



## Stopping the Bully?

Five alumni debate the anti-bullying law

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Catherine Lyons '01 • Abigail Williams '87 • Andrew Zelberg '89  
Adjunct Professor Wendy Murphy '87 • Richard Sweeney '00

It took four months and 14 days for the bullies at South Hadley High to drive Phoebe Prince to her breaking point. The 15-year-old freshman's high school troubles began in late 2009 when she moved to Massachusetts from her native Ireland and briefly dated a popular senior boy. It ended on a January afternoon after her tormenters—a clique of teenage girls, including the boy's jealous ex-girlfriend—followed Prince in a car as she walked home, hurling sexual insults and a soda can at her from the car window. Prince's little sister found her body when she got home from school—she had hanged herself in the stairwell.



The news highlighted the serious fallout of school bullying in the United States, and, in Massachusetts, it spurred lawmakers to action. Nearly five months after Prince's suicide, the Massachusetts legislature unanimously passed Phoebe's Law; the statute requires school staff to report and investigate bullying and to develop procedures and policies for reporting, responding to, and disciplining those involved. Schools must also provide annual training for faculty and staff on prevention and intervention—an aspect that makes the Massachusetts law one of the most comprehensive in the country.

By the time the commonwealth passed the law in May 2010, more than 40 states already had a statute on the books. But the Massachusetts law is among the strongest, retrofitting older stalking and criminal harassment definitions to include Internet cyberbullying. A few months earlier, a separate law also created a harassment prevention order that, as a restraining order does for domestic violence situations, provides protection for the bullying victim by requiring the perpetrator to stay away or face criminal consequences.

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When the law passed, many, including Massachusetts Governor Deval Patrick, described it as a victory, but the nascent statute raises a new set of legal questions schools and courts are only beginning to grapple with: Can schools actually police students' behavior? If so, when? What protections should schools offer victims—and accused bullies? And if all measures fail, who—if anyone—should be held responsible?

It is Catherine Lyons's business to know everything about the new anti-bullying law. As a partner at Lyons and Rogers, a Marshfield firm that represents public school districts in the commonwealth, she has spent months since the law's passage teaching her clients how to understand and comply with its mandates. The most important aspect of the law, she believes, is the requirement of an anti-bullying curriculum. "Schools seem positive about this," she says. This is where they excel—in educating students. "It's the policing part that makes everyone nervous."

According to Lyons '01, the law creates a jungle of requirements that, while intended to protect children, could cause a ripple effect of legal exposure for schools. When bullying occurs off campus or online, for example, it is often unclear whether schools have the right to intervene. "If schools overstep their bounds, they risk violating students' first amendment rights," says Lyons. It's a fine jurisdictional line, she explains, and as students step further into the cyber world, school boundaries become only harder to define.

Even the law's seemingly straightforward requirements, such as parental notification, can be problematic, Lyons points out: schools that begin investigations into bullying are required to notify parents only if they conclude that bullying has occurred. That opens the door to parents asking, "Why didn't you tell me my kid was in trouble?" But when schools do contact parents, they risk trampling students' civil rights. As the Greater Boston Parents, Families, and Friends of Lesbians and Gays (PFLAG) pointed out in public comments when the Massachusetts anti-bullying law was first proposed, "notice to parents unaware of the student's sexual orientation may expose the student to violence and harm within the home."

"Well-meaning people made a law they thought would be helpful," says Lyons, "but in trying to apply it, public schools will be subject to a lot of legal actions."

One such legal action, however, may be conspicuously absent. While schools worry about increased liability, one of the anti-bullying law's main requirements—that schools report bullying to the proper authorities—carries no consequence for noncompliance. "There are actually no penalties if schools don't do this," says Lyons. Under the statute, families can't sue for damages, and no public funding is at stake. For Abigail Williams '01, an attorney who represents bullying victims pro bono, this is the toughest pill to swallow. "The problem is, the law has no teeth," she says.

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—Catherine Lyons '01, right





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—Abigail Williams '87, below

“Without jeopardy to the parties involved, how can we hold them accountable?” After the anti-bullying law passed, Williams’s Worcester, Massachusetts, firm, Abigail Williams and Associates, P.C., began advertising its services for victims of schoolyard bullying.

Williams has made good use of the updated Massachusetts criminal harassment and stalking laws to protect her clients from further bullying—and she is not the only one. According to veteran Massachusetts prosecutor Andrew Zeiberg '89, an assistant district attorney for the Essex County District Attorney’s Office, since the Massachusetts statute passed, there has indeed been an increase in the number of bullying cases handled by the DA’s office. “These updates allow us to charge individuals for crimes we simply couldn’t before,” he explains. “Essentially, where electronic messaging is concerned, the laws close a loophole.”

But closing that loophole, Williams points out, only addresses the bullies themselves; the law does nothing, she says, to help enforce schools’ accountability. Under Massachusetts law, she explains, school administrators, like all public officials, cannot be sued for negligence unless they are the direct cause of the events leading to injury. So the fact that the anti-bullying law does not explicitly provide for legal recourse, she says, leaves victims’ lawyers few options.

