

L.W., A MINOR, BY HIS PARENT AND
GUARDIAN, L.G., and L.G.
individually,

Complainants,

v.

TOMS RIVER REGIONAL SCHOOLS
BOARD OF EDUCATION

Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-7084-03T5

ON APPEAL FROM A FINAL
ADMINISTRATIVE DECISION OF
THE DIRECTOR OF THE DIVISION
ON CIVIL RIGHTS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC
SAFETY

OAL DOCKET NO. CRT 8535-01
DCR DOCKET NO. PQ07IE-02596

**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY, ASSOCIATION FOR CHILDREN OF NEW JERSEY,
EDUCATION LAW CENTER, GAY LESBIAN AND STRAIGHT
EDUCATION NETWORK OF NORTHERN NEW JERSEY, NATIONAL
CONFERENCE FOR COMMUNITY AND JUSTICE (NJ), NEW JERSEY
FAMILY VOICES, ROXBURY PARENTS FOR EXCEPTIONAL
CHILDREN, AND STATEWIDE PARENTS ADVOCACY NETWORK OF
NEW JERSEY
IN SUPPORT OF COMPLAINANTS/APPELLEES**

**AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION**
P.O. Box 750
Newark, New Jersey 07101
(973) 642-2084

**GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE**
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5496
(973) 596-4500

Attorneys for Amicus Curiae

On the brief:

Lawrence S. Lustberg, Esq.
Gitanjali S. Gutierrez, Esq.
Edward L. Barocas, Esq.
Jeanne LoCicero, Esq.

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 7

PROCEDURAL HISTORY AND STATEMENT OF FACTS 9

ARGUMENT 13

I. INTRODUCTION 13

II. PEER HARASSMENT AND BULLYING HAVE LASTING NEGATIVE
EFFECTS UPON CHILDREN'S LIVES AND EDUCATION 15

 A. Peer Harassment and Bullying is a Daily
 Occurrence in Many Students' Lives 19

 B. Peer Harassment and Bullying Impacts Students'
 Psychological, Social, and Physical Well-Being 21

 C. The Harms Caused by Peer Harassment and Bullying
 Disrupt a Child's Entire School Environment 24

III. ANTI-GAY PEER HARASSMENT AND BULLYING OF STUDENTS
PERCEIVED TO BE GAY IS SEVERE AND PERVASIVE 26

 A. Anti-Gay Peer Harassment Is Severe and Frequent 26

 B. Anti-gay Peer Harassment May Increase the
 Victim's Risk of Self-destructive Behavior,
 Isolation, and School Difficulties 32

IV. THE BROAD ANTI-DISCRIMINATION MANDATE OF LAD REQUIRES
COMPREHENSIVE SOLUTIONS TO PEER HARASSMENT AND
BULLYING 36

CONCLUSION 43

TABLE OF AUTHORITIES

Page (s)

Cases

Abbott v. Burke, 163 N.J. 95 (2000) 2, 3

Boy Scouts of America v. Dale, 160 N.J. 562 (1999),
rev'd 530 U.S. 640 (2000) 1

Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629 (1999) 40

Frank v. Ivy Club, 120 N.J. 73 (1990), rev'd 228 N.J.
Super. 40 (1998) 2

Fuchilla v. Layman, 109 N.J. 219 (1998) 7, 13

Gallo v. Salesian Society, Inc., 290 N.J. Super. 616
(App. Div. 1996) 2

In re Guardianship of K.H.O., 161 N.J. 337 (1999) 2

Lehman v. Toys "R" Us, Inc., 132 N.J. 587 (1993) 12, 14

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) 27, 32

Ptaszynski v. Uwaneme, 371 N.J. Super. 333 (App. Div.
2004) 13

Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J.
Super. 442 (App. Div. 1997), certif. denied, 153 N.J.
48 (1998) 2

Shore Regional High Sch. Bd. of Educ. v. P.S., 381
F.3d 194 (2004) 31

State v. A.B., 107 N.J. 119 (1987) 2

Tarr v. Ciasulli, 181 N.J. 70 (2004) 14

Viscik v. Fowler Equipment Co., Inc., 173 N.J. 1
(2002) 13, 14

Statutes

N.J.S.A. 10:5-12f 13

N.J.S.A. 10:5-3 40

N.J.S.A. 10:5-5 13, 40

N.J.S.A. 18A:37-13 7, 30

Books and Articles

A Uniform State Memorandum of Agreement Between
Education and Law Enforcement Officials, Addendum 2.
Responding to Hate Crimes and Bias-Related Acts
(1999) 21, 25, 37, 40

A. Damien Martin & Emery S. Hetrick, "The Stigmatization of the Gay and Lesbian Adolescent," <u>J. Homosexuality</u> , Nos. 1/2, 1988	33, 35
Am. Academy of Child and Adolescent Psychiatry, <u>Bullying</u> (2001), available at http://www.aacap.org/publications/factsfam/80.htm (last visited Jan. 23, 2005)	20
Am. Assoc. of Univ. Women Educ. Found., <u>Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School</u> (2001), available at http://www.aauw.org/member_center/publications/HostileHallways/hostilehallways.pdf	28
Am. Medical Assoc., <u>Bullying Behaviors Among Children and Adolescents</u> (2005) available at http://www.ama-assn.org/ama/pub/category/14312.html	passim
Anthony R. D'Augelli & Scott L. Hershberger, "Lesbian, Gay, and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems," in 21 <u>Am. J. Community Psychol.</u> 421 (1993)	35
D. Wolke, et al., "Bullying Involvement in Primary School and Common Health Problems," 85 <u>Arch. Dis. Child.</u> 197 (2001)	21, 24
D.S.J. Hawker & M.J. Boulton, "Twenty Years' Research on Peer Victimization and Psychosocial Maladjustment: A Meta-analytic Review of Cross-sectional Studies," 41 <u>J. Child Psychol. Psychiatry.</u> 441 (2000)	21, 22
Dale Frost Stillman, "Banishing Bias in High Schools," <u>Respect</u> (Winter 2003), available at http://www.njsbf.com/njsbf/student/respect/winter03-4.cfm	31, 32
Daniel B. Weddle, "When Will Schools Take Bullying Seriously?," <u>Trial</u> , Oct. 2003, at 18	passim
Daniel Olweus, "Bullying Among Schoolchildren: Intervention and Prevention," in <u>Aggression and Violence Throughout the Life Span</u> 100-125 (R.D. Peters & V.L. Quinsey, eds., 1992)	22
Daniel Olweus, Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program," 35 <u>J. Child Psychol. Psychiatry</u> 1171 (1994)	17
Daniel Olweus, <u>Bullying at School: What We Know and What We Can Do</u> (1993)	17
Daniel Olweus, et al., <u>Blueprints for Violence Prevention, Book Nine: Bullying Prevention Program</u> (Center for the Study and Prevention of Violence (1999).	38

