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DIGNITY FOR ALL STUDENTS ACT (DIGNITY ACT) GUIDANCE FOR UPDATING CODES OF CONDUCT

The intent of the Dignity for All Students Act (Dignity Act) is to provide all public school students with an environment free from discrimination and harassment, as well as to foster civility in public schools. The Dignity Act also focuses on prevention of harassment and discriminatory behaviors through the promotion of educational measures meant to positively impact school culture and climate. Among the Dignity Act's provisions, is the requirement that all public school districts (districts) and Boards of Cooperative Educational Services (BOCES) include provisions in their Codes of Conduct prohibiting the discrimination and harassment against students by students and/or school employees on school property or at a school function, as well as provisions for responding to acts of discrimination and harassment against students by students and/or school employees on school property or at a school function.¹ By building on the 2000 Safe Schools Against Violence in Education Act (SAVE), which focuses primarily on guiding districts, BOCES and charter schools on how to report and respond to violent and disruptive incidents, the Dignity Act is designed to assist districts, BOCES and charter schools in strengthening their existing policies, and developing new policies as needed, to protect students. The Dignity Act upholds New York State's commitment to provide safe and orderly schools for its students.

The New York State Education Department (NYSED) and the Dignity Act Local Policy and Implementation Task Force have developed this guidance to help districts and BOCES in updating their Codes of Conduct in accordance with the requirements of the Dignity Act and its implementing regulations (Education Law §12[2] and 8 NYCRR §100.2[1][2]). It should also be noted that Education Law §2801(5) already requires districts and BOCES to annually review their Codes of Conduct and update them if necessary, taking into consideration the effectiveness of their provisions and the fairness and consistency of their administration. Since the Dignity Act is effective as of July 1, 2012, districts and BOCES should update their Codes of Conduct prior to that date.

¹ It should be noted that charter schools are also required to include in their disciplinary rules and procedures, (pursuant to Education Law §2851[2][h]), or, if applicable, in their Codes of Conduct, provisions prohibiting, among other things, discrimination and harassment against students by students and/or school employees on school property or at a school function, as well as provisions for responding to acts of discrimination and harassment against students by students and/or school employees on school property or at a school function and guidelines on promoting a safe and supportive school climate (see Education Law §§10-18 and 8 NYCRR §119.6).

As districts and BOCES conduct their annual reviews of their Codes of Conduct, they should be aware that their Codes of Conduct must be developed in collaboration with student, teacher, administrator, and parent organizations, as well as with school safety and other school personnel. Additionally, the Code of Conduct and any amendments to it can be adopted only after at least one public hearing that provides for the participation of school personnel, parents, students and other interested parties. The amended Code of Conduct must be approved by the school district's board of education, chancellor, or other applicable governing body. The amendments must be filed with the Commissioner, in a manner prescribed by the Commissioner, no later than 30 days after their adoption. After a district's and BOCES' Code of Conduct is revised to comply with the requirements of the Dignity Act, the annual Code of Conduct review requirement will continue to ensure that each district's and BOCES' Code of Conduct remain current and reflective of the needs of their respective school communities.

Definitions

As districts and BOCES update their Codes of Conduct as discussed above, they should include the following Dignity Act statutory definitions:

- *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; or in or on a school bus (Education Law §11[1]).
- *School Bus* means every motor vehicle owned by a public or governmental agency or private school and operated for the transportation of pupils, children of pupils, teachers and other persons acting in a supervisory capacity, to or from school or school activities, or, privately owned and operated for compensation for the transportation of pupils, children of pupils, teachers and other persons acting in a supervisory capacity to or from school or school activities (Education Law §11[1] and Vehicle and Traffic Law §142).
- *School Function* means a school-sponsored extra-curricular event or activity (Education §11[2]).
- *Disability* means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term must be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held (Education Law §11[4] and Executive Law §292[21]).

- *Employee* means any person receiving compensation from a school district or employee of a contracted service provider or worker placed within the school under a public assistance employment program, pursuant to title nine-B of article five of the Social Services Law, and consistent with the provisions of such title for the provision of services to such district, its students or employees, directly or through contract, whereby such services performed by such person involve direct student contact (Education Law §§11[4] and 1125[3]).
- *Sexual Orientation* means actual or perceived heterosexuality, homosexuality, or bisexuality (Education Law §11[5]).
- *Gender* means actual or perceived sex and includes a person's gender identity or expression (Education Law §11[6]).
- *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 (Education Law §11[7]).

