



An Introduction to The Dignity for All Students Act (DASA)

NASSAU SUFFOLK LAW SERVICES COMMITTEE, INC.
Education and Disability Rights Project (EDRP)





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Just a Note. . .



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Legal Advice depends upon the specific facts of each situation. These materials cannot replace the advice of competent legal counsel.



An Introduction to The Dignity for All Students Act (DASA)

Presented by: Lynn A. Iacona, Esq.



Education Disability Rights Project (EDRP)

- The EDRP represents students with disabilities between the ages of 5-21 and adults with developmental disabilities.
- Issues include:
 - Special education
 - Residency Disputes
 - Matters pertaining to homelessness
 - OPWDD, and much more.
- EDRP Staff:
 - Lynn Iacona, Supervising Attorney
 - Tracey Discepolo, Staff Attorney
 - Danielle Leake, Staff Attorney
 - Marcia Vogel, Disability Advocate
 - Kimberly Curran, Legal Intern



What is The Dignity for All Students Act (DASA)?

- New York State’s Dignity for All Students Act (“DASA” or “Dignity Act”) was enacted in September 2010.¹
- DASA “seeks to provide public elementary and secondary school students with a safe and supportive environment that is free from discrimination, intimidation, taunting, harassment and bullying on school property [including a school bus], or at a school function.”²
- DASA focuses on the prevention of harassment and discriminatory behaviors through the promotion of educational measures meant to positively impact school culture and climate.³
- DASA does not apply to private, religious or denominational educational institutions. *See* Education Law §17(1).



Brief history of DASA

- DASA took effect on July 1, 2012, amending New York State Education Law by creating Article 2, §§10 through 18.⁴
- Education Law §2801 was amended to require school districts to reference DASA in their codes of conduct.
- Education Law §801-a was amended to require that school districts provide a K-12 course of instruction which includes, “a component on civility, citizenship and character education” with “an emphasis on discouraging acts of harassment, bullying and discrimination.”⁵
- The Legislature amended DASA effective July 1, 2013.⁶
- This amendment: **a)** included cyberbullying as part of the definition of “harassment and bullying” [Education Law §§11(7), (8)]; **b)** required instruction in the safe, responsible use of the Internet and electronic communications (Education Law §801-a); and **c)** required that school professionals applying for a certificate or license complete training on the social patterns of harassment, bullying and discrimination [Education Law §14(5)].⁷
- In July 2019, the definition of “race” under DASA was amended to include a reference to “hair texture and protective hairstyles.” *See* Education Law §§11(9), (10).⁸

What is the legislative intent of DASA?

Education Law §10

- The students' ability to learn and to meet high academic standards, and a school's ability to educate its students are, "compromised by incidents of discrimination or harassment including bullying, taunting or intimidation."
- New York State policy affords public school students [including Board of Cooperative Educational Services ("BOCES") and charter school students] "an environment free of discrimination and harassment."⁹
- The purpose of DASA is to "foster civility in public schools and to prevent and prohibit conduct which is inconsistent with a school's educational mission."



What is the state of our childrens' mental health?

- It is widely reported that the mental health of many American children is at risk.
- According to medical and mental health professionals, even before the pandemic, the mental health of American children was of great concern.¹⁰
- In October 2021, the American Academy of Pediatrics (“AAP”), the American Academy of Child and Adolescent Psychiatry (“AACAP”) and the Children’s Hospital Association (“CHA”) issued a joint statement warning of a national state of emergency in child and adolescent mental health.¹¹
- This statement concluded that the physical isolation, ongoing uncertainty, fear and grief brought on by the pandemic and issues of racial injustice intensified the existing mental health crisis.¹²
- AACAP President Dr. Gabrielle A. Carlson¹³ stated, “we are caring for young people with soaring rates of depression, anxiety, trauma, loneliness and suicidality that will have lasting impacts on them. . . .”¹⁴



What is the state of our childrens' mental health? (cont'd.)

- In December 2021, U.S. Surgeon General Vivek Murthy also warned that the pandemic and other major issues faced by young people were causing “devastating” mental health effects.^{[15](#)}
- In January 2022, the National Public Radio (“NPR”) reported that “[s]chools across the country [were] overwhelmed with K-12 students struggling with mental health problems, according to school staff, pediatricians and mental health care workers. . . .”^{[16](#)}
- “[T]his [crisis] has “challeng[ed both] educators [and] . . . an already strained health-care system.”^{[17](#)}
- Recently, during President Biden’s State of the Union address, he said, “When millions of young people are struggling with bullying, violence, trauma, we owe them greater access to mental health care at school.”^{[18](#)}



How does bullying affect the health and education of the targeted student?