Derek Glover <u>et al.</u> , <u>Towards Bully-Free Schools</u> (1998)	37
Gary Remafedi, <u>et al.</u> , "Risk Factors for Attempted Suicide in Gay and Bisexual Youth," 87 <u>Pediatrics</u> 869 1991)	35, 36
GLSEN, <u>The 2003 National School Climate Survey</u> (2003), <u>available at</u> http://www.glsen.org/binary-data/GLSEN_ ATTACHMENTS/file/300-3.PDF	29
Gwen Glew, <u>et al.</u> , "Bullying: Children Hurting Children," 21 <u>Pediatrics in Rev.</u> 183 (2000)	passim
James M. Lyznicki, <u>et al.</u> , "Childhood Bullying: Implications for Physicians," 70 <u>Am. Fam. Physician</u> 1723(2004)	19
K. Kumpulainen, <u>et al.</u> , "Bullying and Psychiatric Symptoms Among Elementary-age Children," 22 <u>Child</u> <u>Abuse Neglect</u> 705 (1998)	21
Kaiser Family Foundation, <u>et al.</u> , <u>Talking with Kids</u> <u>About Tough Issues: A National Survey of Parents and</u> <u>Kids</u> (2001)	20
Ken Rigby, "Consequences of Bullying in School," 48 <u>Canadian J. Psychiatry</u> 583 (2003)	22, 23, 24
Ken Rigby, "Health Consequences of Bullying and Prevention in Schools," <u>in Peer Harassment in School:</u> <u>The Plight of the Vulnerable and Victimized</u> 249 (J. Juvonen & S. Graham, eds. 2001)	21
Kevin P. Brady, "Local School Officials' Legal Duty to Prevent Anti-Gay Student Harassment: The Impact of <u>Nabonzy</u> and <u>Flores</u> ," 187 <u>West's Educ. L. Rep.</u> 383 (2004)	29, 40
KidsHealth, "Bullying and Your Child," Nov. 2004, <u>available at</u> http://kidshealth.org/PageManager.jsp?dn =nemours&lic=60&cat_id=145&article_set=21590	19, 20
L. Owens, <u>et al.</u> , "Victimizations Among Teenage Girls: What Can Be Done About Indirect Harassment," <u>in Peer</u> <u>Harassment in School: The Plight of the Vulnerable</u> <u>and Victimized</u> 215-241(2001)	18
Lyndal Bond, <u>et al.</u> , "Does Bullying Cause Emotional Problems? A Prospective Study of Young Teenagers," 323 <u>BMJ</u> 480 (2001)	21, 22
Mark C. Weber, "Disability Harassment in the Public Schools," 43 <u>Wm. & Mary L. Rev.</u> 1079 (2002)	18
N.R. Crick & M.A. Bigbee, "Relational and Overt Forms of Peer Victimization: A Multi-informant Approach," 66 <u>J. Counseling Clin. Psychol.</u> 337 (1998)	18

National Mental Health Association, "Bullying and What To Do About It," available at <http://www.nmha.org/pbedu/backtoschool/bullying.cfm> (lasted February 6, 2005)17, 19, 25

National Youth Violence Prevention Resource Center, "Facts for Teens: Bullying," (2002) available at <http://www.safeyouth.org/scripts/teens/docs/bullying.pdf> 25

Paul Gibson, "Gay Male and Lesbian Youth Suicide," in Alcohol, Drug Abuse, and Mental Health Admin., U.S. Dep't of Health & Human Servs., Report of the Secretary's Task Force on Youth Suicide 112-13 (Marcia R. Feinleb ed., 1989) 33

Rich C. Savin-Williams, "Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youth: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide," 62 J. Consulting & Clinical Psychol. 261 (1994) 35, 36

Safe Schools Coalition of Washington, Eighty-three Thousand Youth: Selected Findings of Eight Population-Based Studies (1999) 28

Stuart W. Twemlow, "The Roots of Violence: Converging Psychoanalytical Explanatory Models for Power Struggles and Violence in Schools," 69 Psychoanalytic Q. 741 (2000) 18

Susan G. Parker, "School Avoidance Often Signals Child Being Bullied." Pediatric News, June 1998 24

Tonja R. Nansel, et al., "Bullying Behaviors Among US Youth," 285 J. Am. Medical Assoc. 2094 (2001) ...17, 19, 21, 23

U.S. Dep't of Educ., Office of Civil Rights, Protecting Students From Harassment and Hate Crimes (1999), available at <http://www.ed.gov/offices/OCR/archives/Harassment/fundamentals1.html> 37

U.S. Dep't of Health and Hum. Res., "Stop Bullying Now: Misdirections in Bullying Prevent and Intervention," available at http://stopbullyingnow.hrsa.gov/HHS_PSA/pdfs/SBN_Tip_5.pdf (last visited Feb. 6, 2005) 39

STATEMENT OF INTEREST

Amici curiae are seven New Jersey child advocacy and civil rights organizations who share a common concern about the lives and well-being of schoolchildren. These organizations sought leave to participate as amici curiae in this matter because it presents important and unsettled questions concerning the rights of schoolchildren to learn in an environment free from bias and harassment. Amici believe, as a result of their experience and advocacy, that peer harassment and bullying deprive New Jersey students of a safe learning environment and have enduring negative effects upon children's lives. Amici's interest in this issue arises from their institutional missions, which all place the educational interests and wellbeing of New Jersey's children at their core.

1. American Civil Liberties Union of New Jersey (ACLU-NJ) is a private nonprofit, nonpartisan membership organization dedicated exclusively to the enforcement of civil rights and civil liberties under the federal and State constitutions. Founded in 1960, the ACLU-NJ has over 14,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 and is composed of over 400,000 members nationwide.

The ACLU-NJ has participated in numerous cases regarding the scope and enforcement of the New Jersey Law Against Discrimination. See, e.g., Boy Scouts of America v. Dale, 160 N.J. 562 (1999), rev'd 530 U.S. 640 (2000); Rutgers Council of

AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (App. Div. 1997), certif. denied, 153 N.J. 48 (1998); Gallo v. Salesian Society, Inc., 290 N.J. Super. 616 (App. Div. 1996); Frank v. Ivy Club, 120 N.J. 73 (1990), rev'd 228 N.J. Super. 40 (1998).

2. The Association for Children of New Jersey (ACNJ) is a statewide, nonprofit child advocacy organization, dedicated to advancing children's rights and to improving programs and policies for New Jersey's children and families. Administered by a thirty member Board of Trustees, ACNJ conducts its advocacy efforts through public policy analysis and monitoring, research, and community outreach and education on a wide variety of issues related to children. The broad-based nature of ACNJ's activities is reflected in the range of issues it encompasses. ACNJ has directed its advocacy efforts to all areas that impact the lives of New Jersey's children and families, such as child welfare, juvenile justice, health, education and child care. A program component of ACNJ is our Children's Legal Resource Center which provides information regarding children and the law through responses to individual calls for information, training and publications.

ACNJ has frequently participated in matters before New Jersey courts in which the rights of children were implicated. See, e.g., Abbott v. Burke, 163 N.J. 95 (2000); In re Guardianship of K.H.O., 161 N.J. 337 (1999); State v. A.B., 107 N.J. 119 (1987).

3. The Education Law Center (ELC) is a nonprofit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children in New Jersey's school funding case, Abbott v. Burke, ELC provides a full range of direct legal services to approximately 400 parents each year who are involved in disputes with public school officials in the areas of bullying, special education, discipline and residency.

4. The Gay, Lesbian and Straight Education Network of Northern New Jersey (GLSEN Northern New Jersey) is a volunteer organization of educators, school support staff, students and their families, and community members, working to ensure that schoolchildren learn to respect and value all people, regardless of sexual orientation or gender identity and expression. Established in 1999 with the belief that bias based on sexual orientation or gender identity and expression undermines a healthy school climate, GLSEN Northern New Jersey works to educate teachers, students, and the public about the damaging effects of such; offers curricular resources and teacher trainings that break the cycle of hurtful language and behavior; promotes inclusiveness in all aspects of school life; and

develops school climates where diversity of all kinds is valued for the positive contribution it makes to a vibrant and healthy community.

