



HARRIS BEACH ^{PLLC}
ATTORNEYS AT LAW

Avoiding Court Rooms and Headlines: Strategies to Protect Your District from Legal Challenges Regarding Bullying and DASA

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ELECTRONIC AND CYBER-BULLYING/STALKING





Social Media

“The Other Side of Being Social”



Why is Social Media so Critical?

Social Media now dominates all online activities

Online interaction has replaced many others:

- TV
- Reading
- Face to Face socializing
- Phone conversations

Social Media Threats are Real



CYBERBULLYING-"Unabated"

- 56% of 14-24 year olds report being targets of online bullying, taunting or harassment
- Up 55% since 2009
- 25% Victimization for Middle and High School Students
- Offensive Names (Slut, Retard, Fag)-Racial Slurs
- Special Needs Children-16% more likely to be victims
- Free Lunch-Lower Economic Classes-13% more likely to be victims
- Teachers and Staff-20%-The Most Under Reported



SOCIAL MEDIA-How Many?

- **Facebook**
- **Twitter**
- **MySpace**
- **LinkedIn**
- **Foursquare**
- **Bebo**
- **BlackPlanet**
- **Classmates.com**
- **Google**
- **MyLife**
- **Tumblr**
- **Craigslist**
- **Pinterest**
- **Keeks**
- **Vines**
- **Snapchat**





Cyber Stalker-Bully-Online Predator?



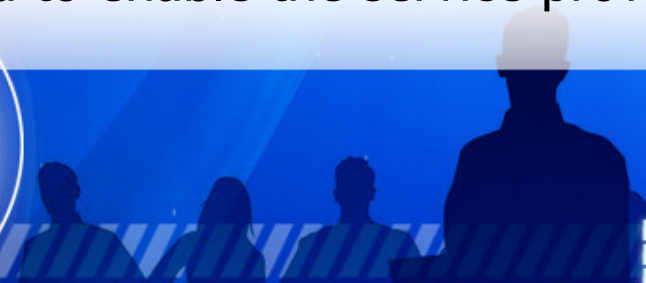
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POLICIES And PROCEDURES



Policies and Procedures

- **Zero Tolerance**
- Investigating **ALL** Incidents
- **ALL** bullying incidents should be properly recorded and investigated.
- Criminal laws that can apply in terms of harassment or threatening and menacing communications.
- Advise pupils and staff to try and keep a record of the bullying as evidence.
- Take steps to identify the bully, including looking at the school systems, identifying and interviewing possible witnesses, and contacting the service provider and the police, if necessary. The police will need to be involved to enable the service provider to look into the data of another user.



In the News...

“Family Sues School District Over Alleged Bullying Of Jewish Boy”

(August 8, 2013)

“Teen Sues School District for \$2 Million Over Alleged Bullying”

(August 7, 2013)

“Carmel teacher bullied boy, 7, parents say in lawsuit”

(July 24, 2013)

“Student sues two school districts for allegedly failing to stop bullying”

(March 18, 2013)

“Iowa teen sues school district, saying he was bullied, severely injured in student attack”

(April 1, 2013)



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To Comply with the Law, you must be familiar with the Law...

- Dignity for All Students Act (“DASA”)
 - New York State Legislature’s attempt to address bullying.
 - Signed into law by Governor Paterson in September 2010; effective July 1, 2012.
 - Governor Cuomo’s Program Bill #43 proposed amendments, which were passed on June 18, 2012, effective July 1, 2013.
- “The purpose of this article is to foster civility in public schools and to prevent and prohibit conduct which is inconsistent with a school's educational mission.” *[Education Law § 10]*

DASA - Important Definitions

- “School Property”
- “School Function”
- “Employee”
- “Sexual Orientation”
- “Gender”
- “Harassment”*
 - ▣ **Definition revised as of July 1, 2013 to “harassment and bullying”*

[Education Law § 11]

DASA - Important Definitions (effective July 1, 2013)

- “Harassment” and “Bullying”: Creating a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that:
 - a. 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
 - b. Reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or
 - c. Reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or...

[Education Law § 11(7)]



DASA - Important Definitions (effective July 1, 2013) (Cont' d.)