- Bullying, on and off campus, including cyberbullying, exacerbates the mental health crisis being experienced by our youth.
- 2018 New York State Department of Education (N.Y.S. DOE) Guidance indicates that “bullying and school climate are linked to children’s academic achievement, learning and development.”¹⁹
- Bullied children are “more likely to avoid school, . . . to drop out of school, [to] have lower academic achievement, . . . lower self-esteem and higher levels of anxiety, depression and loneliness[.]”²⁰
- Bullied children “are more likely to attempt suicide, [not only] during childhood [but also] later in life.”²¹
- According to a 2021 GLSEN National School Climate Survey, “[t]he vast majority of LGBTQ+ youth who attended in-person school during the [2021-2022 school] year reported being verbal[ly] [and/or physically] harass[ed or assaulted] because of their sexual orientation, gender expression, or gender. . .”²²
- “[O]ther incidents of victimization such as sexual harassment, cyberbullying, and deliberate property damage at school [were also reported].”²³
- According to N.Y.S. DOE, “. . . data indicates that 1 in 2 transgender students have had at least one suicide attempt by their twentieth birthday.”²⁴

Does bullying cause the targeted student to refuse to attend school?

Yes.

- Our EDRP represents many students who exhibit school refusal due to anxiety and depression related to bullying.
- Often these students also have learning disabilities or other conditions which interfere with learning.
- Families typically reach out to us when the school district has contacted CPS due to truancy and there is a pending investigation of the parent(s) for educational neglect.
- We assist students to address bullying issues with the school district and to develop a supportive plan to transition the student back to school. Under certain circumstances, that may include asking the school district to place the student in another school in the district due to health and safety concerns.
- Schools must ensure the safety of bullied students under DASA. *See* Education Law §13(1)(e).
- Under Education Law § 2802(7), students who are victims of violent criminal offenses have the right to a safety transfer to a safe public school within the district.²⁵
- Legislation is pending in New York to expand the right to intra-district safety transfers to include students who are victims of harassment at school.

Are students with disabilities at an increased risk for being bullied?

Yes.

- In July 2020, the U.S. Department of Health and Human Services reported that “children with disabilities—such as physical, developmental, intellectual, emotional, and sensory disabilities—are at an increased risk of being bullied.”²⁶
- “[Various] factors—physical vulnerability, social skill challenges, or intolerant environments—may increase the risk. Research suggests that some children with disabilities may bully others as well.”²⁷
- In April 2022, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) reported that “learners with disabilities are disproportionately affected by bullying at all ages and in all learning settings, with serious negative impacts on their education, health and well-being.”²⁸



Does DASA seek to protect students from harassment, bullying and discrimination?

Yes, *see* Education Law §12.

Where are students protected and from whom?

- DASA provides that “[n]o student shall be subjected to harassment or bullying by employees or students on school property or at a school function.” *See* Education Law §12(1).
- Students are protected from harassment and bullying from other students and from school employees.
- School property is defined as “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.” *See* Education Law §11(1).
- A school function is defined as a school-sponsored extra-curricular event or activity. *See* Education Law §11(1).



What is the definition of harassment and bullying under DASA?

Education Law §11(7)

- Harassment and bullying are defined as “the creation of a hostile environment by conduct or by threats, intimidation or abuse, [including verbal and non-verbal actions] and cyberbullying, 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 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; or



What is the definition of harassment and bullying under DASA? (cont'd.)

(c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or

(d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.” *See* Education Law §11(7); *see also* 8 N.Y.C.R.R. §§100.2(jj)(1)(viii), (kk)(1)(viii)(a)-(c).

- Acts of harassment and bullying shall include, but not be limited to, those acts based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex.” *See* Education Law §§11(7), 12(1); *see also* 8 N.Y.C.R.R. §100.2(kk)(1)(viii)(d).



Discrimination of students - categories of protected status under DASA:

Education Law §11

- Disability:
 - (a) “[A] physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological condition 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. . . .” *See* Education Law §11(3); *see also* Executive Law §292(21).



Discrimination of students - categories of protected status under DASA (cont'd.):

Education Law §11

- Sexual Orientation:

- “Actual or perceived heterosexuality, homosexuality or bisexuality.” *See* Education Law §11(5); *see also* 8 N.Y.C.R.R. §§100.2(jj)(1)(v), (kk)(1)(v).

- Gender:

- “Actual or perceived sex and shall include a person’s gender identity or expression.”²⁹ *See* Education Law §11(6); *see also* 8 N.Y.C.R.R. §§100.2(jj)(1)(vi), (kk)(1)(vi).



Discrimination of students - categories of protected status under DASA (cont'd.):

Education Law §11

- Race:
 - “Traits historically associated with race, including but not limited to, hair texture and protective hairstyles.” *See* Education Law §11(9); *see also* 8 N.Y.C.R.R. §100.2(kk)(1)(x).
- Protective hairstyles:
 - “Protective hairstyles shall include, but are not limited to, such hairstyles as braids, locks and twists.” *See* Education Law §11(10); *see also* 8 N.Y.C.R.R. §100.2(kk)(1)(xi).



Discrimination of students - categories of protected status under DASA (cont'd.):

The CROWN Act

- In July 2019, New York was the second state to sign the Creating a Respectful and Open World for Natural Hair (“CROWN”) Act.
- This Act prohibits racial discrimination based on hair texture or hairstyles.³⁰
- The Act protects students’ rights to wear or treat their hair however they desire, without the threat of racial discrimination or loss of school access.³¹
- DASA was amended to make clear that discrimination based on race includes hairstyles and traits associated with race.