5. The National Conference for Community and Justice (NJ) (NCCJ-NJ) was founded in 1927 as the National Conference for Christians and Jews. A human relations organizations, NCCJ's mission is to fight bias, bigotry and racism in America. NCCJ promotes understanding and respect among all races, religions and cultures through advocacy, conflict resolution and education. A statewide organization since 1947, NCCJ-NJ has worked with New Jersey's state and local government, higher education, interfaith and business communities, and youth. NCCJ-NJ believes that it is critical that we create safe schools and build bridges of understanding and respect for all, not just for some. To this end, NCCJ-NJ offers training to both high school students and educators focusing on preventing bias-based bullying in an effort to improve climates at schools and in communities throughout the state.

6. Roxbury Parents for Exceptional Children (Roxbury PEC) is a nonprofit volunteer parent organization dedicated to enhancing the lives of children with special needs and their families. Children with special needs experience many difficulties exploring the social, educational and recreational aspects of their lives. The Roxbury PEC is dedicated to developing, funding and implementing programs that address those

areas of need as well as promoting awareness, advocating and providing support and resources.

7. Statewide Parents Advocacy Network of New Jersey (SPAN) is a nonprofit organization whose mission is to empower parents and engage concerned professionals to advocate for children on behalf of children from birth to twenty-one years of age. New Jersey Family Voices (NJFV) is the statewide chapter of a national, grassroots network for information and education concerning children with special health care needs. It is part of SPAN and has worked on violence prevention issues. SPAN's strongest commitment is to children with the greatest needs due to poverty, disability, discrimination, or family circumstances. It provides information, training, technical assistance, support, family strengthening, leadership development, and public policy advocacy to families and professionals on education, health, and human services issues. Many of the families SPAN works with have children who are disproportionately affected by bullying and harassment - children of color, low-income children, children with disabilities and special needs, children who speak languages other than English or who are immigrants, children who are in foster care, and children who have been the victims of abuse or neglect. SPAN receives hundreds of calls each year from families whose children have been bullied and/or harassed by other students and even by professionals. Often, families call SPAN after months of unsuccessful efforts to get their child's

school to deal with the issue appropriately. From these stories, and from their own experiences as parents, SPAN has seen firsthand the devastating impact of unaddressed bullying and harassment.

The participation of amici will assist the Court in the resolution of issues of public importance raised in this case. As organizations that frequently act as the voice or advocate for children to advance policies that effectively help children, amici here provide the results of social science research data including that describe the nature, frequency, and impact of bullying in the lives of students, and that prescribe effective prevention programs for eliminating bullying and peer harassment.

PRELIMINARY STATEMENT

This case involves persistent anti-gay peer harassment that Complainant L.W. began enduring in fourth grade. As the severity and frequency of the harassment increased over the years, L.W. and his mother, L.G., became concerned for his safety and removed L.W. from his school, eventually enrolling him in a school outside his home district. At the heart of this matter is a schoolchild's right under the New Jersey Law Against Discrimination (LAD) to learn in an environment free of bias-based peer harassment and bullying.

The purpose of LAD is "nothing less than the eradication of the cancer of discrimination." Fuchilla v. Layman, 109 N.J. 219, 334 (1998). Both LAD's antidiscrimination objectives and the recently enacted Bullying Prevention Law, N.J.S.A. 18A:37-13, require schools to unflinchingly address the harsh reality that bullying and peer harassment are a daily occurrence in the lives of many New Jersey school children. Research evaluating the frequency, nature, and consequences of bullying and peer harassment indicates that this conduct has enduring negative effects upon students' emotional, social, and physical well-being. As a result, the learning environment is disrupted for both victims of the bullying or peer harassment, and for other students in the school environment. Further, research also indicates that because bullying and peer harassment are a function of school climate, a comprehensive, policy-based approach is an essential component of any bullying prevention

program. Accordingly, school districts are compelled to adopt comprehensive, school-wide prevention programs in order to eradicate bias, peer harassment and bullying, and to fulfill the school's responsibility to safeguard the welfare of students and to assure their right to a nondiscriminatory learning environment. Failure to do so constitutes a violation of LAD.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This is an appeal from an administrative decision by the Director of the New Jersey Division on Civil Rights (DCR) in favor of the Complainants, L.W., by his parent and guardian, L.G., and L.G. individually. On March 12, 1999, L.W. and L.G. filed a verified complaint against the Toms River Regional School Board of Education alleging that it failed to act in the face of discrimination and harassment based upon L.W.'s perceived sexual orientation.

Beginning in fourth grade, L.W. was subjected to discriminatory peer harassment, including other students frequently saying "you're gay," "you're a homo," and "you're a fag" (1T25).¹ As L.W. progressed through school, the harassment increased in frequency and severity. By fifth grade, he was subjected to verbal abuse almost daily (1T26; 1T203) and, at one point that year, he refused to attend school due to the harassment (1T27). In seventh grade, other students verbally harassed L.W. in the hallways, calling him "faggot," "butt boy," and "homo" (1T28). Someone left a message in his locker that read ". . . you're gay, you're a faggot, you don't belong in our school, get out" (1T29). On January 21, 1999, the harassment escalated to physical assaults. In the school cafeteria, a group of 15 to 20 students accosted L.W., hitting him on the

¹ An administrative hearing was held on this matter before the Honorable John Schuster, III, A.L.J., on March 26, April 1, and April 15, 2003. "1T25" refers to the transcript of the March 26, 2003 hearing date, page 25. "2T" refers to the transcript of the April 1, 2003 hearing date and "3T" refers to the April 15, 2003 hearing date.

head and calling him "faggot" and "homo" (1T131). No staff intervened, not even a teacher witnessing the incident. When L.W. and L.G. spoke with school authorities about this incident and others, the Assistant Principal asked about L.W.'s relationship with his father (1T224) and asked L.W. to specify which students harassed him the most (3T102). She subsequently spoke to only two of the students involved in the cafeteria incident, advised one of them that name-calling was inappropriate and did nothing further in response to the assault (3T29-30).

In addition to daily verbal, anti-gay harassment, L.W. was also forced to endure numerous particularly severe incidents and physical attacks. In the gym locker room during seventh grade, a student said to L.W., in front of a group, "If you had a pussy, I'd fuck you up and down" (1T40). Later that year, L.W. was standing in the cafeteria lunch line when an eighth-grade student began taunting L.W., calling him "gay" and a "faggot." The student then grabbed L.W.'s genitals and "humped him" while saying "Do you like it, do you like it like this?" L.W. escaped the student's hold, but the student came back and did it again. Many students witnessed the incident (1T47-48). Because L.G. did not feel that school authorities could guarantee her son's safety and L.W. was afraid to return, L.G. temporarily removed L.W. from school (1T228; 2T101).

In high school, the anti-gay peer harassment continued. One physical assault on the way to school left L.W. with

injuries that made it difficult for him to chew afterwards, and he missed several days of school (1T71; 1T76). The student who punched L.W. declared that "We don't like faggots, our family doesn't like faggots" (1T70-71). After he was beat up again during lunch, L.G. and L.W. had "had enough" (1T75; 1T166; 2T88). L.G. testified that she could no longer bear "sending her son to school for six hours a day where he's tortured, constantly tortured" (1T166; 2T88). Ultimately, L.G. transferred L.W. to a new school outside his district.

As a result of the harassment, L.W. was often afraid to attend school, and was sad, traumatized and humiliated (1T245; 1T48; 1T229-30; 1T52). He also suffered academically and socially (1T49; 1T227; 1T89; 2T104). The school system's response was to apply a progressive disciplinary program that subjected individual students to punishment for each incident of abuse (3T105; 2T144). For the first incident of "name-calling," for example, a student would be counseled and advised that more serious consequences will result if the harassment occurs again. (3T105; 2T144). Unfortunately, because different students engaged in the peer harassment each day, notwithstanding this system, L.W. was remained subject to constant abuse.