- *“Harassment” and “Bullying”*: (Cont' d.)
 - d. Occurs off school property and 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.

Acts of harassment and bullying shall include, but not be limited to, those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. For the purposes of this definition the term “threats, intimidation or abuse” shall include verbal and non-verbal actions.

[Education Law § 11(7)]

DASA - Important Definitions (effective July 1, 2013) (Cont' d.)

- “Cyberbullying”: “Harassment or bullying as defined above, including paragraphs (a), (b), (c) and (d), where such harassment or bullying occurs through any form of electronic communication.”

[Education Law § 11(8)]



DASA - Significant Amendments Effective July 1, 2013

- Revisions to the definition of “harassment” → “harassment and bullying”
- Addition of “cyberbullying”
- Reporting Requirements
- Notification of Law Enforcement
- Certification Requirements
- Curriculum

Reporting Requirements

- Students and parents may make oral or written reports to teachers, administrators or other school personnel.
 - **Bullying Reporting Forms, Bully Box, Online reports**
- School personnel who witness or receive a report of harassment, bullying or discrimination **must promptly orally notify the Principal, Superintendent or designee within one school day**, and **must file a written report within two school days**.
- Principals must report data trends to the Superintendent.
- Commissioner shall create procedure to report to SED – Part 2 of VADIR report.

[Education Law § 13, 15]

Notification of Law Enforcement



- DASA requires the principal, superintendent or the principal's or superintendent's designee to notify promptly the appropriate local law enforcement when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

[Education Law § 13]



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NEW Requirements for Professional Certification

- School Professionals (including teachers, school counselors, school psychologists, school social workers, school administrators or supervisors or superintendents) who apply for a certificate or license after December 31, 2013 will be required to complete training on the social patterns of harassment, bullying and discrimination including, but not limited to:
 - Those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, disability, sexual orientation, gender, or sex;
 - The identification and mitigation of harassment, bullying and discrimination; and
 - Strategies for effectively addressing problems of exclusion, bias and aggression in educational settings.

[Education Law § 14]

Curriculum

- “Instruction in grades kindergarten through twelve shall include a component on civility, citizenship and character education. Such component shall instruct students on the principles of honesty, tolerance, personal responsibility, respect for others, with **an emphasis on discouraging acts of harassment, bullying, discrimination**, observance of laws and rules, courtesy, dignity and other traits which will enhance the quality of their experiences in, and contributions to, the community. **Such component shall include instruction of safe, responsible use of the internet and electronic communications...**”

[Education Law § 801-a]

Case Study #1

- Female student, “Susie”, received highly offensive emails (within one week) on her school email account from another student, “Max”
- Susie printed out the emails and gave them to her guidance counselor.
- Emails were profane and sexually suggestive.



Case Study #1 (Cont' d.)

- The emails said:
 - “FATTY FATTYFATTYFATTYFATTY fatty mcfatfat wow you are one fat fuck and everyone hates you”;
 - “show me your tits”; and
 - “you you [*sic.*] fat fuck I want to have sex with you in the middle of hte [*sic.*] night. I will grab your tits and suck thm [*sic.*] all while feeling you up in the vagina.”
- **What would you do?**

Case Study #1 (Cont' d.)

- The Assistant Principal discussed the emails with Susie and her mother.
- Assistant Principal and Principal questioned Max. He denied sending the emails, but said he had given his password to two or three other students and they must have sent the emails.
- Other students were questioned (without mentioning Max's name) and they denied ever having obtained another student's password.
- District could not prove Max sent the emails, but it disabled his account because he shared his password with others.

Case Study #1 (Cont' d.)

- Assistant Principal discussed the emails with Max's mother, guidance counselors for both students, and SRO's.
- Assistant Principal observed Susie and he believed she was functioning normally, she did not indicate fear of coming to school.
- Assistant Principal spoke with Susie's parents on 15-25 occasions regarding the investigation. Parents were upset that the District could not determine who sent the emails and claimed that Susie was not safe.
- Susie's mother also complained to the Principal who offered for the Assistant Principal to monitor Susie and Max anytime they were likely to be together and stated that they would not be in any classes together the following year.
- **Were the District's actions reasonable?**

Case Study #1

The Lawsuit and Decision

- Susie and her parents filed a lawsuit alleging that the emails constituted sexual harassment for which the Board and District was liable under Title IX and the individual defendants (Superintendent, Principal, Assistant Principal and Technology Director) were liable under the 14th Amendment and Section 1983.
- District moved for summary judgment.
- The Court determined there was insufficient evidence that the harassment was so **severe and pervasive** that it denied access to educational resources, it was “well short of the kind of harassment found actionable under Title IX.”



