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Memorandum

To: M.A.S.S.

From: Long & DiPietro LLP

Date: May 7, 2010

Re: Legal Update: Bullying Legislation

Summary:

These materials discuss the recent bullying legislation, which was signed by Governor Patrick on May 3, 2010.

The law greatly expands the school district's obligations in terms of monitoring, reporting and investigation all acts of bullying. In addition, the legislation has an educational component for all staff (not just educational staff) and curriculum for all students in grades K-12.

This new law applies to public and private schools, including approved private day or residential schools, charter schools, collaborative schools. All schools are required to establish a bullying prevention and intervention plan, with the criteria enumerated below, by December 31, 2010, which must be submitted to the Department of Elementary and Secondary Education ("DESE").

The legislation contains several key components:

(1) professional development plan for all staff;
(2) establishment of bullying intervention and prevention plan;
(3) curriculum on bullying for all school age children, grades K-12;
(4) reporting requirements for all staff who witness or are aware of any incident of bullying;
(5) investigation and disciplinary policies for acts of bullying; and

(6) notification of law enforcement when criminal charges may be appropriate.

The legislation broadly defines bullying both on and off school grounds. For example, bullying is prohibited at "at a location, activity, function or program that is not school related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school."

Therefore, the legislation appears to require the school to investigate instances of alleged instances of bullying that may occur off school grounds if there is a nexus between the conduct and a hostile environment at school or the alleged conduct disrupts the "educational process"at school.

Discussion:

This discussion is intended as an overview of comprehensive legislation and we recommend that each school district review the entire legislation, Senate Bill 2404 which is attached to this legal update.

A. Key Definitions

The legislation contains a broad definition of bullying and cyberbullying which seeks to address the many different forms which bullying may take.

Bullying is defined as:

> the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. (emphasis added)

Cyberbullying is defined as:

> [B]ullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyberbullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of

another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyberbullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

B. Scope of Definition of Bullying

The legislation contains a broad behavior prohibition which address on and off school grounds. Specifically, the legislation states:

> Bullying shall be prohibited: (i) on school grounds, property immediately adjacent to school grounds, at a school sponsored or school related activity, function or program whether on or off school grounds, at a school bus stop, on a school bus or other vehicle owned, leased or used by a school district or school, or through the use of technology or an electronic device owned, leased or used by a school district or school and (ii) at a location, activity, function or program that is not school related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.

C. Educational Requirements

The legislation requires every school district to implement a curriculum that addresses bullying prevention for age appropriate instruction, Kindergarten to grade 12. The Department of Education is required to develop statewide academic standards by June 30, 2011.

D. Bullying Prevention Plan Criteria

Every school district must establish by December 31, 2010 a plan to address bullying prevention and intervention, which should be filed with the Department of Elementary and Secondary Education ("DESE). The plan must include the following elements:

> (i) description of and statements prohibiting bullying, cyberbullying and retaliation;
>
> (ii) clear procedures for students, staff, parents, guardians and others to report bullying or retaliation;

(iii) a provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report;

(iv) **clear procedures for promptly responding to and investigating reports of bullying or retaliation**;

(v) **the range of disciplinary actions that may be taken against a perpetrator for bullying or retaliation**; provided, however, that the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior;

(vi) clear procedures for restoring a sense of safety for a victim and assessing that victim's needs for protection;

(vii) strategies for protecting from bullying or retaliation a person who reports bullying, provides information during an investigation of bullying or witnesses or has reliable information about an act of bullying;

(viii) procedures consistent with state and federal law for promptly notifying the parents or guardians of a victim and a perpetrator; including notifying the parents or guardians of a victim of the action taken to prevent any further acts of bullying or retaliation; and provided, further, that the procedures shall provide for immediate notification pursuant to regulations[1] promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the perpetrator;

(ix) a **provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action**; and

(x) a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students.

The DESE is required to publish a model plan for school district's to consider when creating their plans. The legislation does not contain a timeframe for the issuance of a "model plan." We are attaching a sample policy which should be carefully reviewed, modified and amended to fit each district. Keep in mind that DESE will ultimately be responsible for a draft policy. FOLLOW THE DESE POLICY.

School districts must update both their policies and their student handbook to incorporate the relevant sections of the bullying prevention and intervention plan.

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[1] Regulations have not been promulgated yet concerning when instances of bullying need to be reported to law enforcement.

