School Law Matters

July 2012

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

New "Cyberbullying" Law Modifies Dignity for All Students Act Beginning July 2013

Michael L. Dodd, Esq.

Governor Cuomo has signed a bill (S. 7740) to amend the Dignity for All Students Act (DASA). As explained in detail below, the law adds new definitions and new procedures for dealing with harassment and bullying, in general, and "cyberbullying," in particular. While the new law will not take effect until July 1, 2013, school districts and BOCES should be reviewing their existing policies and codes of conduct and planning for the changes that will need to be made to those documents next year.

Under the current law, DASA defines "harassment" as creation of a "hostile environment by conduct or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or conduct, verbal threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; such conduct, verbal threats, intimidation or abuse includes but is not limited to conduct, verbal threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex."

The new law retains the above definition but broadens it to include the concept of "bullying" and certain other types of prohibited on-campus and off-campus conduct. Specifically, the DASA amendment makes it clear that DASA's definition of "harassment and bullying" now includes off-campus harassment, bullying and cyberbullying, where it "creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property." It also clarifies that DASA's definition of "harassment and bullying" covers any threats, intimidation or abuse, even if **not** based upon a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. "Cyberbullying" is specifically defined in the new law to mean harassment or bullying, as defined above, "where such harassment or bullying occurs through any form of electronic communication."

The new law also imposes specific requirements for schools' anti-harassment and anti-bullying policies and procedures. As DASA currently reads, school districts must develop and implement policies intended to create a school environment that is free from discrimination or harassment. They are also required to establish guidelines to be used in school training programs to discourage the development of discrimination or harassment that are designed to: 1) raise the awareness and sensitivity of school employees to potential discrimination or harassment, and 2) enable employees to prevent and respond to discrimination or harassment. Finally, it mandates the creation of guidelines relating to the development of nondiscriminatory instructional and counseling methods, as well as, the appointment of a "Dignity Act Coordinator" at every school building who is thoroughly trained to handle human relations in these discriminatory and/or harassing situations.

The DASA amendment will also require each district to implement a procedure for students and parents to make complaints: 1) about harassment, bullying and cyberbullying, and 2) about discrimination based upon a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. The procedure must identify the principal, superintendent or the principal's or superintendent's designee as the school employee charged with receiving reports of harassment, bullying and discrimina-

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tion and enable students and parents to make an oral or written report of harassment, bullying or discrimination to teachers, administrators and other school personnel that the school district deems appropriate.

In addition, the new law will add the following requirements to each district's DASA-related policies and/or procedures:

- school employees who witness or receive complaints about harassment, bullying or protected-class discrimination must: a) make an oral report to a designated school official within one school day, and b) follow up with a written report within two school days;
- the principal, superintendent or the principal's or superintendent's designee must lead or supervise a thorough investigation of **all** reports of harassment, bullying and discrimination, and ensure that such investigations are completed promptly after receipt of any written reports;
- school officials must promptly and thoroughly investigate all complaints of harassment, bullying or protected class discrimination;
- school officials must take prompt and appropriate remedial action regarding verified complaints;
- a prohibition against retaliation against any individual who, in good faith, reports, or assists in the investigation of, harassment, bullying or discrimination;
- a school strategy to prevent harassment, bullying and discrimination;
- a requirement that the principal make a regular report on data and trends related to harassment, bullying and discrimination to the superintendent; and
- the principal, superintendent or their designee must promptly notify the appropriate local law enforcement agency when they "believe that any harassment, bullying or discrimination constitutes criminal conduct."

As noted above, these changes will need to be reflected in your district's applicable policies and code of conduct on or before July 1, 2013. If you have any questions or need assistance in reviewing or revising your existing policies and/or procedures, please feel free to contact us.

Student Health/Safety Issues

New Law on Student Concussions Now in Effect with New Obligations for Schools

As a result of growing concerns regarding the prevalence and severity of head injuries among children and adolescents, the New York State legislature passed the Concussion Management and Awareness Act, which took effect on July 1 of this year. After receiving significant public input on the proposed regulations, which were published in March, the Commissioner of Education promulgated final regulations in late June.

