

“THESE SCALES TELL US THAT THERE  
IS SOMETHING WRONG WITH YOU”:  
HOW FAT STUDENTS ARE  
SYSTEMATICALLY DENIED ACCESS TO  
FAIR AND EQUAL EDUCATION AND  
WHAT WE CAN DO TO STOP THIS

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ABSTRACT

*Fat students are denied access to fair and equal education due to widespread antifat discrimination. Unfortunately, there are currently no statutes that provide adequate recourse for fat students. Thus, this Note advocates the drafting of new legislation specifically aimed at eliminating discrimination against students on the basis of fatness and recommends measures that can be adopted by school districts to combat discrimination against fat students.*

TABLE OF CONTENTS

I. INTRODUCTION.....	937
II. HOW FAT STUDENTS ARE SYSTEMATICALLY DENIED ACCESS TO FAIR AND EQUAL EDUCATION AND THE DETRIMENTAL RESULTS THEREOF .....	938

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\* Class of 2010, University of Southern California Gould School of Law; B.A. Sociology, B.A. Women’s Studies, 2007, *summa cum laude*, University of California, Los Angeles. I am eternally grateful to my advisor, Professor Ronald Garet, for his guidance throughout the writing process and for teaching me the meaning of law and justice in his Law, Language, and Ethics course. I would also like to thank the editors of the *Southern California Law Review* for all of their hard work and support. Extra special thanks to my mother, Geraldine Stover, for her love and willingness to read numerous early drafts of this Note, as well as countless other papers throughout the years, without complaint. Finally, I dedicate this Note to all the fat kids and teens—*never* let what silly people say about your size get in the way of your success.

A.	WIDESPREAD DISCRIMINATION AGAINST FAT STUDENTS.....	939
1.	Peer Rejection and Taunting.....	939
2.	Teacher Inaction and Negative Antifat Comments.....	940
3.	Biased Physical Education Requirements.....	941
4.	Inaccessibility.....	943
5.	School Staff Antifat Bias.....	943
B.	WIDESPREAD FATNESS-BASED DISCRIMINATION DENIES FAT STUDENTS ACCESS TO FAIR AND EQUAL EDUCATION ....	945
C.	THE SOCIETAL CONSEQUENCES OF DENYING FAT STUDENTS ACCESS TO FAIR AND EQUAL EDUCATION.....	947
D.	A NON-SOLUTION: “JUST LOSE WEIGHT”.....	948
III.	THE CURRENT LEGAL FRAMEWORK PROVIDES LITTLE RECOURSE FOR FAT STUDENTS.....	952
A.	THE CONCEPTUAL PROBLEM WITH LABELING FATNESS AS A DISABILITY.....	953
B.	THE PROBLEM WITH THE ADA AND THE RHA AS LEGAL RECOURSE FOR FAT STUDENTS.....	955
1.	Fatness Is Not Likely To Be Considered an Actual Physical or Mental Impairment.....	956
2.	Fatness Itself Probably Would Not Be Considered to Substantially Limit Major Life Activities.....	958
3.	Fatness Is Not Likely To Be Covered Under the “Regarded As” Prong of the ADA.....	960
C.	THE PROBLEM WITH THE IDEA AS A LEGAL RESOURCE FOR FAT STUDENTS.....	963
IV.	SUGGESTIONS FOR FUTURE LEGISLATION THAT PROTECTS FAT STUDENTS.....	965
A.	THE PROBLEM WITH AMENDING THE ADA/RHA TO INCLUDE FATNESS.....	965
B.	THE NEED FOR NEW LEGISLATION SPECIFICALLY TARGETING DISCRIMINATION ON THE BASIS OF FATNESS.....	966
C.	PROBLEMS ASSOCIATED WITH LEGISLATION TARGETING DISCRIMINATION ON THE BASIS OF FATNESS.....	969
V.	RECOMMENDATIONS FOR SCHOOL DISTRICT-LEVEL MEASURES TO COMBAT DISCRIMINATION AGAINST FAT STUDENTS.....	974
A.	ACCESSIBLE SCHOOLS AND CLASSROOMS.....	974
B.	SCHOOL STAFF TRAINING.....	975
C.	TOLERANCE PROGRAMS FOR PARENTS AND STUDENTS.....	976
D.	REVISING PHYSICAL EDUCATION PROGRAMS.....	978
VI.	CONCLUSION.....	981

*They gave me the nickname Kirby because I was “short, fat, and had a big mouth.”*<sup>1</sup>

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*I was overweight from K–12, now a junior in undergrad, and still overweight. I have always been about 2x the size of my peers. . . . I was taunted. Everything from having snowballs thrown at me, graffiti on my house, egging my house on Halloween, threats, rumors spread to the point that I was arrested in 8th grade [when] people said I told people I was bringing a gun to 8th grade prom. All the teachers knew, and did nothing.*<sup>2</sup>

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*the one thing i hated most of all was that the furniture was uncomfortable. even if i fit in the desks, it wasn't nearly as comfortable for me as it was for smaller framed students. i remember the desks being too low for me as a 3rd grader so i couldn't sit up straight (my chair didn't slide all the way under my desk) and that really affected my comfort and therefore my learning. the desk was adjustable (i realise in hindsight) but i didn't know at the time, and the teacher never did anything about it to have it adjusted to fit me better. i hope teachers have learned more since then, but that was a big deal, especially when all my fellow students fit in their desks just fine*<sup>3</sup>

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*In 5th grade, my mother was dragged into a parent-teacher conference by a very thin teacher who spent the entire time jerking her chain about my weight. I was put on (yet another strict) diet—and was forced to wear much dowdier clothing to “cover it up.” It was offensive to said teacher.*<sup>4</sup>

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*In first grade, my teacher, after the whole class was weighed, informed everyone that I was the heaviest in the class, and made a joke*

1. Email from anonymous to author (Nov. 3, 2008, 07:14 PST) (on file with author). This email and the ones *infra* were solicited by posting a questionnaire on a fat acceptance online community and requesting community members to email their responses. With the exception of Amy Salloway (a well-known fat-acceptance advocate), the identities of the survey respondents (and any other individuals referenced in the surveys) have been suppressed in order to protect their privacy. Other than the name changes to protect individuals' anonymity, the following quotations are unedited.

2. Email from anonymous to author (Nov. 3, 2008, 06:39 PST) (on file with author).

3. Email from anonymous to author (Nov. 3, 2008, 06:10 PST) (on file with author).

4. Email from anonymous to author (Nov. 3, 2008, 04:59 PST) (on file with author).

about it. I was made fun of by my classmates and went home in tears.<sup>5</sup>

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*In middle school, I had the same gym teacher for 6th through 8th grade—Mrs. Spark.<sup>6</sup> . . . She led the rest of the class in mocking me—she’d gather them around me as I was struggling to do a sit-up or a pull-up, and rally the students in laughing at me. . . .*

*She NEVER believed I was trying my hardest in gym, and she harassed me, goaded me and reprimanded me during every activity we did. “I want you to TRY, Amy,” she’d shout, “You’re not TRYING.”*

*The seminal moment of my fat childhood existence was the day our class had the last Presidential Physical Fitness Test, which was the Mile Run. I’d been dreading that day for months, because I’d failed all the other, much easier fitness tests. Mrs. Spark’s instructions to our class were that when we finished our mile, we were supposed to sit on the yellow curb beside the outdoor track in the order that we finished, so we could see our ranking from fastest to slowest. Well, one by one, the kids finished, and I remained on the field, struggling to even keep walking, much less running. I remember panting in the freezing November air, and feeling the sweat pouring down my body inside my huge, too-thick fleece sweatshirt, and how much my thighs hurt as they rubbed together inside my sweatpants, the agony of the chafing. When I heard the school bell ring, I realized that it was the marker for our NEXT CLASS PERIOD—everyone had finished the mile, and I was still out on the field, all alone, NOT finished. Mrs. Spark shouted at the class, “NO ONE MOVES UNTIL AMY FINISHES THE MILE. YOU will ALL STAY RIGHT THERE until AMY FINISHES!” The class exploded in jeers, and stared at me, and Mrs. Spark marched out onto the field where I was moving at a crawl. She came up behind me, dug her fingers into my shoulders, and hissed into my ear . . . “If you’re not going to run this mile by yourself, then you’ll have to do it with me PUSHING YOU.” And she began pushing me—like a lawnmower, ahead of her, as she jogged. I tripped over my feet and almost fell down, but Mrs. Spark kept pushing me. She hissed at me as we did that final lap: “You can hate me all you want, Amy, but I’m doing this for your own good. . . .”*

*When Mrs. Spark thrust me past the finish line with the whole class staring, late for Social Studies, she announced my time to everyone: over 23 minutes. Slowest in the whole class, maybe even in the school. The class*

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5. Email from anonymous to author (Nov. 2, 2008, 20:09 PST) (on file with author).

6. This name has been changed throughout this quotation to preserve anonymity.

got up and filed into the locker rooms, while I stood on the asphalt, crying my eyes out.<sup>7</sup>

## I. INTRODUCTION

These are just a few of many personal stories from former fat<sup>8</sup> students<sup>9</sup> detailing the extreme hardships they faced in school.<sup>10</sup> As these narratives indicate, fat students are systemically denied access to fair and equal education.<sup>11</sup> In Part II, this Note reveals how fat students are denied

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7. Email from Amy Salloway to author (Dec. 1, 2008, 12:57 PST) (on file with author).

8. After careful consideration and online conversations with members of the fat-acceptance community, I decided to use the term “fat” rather than “overweight,” “obese,” or any sort of euphemisms. Fat acceptance activists advocate the reclaiming of the word “fat” as gays have reclaimed “queer.” See WENDY SHANKER, *THE FAT GIRL’S GUIDE TO LIFE* 8–11 (Bloomsbury 2004). See also MARILYN WANN, *FAT!SO?: BECAUSE YOU DON’T HAVE TO APOLOGIZE FOR YOUR SIZE!* 18–21 (1998) (noting that “fat” is actually the least offensive descriptive term when compared with other terms like “overweight,” which presumes there exists an objective and universal ideal weight that fat people have transgressed; “obese,” which is used strategically by diet specialists to sell weight-loss treatments and health insurance companies to deny fat people coverage; and euphemisms, which ironically reinforce the notion that there is something wrong with being fat). Additionally, other scholarly legal works have elected to use the term “fat” exclusively or in tandem with “overweight.” See, e.g., SONDRÁ SOLOVAY, *TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION* 29 n.4 (2000); Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41, 41 n.1 (1994); Elizabeth Kristen, Comment, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 59 n.6 (2002); Lucy Wang, Note, *Weight Discrimination: One Size Fits All Remedy?*, 117 YALE L.J. 1900, 1902 n.1 (2008).

9. For the purposes of this Note, “student” generally refers to students in grades K–12.

10. For additional narratives detailing the daily traumatization of fat students, see Cat’s House of Fun, *I Was a Fat Kid...This Is My Story*, <http://www.catay.com/fatkid/school.asp> (last visited Apr. 25, 2010) [hereinafter *I Was a Fat Kid*].

11. Although this Note focuses on antidiscrimination, other conceptual frameworks could be helpful in analyzing the difficulties experienced by fat students. For example, in the context of religious liberty, some scholars argue that the First Amendment requires accommodations for religion. See Email from Ronald Garet to author (Mar. 1, 2009, 13:11 PST) (on file with author). Following this logic of accommodation, the government is required to “take affirmative steps to ease burdens created by religious exercise.” *Id.* Such accommodations might include extending unemployment benefits to persons who lost their jobs because they could not work on their Sabbath, see *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987), or exempting Amish schoolchildren from compulsory schooling laws, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Thus, some might suggest that for fat students to be allowed equal learning opportunities, some accommodations need to be made for students’ fatness. Although this conceptual framework could certainly be useful in achieving the goals of this Note (that is, accessible school facilities, school staff training, tolerance programs, and revising physical education requirements), it is problematic in that many medical professionals believe that fatness (unlike religion) can be a serious health hazard, and thus should *never* be accommodated. Although many fat rights activists contend that these hazards are at best exaggerated, see *infra* note 82 and accompanying text, and a religion could conceivably have practices that some might assert are medically or psychologically unsound, this Note nevertheless elects to use an antidiscrimination conceptual framework.

The antidiscrimination framework is the most attractive because it appeals even to medical

access to fair and equal education due to peer rejection and taunting; teachers' inaction in the face of such taunting and teachers' own antifat comments; biased Physical Education ("P.E.") requirements; inaccessible schools and classrooms; and the antifat biases of school staff members. Part II then reveals the long-term and societal consequences of denying fat students access to fair and equal education. Part III explains why the current legal framework does not help fat students, while Part IV advocates the drafting of new legislation specifically aimed at eliminating discrimination against students on the basis of fatness. Part V recommends policies and programs that may be implemented at the school district-level to combat discrimination against fat students. Finally, Part VI concludes that the best way to combat discrimination against fat students is to couple the new federal legislation advocated in Part IV with the school district-level policies and programs recommended in Part V.

## II. HOW FAT STUDENTS ARE SYSTEMATICALLY DENIED ACCESS TO FAIR AND EQUAL EDUCATION AND THE DETRIMENTAL RESULTS THEREOF

Fat students are routinely discriminated against because of their fatness. In a 1994 report,<sup>12</sup> the National Education Association ("NEA") observed:

For fat students, the school experience is one of ongoing prejudice, unnoticed discrimination, and almost constant harassment. From nursery school through college, fat students experience ostracism, discouragement, and sometimes violence. Often ridiculed by their peers and discouraged by even well-meaning education employees, fat students develop low self-esteem and have limited horizons. They are deprived of places on honor rolls, sports teams, and cheerleading squads and are denied letters of recommendation.<sup>13</sup>

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professionals and other health advocates who contend that fatness should be treated as pathological. *See infra* notes 82, 224 and accompanying text. Such advocates can recognize that even if fatness is a health hazard (a position this Note does not endorse), fat people should not be discriminated against because fatness-based discrimination (like race and gender discrimination) is a moral wrong and rarely, if ever, leads to weight loss. *See infra* note 225.

12. Admittedly, the National Education Association report itself is over fifteen years old. Sadly, this speaks to the persistence of fat-based discrimination. As revealed by the personal narratives of younger individuals and later studies discussed throughout this Note, conditions for fat students have not improved since 1994. In fact, one study showed that negative attitudes toward fat students have increased from 1961 to 2001. Janet D. Latner & Albert J. Stunkard, *Getting Worse: The Stigmatization of Obese Children*, 11 OBESITY RES. 452, 452, 454 (2003) (replicating a 1961–1968 study and measuring students' attitudes toward fat children). *See also infra* text accompanying notes 14–16.

13. NAT'L EDUC. ASS'N, REPORT ON SIZE DISCRIMINATION (1994), available at <http://www.lectlaw.com/files/con28.htm>.

This Note will now discuss how fat students are routinely discriminated against, how this discrimination bars fat students from obtaining a fair and equal education, and the long-term social repercussions of denying fair and equal education to fat students.

#### A. WIDESPREAD DISCRIMINATION AGAINST FAT STUDENTS

Fat students are subjected to peer rejection and taunting, teachers' inaction in the face of such taunting and teachers' own antifat comments, discriminatory P.E. requirements, inaccessible schools and classrooms, and the antifat biases of school staff members.

##### 1. Peer Rejection and Taunting

Fat students are frequently shunned and harassed by their peers who view fatness as an extremely negative and stigmatizing attribute. In a recent study documenting antifat bias among students, middle school students were presented with drawings that depicted one child with no visible disabilities, one holding crutches with a brace on the left leg, one sitting in a wheelchair, one missing a left hand, one with a facial disfigurement on the left side of the mouth, and one child who was fat.<sup>14</sup> The students were then asked to rank the children depicted in the drawings with the child they liked the most being ranked first.<sup>15</sup> Both male and female students ranked the fat child last.<sup>16</sup> Given this bias against fat individuals, it is unfortunately not surprising that fat students are often isolated from and rejected by their peers.<sup>17</sup>

This peer isolation and rejection typically escalates into student-on-student taunting. In a personal memoir, Judith Moore recalls:

When I was in first grade no one paid much attention to me. . . . No one talked to me at lunch and rarely did anyone allow me to join in a game at recess. . . . [I]n second grade, a group of older boys took after me. Out on the playground, after lunch, they circled me. They yelled, "Fat girl! Fat girl! Fat girl!" They sang, "I don't want her, you can have her, she's too

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14. Latner & Stunkard, *supra* note 12, at 453.

