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**Memorandum to: M.A.S.S. Members**

**From: Long and DiPietro, LLP.**

**RE: 2013 Amendments to Bullying Law** 

**Date: Monday, August 26, 2013**

**New Provisions in 2013 State Budget Expand Bullying Prohibition**

In mid-July the legislature adopted a new state budget containing in three outside sections (Sections 72, 73, and 74) an expansion of the anti-bullying law first adopted in 2010. See M.G.L., sec.370. Recent news arising in Concord-Carlisle reminds us all that we must continue to be vigilant and understand that even when districts act in a manner consistent with policy or law, allegations or incidents of bullying can and will occur.

The primary thrust of the new law expands the definition of “perpetrator” to include school staff and employees.

**Summary of Existing Law and New Legislation:** Updated with 2013 Changes in “boldface” (M.G.L. c. 71 §370)

Generally, the original law greatly expanded the school district’s obligations in terms of monitoring, reporting and investigation all acts of bullying. In addition, the law has an educational component for all staff (not just educational staff) and requires an anti-bullying curriculum for all students in grades K-12.

The bullying law applies to public and private schools, including approved private day or residential schools, charter schools, collaborative schools. Under the provisions of the prior law all schools were required to establish a bullying prevention and intervention plan, with the criteria enumerated below, by December 31, 2010. Those original plans were to be submitted to the Department of Elementary and Secondary Education (“DESE”) pursuant to §370(d). All schools must create a policy prohibiting bullying for the student handbook per §37H of c.71.

The law contains several key components:

- (1) professional development plan for all staff; §370(d)
- (2) establishment of bullying intervention and prevention plan; §370(d)
- (3) curriculum on bullying for all school age children, grades K-12; §370(c)
- (4) reporting requirements for all staff who witness or are aware of any incident of bullying; §370(g)
- (5) investigation and disciplinary policies for acts of bullying; and
- (6) notification of law enforcement when criminal charges may be appropriate. §370(d)

The law broadly defines bullying both on and off school grounds. For example, bullying is prohibited at bus stops, on buses or other vehicles owned, used or leased by schools and “at a location, activity, function or program that is not school related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.” See §370(b)

The law appears to require the school district to investigate instances of alleged instances of bullying that may occur off school grounds if there is a nexus between the conduct and a hostile environment at school or the alleged conduct disrupts the “educational process “at school.

**Discussion of 2013 Amendments:** Amendments in 2013 expand the definition of Perpetrator to INCLUDE staff among the class of people who are prohibited from engaging in bullying behavior. We recommend that each school district review the new law in the context of c.71, section 370 and existing policies and procedures.

A. New Key Definitions Expanded (Changes in boldface type)

Bullying has been re-defined as:

the repeated use by one or more students **or by a member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional** of a written, verbal or electronic

expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim’s property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school...  
§370(a)

Perpetrator is now defined as:

**a student or member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional.**

Cyber bullying is defined as:

[B]ullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. §370(a)

**B. Scope of Prohibition of Bullying §370(b)**

The legislation contains a broad behavior prohibition which address on and off school grounds. Specifically, the legislation states:

Bullying shall be prohibited: (i) on school grounds, property immediately adjacent to school grounds, at a school sponsored or school related activity, function or program whether on or off school grounds, at a school bus stop, on a school bus or other vehicle owned, leased or used by a school district or school, or through the use of technology or an electronic device owned, leased or used by a school district or school and (ii) at a location, activity, function or program that is not school related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.

**C. Educational Requirements §370(c)**

The legislation requires every school district to implement a curriculum that addresses bullying prevention for age appropriate instruction, Kindergarten to grade 12.

**D. Bullying Prevention Plan Criteria §370(d)**

Every school district must establish by a plan to address bullying prevention and intervention, which should be filed with the Department of Elementary and Secondary Education (“DESE). Pursuant to changes in 2013, **the plan shall apply to students and members of a school staff, including, but not limited to, educators, administrators, school nurses, cafeteria workers, custodians, bus driver, athletic coaches, advisors to an extracurricular activity and paraprofessionals.** The plan must include the following elements:

- (i) description of and statements prohibiting bullying, cyber bullying and retaliation;
- (ii) clear procedures for students, staff, parents, guardians and others to report bullying or retaliation;
- (iii) a provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report;
- (iv) clear procedures for promptly responding to and investigating reports of bullying or retaliation;
- (v) the range of disciplinary actions that may be taken against a perpetrator for bullying or retaliation; provided, however, that the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior;
- (vi) clear procedures for restoring a sense of safety for a victim and assessing that victim’s needs for protection;
- (vii) strategies for protecting from bullying or retaliation a person who reports bullying, provides information during an investigation of bullying or witnesses or has reliable information about an act of bullying;
- (viii) procedures consistent with state and federal law for promptly notifying the parents or guardians of a victim and a perpetrator; including notifying the parents or guardians of a victim of the action taken to prevent any further acts of bullying or retaliation; and provided, further, that the procedures shall provide for immediate notification pursuant to regulations promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the perpetrator;
- (ix) a provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action; and
- (x) a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students.