The Director of the Division on Civil Rights issued a finding of probable cause on the complaint on July 10, 2000. After a three-day hearing and post-hearing submissions, on April 29, 2004, an Administrative Law Judge (ALJ) determined that the Respondents had not violated the New Jersey Law Against

Discrimination (LAD). The parties filed exceptions to the ALJ's decision, and the DCR Director issued his final determination on July 26, 2004, holding that the Respondents had violated the LAD.

In particular, the Director held that the standard to be applied in determining the school's liability for failing to stop anti-gay peer harassment under LAD is the same as that applicable to LAD employment discrimination cases, set forth in Lehman v. Toys "R" Us, Inc., 132 N.J. 587, 623 (1993) (holding that an employer is liable for employee-on-employee harassment when the harassment is based upon an employee's protected characteristic; is severe or pervasive enough that a reasonable member of the victim's class would find the environment hostile or abusive; and the employer knew or should have known of the harassment and failed to take effective measures to stop it). Therefore, a school is liable for anti-gay peer harassment, the Director held, if it should have known that a situation existed which would make a reasonable student find the school environment hostile and failed to take effective measures to stop it. On August 20, 2004, the Respondents filed this appeal from that determination.

ARGUMENT

I. INTRODUCTION

The New Jersey Supreme Court has held that "the overarching goal of the Law Against Discrimination to eliminate the cancer of discrimination is to be achieved through a liberal construction of its provisions." Viscik v. Fowler Equipment Co., Inc., 173 N.J. 1, 13 (2002); see also Fuchilla, 109 N.J. at 334. Indeed, the courts have expressly recognized that "the more broadly this statute is applied the greater its antidiscriminatory impact." Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 345 (App. Div. 2004). In an effort to eradicate discrimination in communities throughout the state, the Legislature has made clear its intent to extend the protections of LAD to schoolchildren. See N.J.S.A. 10:5-12f (providing that it shall be unlawful discrimination for "any . . . superintendent, agent or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof . . . on account of the . . . affectional or sexual orientation of such person"); N.J.S.A. 10:5-5(1) (defining "place of public accommodation" as including "any kindergarten, primary or secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the

State Board of Education, or the Commissioner of Education of the State of New Jersey").

Further, when interpreting the expansive protective language and broad remedial provisions of LAD, the New Jersey Supreme Court has repeatedly considered social science and medical data when determining whether an individual falls within a protected class and the nature of the discriminatory harassment and its impact. See, e.g., Viscik, 173 N.J. at 6-7, 17-18 (thoroughly considering plaintiff's testimony, medical history, and expert's opinion concerning the nature, cause, and consequences of her morbid obesity before concluding that it constituted a physical handicap within the meaning of LAD). The courts have also relied upon such data and testimony about the impact of the harassment to define the contours of the remedies that discriminatory harassment necessitates. See, e.g., Tarr v. Ciasulli, 181 N.J. 70, 82 (2004) (finding in the employment context that the victim may broadly recover "all natural consequences" of the wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and "other intangible injuries"); Lehmann, 132 N.J. at 609 (noting that "[g]iven the breadth of individual and societal harms that flow from discrimination and harassment, to limit the LAD's application to only those cases in which the victim suffered . . . serious psychological harm would be contrary to its remedial purpose"). It follows that in extending anti-discrimination protections to schoolchildren, the

Legislature sought to provide a remedy responsive to the discrimination that such children actually experience: peer harassment and bullying, especially the type of discriminatory harassment at issue in this case. The Legislature's intent to address just these harms is also evidenced by the recent adoption of the Bullying Prevention Law, a response to the everyday phenomenon of bullying in the lives of New Jersey schoolchildren. See infra page 30-31 (discussing the enactment of the Bullying Prevention Program following an incident of anti-gay bullying at Hillsdale High School). In light of this legal framework, amici here provide an overview of recent social science research examining the nature, frequency, and impact of peer harassment and bullying upon the lives of schoolchildren. This research clearly shows that the eradication of the peer harassment and bullying that permeates many children's school environments can only be achieved through comprehensive school-wide intervention. It is that intervention which the law now requires.

II. PEER HARASSMENT AND BULLYING HAVE LASTING NEGATIVE EFFECTS UPON CHILDREN'S LIVES AND EDUCATION

Every day in New Jersey and throughout the country, schoolchildren are subjected to peer harassment and bullying that can create enduring psychological, social and physical harm to the victim. Today, "[t]here is no longer any real debate that bullying is one of the most pervasive and damaging threats

that exist in the schools." Daniel B. Weddle, "When Will Schools Take Bullying Seriously?," Trial, Oct. 2003, at 18. The term "bullying" does not refer to brief teasing or an occasional run-in with another student. Nor does it refer to an infrequent insult or the exclusion of a student from a popular clique. "Bullying" is "a complex and abusive behavior with potentially serious social and mental health consequences for children and adolescents." Am. Medical Assoc., Bullying Behaviors Among Children and Adolescents (2005) ["2005 AMA Report"], available at <http://www.ama-assn.org/ama/pub/category/14312.html>. The American Medical Association defines bullying "as a pattern of repeated aggression; with deliberate intent to harm or disturb a victim despite apparent victim distress; and a real or perceived imbalance of power (e.g., due to age, strength, size), with the more powerful child or group attacking a physically or psychologically vulnerable victim." Id.²

² This widely-accepted definition of bullying is also employed by the National Mental Health Association,

Bullying is aggressive behavior. A child is targeted by one or more youths with repeated negative actions over a period of time. These are intentional attempts to cause discomfort or injury and can include name-calling, making faces, obscene gestures, malicious teasing, threats, rumors, physical hitting, kicking, pushing, and choking. More subtle is simply excluding a child from the group. Generally, bullying occurs when there's an imbalance of power favoring the bully. Victims usually don't have the strength to defend themselves. Make no mistake, bullying is a form of violence that shouldn't be tolerated.

Bullying may be direct or indirect, but always occurs "repeatedly over time in an ongoing pattern of harassment, intimidation, and abuse." Id. Direct incidents of bullying involve "physical contact, verbal taunts, or use of obscene, threatening gestures." Id. "Indirect bullying involves more passive-aggressive actions such as spreading rumors, intentionally excluding someone from a group, or getting other children to assault a victim." Id. Bullying includes incidents of physical,³ verbal,⁴ and relational⁵ attacks upon vulnerable

National Mental Health Association, "Bullying and What To Do About It," ["NMHA Bullying"] available at <http://www.nmha.org/pbedu/backtoschool/bullying.cfm> (lasted February 6, 2005), as well as by educational research literature:

[Bullying is] persistent, pervasive harassment targeting a specific individual. Typically conducted behind teachers' backs, it may include threats and physical assaults. It may consist of daily cruelties designed to make a child appear weak and vulnerable in front of his or her peers. Bullying may be a systematic isolation that strips a child of friends and leaves him or her shunned by everyone in the class. It often involves the acquiescence and even participation of the large group. It is an ongoing type of abuse that usually requires a seemingly insurmountable imbalance of power.

Weddle, supra, at 18-19 (internal footnotes omitted); see also Daniel Olweus, Bullying at School: What We Know and What We Can Do (1993); Tonja R. Nansel, et al., "Bullying Behaviors Among US Youth," 285 J. Am. Medical Assoc. 2094 (2001); Daniel Olweus, Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program," 35 J. Child Psychol. Psychiatry 1171 (1994).