The new law and its attendant regulations impose a number of affirmative obligations on school districts. At the heart of this legislation is the requirement that a student who has sustained, or who is thought to have sustained a concussion must be removed from the activity he or she is participating in and must not resume any athletic activity, including recess or physical education, until he or she has been symptom free for at least 24 hours and has been evaluated by and received written authorization from a licensed physician. In the case of "extra-class athletic activities," including interscholastic sports, the student must receive final clearance from the school district's medical director. Moreover, all such authorizations must be kept on file in the student's permanent health record.

The Act also requires that all coaches, physical education teachers, school nurses and athletic trainers complete a course of instruction related to recognizing the symptoms of concussions, monitoring pupils who suffer such injuries and seeking proper medical treatment for them. This training must be completed every two years and must include the definition of a concussion, signs and symptoms of concussions, how such injuries occur, prevention practices, and guidelines for the return to school and school activities following a concussion. Courses addressing these topics will be provided online and through teleconferencing in order to facilitate access for personnel required to receive such education.

In addition to educating relevant school personnel, the new law requires that schools include information regarding the definition of a concussion, signs and symptoms of concussions, how such injuries occur, and guidelines for the return to school and school activities following a concussion in any permission or consent form required from a parent or guardian for a pupil's participation in school sports. Districts must also include this information on their websites or reference how to obtain it from the websites of the State Education Department and the Department of Health.

Finally, each district is authorized to establish a "concussion management team" to oversee compliance with the Act's requirements, and to establish and implement a program which provides information on concussions to parents and guardians throughout the school year. While forming a concus-

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Student Health/Safety Issues

New Law on Student Concussions Now in Effect (cont'd)

sion management team is completely discretionary, doing so helps to ensure that a district is meeting its obligations under the law and provides a forum for the discussion and dissemination of important concussion-related information.

It is important that each district establish a concussion management policy addressing the foregoing topics, as well as other concerns regarding how concussions are handled. In adopting such a policy, each district should strongly consider including strategies to reduce the risk of head injuries, procedure and treatment plans, protocols for return to activity, and plans for communicating with parents, guardians, and medical personnel in the event a student sustains a concussion.

In order to assist school districts in developing such policies, the State Education Department has issued guidance addressing some of these issues, available at www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/ConcussionManageGuidelines.pdf. Please note, however, that the needs and capabilities of each district are different and concussion policies will differ accordingly.

In the event that your district requires assistance in drafting or reviewing concussion policies and protocols, or parental consent/permission slips, please feel free to contact our office.

Teacher Discipline

Court Affirms Counseling Memo to Teacher Does Not Preclude Disciplinary Action

Many school districts have found non-disciplinary counseling memoranda (or "*Holt* letters") to be an effective tool for addressing employee performance issues. A recent New York appellate court decision makes it clear that the use of such counseling memoranda will not undermine the authority of boards of education to subsequently bring Education Law Section 3020-a disciplinary charges, even where the charges focus on conduct addressed in a prior *Holt* letter. *See Board of Education of Dundee Central School District (Coleman)*, 2012 Westlaw 2164161, 2012 N.Y. Slip Op. 04849 (4th Dept. 2012), However, careful attention must be paid to the drafting of these letters to avoid claims that the right to discipline has been waived or otherwise compromised.

In its landmark 1981 decision, *Holt v. Board of Ed. of Webutuck Central School District*, the New York Court of Appeals ruled that Section 3020–a of the Education Law did not require a disciplinary hearing before a school district could place a counseling memorandum critical of a teacher's job performance in the teacher's personnel file. In doing so the Court of Appeals held that non-disciplinary counseling memoranda "amount to nothing more than administrative evaluations which the supervisory personnel of the school district have the right and the duty to make as an adjunct to their responsibility to supervise the faculty of the schools."

New York's Appellate Division Fourth Department, in *Board of Education of Dundee Central School District (Coleman)*, relied on the *Holt* decision when it reinstated Section 3020-a disciplinary charges that had been dismissed by a hearing officer. In this case, a teacher made a motion during a Section 3020-a disciplinary hearing to dismiss several disciplinary charges that had previously been the subject of counseling memoranda given to him by District officials. The hearing officer granted the motion and dismissed the charges, holding that by issuing the prior memoranda the district had, in effect, decided that the conduct addressed did not warrant discipline. Finding that the hearing officer's decision was "irrational, arbitrary and capricious," the Appellate Division held that under the clear language of *Holt* and subsequent court decisions, conduct addressed in a non-disciplinary counseling memorandum may be used to support formal disciplinary charges at a later date, subject to statutory limitations periods.

