



## Anti-Bullying Policy Yardstick

At Alliance Defending Freedom, we often field questions about what makes an anti-bullying policy good, and what makes one bad. Over the past few years, we have reviewed and commented on proposed anti-bullying laws and policies all across the United States. Gleaned from this experience, and from our knowledge of the constitutionally-protected rights of public school students and teachers, we offer below our Anti-Bullying Policy Yardstick, which discusses “good” and “bad” approaches to the top ten most common components of anti-bullying policies/laws.

GOOD ANTI-BULLYING POLICY	BAD ANTI-BULLYING POLICY
<b>1) Definition of “Bullying”:</b>	
<p>Good:</p> <ul style="list-style-type: none"> <li>• Precise definitions; not overly vague.</li> <li>• Addresses verbal expression traditionally not protected by the First Amendment.</li> </ul> <hr style="width: 20%; margin: 10px auto;"/> <p>A <i>good</i> policy provides a precise definition of “bullying” that regulates bullying conduct. To the extent such a policy covers verbal expression, it must only cover expression that the courts have traditionally treated as unprotected in the school context (i.e., lewd, indecent, obscene, advocating illegal conduct, intended to incite an immediate breach of the peace, or severe, persistent, and pervasive use of threatening words that objectively inflict injury). A <i>good</i> policy also focuses on the acts or words said by the alleged bully rather than the intent or motives behind the actions.</p>	<p>Bad:</p> <ul style="list-style-type: none"> <li>• Uses vague and overly broad definitions of bullying.</li> <li>• Restricts student expression traditionally protected by the First Amendment.</li> <li>• Uses vague, overbroad terms like “offensive” and “emotional distress.”</li> </ul> <hr style="width: 20%; margin: 10px auto;"/> <p>A <i>bad</i> policy provides a definition of “bullying” using terms so vague and overbroad that it fails to provide students with adequate notice of what it prohibits, allows for unbridled discretion in enforcement decisions, and covers student expression that is protected by the First Amendment. Examples of such policies are those that: use vague and overbroad terms like “emotional distress,” “offensive,” “annoying,” “uncomfortable,” “alarming,” and “mental harm” to describe what is prohibited; punish the alleged bully based on how the victim perceives the bully’s acts/words or how the victim “feels,” without any inquiry into whether the reaction is objectively reasonable; and focuses on the thoughts and motives of the alleged bully rather than the actual acts/words.</p>

## 2) First Amendment Protection:

### Good:

- Does not apply to religious, political, philosophical, or other protected student speech.

A *good* policy includes a provision stating that it does not apply to expression protected by the First Amendment. Such a provision should expressly state that the bullying policy does not prohibit expression of religious, philosophical, or political views, provided that it otherwise does not meet the definition of bullying and does not cause a substantial and material disruption of the work of the school.

### Bad:

- Lacks exceptions for religious, political, or philosophical student speech that is protected by the First Amendment.

A *bad* policy lacks a provision or statement that it does not apply to expression protected by the First Amendment. Such a policy becomes even worse when it uses vague and overbroad terms that imperil protected expression. *See* Point No. 1, above.

## 3) Punishing Based on Intent or Motive:

### Good:

- Defines bullying based upon conduct or action, not upon motive or intent.
- Objective, not subjective, definition of bullying.

A *good* policy avoids any consideration of the motive or intent of the alleged bully (i.e. whether the alleged bullying dislikes all people with a specific characteristic). A good policy focuses on eliminating the wrongful bullying *conduct*, by providing sufficiently objective definitions and guidelines of what constitutes “bullying.” Such a policy is based on the understanding that punishing thoughts and motives is outside of the school’s proper role; punishing wrong conduct falls within it. If the conduct constitutes bullying on an objective basis, then there is no need for any further inquiry.

### Bad:

- Defines bullying based on motive or intent, not merely the conduct involved.
- Examines the thoughts and beliefs of the alleged bully.
- Includes “re-education” of persons accused of bullying to change the way they think.

A *bad* policy authorizes punishment of the alleged bully on the basis of his motives or intent. This dangerous approach invites all kinds of inquiry and invasion into the private thoughts and beliefs of students, and permits punishing students based on those thoughts and beliefs. Further, such an approach opens the door to improper and unlawful attempts to “re-educate” students and to help them “think” or “believe” the “right thing.”

#### 4) Categorizing vs. Banning All Bullying:

Good:

- Prohibits bullying of all students.
- Does not define bullying based upon the characteristics of the person being bullied.

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A *good* policy bans all bullying, regardless of the reason for the bullying. Anti-bullying policies exist to protect the ability of *every* student to receive a quality education. Thus, a good policy does not prohibit bullying based on certain characteristics, but rather bans all bullying so that every student who is bullied benefits from its protection.

Bad:

- Prohibits bullying against students based upon certain characteristics only (i.e. race, sexual orientation).
- Does not prohibit bullying against all students.

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A *bad* policy offers special protection to students who are bullied based on certain characteristics, but provides no protection to students who are bullied based on characteristics not listed in the policy. It is improper for bullying policies to favor some students over others in this way, especially considering that their primary purpose is to ensure all students receive a quality education.

