, and peacemaking circles.<sup>35</sup> The larger goal of RP is for “educational policy and practice to be more responsive and restorative to the needs and concerns of the school community.”<sup>36</sup>

Research has shown that RP has a positive effect on the entire school community and is a better alternative to harsh punitive disciplinary policies. In Minnesota, for example, one report found that when a school district began utilizing RP over a three year period, behavior referrals for physical aggression in elementary school went from 773 to 153 and suspensions in junior high school went from 110 to 55.<sup>37</sup> Similarly, a systematic comparative study examining a range of anti-bullying programs found that educators rated RP as “moderately to highly effective strategy for developing a restorative ethos to address bullying behavior in schools.”<sup>38</sup> Likewise, a 2013 study of the Boston Public Schools, which amended its discipline policies to allow for RP, found that suspensions and expulsions dropped by more than 80 percent in one year after implementing the approach. Particularly striking were

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<sup>35</sup> *Restorative Justice* at 142-143.

<sup>36</sup> *Id.* at 140.

<sup>37</sup> J. Stinchcomb, G. Bazemore, & N. Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, YOUTH VIOLENCE AND JUVENILE JUSTICE, Vol. 4, No. 2, 136-137 (April 2006.)

<sup>38</sup> *Restorative Justice* at 148; F. Thompson & P. Smith, *The Use and Effectiveness of Anti-Bullying Strategies in Schools* (Research Report, Department for Education, United Kingdom, 2010), available at <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-RR098>.

the decreases in suspensions and expulsions for physical fights, attacks, and sexual assaults.<sup>39</sup>

Rather than abdicating responsibility to the criminal justice system, to most effectively deal with the problem of cyber-bullying, schools should employ restorative practices as part of a larger school climate reform effort. By proactively strengthening the school environment in this fashion, schools will both prevent, to a large extent, incidences of cyber-bullying from occurring, and also provide both bullied students and bullying students with an environment in which they can feel safe, grow, and thrive. In short, they present empirically supported, better alternatives to turning students into criminals.

## CONCLUSION

Studies and data show that criminalizing cyber-bullying will not decrease bullying and will instead cause a less satisfactory school climate for all of the students and significant harms to the children labeled “bullies,” effectively depriving them of the opportunities to mature and be educated adequately and in a beneficial manner. Because the Cyber-bullying Law imposes drastic, life-altering punitive consequences on a vast range of unkind behavior, some or all of which can be remedied more effectively without resort to prosecution, it does not represent a narrowly tailored response to its stated objectives. For the foregoing reasons, the

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<sup>39</sup> J. Encarnacao, *Sharp drop in suspensions as Boston schools try ‘restorative’ approach*, BOSTON HERALD, Sept. 3, 2013.

*amici* respectfully request that this Court overturn Marquan W. Mackey-Megg's conviction and hold that the Cyber-bullying Law is unconstitutional.

Dated: New York, New York  
May 2, 2014

Respectfully submitted,



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