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MASSACHUSETTS CASE CALLS INTO QUESTION STATE ANTI-BULLYING STATUTE

A case[1] is making its way through the federal courts that is causing Massachusetts schools to pay attention. Earlier this month, the U.S. District Court for the District of Massachusetts issued an order that calls into question the validity of the Hopkinton public high school's anti-bullying policy because it is arguably vague and overbroad, in violation of rights guaranteed by the First Amendment. Notably, the school's policy uses a definition of "bullying" that mirrors the language used by the Massachusetts anti-bullying law, M.G.L. c. 71, § 37O, and the state's model anti-bullying plan. The question the Hopkinton case raises but has not yet answered is whether a key provision of the law will be struck down and, if so, what that means for the state's anti-bullying law, and public and independent schools that are governed by the law.

Specifically at issue is whether the Hopkinton high school's anti-bullying policy is vague and overbroad. The school's policy, which tracks the language of the law, defined bullying as "*the repeated use … 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 …; (ii) places the victim in reasonable fear of harm to himself …; (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.*"

In brief, the Hopkinton case involves a group of students who were allegedly bullying a fellow classmate. The means of

[1] Doe v. Cavanaugh, Bishop, and Hopkinton Public Schools, No. 19-cv-11384-WGY (D. Mass. Feb. 5, 2020) (order denying in part motion to dismiss). The case was consolidated with Bloggs v. Cavanaugh, Bishop, and Hopkinton Public Schools, No. 19-cv-11987-WGY.

bullying involved derogatory comments being made on a private, group Snapchat. After an investigation, the school suspended some students for violating the school's anti-bullying policy. The disciplined students sued, alleging that the school's anti-bullying policy unlawfully restricts their right to free speech, rights guaranteed them by the First Amendment. The seminal case on students' free speech rights in the classroom says that student speech can be restricted only if the speech could substantially disrupt school operations or interfere with the rights of others. Here, the students argue that the policy is faulty because the policy does not require that the emotional harm suffered by the victim also substantially disrupt school operations or interfere with the victim's rights. The plaintiffs also claim that the undefined phrase "emotional harm" is vague and, as a result, the policy unlawfully runs the risk of being subjectively and arbitrarily enforced.

The court has not definitively ruled on this issue yet. For now, it has merely accepted the plaintiff's contention that the policy – and in effect, the law – *could* be overly broad and vague, and the plaintiff may continue to try this point. If the parties continue to litigate these issues, the court may eventually make a definitive determination on the matter. And if the court invalidates Hopkinton's anti-bullying policy because it violates students' First Amendment rights, other public schools across the Commonwealth will be directly impacted because their policies, if substantially similar to Hopkinton's, will also be considered invalid.

The impacts for independent schools, however, may not be as immediate. Independent schools' policies, even if the same as Hopkinton's, will still be valid. Unlike public schools, independent schools are not government actors that are bound by the constitutional guarantees of free speech. They can restrict student speech without worrying about violating the rights guaranteed by the First Amendment.[2] Therefore, although the anti-bullying policy might be invalid in the public school setting, such a ruling does not mean similar policies in the independent school setting are invalid. But this does not mean independent schools are in the clear. If the court invalidates the school policy, the anti-bullying law is effectively invalidated (at least in part). This could lead to an overhaul of the anti-bullying law, with ripple effects being felt by *every school* across the Commonwealth that has an anti-bullying policy based on the law's language, and that includes independent schools.

What Does This Mean for You?

The Massachusetts law governing bullying in schools and obligating all schools to maintain anti-bullying policies covers public schools and private independent schools. Many schools' anti-bullying policies are based verbatim on the Massachusetts law or the state's model policy. If this case results

[2] Of course, just because independent schools *can* limit students' rights to free speech does not mean that they do or necessarily should, particularly when the speech is political speech. Most independent schools carefully balance any restrictions on student speech with the idea that schools are the ultimate "marketplace of ideas", places where students can and in fact are encouraged to engage in and test out ideas and thoughts.

in the court striking down the very definition of "bullying" under Massachusetts law, it remains to be seen what that will mean for the Massachusetts law and your school's anti-bullying policy.

For now, our office will continue to monitor the Hopkinton case to see if the court makes any controlling determinations about the validity of the Massachusetts anti-bullying law. If it does, changes to your school's anti-bullying policies may be required.

