

Emerging issues in bullying and cyberbullying

By the New York State
Association of School Attorneys

About two years have passed since New York's legislation targeting bullying in public schools, the Dignity for All Students Act (the Dignity Act), took effect. In that time, several issues involving or implicating the Dignity Act have been addressed by the courts, the commissioner of education, and the U.S. Department of Education, including:

- **Adequacy of response.** The commissioner recently found a district's investigation of alleged bullying complied with the Dignity Act.

- **Money damages.** A recent Nassau County decision may open up a new avenue for parents to seek recovery of money damages from schools based on non-compliance with the Dignity Act.

- **Private school victims.** The same Nassau County court concluded that the Dignity Act can protect private school students who are the victims of bullying carried out by public school students.

- **Federal claims.** Peer-on-peer bullying and harassment can rise to the level of prohibited discrimination under federal laws such as Title IX, Title VI, the Americans with Disabilities Act, Section 504, and the Individuals with Disabilities Education Act.

- **Free speech.** Students accused of bullying may claim their actions were constitutionally protected speech, particularly where off-campus or online communication is involved.

The Dignity Act includes a host of obligations for public schools. It enables students and parents to make oral or written reports of bullying, harassment and discrimination to a teacher, administrator, or other designated school personnel. In addition, school employees who witness or receive an oral or written complaint of harassment, bullying, or discrimination must promptly notify the building principal or superintendent of schools (or his or her designee) orally within one school day and in writing within two school days. The principal, superintendent, or designee must then lead or supervise a thorough investigation of *all* reports of harassment, bullying, and discrimination and ensure that the investigation is completed promptly.

If the investigation verifies that harassment, bullying, or discrimination occurred, the school must take prompt actions to end the harassment, eliminate any hostile environment, create a more positive school culture, prevent recurrence of the behavior, and ensure the safety of the targeted student(s). Districts must have policies that prohibit retaliation against any individuals involved in reporting or investigating allegations. The principal, superintendent, or the superintendent's designee must also notify local law enforcement if he or she be-

lieves the conduct at issue constitutes a crime. In addition, districts must have updated policies, Codes of Con-

duct, school-wide strategies, and guidelines that implement and further the Dignity Act's objectives, including guidelines for appropriate responses to incidents of harassment, bullying and discrimination. This also includes education for students as well as staff training.

Below are summaries of some key legal rulings.

Adequacy of investigation

In a recently decided appeal to the commissioner of education, *Appeal of C.B.*, a parent claimed a district failed to properly investigate "horrible bullying" that her daughter experienced for two years. Finding no violation of the Dignity Act, the Commissioner noted that an investigation had taken place at both the school-level and the district-level, consisting of assembling documents, a conference with the parent and a social worker, an unsuccessful attempt to secure an interview of the victim student, interviewing the parent, interviewing school personnel, providing the parent with multiple opportunities to present relevant information and documents, creating a final report of findings, and providing a copy of the report to the parent. The Commissioner also noted that the parent's refusal to permit her child to be interviewed imposed a significant constraint on the district's investigation.

Money damages and private school students

In a decision rendered in May 2014, a court in Nassau County ruled in *J.G.S. v. Bellmore-Merrick Central High School District* that a private school student and her parent may pursue a lawsuit seeking damages from the public school district under the Dignity Act for incidents of bullying the student allegedly suffered due to actions of students attending public school in the district. Two district students allegedly circulated a video that showed an anonymous female engaged in a lewd act and falsely represented to the student body that the girl in the video was the plaintiff student. The student and parent alleged that they had unsuccessfully sought the assistance of the public school district in putting an end to the circulation of the video and the spread of rumors about the plaintiff student, and that the school district had failed to comply with its obligations under the Dignity Act.

In permitting the family's suit to go forward, the court addressed the question of whether the Dignity Act protects private school students who are the victims of bullying carried out by public school



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students, when the bullying is brought to the attention of the public school district. Despite a provision in the Dignity Act

stating that nothing in the law shall apply to private educational institutions, the court found that the district had an obligation under the Dignity Act to foster civility regardless of whether the targeted student attended the district.

Potential federal claims

School districts should be cognizant that, beyond the Dignity Act, other laws protecting students' civil rights and educational entitlements, such as Title IX, Title VI, the ADA, Section 504, and the IDEA, can be implicated by unaddressed – or inadequately addressed – incidents of bullying and cyberbullying. The U.S. Department of Education has issued several guidance documents and letters to school districts reminding them of this, the most recent of which was issued in late October 2014.

The potential consequences of inadequately addressing incidents of bullying are significant in light of decisions finding that peer-on-peer bullying and harassment can rise to the level of prohibited discrimination under federal law. For example, in *Zeno v. Pine Plains Central School District*, a student was awarded \$1 million in damages from a school district for race-based peer-on-peer bullying and harassment in violation of Title VI (which prohibits discrimination based on race, color, or national origin). The plaintiff in *Zeno* was a bi-racial student at the district's high school who was bullied and harassed for more than three years by other students, who threatened to lynch the plaintiff student, physically assaulted him several times and referred to him by a racial epithet almost every day. While the school had, at varying points, suspended most of the students involved in the conduct and taken other actions, such as contacting parents and conducting a training at the school, the court found that the school's response to the harassment was inadequate. It held, for example, that more than a year passed before the school considered non-disciplinary interventions to put an end to the bullying despite "many signals that greater, more directed action was needed."

Constitutional considerations

Students facing discipline at school for bullying and cyberbullying may claim that their First Amendment right to freedom of speech protects them from discipline, particularly if the speech occurred on social media and it occurred after school hours. The U.S. Supreme Court outlined the legal standard applied in determining whether a public school may

impose discipline for student speech in *Tinker v. Des Moines Independent Community School District* in 1969. The decision has since been consistently reaffirmed. As the Supreme Court has recognized, students do not shed their constitutional rights when they enter school. However, student speech that materially or substantially disrupts the discipline or operations of the school is not constitutionally protected and does not insulate a student from discipline. Thus, a student may be disciplined for speech that creates a foreseeable risk of substantial disruption to the work and discipline of the school. Courts have applied this standard in recent years in the context of students' use of social media in the educational setting and have upheld schools' decisions to discipline students where, for example:

- A student posted a vulgar and inaccurate message about the cancellation of a school event on an off-campus, independent, publicly accessible blog and called school officials "douche bags" while encouraging other students to email and "piss off" the superintendent.

- A student used an instant messaging icon for three weeks while messaging fifteen classmates which consisted of a drawing of a gun firing a bullet at a person's head and calling for the killing of the student's teacher.

- A student published inappropriate and derogatory statements about another student on the student's Facebook page outside of school and threatened to fight the student at school as a result.

- A student uploaded a photo of his substitute teacher to Instagram with the caption, purportedly as a joke, "I'm going to kill this bitch," which was viewed by a classmate who reported it to the school.

Local laws on cyberbullying

Notably, both Albany County and Suffolk County have passed local laws criminalizing cyberbullying of minors. Albany's local cyberbullying law was recently invalidated by New York State's highest court, the Court of Appeals, on constitutional grounds. Albany County recently enacted a new version of the cyberbullying law that has not yet been challenged. Suffolk County's cyberbullying law remains in effect. School administrators should be aware of such local laws because the Dignity Act requires school officials to notify local law enforcement when they believe that an act of bullying, harassment, or discrimination encountered at the school constitutes criminal conduct.



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