³ According to the American Medical Association, physical bullying "takes the form of hitting, shoving, poking, tripping, or slapping. Physical harm can be but is usually not severe. . . . Rather than inflict severe harm, the bully aims to humiliate a child in the presence of peers. Dunking the head of a child in a toilet, putting obnoxious signs on the back of clothing, sexual grabbing, and other forms of touching and poking are common examples of physical bullying; defilement of clothing or other personal items is a less direct form of this behavior." 2005 AMA Report; see also Stuart W. Twemlow, "The Roots of Violence: Converging Psychoanalytical Explanatory

students. Victims "may be teased, physically hit or attacked, ignored, socially isolated, or called names; have personal property stolen or defaced repeatedly; have rumors spread about them; or be publicly or privately humiliated and embarrassed." 2005 AMA Report, supra.

Because bullying usually occurs when there is an imbalance of power, students with physical or social differences may be particularly vulnerable to peer harassment or bullying. As a result, peers may bully other students based upon actual or perceived sexual orientation, discussed in detail below. Targets of bullying may also include students with disabilities or other physical differences. See Mark C. Weber, "Disability Harassment in the Public Schools," 43 Wm. & Mary L. Rev. 1079 (2002); James M. Lyznicki, et al., "Childhood Bullying: Implications for Physicians," 70 Am. Fam. Physician 1723, 1726

Models for Power Struggles and Violence in Schools," 69 Psychoanalytic Q. 741 (2000).

⁴ Verbal bullying "involves harm to another's self-esteem and usually occurs in the presence of an audience. Verbal bullies use name-calling, insults, put-downs, racist remarks, and constant teasing to hurt or humiliate another person. Teasing is often said to be 'in fun' but is rarely enjoyed by the victim." 2005 AMA Report; see also Twemlow, supra.

⁵ Relational bullying is "social manipulation to harm another's acceptance by a group. Social bullies try to convince their peers to exclude or reject a certain person or persons and cut those victims off from their social connections. The most devastating effect with this type of bullying is rejections by the peer group at a time when most children highly value their social connections." 2005 AMA Report; see also L. Owens, et al., "Victimizations Among Teenage Girls: What Can Be Done About Indirect Harassment," in Peer Harassment in School: The Plight of the Vulnerable and Victimized 215-241(2001); N.R. Crick & M.A. Bigbee, "Relational and Overt Forms of Peer Victimization: A Multi-informant Approach," 66 J. Counseling Clin. Psychol. 337 (1998).

(2004) ("Obese and physically disabled children are common targets."); see also NMHA Bullying, supra (noting that bullies target students "who are physically different in race, body size, or clothing" and who have "disabilities or who are dealing with sexual orientation issues"); KidsHealth, "Bullying and Your Child," Nov. 2004, available at http://kidshealth.org/PageManager.jsp?dn=nemours&lic=60&cat_id=145&article_set=21590 ("Bullies frequently target people who are different. Then, they seek to exploit those differences.").

A. Peer Harassment and Bullying is a Daily Occurrence in Many Students' Lives

Nationwide, the percentage of students who are victims of bullying has been steadily increasing. In 2001, the National Institute of Child Health and Human Development (NICHD) published the first nationally representative research on bullying. The study involved 15,686 public and private school students, in grades 6 through 10, who were questioned about their experiences with bullying. Nansel, et al., supra, at 2094. The NICHD study found that almost 17% of the students reported being bullied "sometimes" or more often; 13% reported bullying others "sometimes" or more often during the school term. Id. According to a report issued by the American Medical Association in January 2005, "[s]urveys indicate that nearly half of all students in the United States are bullied at some time during

their school years and at least 1 in 10 is bullied on a regular basis." 2005 AMA Report, supra; see also Am. Academy of Child and Adolescent Psychiatry, Bullying (2001), available at <http://www.aacap.org/publications/factsfam/80.htm> (last visited Jan. 23, 2005); KidsHealth, supra ("According to a 2004 KidsHealth Poll 86% of more than 1,200 9- to 13-year-old boys and girls polled said they've seen someone else being bullied, 48% said they've been bullied, and 42% admitted to bullying other kids at least once in a while."). A national survey showed that youth, ages 8- to 15-years-old, rank bullying as more of a problem in their lives than racism, pressure to use alcohol or other drugs, and pressure to have sex. Kaiser Family Foundation, et al., Talking with Kids About Tough Issues: A National Survey of Parents and Kids (2001). Furthermore, over time, the vast majority of schoolchildren will struggle with bullying. "[R]ecent research suggests that between 80% and 90% of preadolescents will face ongoing psychological and physical harassment at some point in their school life that could be characterized as bullying." Gwen Glew, et al., "Bullying: Children Hurting Children," 21 Pediatrics in Rev. 183, 183-84 (2000).

B. Peer Harassment and Bullying Impacts Students' Psychological, Social, and Physical Well-Being

Research consistently shows that peer harassment and bullying has an enduring negative impact upon the lives and education of schoolchildren. Victims of bullying experience more psychological, social adjustment, and physical problems than peers who are not chronically harassed by other children.⁶

Repeatedly victimized children experience acute suffering that can interfere with social and emotional development. The New Jersey Departments of Law & Public Safety and of Education "recognize that school-aged children are especially vulnerable to the emotional injury often associated with the commission of hate crimes and bias-related acts. Too often, such acts may have lasting, negative effects on the social development of child victims." A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials, Addendum 2. Responding to Hate Crimes and Bias-Related Acts (1999), at 1.4 ["Memorandum of Agreement, Addendum 2"].

⁶ See Lyndal Bond, et al., "Does Bullying Cause Emotional Problems? A Prospective Study of Young Teenagers," 323 BMJ 480 (2001); Glew, supra; D.S.J. Hawker & M.J. Boulton, "Twenty Years' Research on Peer Victimization and Psychosocial Maladjustment: A Meta-analytic Review of Cross-sectional Studies," 41 J. Child Psychol. Psychiatry. 441 (2000); K. Kumpulainen, et al., "Bullying and Psychiatric Symptoms Among Elementary-age Children," 22 Child Abuse Neglect 705 (1998); Nansel, et al., supra, at 2094; Ken Rigby, "Health Consequences of Bullying and Prevention in Schools," in Peer Harassment in School: The Plight of the Vulnerable and Victimized 249 (J. Juvonen & S. Graham, eds. 2001); D. Wolke, et al., "Bullying Involvement in Primary School and Common Health Problems," 85 Arch. Dis. Child. 197 (2001).

These effects may threaten a child's psychological wellbeing by creating general unhappiness, low self-esteem, and feelings of sadness or depression. See, e.g., Bond, et al., supra at 483 (finding "that victimisation raised levels of subsequent self reported symptoms of anxiety or depression"); Hawker & Boulton, supra, at 441 (finding a strong association with depression or anxiety and peer victimizations); Ken Rigby, "Consequences of Bullying in School," 48 Canadian J. Psychiatry 583, 586 (2003) [Rigby, "Consequences"] (citing research findings from the United States and Norway that peer victimization at school results in an impairment of self-esteem). The negative impact of bullying may even persist into later life. See, e.g., Daniel Olweus, "Bullying Among Schoolchildren: Intervention and Prevention," in Aggression and Violence Throughout the Life Span 100-125 (R.D. Peters & V.L. Quinsey, eds., 1992) (finding that individuals bullied in childhood had higher levels of depression and poorer self-esteem at the age of 23 despite the fact that they were not harassed or socially isolated as young adults). Finally, bullying can create more severe psychological distress that manifests itself in high levels of anxiety, depression, and suicidal thinking. See, e.g., Rigby, "Consequences," supra, at 587-8 (noting that numerous correlational studies have reported that symptoms of "chronic anxiety and fear," depression, and suicidal ideation

are often associated with experiencing peer victimization); Glew, supra, at 185 ("Some victims go through the school years in a state of more or less permanent anxiety and insecurity coupled with poor self-esteem.").