E. Professional Development

Every school is required to develop an ongoing professional development plan for the 2010-2011 academic school year for all the school's educational and non-educational staff, including but not limited to educators, administrators, cafeteria workers, custodians, bus drivers, coaches, advisors to extracurricular activities and paraprofessionals.

The professional development curriculum shall include:

(i) developmentally appropriate strategies to prevent bullying incidents;

(ii) developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents;

(iii) information regarding the complex interaction and power differential that can take place between and among a perpetrator, victim and witnesses to the bullying;

(iv) research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment;

(v) information on the incidence and nature of cyberbullying;

(vi) internet safety issues as they relate to cyberbullying.

The DESE is required to provide information on alternative methods for fulfilling the professional development requirements, which include at least one option that is available at no cost to the school.[2]

F. Reporting Requirements

The law imposes mandatory reporting requirements on all members of the school staff, not all teaching staff, to immediately report any instance of bullying or retaliation the staff member has either witnessed or become aware of, to the principal or school designee. Staff shall immediately report any instance of bullying or retaliation the staff member has witnessed or become aware of to the principal or to the school official identified in the plan as responsible for receiving such reports or both.

[2] The DESE must submit a report on implementing cost effective professional development requirements by August 31, 2010.

G. Investigation by Principal

The school principal or designee is required to conduct a prompt investigation of every report of bullying, cyberbullying or retaliation for reporting an incident of bullying.

The bullying prevention plan criteria, clause viii, outlines the principal's duties if he or she determines that bullying or retaliation has occurred. The duties include:

1) taking appropriate disciplinary action;
2) notifying the parents of both the victim and perpetrator of the incident;
3) notifying the parents of the victim(s) of actions taken to prevent further acts of bullying/retaliation; and
4) when appropriate, notifying law enforcement if the principal/designee believes criminal charges may be pursued.

The DESE is required to promulgate regulations on principal's duties by September 30, 2010.

H. Other Areas Addressed by the Legislation

Internet Use

Every public school providing computer access shall have a policy regarding internet safety measures to protect students from inappropriate subject matter and shall notify all students and parents of the policy. We are working a new AUP which will incorporate references to the new cyberbullying statute.

Special Education

If an Independent Education Program ("IEP") indicates that a child has a disability which affects "social skills development" or the child is "vulnerable to bullying, harassment or teasing because of the child's disability" the IEP shall address the skills/proficiencies needed to avoid and respond to these issues.

Conclusion

In the wake of the tragic incidents in South Hadley and Springfield, this legislation seeks to address some of these issues and holds all school administrators to a significantly higher standard. The new bullying legislation greatly increases the school district's reporting and investigative responsibilities, in addition to the educational requirements.

In the most recent court case addressing bullying in Massachusetts that we are aware of, a Massachusetts Superior court judge dismissed a parent's claim that the School District failed to act and prevent harassment and bullying of their son by other students. In Nicholas v. Town of Tewksbury, the court dismissed all the claims, including negligence, intentional infliction of emotional distress and the civil rights claim alleging a violation of the State Constitution.

The Nicholas case appears to be of limited vitality, in light of the recent legislation, in determining a school district's potential liability. In our opinion, based on the new legislation, it would appear that a school district may be liable if a victim establishes that the school district had notice of a claim of bullying and failed to investigate or in the alternative, failed to adhere to or enforce its bullying prevention plan. While the legislation does not specifically establish a cause of action for not adhering to a bullying prevention plan, it appears that the scope of potential liability is expanded, subject to any applicable defenses under the Massachusetts Tort Claims Act.

_____ PUBLIC SCHOOLS

SEXUAL HARASSMENT , BULLYING & HAZING POLICY

I. Policy

A. It is the policy of the _____ Public Schools to provide a learning and working atmosphere for students, employees and visitors free from sexual harassment, bullying, hazing, and intimidation. These terms are referenced herein as "harassment". Such action may occur on the basis of race, color, religion, national origin, age, gender, sexual orientation or disability, or for any other reason.

B. It is a violation of this policy for any administrator, teacher or other employee, or any student to engage in or condone harassment in school or to fail to report or otherwise take reasonable corrective measures when they become aware of an incident of harassment.

C. This policy is not designed or intended to limit the school's authority to take disciplinary action or take remedial action when such harassment occurs out of school but has a nexus to school, or is disruptive to an employee's or student's work or participation in school related activities.