Does DASA include acts of cyberbullying?

Yes.

Education Law §11

- In June 2012, Education Law §§11(7), (8) were amended to include cyberbullying as part of the definition of “harassment and bullying.”
- Cyberbullying is defined as harassment or bullying which, “occurs through any form of electronic communication.” *See* Education Law §11(8).
- DASA prohibits off-campus cyberbullying in the same way that other off-campus bullying is prohibited under DASA – (foreseeable risk of substantial disruption within the school environment, where it is foreseeable that the conduct might reach school property). *See* Education Law §11(7)(d); *see also* 8 N.Y.C.R.R §100.2(kk)(1)(ix).



Off-Campus Speech and the First Amendment:

A. Restriction on Student Speech, Generally:

In *Tinker v. Des Moines Independent Community School District, et al.*, 393 U.S. 503, 504 (U.S. Sup. Ct. 1969), three students were suspended for wearing black armbands to school to protest the Vietnam War. The U.S. Supreme Court held that the students' First Amendment rights had been violated, determining that:

- Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.
- Student speech is protected if it does not “‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school’ and [does not] collid[e] with the rights of others[,]” citing *Burnside v. Byars*, 363 F.2d 744 at 749 (5th Cir. 1966). *Id.* at 513.
- “[C]onduct by the student, in class or out of it, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.” *Tinker* at 513.
- The Court concluded that “the record [did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.” *Id.* at 514.

Off-Campus Speech and the First Amendment (cont'd.):

B. U.S. Supreme Court case involving off-campus speech

In *Mahanoy Area School District v. B.L., a Minor, by and through her father, Lawrence Levy and her Mother, Betty Lou Levy*, 141 S.Ct. 2038 (2021) student, B.L., a rising 10th grader, did not make the school's varsity cheerleading team but was offered a spot on the junior varsity team. An entering freshman, however, did make the varsity team. B.L. expressed her displeasure by posting two photos on Snapchat, one with a vulgar gesture and caption, and the other with just a caption that read "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The school learned about the images and suspended B.L. from the junior varsity cheerleading team. The case ultimately came before the Supreme Court.

- The Court noted that there may be instances in which school districts can regulate off-campus speech, citing:
 - serious or severe bullying or harassment targeting particular individuals;
 - threats aimed at teachers or other students;
 - the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and
 - breaches of school security devices. *Id.* at 2045.
- When evaluating whether the student's speech was protected under the First Amendment, the Court used the *Tinker* standard to consider if there was "evidence of 'substantial disruption' of school activity or a threatened harm to. . . others." *Id.* at 2047.
- In part, the Court noted that:
 - The cheerleading coach stated that she had no reason to think that the incident would disrupt class or school activities; and
 - There was no evidence of any serious decline in cheerleading team morale that would create a substantial disruption to team cohesion. *Id.* at 2048.
- The Supreme Court concluded that the school violated B.L.'s First Amendment rights.³²

Off-Campus Speech and the First Amendment (cont'd.):

C. Cases Addressing Off-Campus Speech involving threats

1) In *Wisniewski v. Board of Weedsport Central School District*, 494 F.3d 34, 35-36, 39 (2d Cir. 2007), the court determined that a student's use of a home computer to instant message other students a drawing which suggested that a named teacher be shot and killed was not protected speech.

- “Off-campus conduct can create a foreseeable risk of substantial disruption within a school.” *Id.* at 39.
- The Second Circuit determined that there was a reasonably foreseeable risk that the student's speech would come to the attention of school authorities, and that, under the *Tinker* standard, it would materially and substantially disrupt the work and discipline of the school. *Id.* at 38-39; *see also Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

2) In *Cuff v. Valley Central School District*, 677 F.3d 109, 113 (2d Cir. 2012), the Second Circuit stated that the relevant inquiry under *Tinker* “does not require school administrators to prove that actual disruption occurred or that substantial disruption was inevitable” but rather, “whether school officials might reasonably portend disruption from the student expression at issue.” *See also Defabio v. East Hampton Union Free School District*, 623 F.3d 71, 78 (2d Cir. 2010).

Off-Campus Speech and the First Amendment (cont'd.):

D. NYS Commissioner of Education Decision:

3) In [*Appeal of Student with a Disability*](#), 59 Educ. Dept. Rep., Decision No. 17,834 (2020), a student was suspended for 40 weeks for sending Snapchat messages depicting a gun, hand gestures, and language which portended violence against the school including the message, “[k]eep ya cams ready for Monday. I’m going viral.” In appealing his suspension, the student alleged that the messages were not a threat to the school and were protected under the First Amendment.

- The Commissioner of Education upheld the suspension, concluding that “. . . it was reasonably foreseeable that the student’s Snapchat messages would come to the attention of school officials and that the school officials could reasonably foresee that the messages would cause substantial disruption or material interference within the school environment.”
- Note that Education Law §11(7)(d) defining off campus bullying uses language derived from the 1st Amendment cases cited above.

Is DASA training mandated for school professionals in order to obtain a certificate or license?

Yes.