Poor social adjustment also caused by peer harassment includes feelings of dislike of the school environment, loneliness, and isolation. Children who are bullied may have difficulties with social and emotional adjustment and have greater difficulty making friends. See, e.g., Nansel, et al., supra, at 2098 (concluding in a national research study that "[t]hose bullied demonstrated poorer social and emotional adjustment, reporting greater difficulty making friends, poorer relationships with classmates, and greater loneliness"). Victims of bullying may perceive the world, including their school, as a threatening, unsafe place and become suspicious, withdrawn, or joyless. 2005 AMA Report, supra; see, e.g., Rigby, Consequences, supra, at 586 (citing studies that "have shown that children who are repeatedly victimized at school have an aversion to the school environment"); id. at 587 ("A measure of peer victimization . . . was significantly correlated with being lonely at school, not liking school, and avoiding school.").

Peer harassment and bullying may also threaten children's physical health. In addition to injuries received during

physical attacks, victims of bullying may develop physical symptoms such as headaches and abdominal pain to support their pleas to stay home to avoid attending school. See Susan G. Parker, "School Avoidance Often Signals Child Being Bullied." Pediatric News, June 1998, at 46 ("Children who refuse to go to school and present somatic symptoms like chronic headaches and abdominal pain may be victims of bullies."); see also 2005 AMA Report, supra ("[Victims of bullying] may also be more likely to manifest psychosomatic symptoms such as sleep disturbances, enuresis, and unexplained abdominal discomfort or headaches."); Rigby, "Consequences," supra, at 588 (citing study that found victims of bullying "were more than twice as likely to say they had [headaches and abdominal pains], compared with nonvictimized children"); Wolke, et al., supra at 199 ("Direct victims . . . had significantly more often repeated sore throats, colds or coughs, breathing problems, nausea, and poor appetite. They were also more often worried about going to school and were more likely to make up illness to stay at home during school days.").

C. The Harms Caused by Peer Harassment and Bullying Disrupt a Child's Entire School Environment

Peer harassment and bullying disrupt children's learning processes and pervade a child's entire school environment, potentially causing poor academic performance and denying a child adequate educational opportunities. As the New Jersey

Departments of Law & Public Safety and Education recently affirmed, "hate crimes and bias-related acts are simply incompatible with the basic educational mission and the environment of a school." Memorandum of Agreement, Addendum 2, at 1.3. These Departments further recognized that "[h]ate-crimes and bias-related acts by their nature have the greatest potential to disrupt the education environment and thereby deprive students and educators of their fundamental rights." Id.

As a result of bullying and peer harassment, students may find themselves unable to concentrate upon their classes or homework. See National Youth Violence Prevention Resource Center, "Facts for Teens: Bullying," (2002), available at <http://www.safeyouth.org/scripts/teens/docs/bullying.pdf>. In addition, bullying and related violence often cause children to miss school frequently out of fear or an effort to avoid the harassment. See NMHA Bullying (stating that bullying and related violence cause 160,000 children to miss one or more days of school each month); Glew, supra, at 185 (stating that "7% of America's eighth-graders stay home at least one day a month because they are afraid of other children"). The stress from coping with bullying and the consequences of missing school may result in children failing to complete their homework and otherwise falling behind academically.

Finally, bullying not only affects the learning environment for victims, but "detracts from learning by all students because it interrupts teaching sessions, distracts and scares other students, and takes up teachers' time." Gwen, supra, at 185; Weddle, supra, at 19 ("Many bystanders [witnessing bullying] experience intense feelings of vulnerability and, in some cases, suffer the same emotional problems as the targets.").

III. ANTI-GAY PEER HARASSMENT AND BULLYING OF STUDENTS PERCEIVED TO BE GAY IS SEVERE AND PERVASIVE

While peer harassment and bullying is a daily phenomenon for many students, such conduct targeted at students who are gay, lesbian, or bisexual, or who are perceived to be gay, lesbian, or bisexual, is particularly severe nationwide and in New Jersey. This is so in terms of both the prevalence of anti-gay harassment and the severity of the problems it causes.

A. Anti-Gay Peer Harassment Is Severe and Frequent

Nationwide, adolescents in middle school and high school have reported an alarming frequency of peer-to-peer verbal harassment and physical abuse based solely on actual or perceived sexual orientation, conduct which mirrors that at issue in the present case. For example, Jamie Nabozny was subjected to continuous verbal and physical harassment by his classmates in middle school and high school in Wisconsin.

Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996). His peers routinely called him "faggot" and "queer," hit him, and spit on him. Id. at 451-52. As the harassment escalated, one incident involved two male students "hold[ing] Nabozny down and perform[ing] a mock rape on Nabonzy, exclaiming that [he] should enjoy it." Id. at 451. After this assault, two male students physically attacked him in the bathroom. Id. at 452. Similar incidents of anti-gay harassment and bullying have been reported by students in New Jersey schools. See infra at 30-32. The nature and frequency of the anti-gay peer harassment anecdotally reported in cases such as Nabozny and the present matter are supported by statistics derived from samples of larger groups of students.

The most direct way to evaluate the prevalence of anti-gay peer harassment is through surveys of randomly selected groups of students. These assessments seek to quantify incidents of anti-gay peer harassment of heterosexual students who are perceived to be gay or lesbian by their classmates.

Under this method, in one survey of 8,406 public middle school and high school students in Seattle, 8% reported experiencing anti-gay peer harassment or attacks. See Safe Schools Coalition of Washington, Eighty-three Thousand Youth: Selected Findings of Eight Population-Based Studies 3, 7

(1999) ["Eighty-three Thousand Youth"]. Notably, 4 out of 5 who reported having experienced anti-gay peer harassment or violence self-identified as heterosexual. Id. at 7. Similarly, 5% of all of the 1,325 students surveyed in Wisconsin and 6.3% of the 9,071 students surveyed in Connecticut also reported experiencing anti-gay harassment or threats. Id. at 3, 7. In a national survey conducted by the American Association of University Women Educational Foundation, 36% of all of the students who were surveyed reported that they had been called gay or lesbian in school, with 19% of the boys being called gay occasionally or often. Am. Assoc. of Univ. Women Educ. Found., Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School at 21 (2001), available at http://www.aauw.org/member_center/publications/HostileHallways/hostilehallways.pdf. This research makes clear that anti-gay peer harassment is prevalent and is not even limited to students who identify as gay, lesbian or bisexual.

A second method of determining the frequency of anti-gay peer harassment involves studies that report incidents of bias harassment of self-identified gay, lesbian, and bisexual students. These studies may underestimate the frequency of anti-gay peer harassment because they rely upon surveys of a student population that is difficult for researchers to contact and because these studies omit anti-gay harassment of

heterosexual students who are perceived to be gay, lesbian, or bisexual by their classmates. Nonetheless, these studies also demonstrate a high frequency of anti-gay peer harassment of gay, lesbian and bisexual students, and the devastating impact such harassment has upon their education and lives. See Kevin P. Brady, "Local School Officials' Legal Duty to Prevent Anti-Gay Student Harassment: The Impact of Nabonzy and Flores," 187 West's Educ. L. Rep. 383, 383 (2004) ("Statistics reveal that [gay lesbian and bisexual] students are disproportionately harassed, bullied, and physically abused in the U.S. middle and secondary schools compared to the general population."). For example, the 2004 school climate survey conducted by the national Gay, Lesbian, Straight Educators Network (GLSEN) considered data from 887 gay, lesbian and bisexual youth from 48 states and the District of Columbia. The overwhelming majority of these students, 84%, experienced verbal harassment and 39.1% reported being physically harassed. GLSEN, The 2003 National School Climate Survey, at 3 (2003), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF. Most gay, lesbian and bisexual students, 64.3%, reported feeling unsafe at their school because of the hostile environment, and 28.6% reported missing at least one entire day of school in the past month because of this fear. Id. at 4.