The DESE has published a model plan for school district's to consider when creating their plans. §370(j)

School districts must update both their policies and their student handbook to incorporate the relevant sections of the bullying prevention and intervention plan §370(e). Districts must provide written notice of the plans and policy to all staff annually and provide annual training. Plans must be posted on the District's website.

#### E. Professional Development

Every school is required to develop an ongoing professional development plan for all the school's educational and non-educational staff, including but not limited to educators, administrators, cafeteria workers, custodians, bus drivers, coaches, advisors to extracurricular activities and paraprofessionals.

The professional development curriculum shall include:

- (i) developmentally appropriate strategies to prevent bullying incidents;
- (ii) developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents;
- (iii) information regarding the complex interaction and power differential that can take place between and among a perpetrator, victim and witnesses to the bullying;
- (iv) research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment;
- (v) information on the incidence and nature of cyber bullying;
- (vi) internet safety issues as they relate to cyber bullying.

The DESE is required to provide information on alternative methods for fulfilling the professional development requirements, which include at least one option that is available at no cost to the school.

#### F. Reporting Requirements §370(g)

The law imposes mandatory reporting requirements on all members of the school staff, not just all teaching staff, to immediately report any instance of bullying or retaliation the staff member has either witnessed or become aware of, to the principal or school designee. Staff shall immediately report any instance of bullying or retaliation the staff

member has witnessed or become aware of to the principal or to the school official identified in the plan as responsible for receiving such reports or both.

#### G. Investigation by Principal §370(g)

The school principal or designee is required to conduct a prompt investigation of every report of bullying, cyber bullying or retaliation for reporting an incident of bullying.

The bullying prevention plan outlines the principal's duties if he or she determines that bullying or retaliation has occurred. The duties include:

- 1) taking appropriate disciplinary action;
- 2) notifying the parents of both the victim and perpetrator of the incident;
- 3) notifying the parents of the victim(s) of actions taken to prevent further acts of bullying/retaliation; and
- 4) when appropriate, notifying law enforcement if the principal/designee believes criminal charges may be pursued.

The DESE has required promulgated regulations on principal's duties.

#### A. Other Areas Addressed by the 2010 Legislation

##### Internet Use Rules: 2010 legislation added §93 to M.G.L. c. 71

Every public school providing computer access shall have a policy regarding internet safety measures to protect students from inappropriate subject matter and shall notify all students and parents of the policy.

##### Special Education

If an Independent Education Program ("IEP") indicates that a child has a disability which affects "social skills development" or the child is "vulnerable to bullying, harassment or teasing because of the child's disability" the IEP shall address the skills/proficiencies needed to avoid and respond to these issues.

##### Criminal Law Amended

Various criminal statutes have been amended to incorporate bullying or harassment, including behavior which is part of a pattern of action which results in substantial emotional distress, or use of mail or electronic/telephonic conversations with the intent to harass.

## Conclusion

In the wake of the tragic incidents in South Hadley and Springfield, this legislation, as amended in 2013, seeks to address some of these issues and holds all school administrators and all staff to a significantly higher standard. The new bullying legislation greatly increases the school district's reporting and investigative responsibilities, in addition to the educational requirements.

In the most recent Massachusetts court case in which a decision was reached addressing bullying of which we are aware, a Massachusetts Superior Court judge dismissed a parent's claim that the School District failed to act and prevent harassment and bullying of their son by other students. In Parsons v. Town of Tewksbury, the court dismissed all the claims, including negligence, intentional infliction of emotional distress and the civil rights claim alleging a violation of the State Constitution.

The Parsons case appears to be of limited vitality, in light of the subsequent legislation, in determining a school district's potential liability. In our opinion, based on the law as enacted in 2010 and in consideration of the 2013 amendments, it would appear that a school district may be liable if a victim establishes that the school district had notice of a claim of bullying and failed to investigate or in the alternative, failed to adhere to or enforce its bullying prevention plan. While the legislation does not specifically establish a cause of action for not adhering to a bullying prevention plan, it appears that the scope of potential liability is expanded, subject to any applicable defenses under the Massachusetts Tort Claims Act.

With School openings nigh LEA's should review their procedures by:

- Emphasizing Mandatory Reporting to Principal who shall also:
  - notify to law enforcement if criminal
  - take appropriate disciplinary action
  - notify parents
  - notice to other schools if other students involved
- Highlighting Student Handbook references to the new law and district policy
- Making Age appropriate curriculum adjustments
- Publicizing Professional development
  - research based
  - parental involvement
  - home language
- Review the annual notice in writing to staff – employee handbook
- Reissue Annual notice of anti-bullying process on website
- Remind all segments of the school community of AUP – safety measures by notice to students and parents