Education Law §14

- “[S]chool professionals applying . . .for a certificate or license, including but not limited to a certificate or license valid for service as a classroom teacher, school counselor, school psychologist, school social worker, school administrator or supervisor or superintendent of schools shall . . . have completed training on . . . harassment, bullying and discrimination . . . including but not limited to those acts based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex” *See* Education Law §14(5).



What are the mandatory policies and guidelines that must be followed by school districts under DASA?

Education Law §§ 12, 13

Generally:

- The Board of Education of every school district must create mandatory policies, procedures and guidelines “intended to create a school environment that is free from harassment, bullying and discrimination.” *See* Education Law §13(1).

Mandatory Notifications to the School Community:

- An “age-appropriate version” of the DASA policy, written in “plain language” shall be included in the code of conduct adopted by the Board of Education. *See* Education Law §12(2).
- At least once during each school year, all school employees, students and parents must be provided with a written or electronic copy of the school district’s DASA policies and procedures, or a plain-language summary thereof, including notification of the process by which to report harassment, bullying and discrimination. *See* Education Law §§13(1)(k), 2801(2)(n).
- Current policies regarding harassment, bullying and discrimination must be posted on the school district’s website. *See* Education Law §13(1)(l).

Employee Training Programs:

Pursuant to Education Law §13(2)-(5), employee training programs must include guidelines “to discourage the development of harassment, bullying, cyberbullying and discrimination” that:

- “[R]aise the awareness and sensitivity of school employees to potential harassment, bullying and discrimination”;
- “[E]nable employees to prevent harassment, bullying and discrimination”;
- Relate to the development of “nondiscriminatory instructional and counseling methods”;
- “[R]equire that at least one staff member . . . 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”;
- Relate to the development of appropriate responses, remedies and procedures relating to instances of harassment, bullying or discrimination by students; and
- Address the social patterns, the identification and the mitigation of harassment, bullying, and discrimination, and strategies for effectively addressing problems of exclusion, bias and aggression in educational settings.

How does someone report harassment, bullying or discrimination under DASA?

Education Law §13

- There must be an identification of ‘the principal, superintendent or [their] designee as the school employee charged with receiving reports of harassment, bullying and discrimination’ (known as the “Dignity Act Coordinator” or “DAC”). *See* Education Law §13(1)(a).
- “Students and parents [can] make an oral or written report of harassment, bullying or discrimination to teachers, administrators and other school personnel designated by the school district.” *See* Education Law §13(1)(b).³³
- School employees who witness harassment, bullying or discrimination, or who receive an oral or written report of such conduct, must: 1) orally notify the principal, superintendent or DAC no later than one school day after witnessing or receiving a report; and 2) file a written report with the principal, superintendent or DAC not later than two school days after making the oral report. *See* Education Law §13(1)(c).

What are the school district's responsibilities after a written report is filed?

Education Law §13

- The principal, superintendent or their designee must “lead or supervise a thorough investigation of all reports of harassment, bullying and discrimination, and . . . ensure that such investigation is completed promptly after receipt of any written reports” *See* Education Law §13(1)(d).
- “[W]hen an investigation reveals any. . .verified harassment, bullying or discrimination,” the school must:
 - “take **prompt actions** reasonably calculated to end [the prohibited conduct]”;³⁴
 - “eliminate any hostile environment”;
 - “create a more positive school culture and climate”;
 - “prevent recurrence of the behavior”; and
 - “ensure the safety of the student or students against whom such [conduct] was directed.” *See* Education Law §13(1)(e); *see also* 8 N.Y.C.R.R. §§100.2(gg)(1)(iv)(d), (kk)(2)(iv).

Can the student who is engaging in bullying be suspended?

Yes.

- In [*Appeal of N.C., on behalf of her son C.C.*](#), 58 Educ. Dept. Rep., Decision No. 17,417 (2018), the New York State Commissioner of Education upheld a student's three-month suspension where the student posted negative comments on social media about another student's sexual orientation, made "racially insensitive and inappropriate remarks, and ma[de] inappropriate remarks about the other student's deceased grandmother."
- In [*Appeal of M.F. and T.F.*](#), 61 Educ. Dept. Rep., Decision No. 18,131 (2022), the New York State Commissioner of Education upheld a ninth-grade student's three-day suspension where the student directed racial slurs towards another student, causing the victimized student to leave school early.

What if the bullying activity constitutes criminal conduct?

Education Law §13

- When the principal, superintendent or their designee “believes that any harassment, bullying or discrimination constitutes criminal conduct[,]” that individual is required to “notify promptly the appropriate local law enforcement agency” (*see* Education Law §13[1][i]) and “include appropriate references to the provisions of the school district’s code of conduct . . . that are relevant to harassment, bullying and discrimination[.]” *See also* Education Law §13(1)(j).

Are DASA incidents reported to the New York State Commissioner of Education or others?

Yes, *see* Education Law §§13, 15

- “The commissioner shall create a procedure under which material incidents of harassment, bullying and discrimination on school grounds or at a school function are reported to the [New York State Education] Department at least on an annual basis.” *See* Education Law §15.³⁵
- School principals are also required to “make a regular report on data and trends related to harassment, bullying and discrimination to the superintendent [of the school district].” *See* Education Law §13(1)(h).