Moreover, from a practical standpoint, in addition to the Dignity Act requirements, districts and BOCES should consult with their attorneys to ensure that their Codes of Conduct and policies comply with federal civil rights laws and regulations enforced by the United States Department of Education's Office for Civil Rights (OCR), including Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; and Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, both of which prohibit discrimination on the basis of disability. Although the intent of these federal civil rights statutes and the Dignity Act are related to each other in some ways, their requirements and definitions are separate and distinct from one another. Thus, NYSED recommends that districts and BOCES, as well as charter schools, consult with their attorneys in developing their policies to make sure that they align with both state and federal law and regulatory requirements regarding discrimination and harassment.

NYSED further recommends that districts, BOCES, and charter schools review federal guidance on discrimination and harassment, including, but not limited to OCR's [Dear Colleague Letter regarding harassment and bullying](#) (October 26, 2010), which can be found at:

www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

Scope

As discussed above, the Dignity Act prohibits discrimination and harassment of students on school property, including at school functions, by any student and/or employee. However, harassment may include, among other things, the use, both on and off school property, of information technology, including, but not limited to, e-mail, instant messaging, blogs, chat rooms, pagers, cell phones, gaming systems and social media websites, to deliberately harass or threaten others. This type of harassment is generally referred to as cyberbullying.

Prior Commissioner's decisions have upheld the suspension of students for off-campus conduct (Appeal of K.S., 43 Ed Dept Rep 492, Decision No. 15,063; Appeal of Ravick, 40 id. 262, Decision No. 14,477; Appeal of Orman, 39 id. 811, Decision No. 14,389). Students may be disciplined for conduct that occurred outside of the school that may endanger the health or safety of pupils within the educational system or adversely affect the educative process (Matter of Coghlan v. Bd. of Educ. of Liverpool Cent. School Dist., 262 AD2d 949, citing Pollnow v. Glennon, 594 F.Supp. 220, 224, affd 757 F.2d 496).

Since regulation of harassment in the forms of bullying, cyberbullying and sexting may involve free speech and expression, constitutional issues arise regarding the ability of a school district, BOCES, or charter school to restrict these forms of speech and expression and to discipline students for engaging in them. In Tinker v. Des Moines Indep. Community Sch. Dist. (393 US 503 [1969]), the U.S. Supreme Court stated that school administrators may prohibit student expression where it "materially and substantially disrupt[s] the work and discipline of the school" (Tinker v. Des Moines Indep. Community Sch. Dist., 393 US 503, 513). The Second Circuit Court of Appeals has found that school administrators were not prevented from disqualifying a student from a school election after she posted a vulgar message about the cancellation of a school event on an internet blog (Doninger v. Niehoff, et al., 527 F3d 41 [2008]). In Doninger, the Second Circuit stated that "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus" (Doninger v. Niehoff, et al., 527 F3d 41, 48 [2008]; see also Wisniewski v. Board of Educ. of the Weedsport Central School Dist., 494 F3d 34 [2d Cir 2007], cert den 552 US 1296 [2008] [court upheld suspension of student who sent internet "instant message" of a drawing depicting a teacher being shot, stating that "off-campus conduct can create a foreseeable risk of substantial disruption within a school" and that it was "reasonably foreseeable that the [drawing] would come to the attention of school authorities and the teacher"])).

It should also be noted that, in 2011, the Fourth Circuit Court of Appeals upheld the suspension of a student who created and posted from her home computer a webpage ridiculing another student (Kowalski v. Berkeley County Schools, et al., 652 F3d 565 [4th Cir 2011]). Citing Tinker, as well as the Second Circuit's decisions in both Doninger and Wisniewski, the Fourth Circuit stated that "the

language of Tinker supports the conclusion that public schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying” (Kowalski v. Berkeley County Schools, et al., 652 F3d at 572).

Because this area of the law continues to evolve, NYSED recommends that districts, BOCES, and charter schools consult with their attorneys in developing policies – and periodically reviewing existing policies – on bullying, cyberbullying, and sexting to determine whether the proposed policy is consistent with case law and Commissioner’s decisions.

For further information, please refer to NYSED’s Guidance on Bullying and Cyberbullying, which can be found at:

www.p12.nysed.gov/technology/internet_safety/documents/cyberbullying.html

Districts, BOCES and charter schools, in consultation with their attorneys, can also consider non-punitive options when addressing problematic off-campus behavior. Additionally, districts, BOCES and charter schools should not fail to prevent or address in-school harassment simply because the involved students are also experiencing harassment outside of school.

