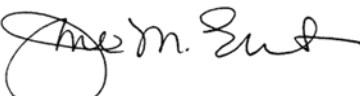




TO: The Honorable the Members of the Board of Regents

FROM: Jhone M. Ebert 

SUBJECT: Proposed Amendment to Section 100.2(kk)(1) of the Commissioner's Regulations Relating to Reports of Incidents of Harassment, Bullying and/or Discrimination Pursuant to the Dignity for All Students Act

DATE: June 29, 2018

AUTHORIZATION(S):



SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents amend §100.2(kk)(1) of the Commissioner's Regulations to add a new subparagraph (x) to include illustrative examples of the types of incidents of harassment, bullying and/or discrimination which must be reported to the principal, superintendent or designee as possible violations of the Dignity for All Students Act (DASA)?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

The proposed amendment is presented to the Full Board for adoption as an emergency rule at the July 2018 Board of Regents meeting, effective August 6, 2018. A copy of the proposed amendment is included as Attachment A. A Notice of Proposed Rulemaking and Emergency Adoption was published in the State Register on May 23, 2018. A second Notice of Emergency Adoption will be published on August 1, 2018. A statement of facts and circumstances justifying the emergency action is included as Attachment B. Supporting materials are available upon request from the Secretary to the Board of Regents.

Procedural History

A Notice of Emergency Adoption and Proposed Rulemaking was published in the State Register on May 23, 2018. It is anticipated that the proposed amendment will be presented for permanent adoption at the September 17-18, 2018 Regents meeting. However, the emergency rule published on May 23, 2018 will expire on August 5, 2018. A second emergency action is, therefore, necessary at the July 2018 Regents meeting, effective August 6, 2018, to ensure that the rule remains continuously in effect until it can be presented for adoption at the September Regents meeting and take effect as a permanent rule on October 3, 2018.

Background Information

In 2010, the Dignity for All Students Act¹ (DASA) added a new Article 2 to the Education Law to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage harassment, bullying, and/or discrimination and to enable school personnel to prevent and respond to discrimination or harassment. DASA became effective on July 1, 2012, and was later amended to include cyberbullying, effective July 1, 2013. Subsequently, the Department worked with key stakeholders through the DASA Task Force to develop and implement guidance and regulations to assist schools in implementing the provisions of the law. Since the adoption of Commissioner's Regulations to implement DASA, the Department has worked to provide training to the field, updates to the DASA website, and several guidance documents.

DASA continues to be a powerful tool used to address bullying, discrimination, and harassment in our schools and to ensure that all students are educated in a safe and supportive school environment. However, the issues faced by students and schools in this area continue to evolve. The Department is committed to working with stakeholders to ensure that all students have the opportunity to learn and to attend school free from bullying, harassment, and/or discrimination.

To that end, in July 2015, the Department issued guidance, entitled "Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students", to assist school districts in fostering an educational environment for all students that is safe and free from harassment, bullying, and discrimination — regardless of sex, gender identity, or expression — and to facilitate compliance with local, state, and federal laws concerning bullying, harassment, discrimination, and student privacy (See [NYSED Transgender GNC Guidance](#)). At the time the guidance document was issued, the Department received national recognition for the proactive nature of the guidance to protect transgender and gender non-conforming students. In May 2016, this work was highlighted by the United States Department of Education as a sample policy designed to address bullying, discrimination, and/or harassment of transgender and gender non-conforming students.²

¹ Chapter 482 of the Laws of 2010

² http://www.p12.nysed.gov/dignityact/documents/USDEandUSDOJ_TransgenderStudents_May2016.pdf

In August 2016, Commissioner Elia, in partnership with the Attorney General's Office, issued a memorandum,³ guidance,⁴ and model materials⁵ to assist school districts in complying with DASA. That guidance provided school districts with model forms to assist with investigating and verifying reports of bullying, harassment, and/or discrimination.

In October 2017, the Office of the State Comptroller (OSC) issued an audit report entitled "Implementation of the Dignity for All Students Act".⁶ While OSC noted the efforts made by the Department to provide professional development and technical assistance and the efforts of school districts throughout the State to comply with DASA, OSC's findings also revealed a need to provide additional guidance and training to the field, particularly in the area of identifying, documenting, investigating, and reporting DASA incidents.⁷

In February 2017, the Commissioner again issued a joint memorandum with the Attorney General to remind school districts of the obligation to protect transgender students from bullying, discrimination, and harassment in their schools and at all school functions, despite actions taken by the United States Department of Education (USDOE) and the United States Department of Justice (USDOJ) to rescind previously issued guidance surrounding the protection of transgender and gender non-conforming students.⁸ In response to USDOE's confirmation in February 2018 that it would no longer investigate civil rights complaints from transgender students denied access to bathrooms consistent with their gender identity, the Commissioner and the Attorney General issued another joint memorandum to school districts in which they reiterated New York's commitment to creating safe and supportive learning environments for all New York students and school district's obligation to comply with DASA.

