



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents

FROM: Ken Slentz

SUBJECT: Addition of section 100.2(kk) of the Commissioner's Regulations, Relating to Reporting Requirements Under the Dignity for All Students Act

DATE: June 13, 2012

AUTHORIZATION(S):

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SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed addition of a new section 100.2(kk), relating to the reporting of material incidents of discrimination and/or harassment on school property or at school functions, under the Dignity for All Students Act ("Dignity Act")?

Reason(s) for Consideration

Required by Statute (L. 2010, Ch. 482).

Proposed Handling

The proposed rule is being presented to the Full Board for adoption as an emergency rule at the June 2012 Regents meeting. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

The proposed rule was discussed at the April Regents meeting. A Notice of Proposed Rule Making was published in the State Register on April 11, 2012. An Assessment of Public Comment is attached. The proposed rule has been revised in response to public comment. A copy of the revised proposed rule is attached.

Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Chapter 482 of the Laws of 2010 added a new Article 2 to the Education Law (Ed.L. §§10 through 18), relating to the Dignity for All Students Act. The statute's provisions take effect on July 1, 2012.

The proposed rule is necessary to implement provisions of the Dignity Act, by establishing standards for the reporting of material incidents of discrimination and/or harassment including, but not limited to, 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.

For the 2012-2013 school year and for each succeeding school year thereafter, Education Law §15 requires the Commissioner to establish a procedure for submission of an annual report of material incidents of discrimination and/or harassment that occurred in such school year by each school district, board of cooperative educational services (BOCES) and charter school.

Proposed §100.2(kk) of the Commissioner's regulations would require that each school district, BOCES or charter school include in its annual report all material incidents of discrimination and/or harassment that:

- are the result of the investigation of a written or oral complaint made to the school principal or other school administrator responsible for school discipline, or to any other school employee; or
- are otherwise directly observed by such principal or administrator, or by any other school employee regardless of whether a complaint is made.

The report would be required to include information describing the specific nature of the incident, including, but not limited to:

1. the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, sex or other) – where multiple types of bias are involved, they must all be reported;
2. whether the incident resulted from student and/or employee conduct;
3. whether the incident involved physical contact and/or verbal threats, intimidation or abuse; and
4. the location where the incident occurred (on school property or at a school function).

The regulation would require each school district, BOCES and charter school to annually submit its report on material incidents of discrimination and/or harassment, in a manner prescribed by the Commissioner, on or before the basic educational data

system (BEDS) reporting deadline or such other date as determined by the Commissioner.

Proposed §100.2(kk) would also repeat the statutory language from Education Law §16 prohibiting retaliatory action against persons who report incidents of discrimination and/or harassment and providing them with immunity from civil liability. It is important that there be absolute clarity that persons may report such incidents without fear of liability or retaliatory action.

The proposed rule has been revised in response to public comment. The definition section in 100.2(kk)(1) has been revised to clarify that the definition of "employee" includes charter school employees, to add a definition of "discrimination", and to otherwise ensure consistency with the definitions in proposed section 100.2(jj) relating to Dignity Act training requirements. Certain technical changes have also been made to ensure consistency in the terminology used in the proposed rule.

Pursuant to the State Administrative Procedure Act, the revised proposed rule cannot be adopted as a permanent rule until after its publication in the State Register and expiration of a 30-day public comment period. However, the Dignity Act will become effective on July 1, 2012. Therefore, an emergency action is necessary to adopt the revised proposed rule so that the Dignity Act reporting requirements may be timely implemented pursuant to the statute's requirements.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: that subdivision (kk) of section 100.2 of the Regulations of the Commissioner of Education be added, as submitted, as an emergency action, effective July 1, 2012, upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the revised proposed rule takes effect on the July 1, 2012 effective date of Chapter 482 of the Laws of 2010 so that, so that the requirements for reporting of material incidents of discrimination and/or harassment will be timely implemented.

Timetable for Implementation

The statute provides that any rules or regulations necessary for the timely implementation of the Dignity Act shall be promulgated on or before July 1, 2012. If adopted at the June Regents meeting, the emergency rule will take effect on July 1, 2012. It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the September Regents meeting, which is the first meeting scheduled after expiration of the 30-day public comment period for revised rule makings.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 11, 15, 16, 101, 207, 305 and 2854(1)(b) and Chapter 482 of the Laws of 2010.

Subdivision (kk) of section 100.2 of the Regulations of the Commissioner of Education is added, effective July 1, 2012, as follows:

(kk) Dignity Act reporting requirements.

(1) Definitions. For purposes of this subdivision:

(i) "School property" means in or within any building, structure, athletic playing field, playground, parking lot, or land contained within the real property boundary line of a public elementary or secondary school, including a charter school; or in or on a school bus, as defined in Vehicle and Traffic Law section 142.

(ii) "School function" means a school-sponsored extracurricular event or activity.