15. *Id.*

16. *Id.* at 454 (depicting the mean rank and noting a significant difference between boys' and girls' rankings in Table 1). Making these results even more distressing is that when compared to a nearly identical study conducted in 1961, the data shows that students have become even *more* biased against fat children in recent years. *Id.* (comparing 1961 and 2001 findings in Figure I).

17. See Richard S. Strauss & Harold A. Pollack, *Social Marginalization of Overweight Children*, 157 ARCHIVES PEDIATRICS & ADOLESCENT MED. 746, 752 (2003) (reporting the data of a study showing that overweight adolescents have "fewer and less reciprocal friendships").

fat for me.”<sup>18</sup>

Taunting goes beyond verbal abuse. For example, former fat student James Airre was physically abused by a group of four to six other students who would punch his stomach and arms whenever they saw him.<sup>19</sup>

Although, sadly, many students are victimized for various reasons, fat students are especially prone to becoming victims of both verbal and physical harassment.<sup>20</sup> Project EAT (Eating Among Teens), a study of weight-related issues among a sample size of over four thousand middle and high school students, details the disturbing extent of fatness-based taunting:

Nearly a quarter of the adolescents reported being teased about their weight at least a few times a year (25.5% of girls and 22.2% of boys). Weight teasing by peers (ever) was reported by 30.0% of the girls and 24.6% of the boys. . . . Teens with the body mass index (BMI) values  $\geq$  95th percentile (labeled as overweight . . .) reported the highest prevalence of weight teasing by peers; 63.2% of these overweight girls and 58.3% of these overweight boys reported that they had been teased about their weight by their peers.<sup>21</sup>

## 2. Teacher Inaction and Negative Antifat Comments

Unfortunately, teachers and other school officials often ignore fatness-based taunting.<sup>22</sup> University of California, Berkeley nutritionist Joanne Ikeda explains that although taunting is a serious problem, “A lot of teachers do not have any idea how to handle it.”<sup>23</sup> Unsure of how to react to such widespread teasing, teachers frequently do nothing.<sup>24</sup> Far from being a neutral force, teacher inaction compounds the harassment.<sup>25</sup> Legal scholar Deborah L. Brake explains that not only is teacher inaction often interpreted as implicit approval of the harassment, but such inaction also

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18. JUDITH MOORE, *FAT GIRL: A TRUE STORY* 89 (2005).

19. SOLOVAY, *supra* note 8, at 59.

20. Ian Janssen et al., *Associations Between Overweight and Obesity with Bullying Behaviors in School-Aged Children*, 113 *PEDIATRICS* 1187, 1191 (2004) (discussing a study showing that “overweight and obese boys and girls are more likely to be the victims and perpetrators of verbal, physical, and relational bullying than their normal-weight peers”).

21. Diane Neumark-Sztainer & Marla Eisenberg, *Weight Bias in a Teen’s World*, in *WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES* 68, 69 (Kelly D. Brownell et al. eds., 2005).

22. See SOLOVAY, *supra* note 8, at 49–50.

23. *Id.*

24. See *id.*

25. Cf. Deborah L. Brake, *School Liability for Peer Sexual Harassment After Davis: Shifting from Intent to Causation in Discrimination Law*, 12 *HASTINGS WOMEN’S L.J.* 5, 11–12 (2001) (discussing sexual harassment in a way such that it is reasonable to extend any conclusions to all forms of classroom harassment).

escalates the taunting by emboldening the harasser.<sup>26</sup>

Teachers themselves often harass fat students.<sup>27</sup> Former fat student Lorca James recalls when her teacher brought her to the front of the class, instructed her to stand on a scale, and told her that she weighed “at least thirty pounds more than anyone else in the class.”<sup>28</sup> Another fat student recalls an incident when she was

scheduled for a double science period during what was normally her lunch period, so she innocently asked the science teacher when she would be able to eat lunch. He stared at her overweight body and answered—in front of the class—“It doesn’t look like you need to go to lunch.”<sup>29</sup>

Negative comments by teachers and staff are especially prevalent during P.E. classes.<sup>30</sup> Legal scholar Sondra Solovay reveals that “[b]eing called offensive nicknames by teachers and being screamed at in front of the class for being fat, uncoordinated, or slow is a common experience of many fat people during school gym classes.”<sup>31</sup> One former fat student recalls a time in P.E. when, despite her protests, “They measured me with calipers. Then the gym teacher told me, loud enough for everyone to hear, that I had the highest body fat of the class!”<sup>32</sup>

### 3. Biased Physical Education Requirements

Flawed government and district-level P.E. requirements are frequently unfairly biased against fat students.<sup>33</sup> This bias sometimes manifests itself in requiring students to do exercises that fat students cannot do as well as thin students simply because of their size (not necessarily because they are less fit than their thinner counterparts).<sup>34</sup> Thus, even athletically skilled fat students are affected by biased P.E. requirements.<sup>35</sup> For example, one such student recalls:

They were all exercises that lighter kids excelled at . . . Running backwards was much harder for the heavier kids—we seemed to have a

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26. *Id.*

27. See SYLVIA RIMM & ERIC RIMM, RESCUING THE EMOTIONAL LIVES OF OVERWEIGHT CHILDREN: WHAT OUR KIDS GO THROUGH—AND HOW WE CAN HELP 96 (2004).

28. SOLOVAY, *supra* note 8, at 50 (quoting Lorca James, *Fat or Not: A Teenager Reports*, RADIANCE, Fall 1987, at 9).

29. RIMM & RIMM, *supra* note 27, at 96.

30. See SOLOVAY, *supra* note 8, at 54–55.

31. *Id.* at 55.

32. *Id.* at 51.

33. See *id.* at 54.

34. See *id.*

35. See *id.*

center of gravity problem that the thin girls without breasts didn't have. The fatter children would often fall during this exercise. I remember one time where I fell more than once, and I was a very skilled athlete. The fact that I had problems with the test was a direct result of my size, not my fitness. After all, I was recruited out of the eighth grade by the field hockey coach to play for the varsity high-school team.<sup>36</sup>

In addition to exercises that are biased against fat students, P.E. requirements often include mandatory “[w]eighing, charting, and comparing [students] by weight.”<sup>37</sup> Despite evidence that weighing and charting have a negative effect on students’ self-esteem,<sup>38</sup> many schools nevertheless are required by state law to measure students’ “body composition” as determined by skinfold measurements, BMI, or percent body fat measurements.<sup>39</sup> Although some research has suggested that such tests can be useful in monitoring student health,<sup>40</sup> the careless manner in which such tests are administered is highly problematic. Sarah Manchester<sup>41</sup> recalls:

I remember how the teacher would weigh us one by one for those state tests or whatever. As if that wasn't embarrassing enough, you know, with the person in back of you overhearing your weight, you then had to go back to the gym floor. Then, the teacher would go around with her little record book and ask each student to retell his/her weight. In front of the whole class. Of course, we lied, but still. Ugh, I remember hearing in a class later on that day, “Did you hear Alice<sup>42</sup> weigh[]s 180 pounds? 180!” My real weight was just ten pounds shy of that. Dude, I wanted to die.<sup>43</sup>

Another former fat student reveals how weigh-ins profoundly damaged her self-esteem:

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36. *Id.*

37. *Id.* at 51.

38. *See id.* (citing J. Ogden & C. Evans, *The Problem with Weighing: Effects on Mood, Self-Esteem and Body Image*, 20 INT'L J. OBESITY & RELATED METABOLIC DISORDERS 272, 272–77 (1996) (a 1996 study investigating the psychological effects of weighing individuals and classifying them according to a fictional height and weight chart)).

39. *See, e.g.*, CAL. DEP'T OF EDUC., 2009–2010 CALIFORNIA PHYSICAL FITNESS TEST: PREPARATION MANUAL FOR TESTING AND REPORTING 5–7 (Dec. 2009), available at <http://www.cde.ca.gov/ta/tg/pf/documents/prepmanual09.pdf>.

40. *See* Joanne P. Ikeda, Patricia B. Crawford & Gail Woodward-Lopez, *BMI Screening in Schools: Helpful or Harmful*, 21 HEALTH EDUC. RES. 761, 768 (2006) (noting, however, that precautions need to be taken when measuring and reporting student BMI to avoid harming students' well-being). *But see* J. ERIC OLIVER, *FAT POLITICS: THE REAL STORY BEHIND AMERICA'S OBESITY EPIDEMIC* 16, 20–28 (2006) (criticizing BMI and other height-weight indices as scientifically flawed).

41. This name has been changed to preserve anonymity.

42. This name has been changed to preserve anonymity.

43. Online Interview with “Sarah Manchester” (Oct. 7, 2008).

[T]here was the “weigh-in” at school . . . . I dreaded those days—and sometimes convinced my parents that I was too sick to go to school that day. We lined up behind the scales. The kids right behind me could usually see what I weighed, chuckled, and told everyone else. Generally, the teacher would advise me that I weighed too much. What I heard was “These scales tell us that there is something wrong with you.”<sup>44</sup>

#### 4. Inaccessibility

For some fat students, schools are even physically inaccessible. Christina Corrigan was unable to attend Portola Junior High because it was on top of a very steep hill, covered with stairs with no handrails, and had only one (slightly dilapidated) elevator.<sup>45</sup> Even students who are not very fat are faced with accessibility problems in the classroom. Former fat students, some who might not even be considered fat by most standards, reveal the discomfort and embarrassment of having to sit in “tablet arm chair desks” (small chairs physically attached to even smaller desks).<sup>46</sup> Others recall the stress of wondering whether they would be able to fit through “extremely narrow” walkways separating closely-spaced rows of desks “without knocking over all the books on some skinny student’s desk with [their] hips or butt,” or, even worse, “getting stuck.”<sup>47</sup>

#### 5. School Staff Antifat Bias

Because of their close proximity and “custodial and tutelary” relationship to students,<sup>48</sup> school staff members are probably best situated to take action against peer isolation and taunting, harassing comments by teachers, unfair P.E. requirements, and inaccessibility. However, like apathetic or confused teachers who fail to intervene to stop student-on-student taunting, staff members typically ignore discrimination against fat students or perpetuate the discrimination themselves.<sup>49</sup> This failure to help

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44. CAROL A. JOHNSON, *Personal Reflections on Bias, Stigma, Discrimination, and Obesity*, in *WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES*, *supra* note 21, at 175, 177.

45. SOLOVAY, *supra* note 8, at 13, 17–18.

46. See Email from anonymous to author, *supra* note 3; *I Was a Fat Kid*, *supra* note 10 (One fat student writes, “I have to sit at a table because the desk [sic] are to [sic] small for me to sit in, so that gives the other kids [sic] to tease me about.” Another recalls, “Desks with attached chairs have always been a nightmare. Even as a middle schooler I never fit in the seat quite right.”); Today’s Classroom, Tablet Arm Chair Desk, [http://www.todaysclassroom.com/-c-39\\_49.html](http://www.todaysclassroom.com/-c-39_49.html) (last visited Apr. 25, 2010).

47. Online Personal Conversation (Oct. 8, 2008).

48. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) (noting “that the nature of [the State’s] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults” (alteration in original) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)) (internal quotation marks omitted)).

49. See *supra* Part II.A.2. See also Neumark-Sztainer & Eisenberg, *supra* note 21, at 71. *But see*

fat students is typically not out of malice as school staff members tend to be “well-educated and care about the well-being of their students.”<sup>50</sup> Rather, studies show that quite simply, “school staff members are not immune to social pressures stigmatizing overweight persons, and could unintentionally perpetuate misconceptions about overweight individuals or treat overweight students differently than their nonoverweight peers.”<sup>51</sup> One study of the beliefs and attitudes of P.E. teachers toward fat students reveals the recurring belief that “normal weight youth are physically, cognitively, and socially superior to overweight youth.”<sup>52</sup> Another study of teachers and other school staff members reveals:

[Although] the vast majority of the respondents did not appear to associate obesity with characteristics unrelated to weight such as personality, tidiness, and work success[,] . . . the percentage of school staff who expressed negative attitudes about nonweight-related characteristics of obese persons is of concern. Approximately one-fifth of the respondents viewed obese persons as more emotional, less tidy, less likely to succeed at work, and as having different personalities than nonobese persons. About one-quarter of the respondents viewed obese persons as having more family problems than the nonobese and agreed with the statement that “one of the worst things that could happen to a person would be for him/her to become obese.”<sup>53</sup>

Once we know that school staff members harbor such antifat sentiments, it becomes easier to understand (although far from excusable) why they turn a negligent blind eye to or actively participate in discrimination against fat students.<sup>54</sup>

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SOLOVAY, *supra* note 8, at 54 (revealing an incident where a sympathetic coach allowed a junior-high student to “retake” (essentially allowing her to “cheat”) a flawed (and biased against fat students) government-mandated physical fitness test that students had to pass before they would be allowed to play on varsity teams).

50. Neumark-Sztainer & Eisenberg, *supra* note 21, at 71.

51. *Id.* at 71–74.

52. Christy Greenleaf & Karen Weiller, *Perceptions of Youth Obesity Among Physical Educators*, 8 SOC. PSYCHOL. EDUC. 407, 419 (2005).

53. Dianne Neumark-Sztainer, Mary Story & Tanya Harris, *Beliefs and Attitudes About Obesity Among Teachers and School Health Care Providers Working with Adolescents*, 31 J. NUTRITION EDUC. 3, 7 (1999).

54. Speculating on how school staff members’ antifat bias probably taints their interactions with students, one former NEA member states, “I have had a guidance counselor in this system tell me that he would rather be dead than look like me. I have wondered how he related to fat teenagers.” SOLOVAY, *supra* note 8, at 56 (quoting NAT’L EDUC. ASS’N, *supra* note 13).

## B. WIDESPREAD FATNESS-BASED DISCRIMINATION DENIES FAT STUDENTS ACCESS TO FAIR AND EQUAL EDUCATION

Discrimination against fat students denies fat students access to fair and equal education. Numerous studies show that as a result of fatness-based discrimination,<sup>55</sup> fat students have lower self-esteem and are thus less confident in their abilities than their thinner counterparts.<sup>56</sup> This lack of confidence can translate into academic underachievement as insecure fat students may “avoid doing schoolwork because they believe that even if they put forth appropriate effort, it will not result in good grades or teacher or parent approval.”<sup>57</sup> Also, insecure fat students may underachieve in hope of fitting in.<sup>58</sup> Child development researchers Sara Gable, Jennifer L. Krull,

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55. See Janet D. Latner & Marlene B. Schwartz, *Weight Bias in a Child's World*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 21, at 54, 60 (citing studies that show “negative psychological outcomes” associated with “heavier body weight may be primarily the consequence of the negative reactions of others to excess weight” rather than fatness itself). Also supporting this proposition are observations that fat children in cultural and social groups that tend to be more weight-tolerant do not experience the same stigmatization as children in mainstream America. See *id.* at 57; SHARRON DALTON, OUR OVERWEIGHT CHILDREN: WHAT PARENTS, SCHOOLS, AND COMMUNITIES CAN DO TO CONTROL THE FATNESS EPIDEMIC 182–83 (2004). Thus, it is not fatness itself that causes low self-esteem, but discrimination based on fatness that damages the psychological well-being of fat students.

56. See, e.g., Latner & Schwartz, *supra* note 55, at 59–60; Caroline Braet, Ivan Mervielde & Walter Vandereycken, *Psychological Aspects of Childhood Obesity: A Controlled Study in a Clinical and Nonclinical Sample*, 22 J. PEDIATRIC PSYCHOL. 59, 66 (1996); Latner & Stunkard, *supra* note 12, at 455; Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 796, 801 (2001); Rebecca M. Puhl & Janet D. Latner, *Stigma, Obesity, and the Health of the Nation's Children*, 133 PSYCHOL. BULL. 557, 565–66 (2007); David Brown, *Study Cites Pervasive Effects of Obesity in Children; Condition Affects Physical, Social and Emotional Activities; Parallel to Cancer Patients Noted*, WASH. POST, Apr. 9, 2003, at A10 (noting a study showing that “[t]he quality of life for severely obese children and adolescents is roughly equivalent to that of pediatric cancer patients undergoing chemotherapy”) (citing Jeffrey B. Schwimmer, Tasha M. Burwinkle & James W. Varni, *Health-Related Quality of Life of Severely Obese Children and Adolescents*, 289 J. AM. MED. ASS'N 1813 (2003)); Richard S. Strauss, *Childhood Obesity and Self-Esteem*, 105 PEDIATRICS e15, at 4 (2000), <http://pediatrics.aappublications.org/cgi/reprint/105/1/e15> (noting data showing “a significant relationship between obesity and changes in self-esteem during early adolescence” and “significant social consequences of decreasing self-esteem in obese children”).