As with other forms of bullying, anti-gay peer harassment can include physical, verbal, and relational attacks upon the victim. Anti-gay harassment, however, is likely to escalate into physical violence. According to the 2003 GLSEN school climate survey, 39.1% of gay, lesbian, and bisexual youth report being physically harassed or assaulted because of their sexual orientation. Id. at 3. The same survey also found that gay, lesbian, and bisexual students are "significantly more likely" to have their property stolen or deliberately damaged at school. Id. at 3-4 (finding that 57.9% of gay, lesbian, and bisexual students reported having property stolen or deliberately damaged at school, compared with 35% of all students).

The nature and frequency of anti-gay bullying in New Jersey is no different than in schools throughout the country. While researchers have not compiled statistical data specific to New Jersey public schools, the New Jersey Bullying Prevention in Schools Law, N.J.S.A. 18A:37-13, was enacted after a well-publicized incident at Hillborough High School during which four students physically attacked a bisexual student in the cafeteria. Similar incidents in New Jersey schools were publicized years before. In 1997, for example, a former student at Jefferson High School in Newton, New Jersey, filed a federal lawsuit against the school board and administrators for failing to address the anti-gay peer harassment he suffered while in

school.⁷ The student was subjected to slurs and spitting, had his clothes stolen or scattered during gym, and was physically assaulted. Associated Press, "Former Student Sues Educators, Alleging Harassment at Newton High School," (Nov. 12, 1997), available at <http://www.youth.org/loco/PERSONProject/Alerts/States/NewJersey/lawsuit.html>. A beating his junior year robbed him of 80% of his hearing in his left ear. Id. In Shore Regional High School Board of Education v. P.S., 381 F.3d 194, 195-196 (2004), the court described the "severe and prolonged" anti-gay harassment inflicted upon the appellant, P.S., before his parents removed him from Maple Place Middle School in Oceanport, New Jersey, and enrolled him in a school outside his home district. During middle school, "bullies constantly called P.S. names such as 'faggot,' 'gay,' 'homo,' 'transvestite,' 'transsexual,' 'slut,' 'queer,' 'loser,' 'big tits,' and 'fat ass.'" Id. at 195. Other schoolchildren threw rocks at P.S. and "one student hit him with a padlock in gym class." Id. As a result of this harassment, P.S. became depressed and fell behind in school; by eighth grade, the years of constant anti-gay harassment and bullying drove P.S. to attempt suicide. Id. And while the recent Bullying Prevention in Schools Law requires each school to adopt an anti-harassment and bullying policy,

⁷ The case was settled out of court. Dale Frost Stillman, "Banishing Bias in High Schools," Respect (Winter 2003), available at <http://www.njsbf.com/njsbf/student/respect/winter03-4.cfm>

many New Jersey public school students still face daily anti-gay harassment. See e.g., Stillman, supra (describing the daily verbal harassment of a 16-year-old lesbian student at a New Jersey high school). These anecdotal reports of anti-gay peer harassment in New Jersey schools mirror the incidents reported in school districts throughout the country, and nothing suggests that the frequency or prevalence of anti-gay peer harassment in New Jersey is less common than in any other school system.

The findings from these studies indicate that in schools throughout the state and nation, anti-gay peer harassment based upon actual or perceived sexual orientation is pervasive and can have severe consequences for all students. It is within this context that the case before the Court must be decided.

B. Anti-gay Peer Harassment May Increase the Victim's Risk of Self-destructive Behavior, Isolation, and School Difficulties

In addition to the harms caused by general peer harassment and bullying, numerous studies demonstrate that anti-gay peer harassment on the basis of actual or perceived sexual orientation may create particular psychological, social, educational or other difficulties for a significant number of students. As a result of the anti-gay harassment and violence Jamie Nabozny faced in middle school and high school, for example, he attempted suicide repeatedly, ran away, and

eventually left home to attend school in another city. See Nabonzy, 92 F.3d at 452. His response to the stress created by anti-gay peer harassment is not uncommon. Studies indicate that anti-gay peer harassment has a strong correlation with higher suicide attempts and other self-destructive behavior, as well as with an increased risk of academic difficulties.

In particular, truancy, withdrawal from school, and poor academic performance result from peer harassment based upon actual or perceived sexual orientation. Id. at 264. Students who are the target of such harassment often drop out or attend school irregularly to avoid their peers. See Paul Gibson, "Gay Male and Lesbian Youth Suicide," in Alcohol, Drug Abuse, and Mental Health Admin., U.S. Dep't of Health & Human Servs., Report of the Secretary's Task Force on Youth Suicide 112-13 (Marcia R. Feinleb ed., 1989) (asserting that for gay and lesbian students, the "shame of ridicule and fear of attack makes school a fearful place to go resulting in frequent absences and sometimes academic failure"); A. Damien Martin & Emery S. Hetrick, "The Stigmatization of the Gay and Lesbian Adolescent," J. Homosexuality, Nos. 1/2, 1988, at 179 (explaining that truancy and withdrawal from school activities are two ways in which gay or lesbian students may respond to harassment, and noting that school may become too intolerable and dangerous for some students to continue to attend); Donna I.

Dennis & Ruth E. Harlow, "Gay Youth and the Right to an Education," 4 Yale L. & Pol'y Rev. 446, 446 (1986) (noting that anti-gay peer harassment "undermine[s] the ability of gay students to learn in school and frequently cause[s] them to forfeit a high school education altogether"). Thus, for example, the 2003 School Climate Survey examined for the first time the correlation between school climate and the school performance, grade-point average, and college aspirations of gay, lesbian, and bisexual students. The researchers found that "[s]tudents who frequently experienced harassment because of their sexual orientation had GPA's that were more than 10% lower than gay, lesbian, and bisexual students who reported only rare or less frequent harassment." 2003 National School Climate Survey, supra, at 4. Similarly, gay, lesbian, and bisexual students who were subject to harassment frequently were twice as likely to expect not to attend college as were those students who did not report frequent harassment. Id.

Even more alarming, anti-gay peer harassment correlates with a remarkably high risk of suicide and suicide attempts or other self-injurious conduct on the part of the victim of such harassment. "Studies of lesbian, gay male, and bisexual youths report suicide attempts in the 20% to 40% range,"⁸ in comparison

⁸ Savin-Williams, supra, at 266.

to reported ranges of 6% to 13% in the general high school population.⁹ Among the multiple factors leading to this higher rate of suicide attempts, is peer harassment. See Rich C. Savin-Williams, "Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youth: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide," 62 J. Consulting & Clinical Psychol. 261, 266 (1994). Anti-gay peer harassment based upon actual or perceived sexual orientation may lead a student to become withdrawn from his or her classmates. In turn, this isolation is a measurable factor contributing to suicide attempts. For example, Martin and Hetrick found that each gay, lesbian or bisexual youth who reported a suicide attempt in their study stated that a factor in their attempt was "feeling totally alone with no one to talk to." Martin & Hetrick, supra, at 172. Another study found that gender nonconformity of gay and bisexual males was a predictor of self-harm. See Gary Remafedi, et al., "Risk Factors for Attempted Suicide in Gay and Bisexual Youth," 87 Pediatrics 869, 873 (1991). In discussing this finding, the researchers explained that "feminine" or ambiguous gender traits of gay or bisexual male students often exacerbate the impact of harassment, because these children may experience

⁹ Anthony R. D'Augelli & Scott L. Hershberger, "Lesbian, Gay, and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems," in 21 Am. J. Community Psychol. 421, 424 (1993).