Reports of cyber bullying by electronic or other means, occurring in or out of school will be reviewed and, when a nexus to work or school exists, will result in discipline. Parents of students alleged to have engaged in cyber harassment will be invited to attend a meeting at which the activity, words or images subject to the complaint will be reviewed. A student disciplined for cyberbullying will not be re-admitted to the regular school program until his or her parent(s) attend such meeting.

D. It is the responsibility of every employee, student and parent to recognize acts of harassment and take every action necessary to ensure that the applicable policies and procedures of this school district are implemented.

E. Any employee or student who believes that he or she has been subjected to harassment has the right to file a complaint and to receive prompt and appropriate handling of the complaint. Further, all reasonable efforts shall be made to maintain the confidentiality and protect the privacy of all parties, but proper enforcement of this policy may require disclosure of any or all information received.

F. The Building Principal/Designee shall be responsible for assisting employees and students seeking guidance or support in addressing matters relating to any form of

harassment.

II. Procedures

A. Definitions – Sexual Harassment Prohibited

"Sexual Harassment" means unwelcome sexual advances, requests for sexual favors, and other inappropriate verbal, written, electronically transmitted, or physical conduct of a sexual nature, including but not limited to unwelcome comments, touching, written notes, pictures/cartoons or other inappropriate conduct, such as leering, whistling, brushing up against the body, commenting on sexual activity or body parts or other activity referred to by the Model MCAD policy prohibiting such behavior. Harassment has the effect of creating an intimidating, hostile, or offensive work or learning environment that takes place under any of the following circumstances:

1. When submission to such conduct is made, explicitly or implicitly, a term or condition of employment, instruction, or participation in school activities or programs;

2. When submission to or rejection of such conduct by an individual is used by the offender as the basis for making personal or academic decisions affecting the individual subjected to sexual advances;

3. When such conduct has the effect of unreasonably interfering with the individual's work, attendance at school or participation in academic or curricular activities, or

4. When such conduct has the effect of creating an intimidating, hostile, or offensive work or learning environment.

B. Definitions – Bullying Prohibited

Bullying may take a variety of forms. It is unacceptable in a school or work environment. As a result no student or employee shall be subjected to harassment, intimidation, bullying, or cyberbullying in any public educational institute:

1. "Bullying and cyberbullying," means unwelcome written, electronic, verbal or physical acts or gestures where a student or employee feels coerced, intimidated, harassed or threatened and under the circumstances (1) may cause a reasonable person to suffer physical or emotional harm to a student or employee, (2) may cause damage to another student's or employee's property, or (3) may cause a disruptive or hostile school environment. The behavior must interfere with an employee's ability to perform his or her duties or with a student's academic performance or ability to learn, or interfere with a

student's ability to participate in or benefit from services, activities, or privileges:

a. that are being offered through the school district; or

b. During any education program or activity; or

c. While in school, on school equipment or property, in school vehicles, on school buses, at designated school bus stops, at school-sponsored activities, at school-sanctioned events; or

2. Through the use of data, telephone or computer software that is accessed through a computer, computer system, or computer network or any public education institute.

3. As used in this Section, "electronic communication" means any communication through an electronic device including a telephone, cellular phone, computer or pager.

C. Definitions – Hazing Prohibited

The term "hazing" shall mean any conduct or method of initiation, even if consented to, into any student organization, whether on public or private property, which willfully or recklessly endangers the physical or mental health of any student or other person.

1. Such conduct shall include, but is not limited to, whipping, beating, branding, forced calisthenics, exposure to the weather, forced consumption of any food, liquor, beverage, drug or other substance or any other brutal treatment or forced physical activity which is likely to adversely affect the physical health or safety of any such student or person, or which subjects such student or other person to extreme mental stress, including extended deprivation of sleep or rest or extended isolation.

2. Whoever knows that another person is the victim of hazing and is at the scene of such activity, shall, to the extent that such person can do so without danger or peril to himself or others, report such activity to an appropriate law enforcement official as soon as reasonably practicable. Whoever fails to report such behavior shall be subject to discipline.

D. Guidelines for Investigating Harassment Claims

In school systems, harassment may take many forms and cross many lines. The situation may be an instance of staff member to staff member, staff member to student, student to staff member, or student to student. Guidelines for dealing with any charge of harassment are as follows:

1. By law, harassment is defined by the victim's perception in combination with objective standards or expectations. What one person may consider acceptable behavior may be viewed as harassment by another person. Therefore, in order to protect the rights of both parties, it is important that the victim make it clear to the harasser that the behavior is objectionable.