(iii) "Disability" means disability as defined in Executive Law section 292(21).

(iv) "Employee" means employee as defined in Education Law section 1125(3), including an employee of a charter school.

(v) "Sexual orientation" means actual or perceived heterosexuality, homosexuality or bisexuality.

(vi) "Gender" means actual or perceived sex and shall include a person's gender identity or expression.

(vii) "Discrimination" means discrimination against any student by a student or students and/or an employee or employees on school property or at a school function including, but not limited to, discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

(viii) "Harassment" means the 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.

(ix) "Material Incident of Discrimination and/or Harassment" means a single incident or a series of related incidents where a student is subjected to discrimination and/or harassment by a student and/or employee on school property or at a school function that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such severe or pervasive nature 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 and/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.

Such conduct shall include, but is not limited to, 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; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be

permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

(2) Reporting of incidents.

(i) For the 2012-2013 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the commissioner an annual report of material incidents of discrimination and/or harassment that occurred in such school year, in accordance with Education Law section 15 and this subdivision. Such report shall be submitted in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the commissioner.

(ii) For purposes of reporting pursuant to this subdivision, a school district, BOCES or charter school shall include in its annual report all material incidents of discrimination and/or harassment that:

(a) are the result of the investigation of a written or oral complaint made to the school principal or other school administrator responsible for school discipline, or to any other employee; or

(b) are otherwise directly observed by such principal or administrator, or by any other employee regardless of whether a complaint is made.

(iii) Such report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, sex, or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or verbal threats, intimidation or abuse; and

(d) the location where the incident occurred (on school property or at a school function).

(3) Protection of people who report discrimination and/or harassment.

(i) Pursuant to Education Law section 16, any person having reasonable cause to suspect that a student has been subjected to discrimination and/or harassment by an employee or student, on school grounds or at a school function, who acting reasonably and in good faith, either reports such information to school officials, to the commissioner, or to law enforcement authorities or otherwise initiates, testifies, participates or assists in any formal or informal proceedings under this subdivision, shall have immunity from any civil liability that may arise from the making of such report or from initiating, testifying, participating or assisting in such formal or informal proceedings.

(ii) No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings.

PROPOSED ADDITION OF SECTION 100.2(kk) OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW SECTIONS 11, 15, 16, 101, 207, 305 and 2854(1)(b), AND CHAPTER 482 OF THE LAWS OF 2010, RELATING TO THE DIGNITY FOR ALL STUDENTS ACT REPORTING REQUIREMENTS

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on April 11, 2012, the State Education Department received the following comments.

1. COMMENT:

The proposed regulation will allow the Department to collect adequate information regarding incidents of discrimination and harassment. In addition to the regulation, the Department should issue guidance to school districts and develop a reporting mechanism that allows for recording the essential information about each incident of discrimination, including: recording multiple forms of bias; recording multiple acts of harassment within a given incident; reporting whether discrimination and harassment were conducted by a student or employee (or both); and recording the specific location of the incident. The guidance and reporting mechanism should provide schools with the ability to conduct a real time analysis of the collected data, identify patterns, and take proactive steps to address them, tailored to meet the needs of their students.

DEPARTMENT RESPONSE:

The Department will consider all recommendations in its development of the Dignity Act reporting mechanism and supporting guidance regarding its use. The

Department will continue to solicit stakeholder input in these aspects of Dignity Act implementation.

2. COMMENT:

The Department must ensure that the reporting forms and related guidance documents and instructions developed by the Department to implement the regulation will support the legislative goal of a robust reporting system that will allow the Department and schools to review patterns of discrimination and harassment, identify problem areas, and track changes in those patterns over time to help evaluate which programs help reduce discrimination and harassment and which do not. In particular, it is hoped that the system will be able to capture location information that will help schools identify where the majority of bullying takes place and that guidance documents will encourage schools to use the reporting requirements to gather key data about school climate that will help them analyze trouble spots and intervene throughout the school year to improve school climate, and that the system will be able to capture multiple acts of harassment as part of the same incident, without over-reporting the number of incidents or under-reporting the acts.

DEPARTMENT RESPONSE:

The Department will consider all recommendations in its development of the Dignity Act reporting mechanism and supporting guidance regarding its use. The Department will continue to solicit stakeholder input in these aspects of Dignity Act implementation.

3. COMMENT:

Supports provisions in (kk)(2)(iii)(a) and (b) requiring, respectively, the reporting of multiple types of bias, when involved, and reporting whether the incident resulted from student or employee conduct.

DEPARTMENT RESPONSE:

No response necessary as comment is supportive.