Similar to how negative attitudes toward fat individuals are internalized by fat children, the Supreme Court in *Brown v. Board of Education* looked to how negative attitudes toward African Americans, as embodied by segregation, were internalized by African American children and used this as grounds for striking down school segregation as unconstitutional. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 & n.11 (1954). Although this Note does not make a constitutional argument against fat-based discrimination, the fact that the Supreme Court was willing to consider such psychological damage as evidence of injustice should guide today's courts to take into account negative internalization when faced with statutory-based antidiscrimination cases.

57. RIMM & RIMM, *supra* note 27, at 86.

58. Sara Gable, Jennifer L. Krull & Arathi Srikanta, *Childhood Overweight and Academic Achievement*, in 2 OBESITY IN CHILDHOOD AND ADOLESCENCE: UNDERSTANDING DEVELOPMENT AND PREVENTION 49, 61–62 (Hiram E. Fitzgerald & Vasiliki Mousouli, eds. 2008).

and Arathi Srikanta explain that fat students

may be caught in a harmful cycle of striving to fulfill societal beliefs and expectations. . . . If overweight children are directly or indirectly experiencing weight-based prejudice at school (i.e., the stereotype that big is bad), they may respond by performing more poorly in the classroom because they believe it is expected.<sup>59</sup>

This self-fulfilling prophecy, combined with teachers' and school staff members' lower expectation of fat students,<sup>60</sup> prevent many fat students from reaching their true academic potential.<sup>61</sup> For some fat students this means "being [erroneously] placed in special education classes instead of the regular track, and for others it results in being placed in the regular track rather than honors courses."<sup>62</sup> While some fat students are simply overlooked and grossly underestimated by teachers,<sup>63</sup> other fat students are harassed *by* their teachers<sup>64</sup> and become "defensive and angry" and thus even more likely to underachieve.<sup>65</sup>

Even without taking into account its long-term psychological consequences, student-on-student taunting can be so severe and distracting that it denies fat students access to fair and equal education. Just as the Supreme Court has declared that sexual harassment can be so severe "that it effectively bars the victim's access to an educational opportunity or benefit,"<sup>66</sup> it is clear that fatness-based harassment can likewise be so severe that it denies a student access to fair and equal education. Also, if schools and classrooms are physically inaccessible to fat students, fat students may be completely barred from obtaining any education.<sup>67</sup>

The detrimental effects of low self-esteem and harassing comments from students *and* teachers are real and long-lasting. The NEA recognizes that fat discrimination contributes to fat students receiving lower grades, being denied letters of recommendation, being kept off the honor roll, and

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59. *Id.*

60. *See supra* Part II.A.5.

61. *See* RIMM & RIMM, *supra* note 27, at 86.

62. *Id.*

63. *See id.* at 86, 94 (retelling the stories of a fat student named Patti, who was overlooked by "teachers [who] assumed she was shy and quiet and they never expected much from her" and another fat student named Lorie, whose high school grades only began to turn around once a teacher finally told her she was smart and recognized her as such).

64. *See supra* Part II.A.2.

65. RIMM & RIMM, *supra* note 27, at 96.

66. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

67. Even if a fat student can feasibly trek up steep inclines or "fit" into small tablet arm chair desks or through narrow walkways between desks, the experience could be humiliating to the fat student and result in peer taunting, negative comments by teachers, and lowered self-esteem.

ranking last for scholarships.<sup>68</sup> Fat discrimination permanently stunts the education of many fat students as some drop out of school<sup>69</sup> and many more are denied college admission.<sup>70</sup> This translates into lower paying jobs and lower income status for many fat individuals.<sup>71</sup>

### C. THE SOCIETAL CONSEQUENCES OF DENYING FAT STUDENTS ACCESS TO FAIR AND EQUAL EDUCATION

Denying fat students access to fair and equal education not only profoundly hurts fat children and haunts them throughout their adulthood,<sup>72</sup> but also negatively impacts *all* of society. It is a well-established tenet of American philosophy that having an educated society is essential to free democracy.<sup>73</sup> Further, studies show that the fate of a nation's economy is inextricably tied to the educational level of its populace.<sup>74</sup> When

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68. SOLOVAY, *supra* note 8, at 50, 56.

69. *Id.* at 59 (noting that although “[a]pathy toward the plight of fat kids results in a lack of statistics on their dropout rate . . . anecdotal evidence abounds” and proceeding to tell of two fat students who quit school because of incessant peer and school staff taunting).

70. *Id.* at 56 (reporting that “[e]ven adjusting for high-school records, evaluations, and motivation to enter college, a smaller percentage of fat high-school students are admitted to college than average-weight students”).

71. Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008, 1009–10 (1993), available at <http://content.nejm.org/cgi/content/full/329/14/1008> (longitudinal study revealing that “[b]oth women and men who had been overweight were less likely to have married, had completed fewer years of education, and had lower household incomes, lower self-esteem, and higher rates of poverty than those who had not been overweight”). The long-lasting effects of fatness-based discrimination are especially profound for women. See James D. Sargent & David G. Blanchflower, *Obesity and Stature in Adolescence and Earnings in Young Adulthood: Analysis of a British Birth Cohort*, 148 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 681, 681 (1994) (finding “a statistically significant inverse relation between obesity [at 16 years] and earnings [at 23 years] in *females*, independent of parental social class and ability test scores of the child. . . . The inverse relationship . . . persisted whether [or not] the adolescent female remained obese”).

72. See *supra* Part II.B (describing the long-term educational and socioeconomic effects of anti-fat discrimination). See also J. Kevin Thompson et al., *Effects of Weight-Related Teasing in Adults*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 21, at 137, 138 (citing surveys showing the long-term psychological effects of fatness-based teasing during school-age years and providing examples of one thirty-seven-year-old woman who reported, “No matter how thin I become, I always feel like the fat kid everyone made fun of” and one fifty-nine-year-old man who stated, “Being teased when I was a child made me feel bad about my body for years and years” (quoting David M. Garner, *The 1997 Body Image Survey Results*, PSYCHOL. TODAY, Jan.–Feb. 1997, at 30, 42)).

73. See generally 9 JOHN DEWEY, DEMOCRACY AND EDUCATION: THE MIDDLE WORKS, 1899–1924 (Jo Ann Boydston, Patricia R. Baysinger & Barbara Levine eds., S. Ill. Univ. Press 1985) (1916) (theorizing that education is fundamental to a democratic society).

74. See generally ERIC A. HANUSHEK, INT’L ACAD. OF EDUC. & INT’L INST. FOR EDUC. PLANNING, EDUCATION POLICY SERIES NO. 4, ECONOMIC OUTCOMES AND SCHOOL QUALITY 1 (2005), available at <http://unesdoc.unesco.org/images/0014/001410/141027e.pdf> (concluding that increased school quality and widespread education is linked to national growth and increased individual incomes).

approximately 15 percent of America's children are fat,<sup>75</sup> the possible political and economic repercussions of denying fat students access to fair and equal education are both real and severe.

Also, even the hardest of knocks<sup>76</sup> would agree that taunting that leads to death is unacceptable. We need only think back to the horrors of the Columbine school shooting to see how "mere teasing" can lead to tragedy.<sup>77</sup> Although school shootings (rightfully) grab newspaper headlines, deadly tragedies happen more frequently than most know. Fat student Kelly Yeomans was taunted by her peers for years, who

not only poured salt in her lunch, made her uncomfortable at gym time, and threw out her clothes during school hours, but they continued their aggression at her home. They hit her house with stones, butter, and eggs. Despite the fact that Kelly was involved in her community, she could not survive the abuse. Playing in the local Salvation Army band and volunteering with the elderly proved no match for the hatred she faced daily. She killed herself in her home, as her parents slept, on a Sunday evening before the start of the school week.<sup>78</sup>

Unfortunately, Kelly's story is not unique. Brian Head, although a good student and drama club member, was tormented by his peers for years while teachers and staff stood by doing nothing. One day, "right before his economics class, while being slapped and having his hair pulled by another student as a teacher lingered right outside the door, Brian pulled out a gun and shot himself in the temple. The last thing he said was, 'I'm tired of it.'"<sup>79</sup> When our nation's youth are dying because of fatness-based discrimination, it is both socially irresponsible and morally reprehensible to disregard the problem as "mere teasing."

#### D. A NON-SOLUTION: "JUST LOSE WEIGHT"

Unfortunately, the response to fatness-based discrimination is often "just lose weight."<sup>80</sup> This response is problematic for both conceptual and

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75. RIMM & RIMM, *supra* note 27, at 2.

76. That is, those who share the view of the Supreme Court that "[i]t is . . . understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, [and] pushing . . . that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however . . ." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651-52 (1999).

77. See Jill Grim, Note, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 160 (2008).

78. SOLOVAY, *supra* note 8, at 59.

79. *Id.* at 58 (citing Sondra Solovay, *Fat Doesn't Kill, Fat Hatred Does*, FAT!SO?, 1994, at 19).

80. See Laurie Ann Lepoff, *Fat Politics*, in SHADOW ON A TIGHTROPE: WRITINGS BY WOMEN ON FAT OPPRESSION 204, 206 (Lisa Schoenfelder & Barb Wieser eds., 1983).

practical reasons. Conceptually, this mentality is flawed because, as explained by fat activist Laurie Ann Lepoff,

[t]he “problem” is not . . . being fat. The problem is how [one is] treated because of it. You don’t solve racism by bleaching everyone’s skin the same color (white, of course). Remove the offending characteristic and everything will be peachy. Make us all the same and we’ll stop oppressing each other.<sup>81</sup>

Granted, being fat can lead to health complications whereas being a particular skin color obviously can not.<sup>82</sup> But the bottom line is the same—we must not respond to discrimination with compliance. Simply advising fat students to lose weight is flawed conceptually because it again *blames* fat students for their weight—simultaneously telling them that first their weight is unacceptable and, second, it is their own fault. This lowers the already depressed self-esteem of fat students<sup>83</sup> and encourages peer and teacher taunting.<sup>84</sup>

The “just lose weight” solution is also quite impractical. Typically, weight loss solutions focus on diet and exercise.<sup>85</sup> Although no one contests that eating healthy is a good thing for *all* children, weight loss “solutions” that focus on counting and cutting calories actually *further* endanger fat students’ access to fair and equal education. Sondra Solovay reveals:

When students of all ages diet, they may be putting themselves at an educational disadvantage. Many studies show reduced calorie consumption has a negative impact on performance and psychological state. Dieters are more likely than those who are not dieting to perform poorly on mental tests. Their drop in performance is roughly equivalent to the drop in performance resulting from the ingestion of two alcoholic beverages. . . . [One study showed] the slowing of reaction time to be a short-term and long-term consequence of calorie restriction.<sup>86</sup>

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81. *Id.*

82. *See* Centers for Disease Control and Prevention, Childhood Overweight and Obesity, <http://www.cdc.gov/obesity/childhood/index.html> (last visited Apr. 22, 2010). *But see* WANN, *supra* note 8, at 35–40 (arguing that the health risks associated with fatness are at best exaggerated and at worst outright lies). Also, some students who are discriminated against on the basis of fatness may not even be considered “overweight” by medical standards. *See infra* note 195.

83. *See supra* Part II.B.

84. *See* Greenleaf & Weiller, *supra* note 52, at 417–19 (observing that antifat attitudes are often correlated with the belief that fatness is something for which one can be personally blamed).

85. *See* American Heart Association, Overweight in Children, <http://www.americanheart.org/presenter.jhtml?identifier=4670> (last visited Apr. 25, 2010) (suggesting diet and exercise as methods for preventing and treating overweight children).

86. SOLOVAY, *supra* note 8, at 57 (citations omitted).

Beyond the negative physiological effects of calorie restriction, calorie counting can also be both mentally and psychologically draining. Studies show that calorie counting can preoccupy dieters' minds as thoughts of "eating, weight, planning when and what to eat, [and] counting calories or fat grams" may consume 20 to 65 percent of time spent awake.<sup>87</sup> Thus, instead of focusing on their studies, the minds of students<sup>88</sup> may be filled with thoughts of calorie counting. One student recovering from an eating disorder explains, "I thought about food, weight, and hunger 99 percent of the time. I'd sit in my classes and figure out how many calories I'd had so far and how many I was going to have at lunch."<sup>89</sup> Men are not immune to the negative effects of calorie restriction. In one study, young men "were restricted to 1,570 calories per day, which actually is more calories than most modern diet programs allow. The men became completely preoccupied with thoughts of food to the exclusion of being able to concentrate on other things . . . and exhibited serious personality changes."<sup>90</sup> Dieting can be especially dangerous for pre-pubescent and pubescent students whose bodies are still developing because "[d]ieting alters the metabolism and may affect normal satiety signals."<sup>91</sup> Patricia Crawford, codirector of UC Berkeley's Center for Weight and Health thus advises that "[w]eight loss is inappropriate for children before they have completed puberty."<sup>92</sup> Therefore, far from solving the problem of fat students being denied access to fair and equal education, overemphasis on dieting endangers the education of all students.

The other prong of the "just lose weight" solution is exercise. Just as healthy eating is embraced by all, no one contests the benefits of physical exercise. Rather, the problem is the widespread erroneous belief that fat students simply do not exercise enough.<sup>93</sup> Although some fat students do not exercise, many do.<sup>94</sup> Thus, it is time to recognize that a fat student is

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87. FRANCES M. BERG, *AFRAID TO EAT: CHILDREN AND TEENS IN WEIGHT CRISIS* 51–52, 55, 57–59 (Kendra Rosencrans ed., 1997) (describing dieting as a "form of dysfunctional eating" and detailing the detrimental effects of dysfunctional eating on "mental focus").

88. Notice that not only fat students are distracted by calorie counting. Weight preoccupation is a problem that affects all students. Because such preoccupation is fueled by fatness-based discrimination, the need to combat fatness-based discrimination becomes even more urgent. *See id.* at 51–55, 57–59.

89. SOLOVAY, *supra* note 8, at 57 (quoting Dan W. Reiff & Kathleen Kim Lampson Reiff, *Time Spent Thinking About Food*, *HEALTHY WEIGHT J.*, Nov.–Dec. 1998, at 84).

90. *Id.* at 58 (citing David M. Garner, *The Effects of Starvation on Behavior: Implications for Dieting and Eating Disorders*, *HEALTHY WEIGHT J.*, Sept.–Oct. 1998, at 68).

91. SOLOVAY, *supra* note 8, at 39.

92. *Id.* (internal quotation marks omitted).

93. *See RIMM & RIMM, supra* note 27, at 108–09.

94. *See FRANCES M. BERG, UNDERAGE AND OVERWEIGHT: OUR CHILDHOOD OBESITY CRISIS—WHAT EVERY FAMILY NEEDS TO KNOW* 203–04, 221 (2005).

not necessarily a physically unfit student.<sup>95</sup>

For those fat students who actually do need more exercise,<sup>96</sup> simply commanding them to “exercise more” is inappropriate. Unfair P.E. requirements, negative comments from teachers (especially P.E. teachers), and peer taunting *discourage* fat students from exercising. Nutritionists Joanne Ikeda and Priscilla Naworski reveal that “poor [P.E.] programs can cause children to hate gym class and, consequently, hate physical activity for the rest of their lives.”<sup>97</sup> This was precisely what happened to Cordelia Moon, who, after being told by her P.E. teacher that she had the highest body fat of her class,<sup>98</sup> “never went back to the gym class . . . [She declared] it was just too yucky to ever go back.”<sup>99</sup> For some fat students, the act of exercising itself opens them up to peer taunting. A 2004 study revealed that “[s]tudents and staff indicated that teasing and bullying were among the predominant barriers to students fully participating in physical education class.”<sup>100</sup> One former fat student recalls:

Running the track for gym, some kids would run behind and beside me calling, “Come on Pork chop!” . . . When playing jump rope, they would make me twirl the rope because if I jumped I would go through the floor. When playing kick ball, the ball went into the woods, and they made me go get it. The ball hit a sharp stick and was deflated, so they blamed me and said I must have sat on it.<sup>101</sup>

It is therefore not surprising that as a result of such traumatic experiences with P.E. and exercise in general some fat students do not get

95. See *id.* at 219–33 (advocating the “Health at Every Size” approach which encourages healthy living and eating over dieting and weight loss). For more on the Health at Every Size approach, see generally Wikipedia, Health at Every Size, [http://en.wikipedia.org/wiki/Health\\_at\\_Every\\_Size](http://en.wikipedia.org/wiki/Health_at_Every_Size) (last visited Apr. 25, 2010).