Essential Partners

The Dignity Act emphasizes the importance of tolerance and respect for others by students and staff alike. Therefore, all members of the school community, including essential partners such as superintendents, school board members, parents, students, teachers, guidance counselors, principals/administrators, support staff and other school personnel have particularly important roles to play in its implementation.

Within the Code of Conduct, the roles of each type of essential partner involved in creating a climate of mutual respect for all students should be described, highlighting the specific provisions of the Dignity Act. For example, a Code of Conduct could describe the teacher’s role as including the following responsibilities:

1. Maintain a climate of mutual respect and dignity for all students regardless of actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender² or sex, which will strengthen students’ confidence and promote learning.
2. Confront issues of discrimination and harassment or any situation that threatens the emotional or physical health or safety of any student, school

² For purposes of the Dignity Act, *gender* means a person’s actual or perceived sex and includes a person’s gender identity or expression (Education Law §11[6]).

employee or any person who is lawfully on school property or at a school function.

3. Address personal biases that may prevent equal treatment of all students in the school or classroom setting.
4. Report incidents of discrimination and harassment that are witnessed or otherwise brought to a teacher's attention in a timely manner.

Dignity Act Coordinator (DAC)

The Dignity Act also requires that at least one staff member at every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex (Education Law §13[3]). This staff member should be referred to as the Dignity Act Coordinator (DAC).

Disciplinary and Remedial Consequences

The Dignity Act emphasizes the creation and maintenance of a positive learning environment for all students. In addition, the Dignity Act requires the development of measured, balanced, and age-appropriate responses to the discrimination and harassment of students by students and/or employees on school property, including school functions, with remedies and procedures focusing on intervention and education. Such remedial responses should be included in the Code of Conduct and place the focus of discipline on discerning and correcting the reasons why discrimination and harassment occurred. The remedial responses should also be designed to correct the problem behavior, prevent another occurrence of the behavior, and protect the target of the act. Appropriate remedial measures may include, but are not limited to:

- peer support groups; corrective instruction or other relevant learning or service experience;
- supportive intervention;
- behavioral assessment or evaluation;
- behavioral management plans, with benchmarks that are closely monitored;
- student counseling and parent conferences.

Beyond these individual-focused remedial responses, school-wide or environmental remediation can be an important tool to prevent discrimination and harassment. Environmental remediation strategies may include:

- supervisory systems which empower school staff with prevention and intervention tools to address incidents of bullying and harassment;
- school and community surveys or other strategies for determining the conditions contributing to the relevant behavior;
- adoption of research-based, systemic harassment prevention programs;
- modification of schedules;
- adjustment in hallway traffic and other student routes of travel;
- targeted use of monitors;
- staff professional development;
- parent conferences;
- involvement of parent-teacher organizations; and
- peer support groups.

Reporting Discrimination, Harassment, and Bullying

The Code of Conduct offers an opportunity to reinforce the importance of reporting incidents of discrimination, harassment, and bullying. The Code of Conduct should include procedures by which violations are reported and determined, and by which disciplinary measures are imposed and implemented. It is recommended that districts and BOCES review their Codes of Conduct to ensure that they contain provisions for reporting incidents of discrimination, harassment, and bullying. This reporting mechanism may help form the basis for collecting data that can be useful in assessing school climate.

Code of Conduct Publication and Training

Under Education Law §2801(4) and 8 NYCRR §100.2(l)(2)(iii)(b), districts and BOCES must ensure community awareness of their Code of Conduct provisions by various specified means, including, but not limited to, posting the Code of Conduct on their Internet web site, if available. As part of ensuring community awareness of their Code of Conduct provisions, it is also recommended that districts and BOCES provide training to students and staff that specifically highlights the new Dignity Act provisions, such as the prohibition against discrimination and harassment and the availability of each school's DAC.

Additionally, the Dignity Act requires that a summary of the Code of Conduct be provided to all students, in an age-appropriate version, written in plain-language, to ensure that students understand the standards of respect and appropriate behavior that the school community expects from them.

Please be aware that the Dignity Act does not prohibit the denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law §§2854(2)(a) and 3201-a and Title IX

of the Education Amendments of 1972 (20 USC §1681, et. seq.), or prohibit, as discrimination based on disability, actions that would be permissible under §504 of the Rehabilitation Act of 1973.