4. COMMENT:

We strongly support requirement in 100.2(kk)(2)(ii), regarding the specific information required to be reported. It is critical for incident reports to capture detailed information, such as: the types of bias involved; whether there are multiple types; whether the incident resulted from student and/or employee conduct; and the detailed location of the incident. This information will help alert educators to patterns of behavior and weaknesses in their prevention and response mechanisms. The guidance and training materials should include advice on addressing recurring issues in typical school "hot spots." The reporting system and guidance should emphasize the importance of capturing data on harassment and discrimination by both students and school employees, and that the system be capable of capturing multiple acts of harassment in a single incident report, instead of only reporting the most serious of the multiple acts, so that the information received is the most accurate and useful to the school. The Department should issue detailed guidance to districts about the best uses of the data they capture to identify and target weaknesses in preventing and combating harassment, and emphasize that schools and districts will not be penalized for accurate reporting.

DEPARTMENT REPONSE:

The Department will consider all recommendations in its development of the Dignity Act reporting mechanism and supporting guidance regarding its use. The Department will continue to solicit stakeholder input in these aspects of Dignity Act implementation.

5. COMMENT:

We appreciate the Department's decision to move away from the Violent and Disruptive Incident Reporting (VADIR) system in designing the regulation, as VADIR is overly burdensome and inextricably associated with "weighted incidents" and school penalties, and is incapable of capturing the detailed information that will make the Dignity Act successful.

DEPARTMENT RESPONSE:

No response is necessary as comment is supportive.

6. COMMENT:

The proposed rule provides for a separate reporting system for incidents of harassment and discrimination under the Dignity Act instead of providing for such reporting using the existing VADIR system. This will result in a myriad of problems such as confusion regarding definitions, inability to reconcile the two systems when assessing the reported results, and the burden of maintaining two reporting systems.

DEPARTMENT RESPONSE:

Although the intent of VADIR and the Dignity Act are related to each other in some ways, their requirements, including, but not limited to, reporting requirements, and definitions are separate and distinct from one another. Thus, the Department determined that, due to these differences, the Dignity Act's reporting system should be separate and distinct from the VADIR system.

7. COMMENT:

Since the rule provides for reporting of multiple incidents, districts will need a great deal of guidance and training to determine how to characterize incidents.

DEPARTMENT RESPONSE

The Department will continue to develop supporting guidance with stakeholder input, for use in local trainings to meet the Dignity Act's reporting requirements. The Department recently released Internet-based guidance for school administrators and faculty that provides definitions and resources for Dignity Act implementation.

8. COMMENT:

It appears the rule would require reporting of only those material incidents that involve a protected class.

DEPARTMENT RESPONSE:

The Department has revised the proposed rule to provide separate definitions of "discrimination" and "harassment." The definition of discrimination provides that such term includes discrimination against any student. The Department believes that the definition of harassment in the proposed rule is sufficiently worded to be clear that it applies to any student. Accordingly, the rule would require reporting of material incidents of discrimination and/or harassment against all students, and not just discrimination and/or harassment that involves a protected class of students (i.e. based on a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex). The Department also intends to issue guidance to make it clear that all students are covered by its provisions prohibiting discrimination and/or harassment.

9. COMMENT:

In some places in the proposed rule the phrase "discrimination and harassment" is used, in other places the phrase "discrimination and/or harassment" is used. Concern was expressed that these inconsistencies will result in ambiguity, unnecessary questions and potential misinterpretations.

DEPARTMENT RESPONSE:

The Department agrees and has revised the phrases, where necessary, to ensure consistency.

PROPOSED ADDITION OF SECTION 100.2(kk) OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW SECTIONS 11, 15, 16, 101, 207, 305 and 2854(1)(b), AND CHAPTER 482 OF THE LAWS OF 2010, RELATING TO THE DIGNITY FOR ALL STUDENTS ACT REPORTING REQUIREMENTS
STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ADOPTION

The proposed rule is necessary to implement provisions of the Dignity Act, by establishing standards for the reporting of material incidents of discrimination and/or harassment including, but not limited to, 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.

A Notice of Proposed Rule Making was published in the State Register on April 11, 2012. The proposed rule has been revised in response to public comment. Pursuant to the State Administrative Procedure Act, the revised proposed rule cannot be adopted as a permanent rule until after its publication in the State Register and expiration of a 30-day public comment period. Because the Board of Regents meets at scheduled intervals, the September 10-11, 2012 Regents meeting is the earliest the revised rule could be presented for adoption, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period. However, Chapter 482 of the Laws of 2010 provides that any rules or regulations necessary for the timely implementation of the Dignity Act shall be promulgated on or before July 1, 2012.

Emergency action is necessary for the preservation of the general welfare in order to ensure that rule takes effect on the July 1, 2012 effective date of Chapter 482 of the Laws of 2010, so that the requirements for reporting of material incidents of discrimination and/or harassment will be timely implemented.

It is anticipated that the revised proposed rule will be presented for adoption as a permanent rule at the September 10-11, 2012 Regents meeting, which is the first meeting scheduled after publication of the revised proposed rule in the State Register and expiration of the 30-day public comment period prescribed in the State Administrative Procedure Act for revised rule makings.