While on the topic of anti-bullying policies, now might also be a good time to review compliance with the Massachusetts law generally. Under Massachusetts law, all schools are required to update their bullying prevention plans "***at least biennially***". The law requires that certain public schools do this in consultation with teachers, school staff, and other constituents, and that such consultation include a public notice and comment period. Independent schools are only required to "*give notice to and provide a comment period for families that have a child attending the school*." Although the law mandates an opportunity for review and comment, the law implies that the school still has ultimate discretion on the content of its policy. If your independent school does not have a practice of biennial review or allowing families to comment, you should consider instituting these practices. One suggestion would be to seamlessly incorporate the review and comment process into the enrollment process. It remains to be seen how soon, and ultimately whether, the anti-bullying law will be affected by the Hopkinton case, so it makes sense to take another look at your anti-bullying policy adoption processes now rather than waiting for any further rulings from the court.

- Rebecca Thibault

MASSACHUSETTS' HANDS-FREE DEVICE LAW IS NOW IN EFFECT

If you have driven on a Massachusetts highway anytime in the last month, you have seen the warnings that drivers may now only use mobile electronic devices in hands-free mode. Effective February 23, 2020, the Hands-Free Device Law provides that vehicle operators can use mobile devices only in hands-free mode. The law specifically prohibits drivers from:

- Holding a mobile electronic device;
- Using a device unless the use is in hands-free mode; and
- Reading or viewing text messages, images or video on the devices.

Drivers are prohibited from using their hands to access their devices even when at a traffic light or otherwise stopped in traffic. A driver is, however, allowed to use her hands to access her device if the vehicle is stationary *and* not located in a public way intended for travel by a vehicle or bike. In addition, using your hands to access your device in the event of an emergency is an affirmative defense to an alleged violation of the law.

Drivers are also allowed to use their devices for navigation purposes or to view maps, but *only if* the device is mounted or affixed to the vehicle's windshield, dashboard or center console.

For your employees who are authorized to drive school vehicles, but are not transporting children, they are governed by the new law. MGL c. 90, § 13B. For employees who are operating vehicles used in public transportation to transport children, operators of vehicles are already prohibited from using devices while operating such vehicles, *except* in the performance of their official duties. MGL c. 90, § 12A. And for your students under the age of 18, the law is now expanded: they used to merely be prohibited from using devices while operating vehicles, but they are now prohibited from using or even holding in their hands such devices while operating a vehicle. MGL c. 90, § 8M.

What Does This Mean for You?

We recommend you alert your affected employees and students. In addition, if you have any written policies about vehicle or mobile electronic device use, those policies may need to be amended.

- Rebecca Thibault

CERTIFYING IRS FORM 990 AND COMPLYING WITH REQUIREMENTS FOR PUBLISHING YOUR SCHOOL'S RACIALLY NON-DISCRIMINATORY POLICY

In 2019, the IRS updated its Revenue Procedure to make it easier for non-profit schools to comply with requirements for publishing the school's racially non-discriminatory policy. Proper publication of your school's policy matters for purposes of maintaining your school's 501(c)(3) status and has implications for certifying your school's Form 990.

For decades, private schools that have 501(c)(3) status from the IRS have been required to have a racially non-discriminatory policy as to students to maintain their tax-exempt status. Schools are also required to include a statement about their racially nondiscriminatory policy in their student brochures and catalogues, and must publish the policy in certain media.[3]

In 1975, the IRS explained in a Revenue Procedure[4] the methods it considered were permissible ways for a school to make its required public disclosures about its racially non-discriminatory policies, such as by publishing a policy statement in a local newspaper annually. By today's standards, these disclosure methods are onerous.

The 2019 update makes it much easier to be compliant with the requirements for publishing your school's racially non-discriminatory policy.

What exactly does the IRS require?

Since 1975, for a school to obtain or maintain its 501(c)(3) status with the IRS, the IRS has required the following: ***First***,

[3] Importantly, schools are also required to operate in a bona fide manner in accordance with such policy. That requirement is beyond the scope of this Client Alert, but we would be happy to discuss these requirements in more detail.