96. Note that many children who are not fat do not get enough exercise either. See Nanci Hellmich, *Study: Children Don’t Exercise Nearly Enough at Preschool*, USA TODAY, Nov. 1, 2004, at 6D (noting that preschoolers are not getting the recommended two hours of daily physical activity); Jennifer Sinco Kelleher, *Studies: Schools Not Providing Enough Physical Education*, NEWSDAY (Melville, New York), Jan. 25, 2009, at State and Regional News, available at <http://www.newsday.com/news/local/ny-liphys2512353874jan25,0,4295372.story?page=1> (reporting that only 20 percent of New York students, grades K–3, get the required 120 minutes of P.E. weekly).

97. SOLOVAY, *supra* note 8, at 52 (quoting Joanne Ikeda & Priscilla Naworski, AM I FAT? HELPING YOUNG CHILDREN ACCEPT DIFFERENCES IN BODY SIZE 43 (1992)). Apart from the adverse health effects of a life without physical activity, aversion to exercise can also limit educational options as fat students planning to go to college who “have had traumatic or abusive physical education experiences in high school . . . may be even more limited when all colleges with physical education requirements automatically get crossed off their college lists.” *Id.* at 56.

98. See *supra* note 32 and accompanying text.

99. SOLOVAY, *supra* note 8, at 51 (internal quotation marks omitted).

100. Neumark-Sztainer & Eisenberg, *supra* note 21, at 71.

101. *I Was a Fat Kid*, *supra* note 10.

enough exercise.<sup>102</sup> Consequently it is both unfair and illogical to tell fat students to simply “exercise more” when the reason they refrain from exercising is fatness-based discrimination.<sup>103</sup>

Now that this Note has explained the alarming extent of fatness-based discrimination against fat students, how such discrimination denies fat students access to fair and equal education, and the broader societal repercussions thereof, this Note will discuss possible strategies for combating discrimination against fat students.

### III. THE CURRENT LEGAL FRAMEWORK PROVIDES LITTLE RECOURSE FOR FAT STUDENTS

There are currently no federal laws that specifically prohibit discrimination against fat individuals.<sup>104</sup> There are, however, a few places (Santa Cruz, California; San Francisco, California; Washington, D.C.; and the state of Michigan) with laws that prohibit discrimination on the basis of weight or appearance.<sup>105</sup> This Note, however, does not address these statutes at length because they are few and far between, and thus leave many fat students without protection; lack specificity as most simply list weight as one form of forbidden discrimination in a laundry list of prohibited forms of discrimination;<sup>106</sup> and are so underlitigated that there is insufficient case law to engage in any useful analysis of whether they can or do provide adequate redress to fat students.<sup>107</sup> Further, this dearth of specificity and case law also makes it hard for courts to assess fatness-based discrimination claims.<sup>108</sup>

Thus, the only available legal redress for fat students is to make

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102. See DALTON, *supra* note 55, 181–83 (depicting in figure 6 how “[f]at discrimination feeds the cycle of overeating, reduced physical activity, and lower self-esteem”).

103. Rather, the proper solution is to encourage exercise *while* taking measures to prevent and combat fatness-based discrimination. See *infra* Part V (discussing local school district-level solutions to fatness-based discrimination, particularly Section D on improving physical education).

104. E.g., SOLOVAY, *supra* note 8, at 129; Elizabeth E. Theran, *Legal Theory on Weight Discrimination*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 21, at 195, 195.

105. SOLOVAY, *supra* note 8, app. B at 129, 243–46 (containing excerpts and brief summaries of these laws). Note that the San Francisco measure is a resolution. See *id.* at 245–46.

106. See *id.* app. B at 243–46.

107. See Theran, *supra* note 104, at 205–06; Wang, *supra* note 8, at 1928. This, however, should not be taken to imply that state and local legislation is useless as “it is impossible to know or quantify the effect of the statutes on employers, governments, or owners of public accommodations in drafting their policies.” Theran, *supra* note 104, at 205.

108. See *infra* note 193 and accompanying text (describing one Michigan court’s frustration at the scarcity of authorities to guide it in assessing a weight-based discrimination claim).

discrimination claims under other antidiscrimination laws.<sup>109</sup> Disability antidiscrimination laws are best suited for such claims.<sup>110</sup> However, as this Note will reveal, claiming that discrimination against fat students is “disability discrimination” is both problematic conceptually and unlikely to succeed in court.

#### A. THE CONCEPTUAL PROBLEM WITH LABELING FATNESS AS A DISABILITY

One problem with using any disability antidiscrimination legislation to protect fat students is that this requires the conceptual step of defining fatness as a disability. The fat community itself often objects to fatness being labeled as a disability.<sup>111</sup> Having fought adamantly to be regarded as “normal,” many fat individuals believe that it is not their bodies that are the problem, but society’s perception and “treatment of them as unable, different, undeserving, and inferior.”<sup>112</sup> Some fear that donning the disability label will harm the self-esteem of fat individuals (a risk that is amplified when dealing with fat students) and the fat acceptance movement.<sup>113</sup> Also, even if fat students and their allies in the fat acceptance movement accept the “disabled” label, the parents of fat students might still be hesitant to label their fat children as “disabled.”<sup>114</sup> This is part of the unfortunate reality that fat individuals and allies are not immune to antidisability bias and do not want to be associated with a marginalized group.<sup>115</sup> Additionally, the disabled community is sometimes hostile to defining fatness as a disability.<sup>116</sup> Just as some fat individuals harbor antidisability bias, some disabled individuals want to distance themselves

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109. Theran, *supra* note 104, at 195–96.

110. See SOLOVAY, *supra* note 8, at 129 (observing that “[m]ost of the [very few] fat plaintiffs who have been successful in court have won because they were able to use either state or federal disability laws to challenge the discrimination they faced”). Again, this Note does not address state law at length—this time not due to a dearth of case law, but due to the fact that plaintiffs bringing fatness-based discrimination suits under state disability antidiscrimination laws usually “run into the same problems as federal suits under the ADA: . . . few state courts have embraced obesity, or morbid obesity, as a disability . . . . [Thus,] most non-weight-specific state antidiscrimination laws add little or nothing to the relatively bleak landscape of federal protections against weight-based discrimination.” Theran, *supra* note 104, at 206 (citations omitted).

111. See SOLOVAY, *supra* note 8, at 129.

112. *Id.*

113. See *id.* at 130.

114. See Jessica Meyer, *Obesity Harassment in School: Simply “Teasing” Our Way to Unfettered Obesity Discrimination and Stripping Away the Right to Education*, 23 LAW & INEQ. 429, 448 (2005).

115. See SOLOVAY, *supra* note 8, at 130.

116. *Id.*

from a marginalized group that is subject to widespread societal disdain.<sup>117</sup>

However, this is not to say that all fat individuals (and allies) and all disabled people object to labeling fatness as a disability. Rather, some fat activists like Charlotte Cooper remark that they do not resist the disability label because they “regard it without a value judgment.”<sup>118</sup> Some fat activists and legal scholars actually advocate using disability discrimination without regard to conceptual or policy concerns if it is pragmatic to do so.<sup>119</sup> They argue that because lay terms often do not align with legal definitions anyway, creative lawyering can be used to gain protection for fat students.<sup>120</sup> Also, courts might simply *sua sponte* approach a case involving discrimination against fat students as a disability discrimination case.<sup>121</sup> For example, even though the plaintiff in *Civil Service Commission v. Pennsylvania Human Relations Commission* did not allege that fatness should be considered a disability under the disability antidiscrimination prong of the Pennsylvania Human Relations Act,<sup>122</sup> the Pennsylvania Supreme Court nevertheless approached his grievance as a disability case.<sup>123</sup>

Still, defining fat students as disabled remains deeply flawed. First, it is unfortunately too naïve to believe that students and teachers truly regard the disability label without value judgment. Second, although one can certainly be sympathetic to the “try whatever works” pragmatic approach to helping fat students, relying too heavily on creative lawyering could be interpreted as intellectually dishonest and simply a ploy to usurp the role of Congress in drafting antidiscrimination legislation. Third, for judicial economy concerns and the same separation of powers concern that makes creative lawyering problematic, courts may be hesitant to *sua sponte* craft a disability claim where none is initially alleged. Finally, it should be noted that even when courts have *sua sponte* conceptualized cases involving discrimination against fat individuals as disability discrimination claims, it was to *deny* plaintiffs relief.<sup>124</sup>

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117. *Id.*

118. *Id.* at 131 (quoting CHARLOTTE COOPER, *FAT AND PROUD: THE POLITICS OF SIZE* 123 (1998)).

119. *See id.* at 132.

120. *See id.* Such activists and scholars argue that “[t]ruth . . . is not what the fat community should seek in the courtroom now—protection is.” *Id.*

121. *See id.* at 132–33.

122. *Civil Serv. Comm’n v. Pa. Human Relations Comm’n*, 591 A.2d 281, 285 (Pa. 1991) (Papadakos, J., dissenting).

123. *Id.* at 284 (majority opinion).

124. *See id.* at 284 (concluding that “[b]ecause [plaintiff’s] obesity was not shown to be a

Now that this Note has revealed the general problems with defining fatness as a disability, this Note will turn to a statutory analysis of the broad Americans with Disabilities Act (“ADA”),<sup>125</sup> the similar Rehabilitation Act (“RHA”),<sup>126</sup> and the more education-focused Individuals with Disabilities Education Act (“IDEA”)<sup>127</sup> to reveal why these statutes cannot be properly interpreted to include fat students.

#### B. THE PROBLEM WITH THE ADA AND THE RHA AS LEGAL RECOURSE FOR FAT STUDENTS

The ADA and the RHA prohibit discrimination based on physical and mental disabilities. Although the ADA generally applies to discrimination by private actors and local and state governments<sup>128</sup> whereas the RHA applies to discrimination by the federal government,<sup>129</sup> the statutes use the same legal standards and analysis in evaluating disability discrimination claims.<sup>130</sup> Most public schools must comply with both the ADA and the RHA.<sup>131</sup> In its guide to public elementary and secondary schools on compliance with the ADA (“*ADA Compliance Guide*”), the U.S. Department of Education declares:

The most important activity of any school district is providing elementary and secondary education to students. A school district must ensure that students with disabilities are not excluded from participation in, or denied the benefits of, its services, programs, and activities. It must also ensure that they are not subjected to discrimination by the school system.<sup>132</sup>

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physiological disorder, a cosmetic disfigurement, or an anatomical loss affecting his body systems, and there is no other evidence to indicate that obesity ever affects body systems, [plaintiff] has not shown that obesity is a handicap within the meaning of the [Pennsylvania Human Relations Act]” (footnote omitted).

125. 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008).

126. 29 U.S.C. §§ 701–796 (2006).

127. 20 U.S.C. §§ 1400–1482 (2006).

128. See 42 U.S.C. §§ 12131(1), 12181(7)(J).

129. See 29 U.S.C. § 794.

130. Theran, *supra* note 104, at 196.

131. See Office for Civil Rights, U.S. Dep’t of Educ., Questions and Answers on Disability Discrimination Under Section 504 and Title II, <http://www.ed.gov/about/offices/list/ocr/qa-disability.html> (last visited Apr. 25, 2010).

132. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT: A SELF-EVALUATION GUIDE FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOLS 4–5 (1996) [hereinafter ADA COMPLIANCE GUIDE], available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/14/cb/3c.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/cb/3c.pdf). Note that although the ADA was amended in 2008, the 2008 changes did not materially affect the validity of the sections of the ADA COMPLIANCE GUIDE used in this Note.

Specifically, Title II of the ADA protects against disability-based discrimination by state and local public schools (regardless of funding status) and Section 504 of the RHA protects against disability-based discrimination by public and private schools that receive federal funding.<sup>133</sup> The Program Accessibility subpart of Title II<sup>134</sup> requires schools to make sure that their programs and activities are accessible to and usable by disabled students.<sup>135</sup>

With such broad language and (presumably) resulting protection as described in the ADA, the 2008 Amendments to the ADA (“ADAAA”),<sup>136</sup> and the *ADA Compliance Guide*, it might seem that the ADA is a useful vehicle for fat students seeking legal redress. However, closer examination of the statute reveals why the ADA is not well suited for fat students.

Fat students must be able to prove they fit under the ADA definition of “disabled” to qualify for ADA protection. Now that this Note has discussed the broader and more conceptual problems with the “disabled” label, it will reveal the practical problems fat students face with the “disabled” label. The ADA establishes a three-prong definition of disability: “The term ‘disability’ means, with respect to an individual— (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.”<sup>137</sup>

#### 1. Fatness Is Not Likely To Be Considered an Actual Physical or Mental Impairment

Fat students are unlikely to be covered by the first prong of the ADA. Under the first prong, a fat student would have to show actual physical or mental impairment. A nonexhaustive list of physical and mental impairments is provided by 28 C.F.R. § 35.104:

The phrase physical or mental impairment means—(A) Any physiological disorder or condition, cosmetic disfigurement, or

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133. See ADA COMPLIANCE GUIDE, *supra* note 132, at 2–4. See also 42 U.S.C. §§ 12131(2), 12132; 29 U.S.C. § 794.

134. 28 C.F.R. §§ 35.149–.151 (2009).

135. *Id.*; ADA COMPLIANCE GUIDE, *supra* note 132, at 8.

136. See, e.g., ADA Amendments Act of 2008, Pub. L. No. 110–325, sec. 4(a), §3(4)(A), 122 Stat. 3553, 3555 (codified in scattered sections of 29 and 42 U.S.C.) (“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”). Despite this declaration, this Note’s analysis concludes that the ADAAA does not make the ADA any more useful for fat students. See *infra* notes 168–71 and accompanying text.

137. 42 U.S.C. § 12102(1).

anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>138</sup>

At first glance, it might appear that fatness could feasibly be defined as either a physiological or, less likely, an emotional impairment. However, closer textual analysis reveals that the definition is actually quite underinclusive, as some fat students may not suffer from any physiological<sup>139</sup> or related<sup>140</sup> mental impairments (we certainly would not want to require a fat student to suffer so intensely that he or she develops an emotional disorder before that student can claim legal protection). For example, recall the fat student who was recruited out of the eighth grade by the field hockey coach to play for the varsity high-school team<sup>141</sup>—although this student was faced with flawed P.E. requirements that were biased against fat students, her athletic prowess would prevent her from being able to claim physical impairment under the ADA. Even more disturbingly, Kelly Yeomans and Brian Head committed suicide because of severe peer harassment, but because Kelly was so active in the community and Brian was such a good student, they (ironically) probably would not be considered mentally impaired within the meaning of the ADA.<sup>142</sup>

Further, the *ADA Compliance Guide* states that “[s]imple physical characteristics such as left-handedness, skin color, or age, or uncomplicated pregnancy do not constitute impairments and therefore cannot be considered disabilities under Title II. Similarly, disadvantages attributable to environmental, cultural, or economic factors are not the type of impairments covered by Title II.”<sup>143</sup> Given this list of excluded “simple physical characteristics,” it seems likely that fatness would also be excluded.

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138. 28 C.F.R. § 35.104 (emphasis omitted). See also ADA COMPLIANCE GUIDE, *supra* note 132, at 12.

139. Remember that fat people can be fit and, ironically, that some fat students just might not be “fat enough” to encounter physical problems.