This illustrates that school officials must carefully draft *Holt* letters to avoid even the appearance that the letter is either intended as formal disciplinary action (i.e., a formal reprimand) or that the letter was issued in lieu of later discipline. The letter should affirmatively state in some fashion that the counseling memorandum should not be construed as a formal accusation, charge, or formal disciplinary action. At the same time, it should make it clear to the recipient that it is not intended to rule out formal disciplinary action in the future for the particular incident addressed in the letter.

If you have any questions regarding the foregoing or need assistance drafting *Holt* letters, please feel free to contact us.

SCHOOL LAW MATTERS is published by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Protecting District Revenue

Protect Your District's Revenue, Be on the Lookout for Tax Cert Petitions

With enormous State deficits looming ahead, school districts must actively protect their local revenue sources. Remember that you have two primary sources of in-State revenue: State Aid from Albany and real property tax payments received from the school district residents and commercial businesses. The amount of property tax assessed is often subjected to taxpayer challenge. In order to protect this revenue source in the face of such challenges, it is critical for school officials to understand some basic principles associated with these matters.

In these challenges, known as "tax certiorari proceedings", a taxpayer seeks to lower (or eliminate) its real property assessment. If the taxpayer is successful, the school district must refund tax payments from the start of the proceeding (an expense) and suffer the loss of its assessment base (a revenue reduction) in future years. Examples of typical tax certiorari proceedings involve banks, hotels, retail stores, malls, and industrial properties, and it is not unusual for school district exposure in any of these proceedings to range from tens of thousands of dollars up to millions of dollars of tax revenue in a single tax year.

If the school district, through its school attorney, joins into the proceeding, it becomes a party and the proceeding cannot be settled without the school district's consent. With the school district present in the proceeding, some tax certiorari proceedings can be dismissed outright while others can be successfully defended. For those cases where a reduction in the challenged assessment is appropriate, active defense by the school district can keep the amount of reduction and reimbursement within reasonable limits and structure any reimbursement over a manageable time frame. The school district's representation in the proceeding ensures that its interests are protected at the settlement table.

Too often, School Districts will allow a Town or other municipality to defend, negotiate and settle these cases, without having a "seat at the table." This can be a costly mistake.

Be on the lookout! Districts should be receiving tax certiorari petitions in July and August. We recommend that Districts set up procedures to carefully evaluate these tax cert cases, utilizing the expertise of their business officials and their school attorneys. The goal of this process should be to decide on a case-by-case basis whether it makes financial sense for the District to "intervene" or join the tax cert proceeding to assist in its defense.

If you have any questions regarding tax certiorari proceedings, please do not hesitate to contact us at 315-437-7600.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Joseph Bufano	**8/6/12**	**Client In-service program on *Dignity for All Student Acts***
Joseph Bufano	**8/23/12**	**Client In-service program on *Dignity for All Student Acts***
Michael Dodd	**8/29/12**	**Client In-service program on *Dignity for All Student Acts***
Marc Reitz	**9/2/12**	**Client In-service program on *Legal Updates***
Joseph Bufano	**9/4/12**	**Client In-service program on *Dignity for All Student Acts***
Michael Dodd	**9/5/12**	**Client In-service program on *Harassment of Students and Employees***
Donald Budmen **Joseph Bufano**	**9/23/12**	NYSCOSS - Fall Leadership Summit presentation *"In Truth, We Never Ignored Bullying! **So,** What's Up DASA?"* - Saratoga Hilton, Saratoga Springs, New York
Henry Sobota	9/24/12	NYSCOSS - Fall Leadership Summit presentation "*Hot Topics in Labor and Personnel Confronting Superintendents* in the *Fall of 2012"* - Saratoga Hilton, Saratoga Springs, New York

******SAVE THE DATE******

The Firm's attorneys will be participating in the 36th Annual Education Law Conference presented by the Study Council at Syracuse University on August 28, 2012 at the DoubleTree Hotel in Syracuse. As it has in years past, this conference will help prepare board members and school administrators/personnel to stay ahead of current legal developments relevant to public schools. For more information, feel free to contact our office at 315-437-7600 or the Study Council directly at 315-443-4696.

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.