




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: August 29, 2012

AUTHORIZATION(S):



SUMMARY

Issue for Decision (Consent Agenda)

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 at the September 2012 Regents meeting.

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. The proposed rule was subsequently revised in response to public comment and adopted as an emergency action at the June Regents meeting to ensure timely implementation of

the Dignity Act reporting requirements. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2012. A copy of the revised proposed rule and an Assessment of Public Comment are 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, add a definition of "discrimination", and 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.

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, effective September 26, 2012.

Timetable for Implementation

The June emergency rule became effective on July 1, 2012 and will expire on September 26, 2012. If adopted at the September Regents meeting, the permanent rule will become effective on September 26, 2012.

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 September 26, 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 July 18, 2012, the State Education Department received the following comment.

COMMENT:

The proposed regulation is a burdensome reporting requirement which should not cover charter schools. Charter schools were meant to be free from onerous bureaucratic requirements, yet SED continues to add reporting requirements such as this one. The additional reporting burdens do not, in and of themselves, relate to safety, and furthermore, apply only to school districts (not individual schools or charter schools). We respectfully request that SED delete all references to charter schools in the final version of this proposed rule.

DEPARTMENT REPOSENSE:

Article 2, Section 10 of the Education Law, the Dignity for All Students Act (Dignity Act) states that the intent of the Dignity Act is to provide all students in public schools with an environment free from discrimination and harassment, foster civility in public schools and prevent and prohibit conduct which is inconsistent with a school's educational mission. Under Education Law section 2853(1)(c), charter schools are considered public schools. Article 2, Section 15 of the Education Law, the Dignity for All

Students Act (Dignity Act), requires the Department to create a procedure under which material incidents of discrimination and harassment on school grounds or at a school function are reported to the Department at least on an annual basis. Furthermore, Education Law section 2854(1)(b) provides that charter schools must meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law. Therefore, the provisions of the Dignity Act apply to all public schools, including charter schools, and the Department cannot exempt charter schools from the reporting requirements in the statute.