Case Study #1

What Went Right?

- Susie maintained an excellent academic record, made the high honor roll, had normal attendance, and continued on the softball team.
- “Only” three emails within approximately one week.
- Thorough investigation and cooperation among District employees.
- Communication with parents.

Case Study #1

Different Result under DASA?

- “Cyberbullying” *[Slide 16]*
- “Harassment or bullying” *[Slides 14-15]*
 - a. 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
 - b. Reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or
 - c. Reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or
 - d. Occurs off school property and 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.



DASA “To-Do” List for 2013-2014

- Update Codes of Conduct
- Update Board Policies and Board Regulations
- Reporting Requirements – Awareness and Enforcement
- Dignity Act Coordinators
- Employee Training
- Incorporate into Curriculum

Case Study #2

- Anthony, a half-White, half-Latino student transfers to the District during his freshman year of high school.
- Within the first few weeks of his transfer, Anthony was subjected to threats and remarks related to his race/color from other students.
- Anthony reported numerous incidents to school administration and his mother also contacted the school principal, the Superintendent and the school board.
- **What would you do?**

Case Study #2

Freshman Year

- Anthony's mother reported the first incident to the Principal. The Principal responded "this is a small town and you don't want to start burning your bridges."
- The District warned and/or suspended the students involved in the incidents during the year.
- **Were the District's actions reasonable?**

Case Study #2

Sophomore Year

- Anthony was subjected to further harassment and obtained an Order of Protection on two occasions.
- Anthony and his mother continued to make reports to teachers, the Principal and the Superintendent.
- The family's lawyer and members of the community including the Dutchess County Human Rights Commission and the Dutchess County NAACP contacted the District. They requested that Anthony be provided with a "shadow" to accompany him at school and that the District implement racial sensitivity programs, which they offered to provide at no cost.
- **What would you do?**

Case Study #2

Sophomore Year (Cont' d.)

- The District declined to assign a shadow, but eventually held a one-day program focused on bullying and sexual harassment.
- The District addressed the individual incidents, warned students, suspended them (usually for five days) and transferred at least one student to another school.
- The District coordinated *mediation* between the students involved and their parents.
- The Principal met with Anthony's teachers and asked staff to keep an eye on Anthony and to reach out to him.
- In addition, the District prepared an IEP which noted, "Anthony has been struggling with acceptance in the school environment. There have been numerous incidents between Anthony and others with prejudicial or racial overtones."
- **Were the District's actions reasonable?**

Case Study #2

Junior Year

- While Anthony's reports were less frequent, the harassment continued and Anthony was punished after he threw a punch at another student who threatened to "kick Anthony's black ass" and repeatedly threatened to rape Anthony's sister.
- His mother contacted the Superintendent to discuss a solution.
- **What would you do?**

Case Study #2

Junior Year (Cont' d.)

- The Superintendent did not call his mother back, but sent her a letter a few days later.
- The District hired a consultant who planned to conduct student focus groups, administer surveys and meet with staff, parents, and community members to increase diversity awareness. The consultant was also going to provide training.
- The District reorganized STOP (“Students and Teachers Opposed to Prejudice”), a student extracurricular activity that had been defunded.
- **Were the District’s actions reasonable?**

Case Study #2

Senior Year

- Name-calling and harassment continued.
- Anthony reported fewer incidents, but the incidents that occurred were serious.
- Anthony was involved in a fight at a football game which had to be broken up by off-duty police officers.
- **What would you do?**

Case Study #2

Senior Year (Cont' d.)