140. Note that if one tries to include fatness as a *mental* impairment under this first definition, one must insert the additional conceptual step that the claimed physiological or mental impairment is *related* to fatness (and thus not a result of the fatness itself). Courts probably would not be too sympathetic to this somewhat complicated causation scheme.

141. See *supra* text accompanying note 36.

142. See *supra* text accompanying notes 78–79.

143. ADA COMPLIANCE GUIDE, *supra* note 132, at 12.

Case law and administrative declarations confirm this textual interpretation as “[m]ore or less every authority to consider the question has concluded that overweight or obesity, standing alone, is not considered a ‘disability’ within the meaning of the ADA . . . .”<sup>144</sup> Although morbid obesity (defined as when one’s body weight is either 100 percent or 100 pounds over one’s “ideal” weight)<sup>145</sup> without a separate underlying condition *sometimes* qualifies as a “disability,”<sup>146</sup> very few fat students can be considered “morbidly obese.”<sup>147</sup>

## 2. Fatness Itself Probably Would Not Be Considered to Substantially Limit Major Life Activities

Even if (nonmorbidly obese) fatness were to be considered a physical or mental impairment under the first prong, fat students would still need to prove that their fatness *itself* substantially limits major life activities. Although 28 C.F.R. § 35.104 explicitly lists learning as a “major life activity,”<sup>148</sup> fat students will most likely be unable to show that their learning is “substantially limited” by their fatness. Here is another area where the first definition is underinclusive. Aside from in perhaps P.E. class, fat students will not be able to claim that fatness *in and of itself* is a physiological impairment that substantially limits their learning (rather, it is society’s reaction to their fatness that substantially limits learning). Again, remember Brian Head—his fatness itself did not limit his learning as he was a good student; rather, it was intense peer harassment about his fatness that drove him to end his life.<sup>149</sup>

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144. Theran, *supra* note 104, at 198. *See also* 29 C.F.R. pt. 1630, app. § 1630.2(j) (2009) (establishing that “except in rare circumstances, obesity is not considered a disabling impairment”); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (holding that the ADA does not protect nonmorbidly obese individuals whose obesity is not caused by an underlying physiological disorder); U.S. Dep’t of Justice, ADA Website, Myths and Facts about the Americans with Disabilities Act, <http://www.ada.gov/archive/mythfact.htm> (last visited Apr. 24, 2010) (declaring that for the purposes of the ADA “[j]ust being overweight is not enough”).

145. Theran, *supra* note 104, at 198.

146. *Compare* *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 31 (1st Cir. 1993) (holding that morbid obesity alone can qualify as a disability under the RHA), *and* *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 695–98 (N.Y. 1985) (holding that morbid obesity can qualify as a disability under a New York state law prohibiting employment discrimination on the basis of disability), *with* *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697, 703–05 (S.D.N.Y. 1997) (stating that in order for obesity to qualify as a disability under the ADA, a plaintiff must show that “obesity substantially limits one or more major life activit[ies],” and holding that the plaintiff’s morbid obesity does not qualify).

147. Meyer, *supra* note 114, at 449 (noting that “morbidly obese persons account for only one percent of the population as a whole, and a much smaller cross section of children” (footnote omitted)).

148. 28 C.F.R. § 35.104 (2009).

149. *See supra* text accompanying note 79.

Although an argument might be made that emotional trauma caused by a student's fatness (again this requires courts to accept the rather problematic causation scheme mentioned above)<sup>150</sup> is so pervasive that it constantly limits a student's learning, given the Supreme Court's suggestion (albeit in dicta) that taunting based on weight is nothing more than a "simple act[] of teasing," it is unlikely that courts will be so sympathetic.<sup>151</sup> Additionally, although the *ADA Compliance Guide* notes that temporary impairments may be covered under the ADA<sup>152</sup> and the ADAAA establishes that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,"<sup>153</sup> the fact that fat students sometimes do lose weight (note, however, that even becoming thin might not "undo" any permanent physiological or emotional damage) creates yet another wrinkle in any attempts to define fatness as a disability under the first prong of the disability definition.

The second prong of the disability definition is also of little use to fat students. Although the second prong, which protects individuals who have "a record" of impairment, might seem to cure the problem with the possibility of fatness being considered a "temporary impairment" (that might not be protected by the 2008 Amendments to the ADA<sup>154</sup>) under the first prong, fat students would be faced with the other problems under the first prong (for example, establishing physiological or mental impairment and that the student's learning has been substantially limited by that impairment).

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150. See *supra* note 140.

151. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651–52 (1999). Albeit a sexual harassment case, both the majority and dissent in *Davis* dismiss the taunting of fat students as "simple acts of teasing." In an effort to belittle the majority's argument that sexual harassment can imperil a student's access to education, the dissent states, "The girl who wants to skip recess because she is teased by the boys is no different from the overweight child who skips gym class because the other children tease her about her size." *Id.* at 678 (Kennedy, J., dissenting).

152. ADA COMPLIANCE GUIDE, *supra* note 132, at 16.

153. ADA Amendments Act of 2008, Pub. L. No. 110–325, sec. 4(a), §3(4)(D), 122 Stat. 3553, 3556 (codified in scattered sections of 29 and 42 U.S.C.). *But see id.* sec. 4(a), §3(3)(B), 122 Stat. at 3555 (excluding from the "regarded as" prong "impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less").

154. To understand the difference between a "temporary impairment" that is not explicitly covered by the ADAAA and an episodic impairment or an impairment in remission that is covered by the ADAAA, think of a broken leg (which is an example of the former) as compared to cancer (which could be an example of the latter).

### 3. Fatness Is Not Likely To Be Covered Under the “Regarded As” Prong of the ADA

Although the third prong might initially seem to be of use for fat students, case law reveals that it fails to provide protection for fat students. The third prong provides that an individual can establish disability within the meaning of the ADA if he or she is “regarded as” having a mental or physical impairment. Title 28 of the Code of Federal Regulations explains:

The phrase is regarded as having an impairment means—(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation; (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.<sup>155</sup>

Granted, a quick textual interpretation of this prong could lead one to believe that fat students could be included because the regarded as prong does not on its face require actual impairment. Further, this Note has documented how students and school staff members largely regard fat students as inferior.<sup>156</sup> One might also avoid the causation problem faced under the actual disability definition by using 28 C.F.R. § 35.104, which allows the requisite impairment to stem from society’s stigmatization rather than an individual’s actual physical or mental state.<sup>157</sup> The third prong would also seem to escape the conceptual inquiry of whether labeling fat individuals is appropriate. Moreover, the Supreme Court seemed to embrace a broad interpretation of “regarded as” when it declared, “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>158</sup>

Unfortunately, the Court has backed away from its initial strong antidisability discrimination stance by narrowing the scope of the third prong of the ADA.<sup>159</sup> For example, in *Sutton v. United Air Lines, Inc.*, the Supreme Court held that a plaintiff must show that a public entity

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155. 28 C.F.R. § 35.104 (2009) (emphasis omitted).

156. See *supra* Part II.A.1, 5.

157. See 28 C.F.R. § 35.104; *supra* Part III.B.1–2.

158. *Sch. Bd. v. Arline*, 480 U.S. 273, 284 (1987).

159. Theran, *supra* note 104, at 200; Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 223–24 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/44>.

“believe[s] either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.”<sup>160</sup> Under this standard, “it was not enough for an ADA plaintiff to show that a defendant based an adverse decision on uninformed stereotypes about the plaintiff’s condition. Instead, a plaintiff had to establish that a defendant mistakenly believed that an impairment substantially limited a major life activity of the plaintiff.”<sup>161</sup> To correct the Court’s narrow reading of the regarded as prong of the ADA, Congress declared in the ADAAA that:

An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.<sup>162</sup>

Although the ADAAA succeeds in no longer requiring a plaintiff to prove “that a defendant’s misperception of his or her condition was *so* severe as to amount to a belief that the condition substantially limited a major life activity,”<sup>163</sup> fat students seeking legal recourse under the ADA still face a very high burden as they must establish the subjective mental state of their school officials—that is, that school officials regarded them as fat.<sup>164</sup> Some circuits have established an even tougher standard by holding that “the condition the plaintiff is ‘regarded as’ having must be one that, if the plaintiff indeed had it, would constitute a disability under the ADA.”<sup>165</sup> Because this Note’s analysis of the first prong revealed that fatness would not be considered an actual impairment within the meaning of the ADA, fat students would similarly be precluded from protection under the third prong. Conceptualized as such, the third prong is even worse for fat students than the first as it would require fat students to both prove the mental state of school officials *and* establish fatness as an actual disability as defined under the first prong.

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160. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

161. Long, *supra* note 159, at 223.

162. ADA Amendments Act of 2008, Pub. L. No. 110–325, sec. 4(a), §3(3)(A), 122 Stat. 3553, 3555 (codified in scattered sections of 29 and 42 U.S.C.).

163. Long, *supra* note 159, at 224.

164. *See id.* (“[T]he new amendments place the focus on the employer’s motivation. . . . [I]f [a] plaintiff can show that the defendant, rightly or wrongly, perceived the plaintiff as having an impairment, and that this perception motivated the adverse action, the plaintiff is covered under the ‘regarded as’ prong. . . .”).

165. *Theran*, *supra* note 104, at 200. *See also* *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 381 (3d Cir. 2002); *Francis v. City of Meriden*, 129 F.3d 281, 285–86 (2d Cir. 1997).

Contrary to our initial assumptions, regarded as claims also fail on a textual basis. Although fat students are often seen as inferior, these negative assumptions are usually not about their actual physical or mental abilities (except for perhaps during P.E. class).<sup>166</sup> Rather, the negative stereotypes harbored by school officials about fat students are “predominantly about personal or moral flaws.”<sup>167</sup> Thus, because fat students are being regarded as inferior due to assumptions about their personalities and character rather than assumptions about their physical or mental capabilities as described by the ADA, they cannot be protected under the third prong of the ADA disability definition.

Furthermore, although the ADAAA is generally considered to be a victory for disability-rights advocates,<sup>168</sup> the ADAAA changed the ADA in two very antiplaintiff ways. First, the ADAAA establishes that the regarded as prong, unlike the first two prongs, “shall not apply to impairments that are transitory and minor.”<sup>169</sup> Thus, fat students are again faced with the concerning possibility that fatness be considered too temporary or minor to be covered by the ADA.<sup>170</sup> Second, the ADAAA declares that covered entities “need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability” solely under the regarded as prong of the ADA.<sup>171</sup> Thus, even if a fat student somehow managed to satisfy the regarded as prong of the ADA, the fat student’s school would not be required to institute any policies or programs to help accommodate him or

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166. See Wang, *supra* note 8, at 1925–26.

167. *Id.* at 1926. See also Neumark-Sztainer, Story & Harris, *supra* note 53, at 7 (finding that “[a]pproximately one-fifth of the [school staff] respondents viewed obese persons as more emotional, less tidy, less likely to succeed at work, and as having different personalities than nonobese persons”).

168. See, e.g., PETER N. HILLMAN, DAVID GALLAI & MARJORIE M. GLOVER, CHADBOURNE & PARKE LLP, ADA AMENDMENTS: NEW PROTECTIONS FOR EMPLOYEES AND KEY OBLIGATIONS OF EMPLOYERS (2008), <http://www.chadbourne.com/clientalerts/2008/adaamendsnewprotections/>; Tina M. Maiolo, *Are You Ready for the ADA Amendments Act of 2008?*, WORKFORCE MGMT. ONLINE, Nov. 2008, <http://www.workforce.com/section/03/feature/25/99/86/>; Greg Trapp, *2009 Brings ADA Changes*, BRAILLE MONITOR, May 2009, <http://www.nfb.org/images/nfb/Publications/bm/bm09/bm0905/bm090511.htm>.

169. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), §3(3)(B), 122 Stat. 3553, 3555 (codified in scattered sections of 29 and 42 U.S.C.).

170. The ADAAA goes on to define a “transitory impairment” as “an impairment with an actual or expected duration of 6 months or less.” *Id.* One tends to be fat for longer than six months, however. Thus, rather than suggesting that fatness is a permanent impairment, this definition of “transitory impairment” (and the associated awkward question of how “long” fatness “lasts”) is more likely to suggest that fatness simply is not an “impairment” covered by the ADA.

171. *Id.* sec. 6(a)(1), § 501, 122 Stat. at 3558. See also Long, *supra* note 159, at 225 (observing that “[t]he ADAAA takes the side of defendants in this instance”).

her.<sup>172</sup>

Because of basic textual concerns, courts' overwhelming hostility to defining fatness as an actual *or* regarded as impairment within the meaning of the ADA, and the failure of the ADAAA to make the ADA more useful (in fact, the ADAAA has done just the opposite for regarded as claims), the ADA is not a suitable recourse for fat students.

### C. THE PROBLEM WITH THE IDEA AS A LEGAL RESOURCE FOR FAT STUDENTS

The IDEA is designed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and . . . ensure that the rights of children with disabilities . . . are protected."<sup>173</sup> Accordingly, fat students would still need to show disability before they may obtain IDEA protection.

The IDEA, however, defines disability more broadly than the ADA as it includes "not only those [students] traditionally recognized as handicapped, such as those . . . with mental retardation, hearing impairments, speech or language impairments and visual impairments, but also those with 'serious emotional disturbance . . . who by reason thereof, need special education and related services.'"<sup>174</sup>

Title 34 of the Code of Federal Regulations defines "emotional disturbance" as

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems.<sup>175</sup>

Fat students, who are routinely taunted by peers and school officials, may experience such severe blows to their self-esteem that they develop

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172. See generally *infra* notes 220–21 and accompanying text (explaining why monetary damages alone are an imperfect solution).

173. 20 U.S.C. § 1400(d)(1)(A)–(B) (2006).

174. *Lindsley ex rel. Kolodziejczack v. Girard Sch. Dist.*, 213 F. Supp. 2d 523, 531 (W.D. Pa. 2002) (quoting 20 U.S.C. § 1401(3)(A)).

175. 34 C.F.R. § 300.8 (2009).

some or all of the enumerated IDEA symptoms of emotional disturbance.<sup>176</sup> Thus, from a textual perspective, it seems possible for fat students to find protection under IDEA.

The IDEA, however, is far from a perfect solution for fat students. First, as discussed earlier in this Note, fat students and parents might be reluctant to adopt the “disabled” label out of fear that it would (further) marginalize them.<sup>177</sup> Second, the IDEA requires that a fat student become emotionally disturbed before he or she may claim protection and thus does not protect fat students on account of their fatness. Thus, fat students would still be left vulnerable to vicious taunting and school inaction (and would be required to go through such trauma to gain IDEA protection).<sup>178</sup>

Finally, the IDEA is first and foremost about providing special educational services for students in need of such services.<sup>179</sup> Although a fat student might initially seem to fit the definition of “emotionally disturbed,” the student will nevertheless not be covered by the IDEA if he or she does not “by reason thereof, need[] special education and related services.”<sup>180</sup> Because it is quite possible that a student could be disabled (under, for example, the ADA definition), but not in need of special educational services, legal commentators note that the IDEA is “a less than ideal avenue for relief in harassment cases.”<sup>181</sup> More importantly, even if a fat student could show that he or she required special educational services (most likely P.E.), it is unclear whether such services help the student. Such services might even work to the detriment of the fat student by requiring the student to take different classes and further isolating the student from his or her peers.<sup>182</sup> Also, fearing forced enrollment in such “special classes,” fat students might be further deterred from bringing IDEA claims.<sup>183</sup>

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176. See, e.g., Meyer, *supra* note 114, at 447; *supra* Part II.A.

177. See Meyer, *supra* note 114, at 448.

178. See *id.* at 447.

179. See *id.* at 448.

180. 20 U.S.C. § 1401(3)(A)(ii) (2006).

181. Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1112 (2002). See also Meyer, *supra* note 114, at 448.

182. See Meyer, *supra* note 114, at 448.

183. One fat individual described such separate P.E. classes as “remedial,” thus suggesting that she was inferior and needed to be fixed. Email from Amy Salloway to author (Dec. 1, 2008, 12:57 PST) (on file with author). Another fat individual recalls her painful school years:

One of my worst experiences in . . . school had to do with the special education class. There was one class of kids with various mental and physical impairments—all ages put together in one special classroom. I was frequently told that I should be in that class because I was so fat, and I was shoved into the line of special ed kids when we'd line up in the playground to go back into the building.