What are the district's responsibilities to those who report or assist in the investigation of prohibited conduct?

Education Law §13

- The school shall “prohibit retaliation against anyone who, in good faith, reports or assists in the investigation of harassment, bullying or discrimination.” *See* Education Law §13(1)(f).

Are “good faith” reporters immune from civil liability?

Yes.

Education Law §16

- “Any person having reasonable cause to suspect that a student has been [a victim of] harassment, bullying or discrimination by an employee or student, on school grounds or at a school function, who, acting reasonably and in good faith, 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 article, shall have immunity from any civil liability that may arise from [such actions]”



Do victimized students have a right to sue a school district for failure to comply with DASA?

No, there is no private right of action under DASA.

- In *Eskenazi-McGibney, et al., v. Connetquot Central School District*, 169 A.D.3d 8, 9-10 (2d Dept. 2018), a Long Island public school student brought an action against his school district, asserting a violation of DASA, where the district allegedly failed to respond to the student's repeated complaints of bullying and harassments by another student.
- The school district brought a motion to dismiss the DASA claim, which was denied by the Suffolk County Supreme Court.
- In reversing the Supreme Court's decision and granting the school district's motion to dismiss the student's DASA claim, the Appellate Division determined that:
 - 1) DASA "does not expressly provide for civil damages to a student who has been the victim of . . . harassment, bullying or discrimination";
 - 2) Recognizing an implied private right of action under DASA would be inconsistent with DASA's legislative scheme, where the N.Y.S. Legislature intended DASA to be primarily a preventive, rather than a punitive measure. *Id.* at 10-12.



Do victimized students have a right to sue a school district for failure to comply with DASA? (cont'd.)

- The Appellate Division's determination that there is no private right of action under DASA in the Connetquot case is consistent with decisions of New York federal district courts in the Eastern and Northern districts. *See C.T. v. Valley Stream UFSD*, 201 F.Supp. 3d 307, 326-327 (E.D.N.Y. 2016)(there is no private right of action under DASA); *Terrill v. Windham-Ashland-Jewett Central School District*, 176 F.Supp. 3d 101, 104 (N.D.N.Y. 2016)(DASA does not provide a private right of action, either express or implied);³⁶



What legal options do victimized students have?

- There are enforcement mechanisms and remedies that can be pursued to remedy the harm that DASA seeks to prevent. *Terrill v. Windham-Ashland-Jewett Central School District*, 176 F.Supp.3d 101, 109 (N.D.N.Y. 2016).

Education Law §17(2) states that:

- “DASA does not preclude or limit any right or cause of action provided under any local, state or federal ordinance, law or regulation including, but not limited to, any remedies or rights available under the Individuals with Disabilities Education Act [schools must provide students with disabilities with a free appropriate public education – FAPE], Title VII of the Civil Rights Law of 1964, Section 504 of the Rehabilitation Act of 1973 [discrimination based on disability] or the Americans with Disabilities Act of 1990 [discrimination based on disability].”

Other potential claims include:

- **Title VI of the Civil Rights Act of 1964** (discrimination based on race, color, national origin). *See, e.g., Zeno v. Pine Plains Central School District*, 702 F.3d 655, 672, 673 (2d Cir. 2012)(a high school student who endured severe and discriminatory race-based harassment over the course of three and a half years brought an action under Title VI of the Civil Rights Act of 1964, alleging that the school district was deliberately indifferent to the objectionable conduct; after a jury trial, he was awarded \$1 million in compensatory damages for his mental distress claims. In affirming the award, the Second Circuit concluded that the prolonged harassment “resulted in an educational environment that was disparately hostile, depriving [the student] of a scholastic benefit”, with a “profound and long-term impact on [the student’s] life and . . . his ability to earn a living”).
- **Title IX of the Education Amendments of 1972** (discrimination based on sex)
- **Equal Protection Clause of the Fourteenth Amendment**
- **State claim for negligent supervision.** *See, e.g., R.T. v. Three Village School District*, 153 A.D.3d 747, 748 (2d Dept. 2017), citing, *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994)(the Second Department noted that “schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision”).
- *See also* a recent lawsuit filed on January 16, 2023 against [Three Village School District](#), where a student is alleging he endured years of bullying due to his hearing impairment, including a broken nose caused by classmate who threw books at him, and that school officials violated the Americans with Disabilities Act, where they knew that the bullying was occurring but failed to address it.
- To summarize, although there is no private right of action under DASA, a DASA complaint provides a formal mechanism for the student and their family to give notice of the bullying to the school, which may lay the groundwork for litigation; always advise the student/family to file a report each time a bullying incident occurs.

Short of litigation, what are other methods of protecting the health, safety and access to education of the bullied student?