The research shows that bullying and school climate are linked to children's academic achievement, learning, and development.⁹ Specifically, children who are bullied are more likely to avoid school, more likely to drop out of school, have lower academic achievement, have lower self-esteem and higher levels of anxiety, depression and loneliness, and are more likely to attempt suicide, both during childhood and later in life.¹⁰ A recent national survey of school climate found that more than 80 percent of lesbian, gay, bisexual, and transgender (LGBT) youth reported some form of bullying or

³ <https://ag.ny.gov/press-release/ag-schneiderman-and-state-education-commissioner-elia-release-guidance-and-model>

⁴ <http://www.p12.nysed.gov/dignityact/documents/SED-AGLtrandGuidance8-31-16.pdf>

⁵ <http://www.p12.nysed.gov/dignityact/documents/TrainingMaterialsFn18-31-16.pdf>

⁶ <https://osc.state.ny.us/audits/allaudits/093018/16s28.pdf>

⁷ As part of the audit, OSC observed "school personnel's lack of knowledge, experience, and training in identifying, documenting, investigating, and reporting DASA incidents. During our visits, officials at 17 of the 20 schools indicated that they struggle with interpreting or implementing DASA guidance and reporting requirements. Four years after DASA took effect, some schools continue to have difficulty identifying a material incident and would like better descriptions of the categories and/or more examples of incidents to help them make proper incident classifications. Some school personnel also said they struggle with differing conceptions of what constitutes "bullying," and they are unclear about their responsibilities to respond to and report cyberbullying incidents."

⁸ http://www.p12.nysed.gov/dignityact/documents/USDEandUSDOJ_TransgenderStudents_May2016.pdf

⁹ <http://www.apa.org/advocacy/interpersonal-violence/bullying-school-climate.aspx>

¹⁰ <http://www.apa.org/advocacy/interpersonal-violence/bullying-school-climate.aspx>

harassment at school.¹¹ These concerns are especially urgent for transgender students for whom the data indicates that 1 in 2 transgender students have had at least one suicide attempt by their twentieth birthday.¹²

As a result of these developments, Department staff proposes to amend Commissioner's Regulation §100.2(kk)(1) to include illustrative examples of the types of incidents of harassment, bullying and/or discrimination which must be reported to the principal, superintendent, or designee when reported to or witnessed by a school employee. Specifically, the proposed amendment includes a definition of "report of harassment, bullying, and/or discrimination" to include, but not be limited to, the following examples:

- a report regarding the denial of access to school facilities including, but not limited to, restrooms, changing rooms, locker rooms, and/or field trips, based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or
- a report regarding application of a dress code, specific grooming or appearance standards that is based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or
- a report regarding the use of name(s) and pronoun(s) or the pronunciation of name(s) that is based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or
- a report regarding any other form of harassment, bullying, and/or discrimination, based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex.

The Department remains committed to working with all partners throughout the State to ensure that all students have an opportunity to thrive in a school environment that is safe, supportive and free from bullying, harassment, and/or discrimination. We will continue to support district administrators and school staff as they continue to take proactive steps to create a positive school culture and climate in which students feel safe and supported, and fully included. The proposed amendment to Commissioner's Regulations §100.2(kk)(1) is intended to support these efforts by clarifying and assisting in DASA implementation statewide.

¹¹<http://www.apa.org/advocacy/interpersonal-violence/bullying-school-climate.aspx>

¹²<https://www.cdc.gov/violenceprevention/suicide/statistics/>

Related Regents Items

- [May 2018](http://www.regents.nysed.gov/common/regents/files/518p12a4.pdf)
(<http://www.regents.nysed.gov/common/regents/files/518p12a4.pdf>)
- [September 2016](http://www.regents.nysed.gov/common/regents/files/916p12d2.pdf): Proposed Amendment of §100.2(gg) of the Commissioner's Regulations relating to the Uniform Violent and Disruptive Incident Reporting System (VADIR)
(<http://www.regents.nysed.gov/common/regents/files/916p12d2.pdf>)
- [May 2016](http://www.regents.nysed.gov/common/regents/files/516p12d1.pdf): Violent and Disruptive Incident Reporting and Calculating the School Violent Index
(<http://www.regents.nysed.gov/common/regents/files/516p12d1.pdf>)
- [October 2015](https://www.regents.nysed.gov/common/regents/files/meetings/Oct%202015/1015p12d1.pdf): The NYS Safe Schools Task Force: Current Status Update
(<https://www.regents.nysed.gov/common/regents/files/meetings/Oct%202015/1015p12d1.pdf>)
- [July 2015](http://www.regents.nysed.gov/common/regents/files/meetings/Jul%202015/715p12d1.pdf): New York State Transgender and Gender Nonconforming Students Final Guidance Document
(<http://www.regents.nysed.gov/common/regents/files/meetings/Jul%202015/715p12d1.pdf>)