Now that this Note has discussed why the current legislative framework does not protect fat students, it will move to considering legislation that specifically addresses discrimination against fat individuals.

#### IV. SUGGESTIONS FOR FUTURE LEGISLATION THAT PROTECTS FAT STUDENTS

Fat individuals, especially primary and secondary students, face discrimination based on their fatness on a daily basis. Because of the sheer number of people affected by such discrimination and the intense harm that they suffer, it is essential that fat individuals are legally protected.<sup>184</sup> This is especially true for fat students, who are harassed and discriminated against so intensely that their education is compromised,<sup>185</sup> because society as a whole suffers when primary and secondary students are denied a proper education.<sup>186</sup> Because this Note has revealed that fat students cannot find protection under the ADA or the IDEA, new legislation is needed to protect fat students.

There are two ways to go about legislatively protecting fat students: (1) amending the ADA/RHA to explicitly include fatness as a disability, or (2) drafting an entirely new statute prohibiting discrimination against fat individuals.

##### A. THE PROBLEM WITH AMENDING THE ADA/RHA TO INCLUDE FATNESS

Simply amending the ADA/RHA to explicitly include fatness as a disability is not a viable solution. From a practical standpoint, it is unlikely that Congress would be willing to amend the ADA to include fatness. Although amending an already existing statute likely seems easier and more efficient to draft (and thus more appealing) to Congress than drafting an entirely new statute, it is unlikely that Congress would do so when it amended the ADA in 2008 to broaden its protection, but neglected to explicitly list fatness or change the definition of disability in a way that

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Terre Poppe, *Fat Memories from My Life*, in *SHADOW ON A TIGHTROPE: WRITINGS BY WOMEN ON FAT OPPRESSION*, *supra* note 80, at 67, 67.

184. See Wang, *supra* note 8, at 1919–20.

185. See *supra* Part II.B. Although it could be argued that a general antibullying statute is needed as many students face harassment for reasons other than fatness, such a general statute is beyond the scope of this Note and the overwhelming amount and intensity of fatness-based discrimination reveals that fat students need a remedy specifically targeting discrimination based on fatness. See *supra* Part II.A.

186. See Wang, *supra* note 8, at 1920 (noting the “third party costs” of fatness-based discrimination). See also *supra* notes 73–75 and accompanying text.

would extend coverage to fat individuals.<sup>187</sup>

Further, even if Congress would be willing to amend the ADA to include fatness as a disability, it would be undesirable to do so. First, we would still need to contend with the deep conceptual and practical concerns of defining fatness as a disability.<sup>188</sup> Second, the legislative move to add fatness to the ADA/RHA might encourage courts (especially those already hostile to ADA/RHA claims centering on weight) to think that fatness (including even morbid obesity) is not a disability as defined under the original ADA/RHA. This could throw into question protection obtained by morbidly obese individuals if the amendment to the ADA/RHA were ever repealed. Third, adding fatness to the ADA/RHA could undermine the efficacy of the whole ADA/RHA. At a time when many civil rights groups, especially advocates of disability rights, are facing intense conservative backlash by the general populace and the courts,<sup>189</sup> adding a supposedly entire new class to the ADA/RHA could have tremendous dilutive effects on the statute. Thus, it is both unrealistic and unwise to advocate amending the ADA/RHA to explicitly include fatness. Although some still might argue that amending the ADA/RHA to include fatness is a good idea because cases brought by fat plaintiffs would be easier to adjudicate as they would fit into an already well-established area of case law, new legislation aimed specifically at protecting fat students could borrow from language and concepts embodied in the ADA/RHA case law.<sup>190</sup>

#### B. THE NEED FOR NEW LEGISLATION SPECIFICALLY TARGETING DISCRIMINATION ON THE BASIS OF FATNESS

New carefully drafted federal legislation is needed to provide legal

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187. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.); *supra* Part III.B. Cf. *supra* note 168 and accompanying text (describing how the 2008 amendments were praised and considered a victory for disability-rights advocates and broadened protection under the statute). Given this support, Congress may have little incentive or desire to amend the legislation again.

188. See *supra* Part III.A, C.

189. See SOLOVAY, *supra* note 8, at 130-31; Linda Hamilton Krieger, *Introduction to BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 1, 5-14 (Linda Hamilton Krieger ed., 2003). See also THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* 1-10 (2005) (discussing conservative backlash generally); Catherine Marshall & Amy L. Anderson, *Is it Possible to Be an Activist Educator?*, in *ACTIVIST EDUCATORS: BREAKING PAST LIMITS* 1, 24-25 (Catherine Marshall & Amy L. Anderson eds., 2009) (discussing backlash and historical selectivity). Note that although the ADA's broadening of the ADA might suggest that the backlash against disability rights advocates is subsiding, broadening the ADA even more (and so shortly after the 2008 ADA) might trigger a new and even fiercer backlash.

190. See, e.g., *infra* text accompanying note 201; *infra* note 207 and accompanying text.

protection to fat individuals.<sup>191</sup> The first question is whether legislation should include *all* fat individuals or only fat students. Because this Note is limited to discrimination faced by fat students, this Note will only discuss legal provisions to protect this subset of the fat population. However, this does not mean that these legislative suggestions to protect fat students could not be part of a broader statute that protects fat individuals as a group.<sup>192</sup>

The second and more difficult question is how to draft *effective* legislation to protect fat students. Merely proclaiming that weight discrimination is wrong and should be prohibited is certainly a symbolic victory (and thus could work to alter public opinion), but provides courts with little to no guidance on what behavior is actually prohibited and does not allow courts to draw analytical analogies to legal standards from other antidiscrimination laws.<sup>193</sup>

One way to guide courts is to require, similar to the ADA and the IDEA, that students first fit a definition of “fatness” before they can claim protection. This would focus the legislation specifically on the needs of fat students and away from claims of “weight” discrimination based on thinness or “size” discrimination based on height that could potentially dilute the statute.

There are, however, deep-seated problems with requiring a student to fit a legislatively established definition of fatness. Such definitions lend themselves to problematic “bright line” tests that might require a student to meet a certain height and weight requirement to be deemed “fat” under the statute. Although perhaps useful from a medical perspective, these height/weight indexes (commonly referred to as the Body Mass Index, or

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191. Legislation could occur at the local, state, or federal level. For broad and consistent coverage, however, this Note recommends federal legislation. *See supra* notes 105–07 and accompanying text (explaining that state and local legislation can result in underdeveloped and thus not very useful case law).

192. It should be noted, however, that it might be practically easier to pass legislation designed to protect fat young people than legislation protecting fat adults. The general populace is more likely to be sympathetic toward fat children than adults because childhood fatness tends to be “blamed” on the parents of fat children and is seen to be out of the fat child’s control. *See Latner & Schwartz, supra* note 55, at 54 (noting that parents are often blamed for their children’s weight and referring to cases that “imply that simply having an obese child is evidence of neglect or abuse”). *See also SOLOVAY, supra* note 8, at 102 (observing that “fat people tend to be viewed not only as ‘lacking’ but also as ‘responsible’ for the prejudices held against them”).

193. Wang, *supra* note 8, at 1934–35. *See also Lamoria v. Health Care & Retirement Corp.*, 584 N.W.2d 589, 594 (Mich. Ct. App. 1998) (noting the lack of legal authorities “explicitly addressing the elements necessary for a party to establish a claim of weight discrimination”).

BMI)<sup>194</sup> are unsuitable for determining whether a fat student is deserving of legal protection because they center around the wrong issue.<sup>195</sup> Fatness itself is rarely what hampers fat students' education.<sup>196</sup> Rather, fat students' educational opportunities are diminished by fatness-based discrimination by their peers and school officials.<sup>197</sup> Thus, any new legislation must be directly aimed at prohibiting discrimination that imperils fat students' education.<sup>198</sup>

This Note advocates that under a statute that prohibits discrimination on the basis of fatness, a student should not be required to prove that he or she is fat before obtaining legal protection. This is essential because many students who are discriminated against on the basis of fatness would not be considered even mildly "overweight" by medical standards.<sup>199</sup> Rather, as advocated by one legal scholar, a new statute should "place emphasis on the totality of the circumstances, considering elements such as: the type of harassment faced, the comments made, the injuries suffered, the setting, and the number of harassers, as well as their motivation."<sup>200</sup> Thus, the question would be whether the student was harassed and/or discriminated against on the basis of perceived fatness. As this is quite similar to the

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194. See Centers for Disease Control and Prevention, About BMI for Children and Teens, [http://www.cdc.gov/healthyweight/assessing/bmi/childrens\\_bmi/about\\_childrens\\_bmi.html](http://www.cdc.gov/healthyweight/assessing/bmi/childrens_bmi/about_childrens_bmi.html) (last visited Apr. 25, 2010).

195. Also, students may not fit the medical definition of "overweight" but may still be sufficiently above a cultural "ideal weight" that they are nevertheless discriminated against. This is largely because the "normal weight" BMI range can be very wide. For example, to be considered a "healthy weight," a fifteen-year-old girl who is 5 feet 4 inches tall could weigh anywhere between 95 and 139 pounds. One can imagine how different such girls would look and how the 139 pound girl might be subjected to discrimination. See SOLOVAY, *supra* note 8, at 164 ("[P]eople whose weight is within a 'normal' range are sometimes the victims of fat discrimination because current 'ideals' are so much thinner than 'normal' weights."); Centers for Disease Control and Prevention, BMI Calculator for Child and Teen: English Version, <http://apps.nccd.cdc.gov/dnpabmi/Calculator.aspx> (last visited Feb. 19, 2009) (using January 1, 1995 as Birth Date and January 1, 2010 as Date of Measurement). Additionally, students might be a medically "normal weight," but nevertheless discriminated against due to differing subjective and cultural perceptions of fatness. See sources cited *infra* note 201.

196. See Neumark-Sztainer & Eisenberg, *supra* note 21, at 75 (noting studies that suggest harassment is a better indicator of emotional disturbance than BMI).

197. See sources cited *supra* note 55. For example, even in P.E., where fat students might not be physically able to do *all* of the same exercises as their thinner counterparts, fat students can achieve the same level of physical education through slightly modified exercises. Current education requirements, however, do not permit these modifications and thus deny fat students the opportunity to obtain quality physical education.

198. Bright line weight tests are also problematic because they may ironically punish "the rare individuals who manage to lose some weight with the revocation of their protection from discrimination while they still need it." SOLOVAY, *supra* note 8, at 103.

199. See *supra* note 195.

200. Meyer, *supra* note 114, at 452.

regarded as disability definition in the ADA, courts could borrow ADA regarded as case law in interpreting claims brought under the new statute.<sup>201</sup>

### C. PROBLEMS ASSOCIATED WITH LEGISLATION TARGETING DISCRIMINATION ON THE BASIS OF FATNESS

Granted, there are still some shortcomings with a statute that prohibits discrimination on the basis of perceived fatness. The most concerning is how to include student-on-student harassment as discrimination within the meaning of the new statute. One solution is to include a provision in the statute that requires schools to take a proactive role in preventing student-on-student harassment and outlining disciplinary measures. Voters and legislators, however, might be hostile to what could be seen as the micromanaging of schools and too much restraint on normal childhood behavior.<sup>202</sup> Thus, it would be best to leave it to courts to determine whether student-on-student harassment constitutes discrimination on the basis of fatness by school officials so that schools might be held accountable for such harassment.

Admittedly, student-on-student harassment does not at first seem like discrimination *by schools* such that schools could be held accountable for it.<sup>203</sup> In interpreting Title IX of the Education Amendments of 1972,<sup>204</sup> however, the Supreme Court declared in *Davis v. Monroe County Board of Education* that schools may be held liable for student-on-student harassment if such harassment “is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational

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201. Notice, however, that the cultural definition of “fatness” is dynamic and often highly subjective. See OLIVER, *supra* note 40, at 15 (noting how context shapes our definition of fatness so that what is fat for an actress might be normal for an ordinary woman). See also JOAN JACOBS BRUMBERG, *THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS* 99–100, 119–25 (1997) (observing how the ideal female weight and body shape/size has changed throughout the twentieth century). Oliver’s logic could apply in the school setting for, say, cheerleaders and noncheerleaders. Thus, the inquiry must turn less on whether a student is actually seen as fat (perhaps using a lower standard than the ADA) and more on whether the student was discriminated against and the extent of such discrimination.

202. See *supra* note 76.

203. At least not in the same way that more direct forms of school liability may attach for fatness-based discrimination, like for schools’ discriminatory P.E. requirements, accessibility concerns, or teacher harassment. *But see* *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) (noting schools’ extensive control over students and their resulting responsibility “to prescribe and control conduct in the schools” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969))).

204. 20 U.S.C. §§ 1681–1688 (2006).

opportunity or benefit.”<sup>205</sup> Lower courts have expanded the “hostile environment” theory to the ADA and the RHA, declaring that “there is a cause of action under the ADA and the Rehabilitation Act for a hostile learning environment when harassment based on a student’s disability has ‘the purpose or effect of unreasonably interfering with [the] individual’s performance or [of] creating an intimidating, hostile, or offensive environment.’”<sup>206</sup> Thus, there is no reason why courts could not use the case law of Title IX and the ADA/RHA to interpret whether a hostile environment existed when interpreting a fatness discrimination claim under a fatness antidiscrimination statute.<sup>207</sup>

Of course, saying that a fat student can bring a hostile environment claim based on student-on-student harassment does little to guide courts.<sup>208</sup> Courts still need to determine what constitutes a hostile environment. Writing for the majority in *Davis*, Justice O’Connor declared, “Whether . . . conduct rises to the level of actionable ‘harassment’ . . . ‘depends on a constellation of surrounding circumstances, expectations, and relationships,’ . . . including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”<sup>209</sup> To aid in this fact-intensive analysis, courts could be guided by school district-promulgated guides and policies that define and describe peer harassment.<sup>210</sup>

*Davis* also includes an important qualification to schools’ liability for student-on-student harassment: it is not enough that a hostile environment exists, but in the creation of the hostile environment, school officials must have acted with “*deliberate indifference*”<sup>211</sup> to *known* acts of harassment.”<sup>212</sup>

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205. *Davis*, 526 U.S. at 633 (concluding that a school that receives federal education funding can be held liable for severe harassment under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688).

206. *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 314 (D. Mass. 1997) (alterations in original) (quoting *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995)).

207. See Meyer, *supra* note 114, at 452–53.

208. *Davis* does, however, explicitly warn against overly narrow interpretations of hostile environment claims, declaring that “[i]t is not necessary . . . to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity.” *Davis*, 526 U.S. at 651.

209. *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

210. See Lindsay Havern, Note, *Davis v. Monroe County Board of Education: Setting a Stringent Standard of Fault for School Liability in Peer Sexual Harassment Under Title IX—Demanding Responsible Proactive Protection*, 28 PEPP. L. REV. 195, 215 (2000) (noting that by adopting written policies that define peer harassment, “educators will be able to provide the courts with a reference point for determining liability, rather than the definition being developed by juries on an ad hoc basis”).

211. It is important not to interpret “deliberate indifference” too narrowly or place too much emphasis on the term “deliberate.” See Brake, *supra* note 25, at 24 (“It is not necessary to prove that the

Thus, for a school to be held liable, school officials must know of the harassment and must respond in a manner that is “clearly unreasonable.”<sup>213</sup> Although *Davis* establishes that complete inaction after notification of student-on-student harassment is unacceptable,<sup>214</sup> courts are left with little guidance to determine whether a school’s response is “clearly unreasonable.” Again, courts could be guided by school district–promulgated guides that establish not only what constitutes peer harassment, but also how schools should respond to such harassment. Still, even if school district–promulgated guides set out appropriate definitions of harassment and reasonable responses that are favorable to fat students, courts hostile to fat discrimination claims (or peer taunting claims in general) might nevertheless reject the nonbinding guidelines or interpret them too narrowly. Thus, there remain some issues with holding schools liable for student-on-student harassment under a hostile environment theory.