- The consultant offered sensitivity training.
- The District instituted “Project Wisdom”, which consisted of reading daily messages over the PA system, some of which related to racism and prejudice.
- The District offered two student assemblies addressing character education including bullying, prejudice, decision-making, racism and racial harassment.
- **Were the District's actions reasonable?**
- **Anthony's Diploma.*

Case Study #2

The Lawsuit and Decision

Lawsuit filed alleging a violation of:

- Title VI – District was deliberately indifferent to student harassment (*Davis*).
 - Anthony was subjected to severe, pervasive and objectively offensive harassment – caused him to leave without completing his education.
 - District had knowledge and control.
 - District's responses were insufficient.
- \$1,000,000 damages

Case Study #2

What Went Wrong?

- Discipline was not effective.
 - Incidents became more severe.
 - Number of reports declined – but why?
- Non-disciplinary remedial action was delayed and “half-hearted”.
 - Programs not related to or directed at race discrimination.
 - Programs were optional or self-selecting.
 - Did not inform his mother about mediation.
 - Mediator untrained in relevant topics.
- District ignored signals that greater, more direct action was needed.



Case Study #2

Result under DASA?

- “Cyberbullying” *[Slide 16]*
- “Harassment or bullying” *[Slides 14-15]*
 - a. 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
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 - d. Occurs off school property and 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.



DASA Penalties

- DASA does not describe any penalties for non-compliance or enforcement mechanism.
- DASA does not contain any criminal penalties.
- DASA will likely be cited by Plaintiffs' attorneys as a basis for civil liability, but it is unclear whether the courts will infer a private cause of action or impose penalties or damages for a violation.
- Cases/Opinions In New York that cite DASA are limited in number (only 5) and generally not substantive.

Cases Citing DASA

***North Syracuse Cent. School Dist. v. New York State Division of Human Rights*, 19 N.Y.3d 481 (2012)**

- In determining that the New York State Division of Human Rights does *not* have jurisdiction over public schools, the Court of Appeals relied, in part, on a letter from the State Division of Human Rights which praised the enactment of DASA but failed to indicate that the SDHR had previously handled similar claims of that nature arising in public schools.



Cases Citing DASA

T.K. v. New York City Dept. of Educ., 779 F. Supp.2d 289 (E.D.N.Y. 2011)

- The Eastern District, in assessing a summary judgment motion in a case regarding bullying of a student with a disability, provided a detailed discussion of “Bullying in America”, which included a reference to “Increased State Efforts to Address Bullying” and discussed the enactment of DASA. There was no discussion as to the impact, if any, that DASA would have after its effective date, but merely noted that States were addressing bullying.



Cases Citing DASA

S.C. v. Monroe Woodbury Cent. School Dist., 2012 WL 2940020 (S.D.N.Y. 2012)

- The Southern District briefly discussed DASA in a footnote, explaining that “whatever its effect on the contours of a property interest in public education in New York”, DASA would not impact this case because the case arose and was filed before July 1, 2012. The Court also refused to apply DASA retroactively, “I have found no law, either explicitly or by necessary implication, directing me to apply this law retroactively.”



Appeals to the Commissioner of Education: Citing DASA

Appeal of CM, Decision No. 16,439 (December 24, 2012)

■ In this appeal involving the imposition of student discipline, the Commissioner advised the respondent board of education “to take steps to intervene and protect its students from being subjected to harassment, bullying and discrimination” and included a footnote which stated “I note that, effective July 1, 2012, boards of education must comply with the provisions of Article 2 of the Education Law (Dignity for All Students Act) and, effective July 1, 2013, the amendments thereto (Chapter 102 of the Laws of 2012).”



Appeals to the Commissioner of Education: Citing DASA

Appeal of JA, Decision No. 16,542 (August 30, 2013)

- The appeal claimed, in part, that the District failed to properly investigate DASA complaints. The Commissioner dismissed the claims as moot because the student graduated. He also noted that DASA only protects students, not parents. There was no substantive discussion of whether the Commissioner can/will decide if school districts appropriately investigate DASA complaints and, if so, what the remedy may be.