[New York State Transgender and Gender Nonconforming Final Guidance Document Presentation](http://www.regents.nysed.gov/common/regents/files/meetings/TransgenderGuidance_0.pdf)

(http://www.regents.nysed.gov/common/regents/files/meetings/TransgenderGuidance_0.pdf)

- [April 2015](http://www.regents.nysed.gov/common/regents/files/meetings/Apr%202015/415p12d3.pdf): Transgender and Gender Nonconforming Students Guidance
(<http://www.regents.nysed.gov/common/regents/files/meetings/Apr%202015/415p12d3.pdf>)

[Transgender and Gender Nonconforming Students Guidance Presentation](http://www.regents.nysed.gov/common/regents/files/meetings/TransgenderGuidance.pdf)

(<http://www.regents.nysed.gov/common/regents/files/meetings/TransgenderGuidance.pdf>)

- [June 2014](http://www.regents.nysed.gov/common/regents/files/614p12d1.pdf): Safe Schools Task Force Update
(<http://www.regents.nysed.gov/common/regents/files/614p12d1.pdf>)
- [October 2013](https://www.regents.nysed.gov/common/regents/files/1013p12d1%5B1%5D.pdf): Safe Schools Task Force
(<https://www.regents.nysed.gov/common/regents/files/1013p12d1%5B1%5D.pdf>)

Recommendation

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

VOTED: The a new subparagraph (x) be added to paragraph (1) of subdivision (kk) of §100.2 of the Regulations of the Commissioner of Education, as submitted, effective August 6, 2018, as an emergency action 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 emergency rule adopted at the May 2018 Regents meeting remains continuously in effect until it can be presented for permanent adoption in September, effective October 3, 2018, and to ensure that incidents of harassment, bullying, and/or discrimination which may constitute violations of the Dignity for All Students Act are promptly reported to the principal, superintendent, or designee.

Timetable for Implementation

If adopted at the July Regents Meeting, the proposed amendment will become effective as an emergency measure on August 6, 2018. Following the 60-day public comment period required under the State Administrative Procedure Act which expires on July 23, 2018, it is anticipated that the proposed amendment will be presented to the Board of Regents at the September 2018 meeting for adoption as a permanent rule. If adopted at the September 2018 Regents meeting, the proposed amendment will become effective as a permanent rule on October 3, 2018.

Attachment A

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 11, 15, 16, 101, 207, 215, 305 and 2854(1)(b).

Paragraph (1) of subdivision (kk) of section 100.2 of the Regulations of the Commissioner of Education is amended by adding a new subparagraph (x) as follows:

(x) For purposes of this section, a “report of harassment, bullying, and/or discrimination” means a written or oral report of harassment, bullying, and/or discrimination that could constitute a violation of the Dignity for All Students Act (article 2 of the Education Law). Such a report may include, but is not limited to, the following examples:

(a) a report regarding the denial of access to school facilities, functions, opportunities or programs including, but not limited to, restrooms, changing rooms, locker rooms, and/or field trips, based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or

(b) a report regarding application of a dress code, specific grooming or appearance standards that is based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or

(c) a report regarding the use of name(s) and pronoun(s) or the pronunciation of name(s) that is based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or

(d) a report regarding any other form of harassment, bullying and/or discrimination, based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex.

8 NYCRR §100.2(kk)(1)(x)

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

The proposed amendment is necessary to assist in Statewide implementation of the Dignity for All Students Act (DASA) by adding a new subparagraph (x) to §100.2(kk) of the Commissioner's Regulations to include illustrative examples of the types of incidents of harassment, bullying and/or discrimination which must be reported to the principal, superintendent or designee as possible DASA violations.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the September 17-18, 2018 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be October 3, 2018, the date a Notice of Adoption would be published in the State Register. Therefore, a second emergency action is necessary at the July 2018 Regents meeting for the preservation of the general welfare in order to ensure that the emergency rule adopted at the May 2018 Regents meeting remains continuously in effect until it can be presented for permanent adoption in September, effective October 3, 2018, and to ensure that incidents of harassment, bullying, and/or discrimination which may constitute violations of the Dignity for All Students Act are promptly reported to the principal, superintendent, or designee.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the September 17-18, 2018 Regents meeting, which is the first

scheduled meeting after expiration of the 60-day public comment period prescribed in SAPA for State agency rule makings.