Unfortunately, even a statute prohibiting discrimination on the basis of fatness that is interpreted to include student-on-student harassment is not a perfect solution for fat students facing discrimination. First, fat students and their parents might be hesitant to bring claims. Fat students might be hesitant to notify teachers (needed to establish “deliberate indifference”) and parents (needed to bring a claim) that they are being harassed. The Department of Justice reports that students often do not report harassment because they fear retaliation, are ashamed they could not stand up for themselves, fear they will not be believed, doubt that reporting harassment will make a difference, fear that reporting may make the harassment even worse, and fear being thought of as a “snitch.”<sup>215</sup> Also, just as fat students might be reluctant to don the “disabled” label to make a claim under the ADA/RHA/IDEA,<sup>216</sup> fat students might even be reluctant to take on the stigmatized label of “fat” (or “overweight,” “obese,” or “morbidly obese”). This is especially true for students who do not regard themselves as “fat”

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defendant fully appreciated the harmful consequence of the discrimination, because deliberate indifference is not the same as action (or inaction) taken ‘maliciously or sadistically for the very purpose of causing harm.’ Instead, deliberate indifference can be found when the defendant’s response to known discrimination is clearly unreasonable in light of the known circumstances.” (quoting *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999)).

212. *Davis*, 526 U.S. at 633 (emphasis added).

213. *Id.* at 648.

214. *Id.* at 636.

215. RANA SAMPSON, U.S. DEP’T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE: PROBLEM-SPECIFIC GUIDES SERIES NO. 12, BULLYING IN SCHOOLS 5–6 (2002), available at <http://www.cops.usdoj.gov/files/ric/CDROMs/Tribal/law/BullyingInSchools.pdf>.

216. See *supra* Part III.A.

(or are not considered even “overweight” by medical standards) but are nevertheless relentlessly taunted for being fat.<sup>217</sup> Parents of fat students might also be especially embarrassed to bring claims because they view their child’s fatness as their own personal parenting failure and/or are themselves fat and ashamed of their fatness.<sup>218</sup> Even parents who are not ashamed of their weight or the weight of their children might be reluctant to file a claim because they may not want to sue public schools that are already lacking in resources.<sup>219</sup>

Second, the adjudicative process is very slow and fat students would have to endure weeks (maybe even months) before there is any judicial response. Even if a statute provided for extrajudicial (administrative or school district-level) mediation, the student may still have to endure discrimination before and throughout the (albeit shorter) proceedings. Beyond waiting for judicial or administrative action, the fat students might be emotionally taxed by having to attend proceedings, testify at proceedings, and face further harassment from other students who learn of or appear at the proceedings. Also, busy parents might not have the time, energy, or money to devote themselves to filing an action.

Third, even if a fat student is successful at the administrative or judicial level, it is quite possible that the student will be unable to obtain a sufficient remedy. Injunctive relief could work well in remedying the continuing harm of discriminatory P.E. requirements, harassment from teachers and staff, accessibility problems, and teacher inaction in the face of student-on-student harassment. Injunctive relief, however, cannot always stop student-on-student harassment. Further, monetary damages are imperfect as money does not directly stop future discrimination against fat students<sup>220</sup> and might not be able to cure the permanent emotional scars<sup>221</sup>

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217. See Neumark-Sztainer & Eisenberg, *supra* note 21, at 69–70 (noting studies in which “overweight girls were reluctant to admit, or did not recognize, that they had been teased or treated poorly because of their weight”); *supra* note 195.

218. SOLOVAY, *supra* note 8, at 53.

219. See *id.* at 61 (noting that legal actions filed against schools “are losers. The school districts [are] bankrupt. And even if [they weren’t], no jury will make a decision they see as taking money out of the classroom and putting it into someone’s pocket”).

220. Of course, it could be argued that monetary damages would prompt the offending school to take affirmative steps to end discrimination against all fat students and that other schools would do the same to prevent lawsuits. See J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 350 (1995) (noting that “monetary relief certainly acts as a financial deterrent to misconduct”). But it might be easier and more cost-effective for schools to pay legal damages than to implement measures that combat fatness-based discrimination. This tendency, however, could be countered by implementing punitive damages. Deborah A. Geier, Note, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743, 755 (1985) (“The need for punitive damages

and educational disadvantages brought on by fatness-based discrimination and the societal repercussions thereof.<sup>222</sup>

Finally, given the amount of antifat bias and discrimination, there remains the very real risk that legislation protecting fat students would not pass through the legislature.<sup>223</sup> Groups dedicated to eliminating childhood obesity<sup>224</sup> may choose to mount a formidable campaign against fatness-based discrimination legislation out of fear that such statutes would encourage childhood obesity.<sup>225</sup> This, however, does not mean that we should not try to pass legislation prohibiting discrimination on the basis of fatness. Rather, legislation is *especially* appropriate (and necessary) when societal norms provide no protection to, or even encourage the oppression of, oppressed groups.<sup>226</sup>

Thus, combating discrimination against fat students requires a two-prong strategy: pressing for new legislation protecting fat students *while* implementing policies and programs at the school district-level<sup>227</sup> that raise

and the effect of deterrence is most acute in the situation where the defendant tacitly determines that he will engage in wrongful conduct . . . and run the risk of later paying compensation for the conduct. In this situation, the defendant finds it cheaper to pay damages, if necessary, than to proceed lawfully. . . . [I]f punitive damages exist, [however,] the risk of a substantial penalty may *deter* his wrongful conduct.” (quoting Lisa M. Bromen, Comment, *Punitive Damages: An Appeal for Deterrence*, 61 NEB. L. REV. 651, 652 (1982)).

Remember, however, that public hostility could result from a bill requiring punitive damages against a school (especially a public school) or a court opting to give punitive damages *sua sponte*. In fact, such a provision might even prevent an otherwise good piece of legislation from being passed.

221. Verkerke, *supra* note 220, at 376. (“The injury a hostile environment inflicts is almost exclusively psychological and emotional, and monetary damages provide a poor substitute for such losses.”).

222. See *supra* notes 68–75 and accompanying text.

223. Theran, *supra* note 104, at 207 (observing that “based on current public perceptions of weight and obesity, it would be highly unrealistic to expect widespread legislation targeting weight discrimination anytime soon”). But see *supra* note 192 (positing that legislation protecting fat children might be easier to pass than legislation protecting all fat individuals). Nonetheless, Sondra Solovay reports that even fat children are stereotyped as “lazy, dirty, stupid, cheats, and liars.” SOLOVAY, *supra* note 8, at 113.

224. Examples of such groups include the Alliance for a Healthier Generation, Obesity Prevention Center For Children & Youth, Inc., and Red Apple Foundation. See Alliance for a Healthier Generation, About the Alliance, <http://www.healthiergeneration.org/about.aspx> (last visited Apr. 25, 2010); Obesity Prevention Center for Children & Youth, Inc., Welcome to OPCCY, <http://www.opccy.org/home.html> (last visited Apr. 25, 2010); Red Apple Foundation, About Us, <http://www.redapplefoundation.org> (last visited Apr. 25, 2010).

225. Even those opposed to “fat acceptance,” however, might be sympathetic to statutes prohibiting fatness discrimination on the basis that discrimination “is not going to make him or her, or anyone else, any thinner or healthier, or improve us as a society.” See Theran, *supra* note 104, at 207.

226. Wang, *supra* note 8, at 1920–21.

227. Although it could be argued that federal or state legislation should prescribe such programs, local school districts are more knowledgeable of the characteristics and needs of their populations and

awareness of, and aim to prevent, fatness-based discrimination. The dual prongs of this strategy complement each other as public awareness will spur legislation, and legislation (and judicial decisions) will have both a symbolic and real effect on bettering fat students' educational opportunities.<sup>228</sup> Having just discussed the first prong of this dual-pronged approach, this Note will now move on to suggest policies and programs that can be implemented at the school district-level to combat discrimination against fat students.

## V. RECOMMENDATIONS FOR SCHOOL DISTRICT-LEVEL MEASURES TO COMBAT DISCRIMINATION AGAINST FAT STUDENTS

School districts can combat discrimination against fat students by mandating greater school and classroom accessibility, school staff training targeting antifat bias, tolerance programs for parents and students, and the revision of flawed P.E. programs.

### A. ACCESSIBLE SCHOOLS AND CLASSROOMS

Improving school and classroom accessibility is the first step toward restoring access to fair and equal education for fat students.<sup>229</sup> First, school districts could require that schools purchase chairs and desks that can accommodate fat students and phase out chairs and desks that do not. Although school district budgets are often very limited,<sup>230</sup> it is essential that

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thus are best equipped to implement such programs. Notice, however, that this recommendation does not run counter to this Note's arguments in favor of federal legislation. *See supra* note 191 and accompanying text. Rather, federal legislation coupled with measures at the school district-level can work together as federal legislation provides broad and consistent protection that serves as a backdrop for the subtly-differentiated, school district-specific fat antidiscrimination programs and policies.

228. Legal scholars have written at length about how the groundbreaking decision in *Brown v. Board of Education* sent a powerful symbolic message to the American public that racial discrimination is a fundamental evil and how this knowledge spurred many civil rights gains. *See, e.g.*, Bradley C. Canon, *The Supreme Court as a Cheerleader in Politico-Moral Disputes*, 54 J. POL. 637, 648–50 (1992); Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520, 1522–28 (1968); C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. REV. 869, 869–70 (1964). It is quite possible that legislation and court decisions could have a similar effect on drawing attention to the plight of fat students.

229. This is not to say that improving accessibility is by any means more important than other measures that should be taken to combat fatness-based discrimination. Rather, it is needed first because if the physical terrain of schools and classrooms prevents fat students from entering school or makes learning physically painful, any other measures taken to combat fatness-based discrimination will be severely compromised (if not rendered completely useless).

230. *See, e.g.*, Shawn D. Lewis, *Deep Cutbacks Test Schools*, DETROIT NEWS, Jan. 5, 2009, at A3; Seema Mehta, *Schools Struggling with Cuts; Districts Across the State Face Decisions to Lay Off Teachers, Increase Class Sizes and Eliminate Programs*, L.A. TIMES, Feb. 23, 2009, at B1; Jacqueline

all students be able to learn without having to suffer through the discomfort and embarrassment of sitting in chairs that are too small for them or being unable to fit through narrow walkways.<sup>231</sup> Second, teachers could be instructed to make sure that rows between desks are wide enough for fat students to pass through.

Third, school districts could take extra care in making sure they are in full compliance with the accessibility requirements of the ADA.<sup>232</sup> Although the protection of the ADA probably does not extend to fat students,<sup>233</sup> its accessibility requirements can nevertheless help fat students because many of the ADA's provisions mandating building and facility accessibility can also be of use for fat students (for example, handrails, alternatives to stairs, and sufficiently wide walkways).<sup>234</sup>

### B. SCHOOL STAFF TRAINING

It is essential to train teachers and other school staff members on how to prevent, identify, and deal with discrimination against fat students. Training programs could be hosted by National Association to Advance Fat Acceptance–approved groups, school counselors with special training in weight issues, and/or staff nutrition counselors or nutrition teachers.<sup>235</sup> First, school staff members should learn to identify and then combat their own antifat biases so that they do not themselves perpetuate discrimination against fat students.<sup>236</sup> Although it can be difficult to unlearn well-

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Fell, *Budget Shortfall Could Increase Class Sizes*, CENT. FLA. NEWS 13, Mar. 19, 2009, [http://www.cfnews13.com/Education/EducationHeadlines/2009/3/19/school\\_deficit\\_surges\\_to\\_240m.html](http://www.cfnews13.com/Education/EducationHeadlines/2009/3/19/school_deficit_surges_to_240m.html).

Also, note that almost all school district–level measures will cost school districts money (as, of course, would compliance with any new legislation aimed at protecting fat students). Although this Note does not intend to be dismissive of budgetary hardships, the fair and equal education of fat students should not be placed on the financial backburner.

231. See *supra* notes 3, 46–47 and accompanying text.

232. Of course, schools should already be in compliance with the ADA (and are legally required to be) to protect disabled students and staff members covered by the ADA. If they are not, this is one area where disability rights advocates, fat acceptance advocates, and other advocates for children can come together to ensure that all children are afforded access to fair and equal education.

To aid in full ADA compliance, school districts can consult the National Clearinghouse for Educational Facilities' online Resource Lists, which contains links, books, and journal articles on "how school . . . buildings and grounds can accommodate students with disabilities, including references to federal requirements." National Institute of Building Sciences, National Clearinghouse for Educational Facilities, Resource Lists: Accessibility in School and University Facilities, <http://www.edfacilities.org/rl/accessibility.cfm> (last visited Apr. 25, 2010).

233. See *supra* Part III.B.

234. See 28 C.F.R. pt. 36, app. A (2009) (detailing the ADA accessibility requirements).

235. BERG, *supra* note 87, at 230.

236. See Neumark-Sztainer & Eisenberg, *supra* note 21, at 73. Central to this training is teaching

ingrained biases, a 2005 study showed that Internet-based educational programs can successfully combat antifat bias among current and future teachers.<sup>237</sup> Second, school staff members should learn “skills for addressing and minimizing [fatness-based] teasing.”<sup>238</sup> In connection with these training sessions, school districts could promulgate their own guides and policies on identifying and dealing with incidents of discrimination against fat students.<sup>239</sup> Such policies could include, for example, a definition of fatness-based discrimination, what to do when one staff member notices another staff member engaging in fatness-based discrimination, what to do when a fat student is being taunted by peers, and at what stage to involve the parents of the taunters and/or the harassed fat student.

### C. TOLERANCE PROGRAMS FOR PARENTS AND STUDENTS

It is not enough to reach only school staff members. Rather, fatness antidiscrimination programs must also target parents and students. Studies show that antifat bias may be transmitted from parents to children both directly and indirectly.<sup>240</sup> Thus, it is important to educate parents on the dangers of fatness-based discrimination and what to do if their child is taunting fat students or is being taunted on the basis of fatness. Such education can be accomplished through pamphlets, short seminars, or inviting parents to participate in the student-focused tolerance programs discussed in the next paragraph.

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concerned staff members (who are often well intentioned, but sometimes misguided) that a fat student is not necessarily unfit or unhealthy so they do not cause the fat student unnecessary weight-based anxiety “for her own good.” See *supra* text accompanying notes 7 and 95.

237. Anne L. Hague & Adrienne A. White, *Web-Based Intervention for Changing Attitudes of Obesity Among Current and Future Teachers*, 37 J. NUTRITION EDUC. & BEHAV. 58, 60–61, 63 (2005) (reporting on subjects who participated in a self-paced Internet-based educational program addressing: “(a) controversy regarding the etiology of obesity; (b) treatment and health risks associated with obesity; (c) the physical, psychological, and social effects of the obesity stigma; (d) sociocultural pressures to obtain thinness among children and adolescents and the risks associated with weight loss efforts; (e) strategies to help children deal with the social stigma of obesity; and (f) intervention techniques to promote bias-free behavior in the school setting”).

238. Neumark-Sztainer & Eisenberg, *supra* note 21, at 73.

239. See *supra* note 210 and accompanying text.

240. See Latner & Schwartz, *supra* note 55, at 62–63 (citing Gerald R. Adams, Mandy Hicken & Mahshid Salehi, *Socialization of the Physical Attractiveness Stereotype: Parental Expectations and Verbal Behaviors*, 23 INT’L J. PSYCHOL. 137, 140–48 (1988) (showing antifat bias transmitted directly through subtle parent-child communication); Kirsten Krahnstoever Davidson & Leann Lipps Birch, *Weight Status, Parent Reaction, and Self-Concept in Five-Year-Old Girls*, 107 PEDIATRICS 46, 46 (2001) (showing antifat bias transmitted indirectly through parental concern about child weight status and parental restriction of children’s access to food)).