- If appropriate, ask that the student be permitted to attend a different school within the same school district (intra-district safety transfer) for health and safety purposes;
- If the student being bullied is classified as a student with a disability, that student's Individualized Education Program ("IEP") should be reviewed and revised to include supplementary aids, services, supports and accommodations to prevent further bullying;
- File an Office for Civil Rights ("OCR") complaint with the U.S. Department of Education. According to OCR, a complaint can be filed by anyone who believes that a school that receives federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability or age.
- File a complaint with the New York State Attorney General's Office, Civil Rights Division.



Conclusion:

Among other things, DASA protects students by:

- prohibiting bullying, harassment and discrimination;
- mandating a course of instruction that emphasizes civility, citizenship and character education;
- mandating the implementation of employee training guidelines to discourage bullying, harassment and discrimination;
- implementing notification and investigation protocols;
- mandating schools to act when an investigation reveals verified harassment, bullying or discrimination; and
- creating a reporting mechanism that holds schools accountable for addressing on-campus and off-campus conduct.



Footnotes

- (1) *See* Chapter 482 of the N.Y. Laws of 2010. *See also* NEW YORK STATE EDUCATION DEPARTMENT, [THE DIGNITY FOR ALL STUDENTS ACT](#) (AUGUST 2022).
- (2) *Id.* *See also* NEW YORK STATE EDUCATION DEPARTMENT, [THE DIGNITY FOR ALL STUDENTS ACT](#) (JUNE 2013) p. 2.
- (3) NEW YORK STATE EDUCATION DEPARTMENT OFFICE OF STUDENT SUPPORT SERVICES, DIGNITY FOR ALL STUDENTS ACT (DIGNITY ACT) [GUIDANCE FOR UPDATING CODES OF CONDUCT](#) (APRIL 2012) p. 1.
- (4) NEW YORK STATE EDUCATION DEPARTMENT, [THE DIGNITY FOR ALL STUDENTS ACT](#) (AUGUST 2022) p. 1; *see also* Education Law §§10 through 18.
- (5) NEW YORK STATE EDUCATION DEPARTMENT, [THE DIGNITY FOR ALL STUDENTS ACT](#) (AUGUST 2022) p. 1; *see also* Education Law §11(7).
- (6) NEW YORK STATE EDUCATION DEPARTMENT, THE NEW YORK STATE DIGNITY FOR ALL STUDENTS ACT, [A RESOURCE AND PROMISING PRACTICES GUIDE FOR SCHOOL ADMINISTRATORS & FACULTY](#) (DECEMBER 2017) p. 4.
- (7) *Id.* *See also* Chapter 102 of the Laws of 2012.
- (8) [S.B. 6209A, 2019-20 Leg. Sess.](#) (N.Y. 2019).
- (9) DASA applies to all New York public school districts, Boards of Cooperative Educational Services (“BOCES”), and charter schools. *See* NEW YORK STATE OFFICE OF THE STATE COMPTROLLER, [IMPLEMENTATION OF THE DIGNITY FOR ALL STUDENTS ACT](#) (OCTOBER 2017) p. 5.
- (10) AMERICAN ACADEMY OF CHILD & ADOLESCENT, [PSYCHIATRY, PEDIATRICIANS, CHILD AND ADOLESCENT PSYCHIATRISTS AND CHILDREN’S HOSPITALS DECLARE NATIONAL EMERGENCY IN CHILDREN’S MENTAL HEALTH](#) (OCTOBER 2021) p. 1.
- (11) *Id.*
- (12) AMERICAN ACADEMY OF CHILD & ADOLESCENT, [PSYCHIATRY, PEDIATRICIANS, CHILD AND ADOLESCENT PSYCHIATRISTS AND CHILDREN’S HOSPITALS DECLARE NATIONAL EMERGENCY IN CHILDREN’S MENTAL HEALTH](#) (OCTOBER 2021) p. 2. at 1, 3; *see also* AMERICAN ACADEMY OF CHILD & ADOLESCENT, [AAP, AACAP, CHA DECLARE NATIONAL EMERGENCY IN CHILDREN’S MENTAL HEALTH](#) (OCTOBER 2021) p. 2.
- (13) Gabrielle A. Carlson, M.D. is a board-certified child and adolescent psychiatrist at Stony Brook Medicine, Professor of Psychiatry and Pediatrics at Stony Brook University School of Medicine and works closely with Eastern and Western Suffolk BOCES school districts and mental health agencies. (*See* [Stony Brook Neurosciences Institute](#)).
- (14) AMERICAN ACADEMY OF CHILD & ADOLESCENT, [PSYCHIATRY, PEDIATRICIANS, CHILD AND ADOLESCENT PSYCHIATRISTS AND CHILDREN’S HOSPITALS DECLARE NATIONAL EMERGENCY IN CHILDREN’S MENTAL HEALTH](#) (OCTOBER 2021) p. 2.
- (15) THE U.S. SURGEON GENERAL’S ADVISORY, [PROTECTING YOUTH MENTAL HEALTH](#) (DECEMBER 2021) p. 3-4.
- (16) NATIONAL PUBLIC RADIO, [KIDS ARE BACK IN SCHOOL — AND STRUGGLING WITH MENTAL HEALTH ISSUES](#) (JANUARY 2022) p. 2.
- (17) *Id.*
- (18) NATIONAL PUBLIC RADIO, [READ PRESIDENT BIDEN’S STATE OF THE UNION SPEECH](#) (FEBRUARY 2023) p. 30.