"an abnormal amount of depression and social conflict resulting from peer rejection, isolation, and ridicule of their feminine behavior." Remafedi, supra, at 874. This same study found that suicide attempts were commonly precipitated by conflict with peers, with 22% of attempters reporting that their attempts followed such a conflict. Id. at 857. And victims of anti-gay harassment also have a significant risk of engaging in other self-harming behavior. See, e.g., Savin-Williams, supra at 267 (concluding, after reviewing research about the consequences of verbal and physical abuse of gay and lesbian youth, that the harassment and threats "are sources of great stress to [the students], are detrimental to their mental health, and often correlate with negative outcomes such as school-related problems, substance abuse, criminal activity, prostitution, running away from home, and suicide.").

**IV. THE BROAD ANTI-DISCRIMINATION MANDATE OF LAD
REQUIRES COMPREHENSIVE SOLUTIONS TO PEER
HARASSMENT AND BULLYING**

Bullying and peer harassment is "a function of school climate." Weddle, supra, at 19. The research on peer harassment and bullying makes clear that this problem requires a comprehensive, policy-driven solution. Numerous state and federal studies have concluded that when students are faced with daily bias peer harassment, school-wide education and training

for staff, teachers, and students is a critical component of any prevention plan.¹⁰ See, e.g., Memorandum of Agreement, Addendum 2, (establishing a comprehensive scheme to address bias-related acts in schools); U.S. Dep't of Educ., Office of Civil Rights, Protecting Students From Harassment and Hate Crimes (1999) ["USDOE Protecting Students"], available at <http://www.ed.gov/offices/OCR/archives/Harassment/fundamentals1.html> ("To establish an educational environment free from discrimination and harassment will ordinarily require more than just punishing individual instances of misconduct. . . . Successful prevention strategies depend on the coordinated efforts of all school employees, including individuals responsible for administration, curriculum, instruction, discipline, counseling, public relations, and personnel."). "In fact, when properly implemented, a whole-school approach to developing an anti-bullying policy is as important as the policy itself because of the process's effectiveness in informing and mobilizing the entire school community to focus on bullying's effects and prevention." Weddle, supra, at 19; see also Derek Glover et al., Towards Bully-Free Schools 52-53 (1998).

¹⁰ Another critical component of an effective bullying prevention program is parental and community involvement in anti-bullying efforts. See USDOE Protecting Students, supra (noting that "[p]arents, students, law enforcement agencies, and other community organizations also play an important role" in bullying prevention programs).

One widely-respected bullying prevention approach is the Olweus Bullying Prevention program.¹¹ 2005 AMA Report, supra (describing this model as "currently the best documented and most effective program to reduce bullying among elementary and junior high school students"). The Olweus Bullying Prevention program

aims to alter social norms by changing school responses to bullying incidents. Interventions are directed at school-wide, classroom, and individual levels. In addition to explicit anti-harassment policies, the program is designed to improve social awareness and interaction of students and staff. Classroom interventions are designed for all students (not only bullies and victims) and include a series of exercises that give students and teachers an opportunity to discuss issues related to bullying and peer relations. Rules regarding bullying are provided and enforced and efforts are made to protect and support victims.

2005 AMA Report, supra. Other effective comprehensive prevention programs may include a focus on bystander-activation, other classroom-level interventions, "responsive school" approaches, or elements of a social-emotional-learning curriculum. See, e.g., Weddle, supra at 19. These various

¹¹ A number of federal agencies and professional associations have endorsed the Olweus Bullying Prevention program. The University of Colorado's Center for the Study and Prevention of Violence identifies it as one of eleven model violence prevention programs that meet a high scientific standard of program effectiveness. Daniel Olweus, et al., Blueprints for Violence Prevention, Book Nine: Bullying Prevention Program (Center for the Study and Prevention of Violence (1999)).

approaches to eliminating bullying and peer harassment share a common emphasis on incorporating the entire classroom or school community in the prevention efforts.

The proven success of these programs demonstrates that a comprehensive and coordinated approach to prevent and reduce bullying can be effective when all members of the school community are involved. Because a hostile school environment permits peer harassment to continue, the broad anti-discrimination goals of LAD can only be achieved by these types of comprehensive solutions - remedies which are both urgently needed and fully justified.

Moreover, research by the United States Department of Health and Human Resources has also made clear that individual and "simple, short-term solutions" do not successfully address the problem of peer harassment. U.S. Dep't of Health and Hum. Res., "Stop Bullying Now: Misdirections in Bullying Prevent and Intervention," available at http://stopbullyingnow.hrsa.gov/HHS_PSA/pdfs/SBN_Tip_5.pdf (last visited Feb. 6, 2005) (noting that unsuccessful interventions include "zero tolerance" policies, peer mediation, and other simple programs targeted solely at the bully and victim rather than the entire school community). "Unclear school antidiscrimination policies, local school officials' inaction toward student harassment incidents

based upon sexual orientation, and inadequate or nonexistent training of school staff in issues unique to [gay, lesbian or bisexual] students have been cited as primary reasons why public schools are presently perceived as unsafe environments" for students subjected to anti-gay harassment. Brady, supra, at 383.

In light of these assessments of bullying prevention programs, the responsibility of school systems to eliminate discrimination and protect students from harm compels school districts to adopt a school-wide, comprehensive approach to eradicate bullying and peer harassment. As the New Jersey Executive, Legislature, and Courts have recognized, schools have a duty to educate students and staff about what constitutes unacceptable discriminatory conduct. See, e.g., N.J.S.A. 10:5-3; N.J.S.A. 10:5-5(1). As, the Departments of Law & Public Safety and of Education have declared, "we all have a responsibility to protect the rights and interests of children and to ensure their emotional well-being" and have adopted an "overriding policy" to "provide students with a safe environment conducive to learning and free of violence, fear, and intimidation" stemming from bias-related conduct. Memorandum of Agreement, Addendum 2, at 1.9; cf. Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629, 646 (1999) (recognizing that school officials have the authority and ability to influence how

schoolchildren interact with their peers). Thus, the "school's duty includes teaching students what constitutes unlawful discrimination, as distinguished from general immature and 'insensitive' behavior which is not bias-based," as well as a "duty to protect children from harm" caused by bias-related conduct. L.W., a minor, by his parent and guardian L.G., and L.G. individually v. Toms River Regional Schs. Bd. of Educ., DCR PQ071E-02596, final decision (July 26, 2004), at 22. And, this duty can only be fulfilled by the type of comprehensive, equitable remedial scheme outlined in the decision of the Director of the Division on Civil Rights, here under review.

Every individual should have the right to be spared discrimination and repeated intentional humiliation in school as in society at large. The law is clear: no child should have to be afraid of going to school for fear of being harassed, degraded, or injured, and no parent should have to worry that such harms will be visited upon his or her child.

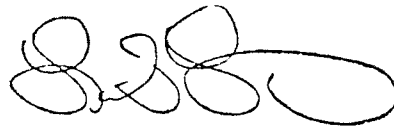
Accordingly, under LAD's mandate that school districts protect students from discriminatory peer harassment, schools should be liable when authorities should have known that a situation existed which would make a reasonable student find the school environment hostile and the school fails to implement a

comprehensive, policy-based solution to bullying and peer harassment that strives to alter the school climate.

CONCLUSION

For the foregoing reasons and the reasons set forth by Complainants, the Final Decision of the Director of the Division on Civil Rights, as well as the associated remedies, should be affirmed.

Respectfully submitted,



Edward L. Barocas
Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 750
Newark, New Jersey 07101
(973) 642-2084

Lawrence S. Lustberg
Gitanjali S. Gutierrez
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4700

Attorneys for Amicus Curiae

Dated: Feb. 7, 2005.