[4] Revenue Procedure 75-50, 1975-2 C.B. 587 (the "1975 Revenue Procedure"), available at https://www.irs.gov/pub/irs-drop/rp-19-22.pdf.

schools must include a statement in their charter, bylaws, other governing instrument, or by resolution of the school's governing body that the school does not discriminate against applicants on the basis of race, color, and national or ethnic origin. ***Second***, a school must also include a statement of its racially non-discriminatory policy in all its brochures and catalogues dealing with student admissions, programs, and scholarships. The following suffices:

> ***Notice of Nondiscriminatory Policy as to Students***
>
> *The [name] School admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the School. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other School-administered programs.*

Finally, under the 1975 Revenue Procedure, a school had to make its racially non-discriminatory policy "known to all segments of the general community served by the school." A school could do so by any of the prescribed methods, which included publication in a newspaper or by using broadcast media. This publicity requirement could be excused or satisfied by other means, and there are special exemptions for parochial schools and schools that draw a substantial percentage of students nationwide or worldwide. Even if your school qualifies under such exemption, however, your school must still publish its racially nondiscriminatory policy on brochures and other admissions materials.

Additionally, the publicity requirement could be met by a showing that the school enrolls students of racial minority groups in "meaningful numbers." Although exceptions to publication are available, the 1975 Revenue Procedure "encouraged" schools to still publish the policy by newspaper or broadcast media regardless of their ability to satisfy the exceptions.

How are the requirements different now? The somewhat onerous and outdated methods for a private school to satisfy the requirement to publicize its racially non-discriminatory policy were updated by the IRS in Revenue Procedure 2019-22 (effective May 28, 2019). As of May 2019, a school could satisfy the publicity requirement by displaying a notice of its racially nondiscriminatory policy on its Internet homepage.

The notice cited above satisfies the new requirement. In addition, to meet the new standard set out in the 2019 Revenue Procedure, the notice must:

- Be on the school's primary, publicly accessible homepage (a link from the homepage does not suffice).
- Appear *at all times* during the year.
- Be noticeable. This means it must be displayed in a way that is reasonably expected to be noticed by visitors to the website (factors to consider include the size, color, graphic treatment, and other distractions on the website).

What Does This Mean for You?

By signing your school's IRS Form 990 every year (specifically, Line 7 of Schedule E), you are in part certifying that your school complies with the requirements listed above. If you are not in fact complying with this publicity requirement, your certification is not accurate.

Our office spoke with the principal author of the 2019 Revenue Procedure to find out how and when the IRS enforces the racially non-discriminatory policy requirements, including the requirement to publish the policy. He said that it typically comes up when the IRS performs an audit and confirmed that the IRS does in fact still check for compliance with this requirement. As stated in the 1975 Revenue Procedure, "on audit, a school must be prepared to demonstrate that the failure to publish its racially non-discriminatory policy was justified" by a showing that the school in fact followed a racially non-discriminatory policy. While many schools might be able to make this factual demonstration, doing so means the school is on the defense to prove that the facts and circumstances of its situation satisfy the requirement. Having to make such a demonstration is likely to be much more time- and resource-intensive than simply updating the school's homepage with the required notice.[5]

Ultimately, if your school is not complying with the publicity requirement now, coming into compliance requires your school to update its website homepage with the requisite notice. In addition, if your student brochures and catalogues do not include the notice, those documents should be revised as well. For other written documents, there is an abbreviated form of the notice that is acceptable.

Again, while some schools may be exempt from the publicity requirement because the school draws a substantial percentage of its students nationwide or worldwide, the IRS could require the school to demonstrate that it qualifies to take advantage of this exemption. Your school might determine that it makes more sense to proactively publish than risk the chance that you would have make such demonstration to the IRS.

Our attorneys would be happy to work with you to discuss how to make sure your school's website notice or admissions brochure language is compliant with the revised 2019 Revenue Procedure.

- Rebecca Thibault

Rebecca Thibault is admitted to the bar in Massachusetts. Her practice encompasses all areas of business and corporate law, with a focus on counseling independent and public charter schools.

[5] Of course, publishing the notice is never enough on its own, and a school is always cautioned to ensure that, in practice, it follows its racially non-discriminatory policy. In addition, the requirement that schools include the statement of policy (*i.e.*, "Our school admits students of any race, color, and national or ethnic origin") in all brochures and catalogues dealing with student admissions, programs, and scholarships is still in effect and has not been changed by the 2019 Revenue Procedure.