Footnotes (cont'd.)

- (19) NEW YORK STATE BOARD OF REGENTS, THE STATE EDUCATION DEPARTMENT OFFICE OF COMMUNICATIONS, [BOARD OF REGENTS ACTS TO AMEND DIGNITY FOR ALL STUDENTS ACT REGULATIONS](#) (APRIL 2018) p. 3.
- (20) *Id.* at 3.
- (21) *Id.*
- (22) KOSCIW, J. G., CLARK, C. M., & MENARD, L., [THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: EXPERIENCES OF LGBTQ+ YOUTH IN OUR NATION'S SCHOOLS](#) (OCTOBER 2022) p. 129.
- (23) *Id.*
- (24) NEW YORK STATE BOARD OF REGENTS, THE STATE EDUCATION DEPARTMENT OFFICE OF COMMUNICATIONS: [BOARD OF REGENTS ACTS TO AMEND DIGNITY FOR ALL STUDENTS ACT REGULATIONS](#) (APRIL 2018) p. 3.
- (25) [Education Law §2802\(7\)](#), enacted through the [Safe Schools Against Violence in Education Act](#) (“Project SAVE”) and in accordance with the [Every Student Succeeds Act](#) (“ESSA”), affords students who are victims of violent criminal offenses the right to transfer to a safe public school within the district, as long as there is another public school in the same district at the same grade-level. The [New York City Chancellor Regulation A-449](#) expanded this idea of “safety transfers” to include situations where the student’s continued presence in the school will be unsafe for the student, including instances of harassment, intimidation, or bullying. [New York State Senate Bill S6006](#) is proposed legislation modeled after the New York City law that would continue to codify safety transfers state-wide in instances of harassment. *See also* [8 NYCRR §120.3](#).
- (26) U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: [BULLYING AND YOUTH WITH DISABILITIES AND SPECIAL HEALTH NEEDS](#) (JULY 2020) p. 1.
- (27) *Id.*
- (28) UNESCO: [BULLYING RATES HIGHER FOR CHILDREN WITH DISABILITIES](#) (APRIL 2022) p. 1.
- (29) Gender identity is a person’s innate sense of their gender. For more information, visit the NATIONAL CENTER FOR TRANSGENDER EQUALITY’S [UNDERSTANDING TRANSGENDER PEOPLE: THE BASICS](#) (JANUARY 2023) and other information at their resource hub.
- (30) NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT GUIDANCE: [IN HONOR OF INTERNATIONAL DAY OF THE GIRL, STATE EDUCATION DEPARTMENT ISSUES GUIDANCE TO SCHOOLS REGARDING THE CROWN ACT](#) (OCTOBER 2021) p. 1.
- (31) *Id.*

Footnotes (cont'd.)

(32) In *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038 (2021), the school district petitioned the United States Supreme Court on writ for certiorari, asking whether the Third Circuit’s decision that the *Tinker* standard does not apply off-campus speech was the correct interpretation of *Tinker*. The U.S. Supreme Court stated that, “Unlike the Third Circuit, we do not believe the special characteristics [of *loco parentis*] that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.” *Id.* at 2045. Still, the Court mentions that a school’s ability to regulate off-campus speech is limited by three considerations: “*First*, a school, in relation to off-campus speech, will rarely stand in *loco parentis* [geographically speaking]. . . . *Second*, . . . courts must be more skeptical of a school’s efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. . . [and] *Third*, the school itself has an interest in protecting a student’s unpopular expression, especially when the expression takes place off campus [since] America’s public schools are the nurseries of democracy.” *Id.* at 2046. Although the Court utilized *Tinker* in analyzing whether the school’s interest in regulating the off-campus speech outweighed the student’s First Amendment interest, the Court chose not to “set forth a broad, highly general First Amendment rule stating just what counts as . . .substantial disruption.” *Id.* at 2045. Similarly, in Justice Alito’s concurring opinion, he gives an example of one instance where it would be difficult to outline this rule, stating, “like the Court, I do not attempt to set out the test to be used in judging the constitutionality of [certain instances of off-campus speech]. . .[p]erhaps the most difficult category [to set forth this standard] involves. . .[b]ullying and severe harassment. . .” *Id.* at 2057.

(33) Click on the following link for sample of [Hempstead School District DASA Reporting form](#).

(34) See [In Appeal of Y.O., 59 Educ. Dept. Rep., Decision No. 17,842 \(2020\)](#)(NYS Commissioner of Education determined that a school took prompt action where the teacher informed the principal of the incident on the date it occurred and also responded to the student to confirm that the incident would be investigated; interviews with classmates took place four days after the incident was first reported and an aide was placed in the classroom six days after the incident was first reported.)

(35) See definition of “material incident” 8 N.Y.C.R.R §§100.2(gg)(1)(iv)(d), (kk)(1)(viii)(a)-(c).