Potential Legal Claims

- Federal Statutes

- Title VI
- Title IX
- Section 504
- Americans with Disabilities Act
- Due Process/Equal Protection Claims
- Section 1983 - as a vehicle to bring other claims

- State Statutes

- Civil Suits
- New York State Human Rights Law (prior to June 2012)
- New York State Penal Law
 - ❖ Harassment/Aggravated Harassment, Hazing, Menacing, Stalking
 - ❖ Assault/Aggravated Assault



Potential Legal Claims (Cont' d.)

■ Tort Claims

- Negligence, Negligent supervision, Intentional infliction of emotional distress, Negligent infliction of emotional distress.

■ Local Laws

- Some local municipalities, including Erie County and Niagara County, are also attempting to address bullying matters.
 - ❖ Define “cyberbullying”.
 - ❖ Provide a potential penalty of “a fine of up to \$1,000 and/or up to one year imprisonment.”
 - ❖ The law is geared toward minors who are under 18 years old and cases would be handled in family court.

Guidance from the Department of Education

- On August 20, 2013, the US Department of Education's Office of Special Education and Rehabilitative Services issued a Dear Colleague Letter regarding bullying of students with disabilities.
- Significantly, the Dear Colleague Letter states, *“Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.”*

Settlements and Verdicts

- Even prior to DASA's implementation, lawsuits in New York State and across the nation targeted school districts for allowing students to be bullied.
- Schools have been hit with **large settlements or jury verdicts** in bullying cases.
- School administrators have been named personally as defendants in bullying lawsuits.



Standards for Liability

- What legal standards will be considered?
 - *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999): “**deliberate indifference**”.
 - October 2010 *Dear Colleague Letter* from OCR and December 2010 *Response to OCR’s Dear Colleague Letter* from National School Boards Association: “**knows or reasonably should have known**”.

How to Avoid the Courtroom and Headlines. . .

Districts that do not follow their own policies

- Could be deemed to have failed to perform a duty enjoined upon it by law, determination made in violation of lawful procedure or was “arbitrary and capricious” as well as torts of negligence or intentional acts.

STRATEGIES:

- Review/Update Policies – include only what the law requires.
- Employees must know the policy so they can comply.
 - Ensure the District has distributed copies/made them available online, conducted trainings for employees.
 - Training is required by DASA → Incorporate policies/training into regular school year (more than a one-time presentation).



How to Avoid the Courtroom and Headlines. . .

Districts that are inconsistent

- Inconsistencies will inevitably be interpreted as having a discriminatory motive.
- Due to DASA's drastic expansion of protected categories, ***all*** students fall within one or more categories.
- Beyond DASA, other laws prohibit discriminatory behaviors (and provide penalties/remedies).

STRATEGIES:

- Take time to compare current situations to past situations before a decision is made.
- If there is a reason for inconsistency, explain it (in writing).



How to Avoid the Courtroom and Headlines. . .

Districts that do not address complaints

- Judgment calls will be necessary as administrators balance all responsibilities and determine which complaints can be handled quickly and those that warrant a full investigation.

STRATEGIES:

- Consider why you are choosing a particular course of action (or temporary non-action) so you can justify it if something does happen.
 - Has this student been involved in similar matters before?
 - Threat/fear of bodily harm?
- Do ***SOMETHING, ANYTHING*** and ***DOCUMENT*** your actions.
 - Another administrator/teacher who can temporarily address the matter until you are available?
 - Can you contact the parents of the student(s) involved?
- Follow-up to confirm that your efforts were effective.
 - Are disciplinary responses enough?

How to Avoid the Courtroom and Headlines. . .

Districts that Retaliate

- Districts must be sure to take steps to prevent retaliation against the reporting individual *and* individuals who participate in the investigation.
- Similar to harassment/discrimination claims in the employment context, even if the underlying complaint is unfounded, a retaliation complaint can still be successful.

STRATEGIES:

- Enact/Update Policies about retaliation – and *enforce* them.
- Educate appropriate individuals regarding retaliation.
- Confirm awareness verbally and in writing.

Final Thoughts

- Avoiding lawsuits v. “the right thing to do”.
- Sharing/Division of responsibilities – staff members, administrators and Dignity Act Coordinators.
- Proactive measures – impact on the school culture.
- Non-Disciplinary responses – be creative and think outside the box.
- Set an example for students – and for each other.
- Communication is key!



Thank you!

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