#### 5) Teacher Liability:

Good:

- Avoids mandatory reporting requirements that create liability risks.
- Provides clear guidelines for teachers to follow when an act of bullying is observed.

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A *good* policy avoids treating teachers and school employees as mandatory reporters of bullying or, if it imposes such a requirement, defines bullying in a clear and precise manner to minimize the possibility that teachers and administrators will be held liable for failing to report bullying behavior. Teachers and staff who fear liability are likely to over-report bullying, leading to students being wrongfully accused of bullying and a drain on school resources due to the need to investigate every false report.

Bad:

- Requires teachers and staff to report possible bullying without providing clear and precise definitions.
- Exposes teachers and staff to civil liability.

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A *bad* policy defines bullying using vague and overbroad terms while treating teachers and school employees as mandatory reporters of bullying. A mandatory reporting requirement, without an objective standard of what constitutes bullying, may expose teachers and administrators to civil liability if they fail to report behavior that a jury later determines was bullying that should have been reported.

## 6) Cyber-bullying and Off-Campus Speech:

### Good:

- Respects the limits of a school’s authority to only regulate on-campus activity.

A *good* policy avoids regulating off-campus student speech. Such a policy will limit its bullying prohibition to bullying behavior, including “cyber-bullying” (i.e., bullying via electronic means), that occurs on school premises, at school-sponsored functions or activities, or while students are being transported by any means of transportation provided or supported by the school.

### Bad:

- Gives school officials authority to punish words or actions that occur off-campus.

A *bad* policy regulates off-campus student speech. This problem often arises in the context of prohibitions on cyber-bullying. For example, a policy may overreach by banning all electronic communications that meet its bullying definition, rather than limiting the prohibition to electronic communications that occur on campus. A policy that regulates off-campus speech or behavior opens the school to potential legal liability for off-campus bullying even though the school has no control over it.

## 7) Promoting Political Agendas:

### Good:

- Does not single out groups for special protection; rather, prohibits bullying against all students.
- Does not use materials or lessons plans from homosexual activist groups.

A *good* policy avoids promoting any political agenda. It does so by prohibiting *any* student from bullying *any* child for *any* reason, rather than extending bullying protections to favored students on the basis of particular characteristics. The latter types of policies, which typically prohibit bullying based on sexual orientation and gender identity, open the door to the advancement of the political agenda of homosexual activist groups in schools. A good policy will also, to the extent that it requires instruction on bullying, limit the instruction to a description of bullying behavior, rather than the characteristics of bullying victims.

### Bad:

- Singles out “sexual orientation,” “gender identity,” etc. for special protection.
- Requires tolerance training and similar programs using materials and lesson plans crafted by homosexual activist groups.

A *bad* policy promotes a particular political agenda, typically that of homosexual activist groups. These groups have orchestrated a nationwide campaign to promote homosexual behavior to impressionable, school-age children. Anti-bullying policies that single out “sexual orientation” and “gender identity” for special protection stand at the forefront of this effort. The adoption of such policies has resulted in public schools subjecting young students to books, lessons, and programs designed to advance the homosexual agenda and undermine traditional notions of sexuality and the family. Policies that *require* instruction on bullying are problematic, as they often result in the inclusion of materials promoting homosexual behavior.

**8) Parental Notice:**

Good:

- Provides notice to parents if child has been bullied or has been accused of bullying.

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A *good* policy provides for notice to parents whether their child has been accused of bullying, or is the recipient, and gives opportunity for parental involvement in the complaint process related to their children. Such involvement properly respects parents' fundamental constitutional right to direct the upbringing and education of their children.

Bad:

- Allows questioning of students being bullied or those accused of bullying without parent notification and consent.

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A *bad* policy provides for no, or very limited, parental involvement when a complaint has been made that their child engaged in, or is on the receiving end of, bullying behavior. This lack of parental involvement tramples the fundamental constitutional right of parents to direct the upbringing and education of their children.

**9) Anonymous Complaints:**

Good:

- Investigates anonymous complaints only when good cause or threat of imminent physical harm exists.

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A *good* policy allows an investigation or disciplinary action to be taken on the basis of an anonymous complaint only under rare circumstances, such as when good cause exists for filing anonymously, or school officials have good reason to believe that a student may be at imminent risk of physical harm.

Bad:

- Investigates all anonymous complaints without evidence that the complaint is not intended to harass other students.

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A *bad* policy allows an investigation or disciplinary action to be taken solely on the basis of an anonymous complaint. Such an approach encourages the use of the complaint process as a tool to harass students.

**10) Private Schools (state statutes only):**

Good:

- State anti-bullying law that exempts private schools and respects their autonomy.

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A *good* law includes an express provision limiting it to public schools. Imposing anti-bullying laws on private schools interferes with the private interests and rights of non-public schools, and the rights of parents who choose to have their children educated at such institutions.

Bad:

- State law that requires private schools to comply with its requirements.

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A *bad* law expressly provides that it applies to private schools, or fails to include a provision limiting it to public schools. Applying anti-bullying laws that mandate instruction on bullying to private schools is problematic, as they would infringe on the schools' rights to set their own curriculum, and on parents' rights to have their children educated according to a non-public-school program.