(36) *But see Simon v. Bellmore Central High School District*, No. 0139012013, 2014 WL 11189280 (N.Y. Sup. Ct. 2014); 133 A.D.3d 557 (1st Dept. 2015) *rev’d on other grounds*, (appellate division reversed the lower court’s decision to deny district’s motion for summary judgment dismissing the complaint, for failure to comply with requirements of General Municipal Law §50-h, but did not address the correctness of the lower court’s refusal to dismiss cause of action under DASA; however, the court in *Terrill v. Windham-Ashland-Jewett Central School District*, 176 F.Supp. 3d 101, 104 (N.D.N.Y 2016), criticized the decision of the lower court in *Simon*, stating “even if *Simon* could be construed to mean that a private right of action exists under DASA, DASA was not intended to allow for a private right of action”).

Thank you for attending!



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If you have questions about this presentation or about special education issues in general, please contact the Education and Disability Rights Project at Nassau/Suffolk Law Services:
(516) 292-8100 x3170.

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Students with a Disability and Bullying

Protections for Students with Disabilities

- Under the Individuals with Disabilities Education Act (IDEA), school districts must provide students with disabilities with a free appropriate public education (FAPE). 20 U.S.C. §1400(d)(1)(A).
- Each student with a disability must have an Individualized Education Program (IEP), a written statement which is “the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017).
- The IEP is developed by the school district’s Committee on Special Education (“CSE”).

Are children with disabilities at an increased risk for being bullied?

Yes.

- The U.S. Department of Health and Human Services reports that “children with disabilities—such as physical, developmental, intellectual, emotional, and sensory disabilities—are at an increased risk of being bullied.”¹
- “[Various] factors—physical vulnerability, social skill challenges, or intolerant environments—may increase the risk. Research suggests that some children with disabilities may bully others as well.”²
- United Nations Educational, Scientific and Cultural Organization (“UNESCO”) reports that “learners with disabilities are disproportionately affected by bullying at all ages and in all learning settings, with serious negative impacts on their education, health and well-being.”³



Are there other protections for a student with a disability who is bullied?

- If the student being bullied is classified as a student with a disability, that student's Individualized Education Program (IEP) should be reviewed and revised to include supplementary aids, services, supports and accommodations to prevent further bullying.

Some examples include:

- Provide counseling;
- provide a 1-1 aide to shadow the student during unstructured time;
- implement a safety plan;
- establish a “safe harbor” to allow the bullied student to leave class early to avoid bullying between classes;
- train staff regarding the student's disability;
- allow “preferential seating” which seats the students near friends and away from potential bullies.

Are there other protections for a student with a disability who is bullied? (cont'd.)

Other examples include:

- Add an “anti-bullying plan” or “provisions or reasonable services to stop (or mitigate) the bullying.” *See Cianciotto v. New York City Department of Education*, 600 F.Supp.3d 434, 459 (S.D.N.Y. 2022); *see also T.K. and S.K., individually and on behalf of L.K. v. New York City Department of Education*, 32 F.Supp.3d 405, 422 (E.D.N.Y. 2014).

IEP goals and objectives may also need to be adjusted and could include:

- Speech and Language – increased focus on pragmatic language (conversational speech);
- Social, Emotional – improvement of self-advocacy and social skills;
- Note that, “schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services.”⁴

What if the school district refuses to address the bullying of a student with a disability?

- There may be a viable tuition reimbursement claim under the IDEA if the school district refused to discuss the subject bullying with the parent during the development of their child's IEP, despite the district's knowledge that the bullying conduct might substantially interfere with the child's learning opportunities, thereby resulting in a procedural denial of FAPE. *See T.K. and S.K., individually and on behalf of L.K. v. New York City Department of Education*, 810 F.3d 869, 874, 877 (2d Cir. 2016); *see also E.L. and D.P., on behalf of J.P. v. Bedford Central School District*, No. 18 Civ. 3062, 2022 WL 3667189, at *16 (S.D.N.Y. 2022)(reaffirming that “bullying can interfere with a disabled student's ability to receive a FAPE. . . the Second Circuit has found a denial of FAPE when a school refused to discuss bullying during development of a student's IEP. . . .”)



What if the school district refuses to address the bullying of a student with a disability? (cont'd.)

Two Caveats:

- “Before a federal district court may exercise subject matter jurisdiction over an IDEA case, a plaintiff must first exhaust the administrative process.” *See* 20 U.S.C §1415(l); *see also Polera v. Board of Education of the Newburgh Enlarged City School District*, 288 F.3d 478, 483 (2d Cir. 2002).
- A Due Process Complaint must be filed to initiate an administrative hearing before an Impartial Hearing Officer (“IHO”).



Students with Disabilities Footnotes

- (1) U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: [BULLYING AND YOUTH WITH DISABILITIES AND SPECIAL HEALTH NEEDS](#) (JULY 2020) p. 1.
- (2) *Id.*
- (3) UNESCO: [BULLYING RATES HIGHER FOR CHILDREN WITH DISABILITIES](#) (APRIL 2022) p. 1.
- (4) U.S. DEPARTMENT OF EDUCATION: [DEAR COLLEAGUE LETTER](#) (AUGUST 2013) p. 3.