“If the bullying is based on a disability, sexual preference, or harassment, it’s a lot easier for us to move forward,” says Williams. “Then, I can sue for civil rights violations.” Unlike the anti-bullying law, civil rights law specifies that schools that fail to report violations can be found liable—a fact supported by reams of case law.

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—Andrew Zeiberg '89, right

For New England Law Adjunct Professor Wendy Murphy '87, this discrepancy between bullying and civil rights violations is the single greatest flaw in the Massachusetts anti-bullying law. Murphy, a trial and appellate attorney who specializes in sexual violence and campus-based sexual harassment/bullying issues, has made it her mission to connect the dots between civil rights violations and bullying.

“If Phoebe Prince’s parents had accused her bullies of sexual harassment, there is a good chance she’d still be alive,” says Murphy. “If this had been framed as sexual harassment, Title IX legislation would have obligated the school to provide a prompt and effective response—and Phoebe’s parents could have held the school liable if it failed in this regard.”

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— Adjunct Professor Wendy Murphy '87, below

The problem is, very few parents understand the relationship between Title IX and bullying and harassment. Passed in 1972 as an addition to the 1964 Civil Rights Act, the federal law prohibits discrimination on the basis of sex and mandates that schools report and punish sexual violence. Civil rights laws are already on the books, says Murphy, and they're very effective tools. “What we've done with the new law is downgrade serious crimes that mandate immediate action to ‘bullying,’ an act that schools can ignore with impunity.” Even shoplifting, she points out, carries a \$100 fine.

This shift in framing, Murphy believes, is no accident; it's in the schools' best interest to limit their liability, and this law does precisely that. Rather than define bullying as “severe and pervasive harassment” as Title IX does, the Massachusetts bill instead defines it as “the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture....” Not only does that language fail to mirror the enforceable civil rights laws already in existence, says Murphy, it excludes the concept of

one-time severe harassment. Technically, under the new Massachusetts law, she points out, a case like Tyler Clementi's, the Rutgers University student who jumped from the George Washington Bridge in 2010 after being secretly videotaped during a sexual encounter, would not be defined as bullying.

Murphy's suggestion for improving the law is simple: include some explicit liability exposure for the schools. Right now, as the laws are written in Massachusetts—statutes put in place long before Phoebe's Law—victims can't sue school systems for negligence, but individuals who believe they have been wrongly accused and disciplined by schools can. “By creating some exposure for the school districts,” she contends, “we eliminate the economic incentive for school officials to side with a bully to avoid a lawsuit.”

Lawsuits are among the few options available for defendants when schools get it wrong, explains Richard Sweeney '00, a criminal defense attorney in Quincy, Massachusetts. Before his cases see a courtroom, Sweeney, a retired police sergeant with 15 years on the force, makes sure his clients with drug-use or mental health issues have sought out counseling and reconciliation with the plaintiffs—“anything a judge would eventually tell them to go do, we do it first.” He describes his clients as good kids who've made bad decisions, and many, he points out, have been bullied themselves.

“The problem is, this anti-bullying law amps up anxiety for schools,” says Sweeney. Situations that were traditionally solved in the schoolyard or the principal's office are now getting pushed into courts, he explains, and once they're in the system, they're very hard to erase. “If you are arraigned on a charge, it doesn't matter if you're found not guilty,” says Sweeney. After age 17, that charge goes on your permanent record.



This is where the wrongful accusation lawsuit card becomes very important. "Say you're the unlucky kid who's been bullied all his life," Sweeney says. "Say the one day you get pushed to the edge, a teacher sees you punch the bully who's been tormenting you forever.... That kid who finally retaliated is going to court on charges of assault and battery, while the bully could leave high school with a clean record."

For Sweeney, the problem with the law comes down to one word: *shall*. This is a word schools do and should pay close attention to, according to Sweeney. Although the law has no provision for private rights of action, "lawyers will keep looking for—and eventually find—ways to get around this," he says. The law says, "If the school principal determines that bullying or retaliation has occurred, the school principal or designee shall (i) notify the local law enforcement...; (ii) take appropriate disciplinary action; (iii) notify the parents..." When schools see the word *shall*, they see a legal mandate to take action, and out of fear, they err on the side of caution, explains Sweeney. "As a result, many cases end up in the court system, even though they don't belong there," he says.

You'd be hard-pressed to find a parent, teacher, lawyer, or student who believes bullying isn't a problem; few, if any quarrel with the new Massachusetts law's anti-bullying education requirements for schools. But where many lawmakers and officials see the law as a proactive, successful measure, many lawyers who must use that statute instead see unresolved issues and unintended consequences. In April 2010, the Northwestern Massachusetts District Attorney's office filed criminal charges against six of Phoebe Prince's alleged bullies. The indictments, which included such felonies as violations of civil rights with bodily injury, harassment, stalking, and statutory rape, were unusually sharp legal responses to adolescent bullying. But when asked why no charges were filed against the school, the prosecutor simply stated the facts: "The actions or inactions of some adults at the school were troublesome...." But not one of them violated any laws.

> by *Cara Feinberg*

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