2. In all charges of harassment, the victim should describe in writing the specifics of the complaint to ensure that the subsequent investigation is focused on the relevant facts. Oral and anonymous complaints will be reviewed but are inherently difficult to investigate and may not be procedurally fair; as a result no disciplinary action shall be taken on anonymous complaints unless verified by clear and convincing evidence. All other complaints will be reviewed based on a preponderance of evidence standard.

3. Any school employee that has reliable information that would lead a reasonable person to suspect that a person is a target of harassment, bullying, or intimidation shall immediately report it to the administration; each school shall document any prohibited incident that is reported and confirmed, and report all incidents of discrimination, harassment, intimidation, bullying or cyberbullying and the resulting consequences, including discipline and referrals, to the Superintendent's office as they occur.

4. A good faith report from a staff member renders the staff member immune from discipline for making a report and is considered to have been made in the course of the staff member's employment for purposes of M.G.L. c. 258. As a result, the school district shall indemnify staff members from any cause of action arising out of a good faith report of harassment or the district's subsequent actions or inaction in connection thereto.

5. If an instance of student to student harassment is reported to a staff member other than an administrator, the staff member must inform the Assistant Principal/House Master, or the Building Principal.

6. If a situation involving a charge of staff member to student harassment is brought to the attention of any staff member, the staff member should notify the Building Principal or Assistant Superintendent immediately.

7. In a situation involving a charge of student to staff member sexual harassment the staff member should notify the Building Principal or Assistant Superintendent.

8. In a situation involving a charge of staff member to staff member harassment the staff member should notify the Building Principal or the Assistant Superintendent.

9. Once a charge of harassment has been made, including charges of mental, emotional or physical harassment as well as threats to a person's safety or position in the school or work environment, the following course of action should be taken.

   a. The Building Principal should investigate the charge through discussions with the individuals involved. In situations involving allegations against a staff member, he/she should be informed of his/her rights to have a third party present at the time of the discussion. In situations involving students the Principal should engage the appropriate classroom or special subject area teacher. Parents will be informed of the situation and invited to participate in resolution discussions. It is important that the situation be resolved as confidentially and as quickly as the circumstances permit.

   b. If the harasser and the victim are willing to discuss the matter at resolution meeting in the presence of the Principal/designee or Assistant Superintendent, a supportive faculty member and/or parent should be included in the discussion. During this discussion, the offending behavior should be described by the victim and administration, a request for a change in behavior should be made, and a promise should be made that the described behavior will stop. If circumstances do not permit a face to face meeting the administration will present the victim's position. Follow-up verification procedures will be explained. Failure to comply after a resolution meeting will result in appropriate discipline.

10. If after a resolution meeting with the involved parties, the Building Principal determines that further disciplinary action must be taken, the following could occur:

    a. In instances involving student to student or student to staff member harassment, the student may be subject to discipline including but not limited to counseling, suspension, and in appropriate cases expulsion.

    b. In instances involving staff member to student and staff member to staff member harassment, findings will be reported to the

Superintendent of Schools for further action. Personnel action may also be initiated at this point, consistent with the applicable law and collective bargaining agreement.

c. In all cases a referral to law enforcement will be considered by the Principal or Superintendent based on the circumstances. School officials will coordinate with the Police Department to identify a police liaison for harassment cases.

11. Retaliation:

Retaliation in any form against any person who has made or filed a complaint relating to harassment is forbidden. If it occurs, it could be considered grounds for dismissal of staff personnel and/or removal from the educational setting for a student. A referral to law enforcement may be made.

12. Confidentiality:

Reports of harassment should be kept completely confidential, consistent with necessary investigation procedures, with the goal of protecting the victim and stopping the behavior.

For further information about these guidelines or help with sexual harassment problems or any other form of harassment, consult:

_____

Harassment Coordinator, _____ Public Schools

If the alleged harasser is responsible for conducting an investigation, the Superintendent or Committee shall designate an alternative Harassment Coordinate, who is _____.

LEGAL REFERENCES

1. Title VII of the 1964 Civil Rights Act, Section 703

2. Title IX of the 1972 U.S. Civil Rights Act.

3. Chapter 151C, Massachusetts General Laws

4. M.G.L. Chapter 76 § 5

5. M.G.L. Chapter 269 § 17, 18, 19

6. M.G.L. Chapter 71, §§82, 84