Perhaps most important to ending fatness-based discrimination is teaching students tolerance for fat people.<sup>241</sup> Fat tolerance programs could be part of the broader diversity and tolerance programs targeted at eliminating racism, sexism, and heterosexism;<sup>242</sup> programs focused on promoting self-esteem and teaching acceptance of all body sizes;<sup>243</sup> and/or more general antibullying programs.<sup>244</sup> Alternatively, or in conjunction with such programs, school districts could invite groups such as the Fat Speaker's Bureau, which "promote healthy eating and exercise, [and] combat weight-related teasing," to speak at school assemblies or in individual classrooms.<sup>245</sup> Fat activist speakers like Nancy Summer go beyond discouraging fatness-based taunting and proactively "encourage kids of all sizes to fight size bias by speaking up every time they see it."<sup>246</sup> School districts can also encourage teachers to include books with fat protagonists in their curriculum to counter stereotypical views of fat individuals presented by many books and films.<sup>247</sup>

Fat tolerance programs can also help raise the self-esteem of fat

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241. Because children and teenagers often engage in taunting to appear "cool," one of the best ways to eliminate fatness-based taunting is to make taunting "uncool." See Nancy Summer, *Bringing Size Awareness to the Classroom: The Making of Young Activists*, RADIANCE, Winter 1996, at 10, available at [http://www.radiancemagazine.com/issues/1996/winter96\\_nsummer.html](http://www.radiancemagazine.com/issues/1996/winter96_nsummer.html) (retelling the story of one girl who admitted "that she teased a teacher until she made her cry [and was] proud of this revelation *until* she hear[d] her classmates define this as being mean" (emphasis added)).

242. See Cobleskill-Richmondville Central Schools, Diversity at C-RCS, <http://www.crcs.k12.ny.us/district/forms/diversity.html> (last visited Apr. 25, 2010) (listing links to online resources promoting diversity and tolerance); Museum of Tolerance, Teacher Resources, Lessons and Activities, [http://www.museumoftolerance.com/site/c.tml6KfNVLtH/b.5063231/k.5AC2/Lessons\\_and\\_Activities.htm](http://www.museumoftolerance.com/site/c.tml6KfNVLtH/b.5063231/k.5AC2/Lessons_and_Activities.htm) (last visited Apr. 25, 2010) (featuring a downloadable Teacher's Guide, curricula, and other classroom activities); Teaching Tolerance: A Project of the Southern Poverty Law Center, <http://www.tolerance.org/about> (last visited Apr. 25, 2010) (featuring downloadable curricula and other classroom activities).

243. See BERG, *supra* note 94, at 217–33 (discussing the "Health at Every Size" movement); National Organization for Women Foundation, Love Your Body Day, <http://loveyourbody.nowfoundation.org> (last visited Apr. 25, 2010) (suggesting various ways to celebrate the natural beauty of different body sizes and declaring that women should love their own bodies).

244. See, e.g., National Youth Violence Prevention Resource Center, Bullying, <http://www.safeyouth.org/scripts/topics/bullying.asp> (last visited Apr. 25, 2010) (listing antibullying online resources); Pacer Center, National Center for Bullying Prevention, Bullying Prevention Awareness Week, <http://www.pacer.org/bullying/bpaw/index.asp> (last visited Apr. 25, 2010) (featuring downloadable curricula and other classroom activities); U.S. Dep't of Health and Human Servs., Health Res. and Servs. Admin., Stop Bullying Now!, <http://stopbullyingnow.hrsa.gov/kids/> (last visited Apr. 25, 2010) (featuring educational tools for teachers, parents, students, and other education-related professionals).

245. SOLOVAY, *supra* note 8, at 60.

246. Summer, *supra* note 241.

247. See DALTON, *supra* note 55, at 196–98.

students.<sup>248</sup> At her workshops, Summer dispels harmful stereotypes about fat people by sharing her personal stories of academic success;<sup>249</sup> bringing magazine articles about fat athletes; displaying collages of photos showing fun-loving, fashionable, and successful fat women; and playing body-positive songs written and performed by fat individuals.<sup>250</sup> Thus, fat students learn that their academic, artistic, social, and even athletic opportunities need not be constrained by their weight.<sup>251</sup> Summer's workshops also raise fat students' self-esteem by making fat students feel more connected to their peers as they hear their thinner peers' angry reactions to the taunting Summer experienced as a fat student and learn that even their thin peers fear being taunted on the basis of fatness.<sup>252</sup>

Unlike proposed legislation, where we can only speculate about effectiveness, fat tolerance programs have been proven to work. Summer shares some of her exit evaluations from students: "I learned that it's wrong to make fun of fat kids and not to play with them"; "Now I have something to sing when I feel bad about my body"; "I learned that I'm okay and that I can be pretty even though I'm fat."<sup>253</sup>

#### D. REVISING PHYSICAL EDUCATION PROGRAMS

Physical education is important for all students.<sup>254</sup> Thus, when revising P.E. requirements, it is important not only to look toward eliminating requirements that are biased against fat students, but also to create P.E. programs that engage all (including fat) students.<sup>255</sup>

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248. Although raising the self-esteem of fat students might not "directly" prevent discrimination against fat students, this paragraph is included primarily because it is important to acknowledge that well-designed tolerance programs can both prevent *and* remedy discrimination against fat students—placing fat students back on track toward realizing their true (academic) potential.

249. Summer, *supra* note 241. When one student recited the stereotype that "fat people are stupid," Summer, who weighs over 400 pounds, revealed that in sixth grade she was invited into a program to skip the eighth grade. *Id.*

250. *See id.*

251. This can directly raise the lowered self-esteem of fat students and combat the underachievement trap discussed *supra* notes 56–59 and accompanying text.

252. *See* Summer, *supra* note 241.

253. *Id.*

254. *See generally* Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Health Topics: Physical Activity, <http://www.cdc.gov/HealthyYouth/physicalactivity/> (last visited Apr. 25, 2010).

255. Note that government-mandated P.E. requirements (as opposed to district- or school-mandated requirements) need to be dealt with legislatively or through judicial action. For example, weigh-ins and body fat measurements are typically government mandated. And although a good case can be made that weigh-ins and body fat measurements should be stricken as P.E. requirements because they inflict unnecessary psychological trauma, *see supra* notes 38–43 and accompanying text, it is unlikely that they will be removed from P.E. programs because they are mandated by law, *see supra*

Some fat students struggle in P.E. not because of unfitness, but rather because they are taunted so intensely by their peers that they are afraid to participate.<sup>256</sup> One notable P.E. teacher dealt with the harassment of fat students by revamping the P.E. program. Under the revised P.E. curriculum, “The grading system was changed so it was based not on pure skill, but on effort, attendance, and participation. Consequently, some of the ‘jocks’ got lower grades than the less coordinated and athletic kids.”<sup>257</sup> In addition to adopting this progressive P.E. program, schools could also include a “sportsmanship” component under “participation” that rewards students who encourage and support other students.

Some fat students, however, do not do well in P.E. because they are actually unfit or simply uncoordinated.<sup>258</sup> Although P.E. teachers could (and should) then grade these students based on individual effort, it would be even better to find activities that allow these students to excel so that they learn to enjoy, rather than dread, physical activity.<sup>259</sup>

One way to engage reluctant students in physical activity is videogames, or “exergaming.”<sup>260</sup> Eight schools in the Parkway School

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note 39 and accompanying text, and some research shows that they serve an important purpose, *see* sources cited *supra* note 40. Thus, it is unlikely that the law requiring them will be changed legislatively or struck down by the courts. This, however, does not mean that schools and districts cannot mandate the way that weight and other sensitive data is collected to ensure that the privacy (and dignity) of all students is respected. *See* sources cited *supra* note 40. For example, rather than announcing a student’s weight loud enough for other students to hear, *see supra* text accompanying notes 43–44, or allowing other students to see the reading on the scale, *see supra* the text accompanying note 44, *all* students can be weighed privately by a nurse, teacher, or coach.

256. *See supra* text accompanying notes 100–02.

257. SOLOVAY, *supra* note 8, at 53.

258. Note, of course, that students who are not fat can also be unfit or uncoordinated (especially given the inadequacy of many schools’ P.E. programs). *See supra* note 96.

259. *See* SOLOVAY, *supra* note 8, at 50–51 (citing Interview by Sondra Solovay with Joanne Ikeda, Nutrition Education Specialist, University of California, Berkeley (Mar. 25, 1999)) (referring to U.C. Berkeley nutritionist Joanne Ikeda’s observation that “it is critical to impart the love of movement and the enjoyment of activity. This philosophy, which is the California physical education mandate, primes children to continue using their bodies actively for the rest of their lives”).

260. *See generally* Wikipedia, Exergaming, <http://en.wikipedia.org/wiki/Exergaming> (last visited Apr. 25, 2010) (“Exergaming or exer-gaming (a portmanteau of ‘exercise’ and ‘gaming’) is a term used for video games that are also a form of exercise.”). *See also* DEBRA A. LIEBERMAN, DANCE GAMES AND OTHER EXERGAMES: WHAT THE RESEARCH SAYS (2006), <http://www.comm.ucsb.edu/faculty/lieberman/exergames.htm> (“Exergaming is popular in the US and research is finding that it can improve players’ stress levels, weight management, fitness, and health.”); The Serious Games Initiative, Games for Health, <http://www.gamesforhealth.org/about2.html> (last visited Apr. 25, 2010) (explaining that Games for Health is a project founded to bring together “researchers, medical professionals, and game developers to share information about the impact games and game technologies can have on health care and policy”).

District in Chesterfield, Missouri have implemented the popular videogame Dance Dance Revolution (“D.D.R.”)<sup>261</sup> into their P.E. programs.<sup>262</sup> Educators and parents in schools that have implemented the program have praised D.D.R. for getting children to enjoy physical activity. One P.E. teacher, who worked at a West Virginia middle school for twenty-seven years revealed, “I’ll tell you one thing: they don’t run in here like that for basketball.”<sup>263</sup> One Chesterfield parent exclaimed:

My oldest son, Sean, used to have love handles; he was kind of pudgy, and I’ll be honest: we were worried about it . . . . We had heard of D.D.R., and I got it for him for his birthday. We put limits on the other video games he plays, but we told him he could play D.D.R. as much as he wanted. And now it’s like he’s a different kid. He’s playing sports and running, and we see D.D.R. as like his bridge to a more active lifestyle.<sup>264</sup>

Fitness experts join teachers, students, and parents in their enthusiasm for exergaming. Physical education researchers at West Virginia University’s School of Physical Education report findings of “significant health benefits for overweight children who played the game regularly, including improved blood pressure, overall fitness scores and endothelial function, which reflects the arteries’ ability to deliver oxygen.”<sup>265</sup> Similarly, Willow Springs Elementary School in Killeen, Texas has introduced the Nintendo Wii<sup>266</sup> into its P.E. curriculum.<sup>267</sup> Instructional

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Although some might immediately assume that videogame-based exercise programs would be prohibitively expensive for many school districts, the New York Times reports that “[a] basic [Dance Dance Revolution (“D.D.R.”)] system, including a television and game console, can be had for less than \$500, but most schools that use the game choose to spend from \$70 to \$800 each for more robust mats, rather than rip apart the relatively flimsy versions meant for home use.” Seth Schiesel, *P.E. Classes Turn to Video Game That Works Legs, Not Thumbs*, N.Y. TIMES, Apr. 30, 2007, at A1.

261. D.D.R. is a game where “[p]layers stand on a ‘dance platform’ or stage and hit colored arrows laid out in a cross with their feet to musical and visual cues.” Wikipedia, Dance Dance Revolution, [http://en.wikipedia.org/wiki/Dance\\_Dance\\_Revolution](http://en.wikipedia.org/wiki/Dance_Dance_Revolution) (last visited Apr. 25, 2010).

262. Schiesel, *supra* note 260.

263. *Id.*

264. *Id.*

265. *Id.* Schiesel’s article derives this information from the results of a study conducted by Linda M. Carson and Emily C-S Murphy at West Virginia University. See Emily C-S Murphy, *The Effect of Aerobic Exercise on Endothelial Dysfunction in Overweight Children 114–15* (2007) (unpublished Ph.D. Dissertation, West Virginia University School of Medicine), available at <http://wvgamesforhealth.wvu.edu/r/download/11552>. See also West Virginia University, WV Games For Health, [http://wvgamesforhealth.wvu.edu/clinical\\_study](http://wvgamesforhealth.wvu.edu/clinical_study) (last visited Apr. 25, 2010).

266. The Nintendo Wii is a home videogame console with a wireless controller (“Wii Remote”), featuring built-in accelerometers and infrared detection that “allows users to control the game using physical gestures as well as traditional button presses.” Wikipedia, Wii, <http://en.wikipedia.org/wiki/Wii> (last visited Apr. 25, 2010).

267. Melissa Slager, *Downward Dog and Dance Dance: Revolution in P.E.*, MSN ENCARTA,

specialist Sara Richards reports:

A lot of the kids who were not as competitive in sports . . . are usually intimidated by things they have to do in P.E., like run the mile or be in a competitive game . . . the Wii kind of balances the playing field with kids' abilities . . . They have a chance to feel successful.<sup>268</sup>

Students themselves corroborate these findings as one fifth-grader reveals, "Most of the time, [P.E.] was kind of boring . . . [but with the Wii] I look forward to going to P.E. now . . . because I know it will be fun."<sup>269</sup> Although many Wii programs include physical activity, the Wii Fit Plus program is specifically aimed at helping users "work towards personal goals of better health and fitness" with its "six training modes [Yoga, Balance Games, Strength Training, Aerobics, Training Plus, and My Wii Fit Plus] and more than 60 exercises and activities."<sup>270</sup>

Of course, videogames are not the only way to engage students in physical activity. They do, however, stand for a broader principle—it is time to stop thinking about P.E. in a narrow manner. P.E. need not be solely about running the mile or playing basketball. Rather, P.E. can include dancing, the use of exercise equipment such as stationary bikes and ellipticals, Pilates, and other activities that allow students not only to enjoy P.E. class, but also to develop a lifelong love of exercise.

In summary, school districts can combat discrimination against fat students by mandating the following: greater school and classroom accessibility, school staff training that targets antifat bias, tolerance programs for parents and students, and the revision of flawed P.E. programs. These recommendations, however, are by no means an exhaustive or definitive list of acceptable approaches. Rather, school districts should work to brainstorm, plan, and implement additional policies and programs to combat fatness-based discrimination.

## VI. CONCLUSION

Fat students are systematically denied access to fair and equal education due to widespread antifat discrimination, as manifested by peer rejection and taunting, teachers' inaction in the face of such taunting and teachers' own antifat comments, biased P.E. requirements, inaccessible

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<http://encarta.msn.com/encnet/Departments/Elementary/Default.aspx?article=WhatsNewinPE> (last visited Mar. 19, 2009).

268. *Id.*

269. *Id.*

270. Nintendo, Wii Fit Plus, What is Wii Fit Plus?: Activities, <http://wiifit.com/what-is-wii-fit-plus/activities.html> (last visited Apr. 25, 2010).

schools and classrooms, and the antifat biases of school staff members. As a result of such discrimination, many fat students suffer from low self-esteem and thus never reach their true academic or earning potential. When approximately 15 percent of America's children are fat, the possible political and economic repercussions of denying fat students access to fair and equal education are both real and severe.

Unfortunately, the current legal framework is of little use to fat students. There are no federal laws that specifically prohibit discrimination against fat individuals, and the very few state and local laws that expressly address fatness-based discrimination are so lacking in specificity and case law that it is hard to predict their usefulness or properly adjudicate them. Although some have suggested that fat individuals seek legal redress under current disability antidiscrimination laws, claiming that discrimination against fat students is "disability discrimination" is both problematic conceptually and unlikely to succeed in court.

Thus, new legislation that specifically prohibits fatness-based discrimination is needed as both a means of legal redress for fat students and a symbolic declaration against fatness-based discrimination. Legislation alone, however, is not enough to stop discrimination against fat students, as the adjudicative process is often very slow and it is uncertain whether the law can provide a sufficient remedy to fat students. Even worse, fatness-based discrimination itself could prevent such legislation from passing.

Combating discrimination against fat students thus requires a two-prong strategy: pressing for new federal legislation that protects fat students *while* implementing policies and programs at the school district-level aimed at ending fatness-based discrimination. School district-level measures could include increasing school and classroom accessibility, school staff training, tolerance programs for parents and students, and the revision of discriminatory P.E. programs. The dual prongs of this strategy complement each other as public awareness will spur legislation, and legislation (coupled with judicial decisions) will have both a symbolic and real effect on bettering fat students' educational opportunities. Although change will not occur overnight, by restoring access to fair and equal education for fat students, we can begin to remedy the long-term consequences of effectively denying education to 15 percent of America's youth as well as prevent future generations from having imprinted upon them the devastating and debilitating message that: "These scales tell us

that there is something wrong with you.”<sup>271</sup>

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271. JOHNSON, *supra* note 44, at 177.

