TESTIMONY OF THE NEW YORK CIVIL LIBERTIES UNION

before

THE NEW YORK CITY COUNCIL

on

THE DEPARTMENT OF EDUCATION’S EFFORTS TO COMBAT BULLYING &
PROPOSED RESOLUTIONS 473-A AND 474-A

June 13, 2011

The New York Civil Liberties Union respectfully submits the following testimony regarding the Department of Education’s efforts to combat bullying and the City Council’s support of the Safe Schools Improvement Act (Resolution 473-A in support of H.R. 1648/S.506) and the Student Non-Discrimination Act (Resolution 474-A in support of H.R.998/S.555).

With more than 48,000 members, the New York Civil Liberties Union is the foremost defender of civil liberties and civil rights in New York State. As part of our dedication to upholding the right to a quality education for all of New York’s children, we have spent over a decade advocating for schools to prevent and address the bias-based harassment of students. Our work has included legislative campaigns in support of the Dignity for All Students Act (“The Dignity Act”) and its local counterpart (“Local Law 42”), legal advocacy on behalf of individual targets of bias-based harassment around the state, and ongoing participation on the State Education Department’s Dignity Implementation Task Force. In addition, our work to improve
school discipline and restrict the role of the criminal justice system in schools affords us a unique perspective on the criminalization of student behaviors, including bullying.

It is with this in mind that we offer our strong support of the two resolutions at issue today. The Student Non-Discrimination Act (SNDA) would extend important legal protections and remedies to LGBTQ students across the country. LGBTQ students are not specifically protected by civil rights statutes that prevent discrimination on the basis of protected characteristics (race, national origin, sex, and disability status) and have few legal remedies in even severe cases of bias-based harassment at school. The SNDA would correct this disparity.

The Safe Schools Improvement Act (SSIA) would also contribute to improved educational environments for students across the country. SSIA’s training and reporting requirements will go a long way to addressing bullying in schools nationwide. In particular, the reporting requirements in SSIA would enable more sophisticated analysis and effective action against bullying by highlighting patterns of behavior among students. Data collected by the federal Department of Education on student achievement and discipline is a valuable tool for advocates and researchers, and we strongly believe that bullying incidents should be tracked and analyzed in the same way.

While we strongly support enactment of the federal bills at issue today, our immediate concern is the successful implementation of the Dignity for All Students Act—a state law which prohibits harassment and bullying. The DOE should be commended for taking important steps to address bullying, but it is still failing to meet all its obligations under Local Law 42—a seven-year-old local anti-bullying law—and is falling far short of the requirements under the Dignity Act. We urge the DOE to come into full compliance with Local Law 42. Compliance with the
local law will put DOE ahead of the curve in implementing the Dignity Act, and ensure that New York City is a model district in ensuring that students are protected from bullying.

I. The Effects of Bullying

Week to week, the NYCLU receives calls from panicked parents and terrified students who are subjected to such severe harassment that just attending school each day is a challenge. In addition to missing class, students who are subject to bias-based harassment may suffer from anxiety and an inability to complete their school work. They may be too scared to join extracurricular activities or participate in school events. These children, like other targets of bullying, can suffer serious health and mental health consequences, consequences that can extend to other children in the school who are not direct targets of the harassment.¹ A school environment that is toxic to students, can lead to high absenteeism, lowered grades and test scores, and a general feeling of disengagement with the school.²

As we speak, NYCLU attorneys are working to secure a transfer for a student who has been so viciously bullied due to his sexual orientation that his principal told him this was a “good year” because he had only received one death threat. Not only does 16-year-old Richard live in constant fear for his physical safety—and even his life—he has sacrificed almost every school activity to avoid being bullied. For instance, though he excels at soccer, he was too afraid of his bullies to try out for the team. He goes out of his way to avoid the other out gay student in the school because their mere friendship makes both boys targets for sexual harassment. The school environment is so poisoned for Richard that he won’t even consider joining the Gay-Straight Alliance—a support group for out LGBT students and straight allies—because he fears it would

draw the bullies’ attention. For Richard, unfortunately, due to the failure of his school to intervene effectively to protect him and improve the school environment, the only viable option is a transfer.

The NYCLU works with a handful of individual bullied students like Richard to find solutions to ensure their right to an education. Ultimately, though, intervening on behalf of individuals is a limited tool for creating safer schools for all children. For that reason, our focus has shifted to establishing strong, meaningful anti-bullying programs in schools. Our work with the DOE and the State Education Department as part of the Dignity Task Force reflects this commitment. Because the DOE has implemented its own anti-bullying program for several years, we believe that a close examination of its successes and shortcomings will highlight important considerations for implementation of the Dignity Act.

II. Statutory Framework

In New York City, the issue of bias-based harassment sits at the intersection of several bodies of law. For decades, all public schools have had obligations to prevent and address harassment pursuant to federal law:

- Title VI of the Civil Rights Act of 1964 protects students from discrimination or harassment on the basis of their race, color, or national origin (including English-language proficiency).
- Title IX of the Education Amendments of 1972 protects students from discrimination or harassment on the basis of their sex (gender).
- Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 protect students from discrimination or harassment based on their disability status.
In 2004, the New York City Council passed the Dignity for All Students Act (which became Local Law 42) to ensure that students in New York City—including those who are not explicitly mentioned in civil rights laws, such as some LGBTQ youth, homeless youth, and youth in foster care—were protected from harassment that rose to the level of creating a hostile school environment. Among other things, the new law mandated regular training of all pedagogical staff and school safety officers on diversity awareness and sensitivity, and how to recognize and respond to harassment. It also required the DOE to issue an annual “statistical summary” of bias-based incidents in schools, disaggregated by school and grade level, and to include an analysis of bias incidents in the school report cards. The Council enacted this law over a veto by Mayor Bloomberg.

The DOE never fully implemented Local Law 42, maintaining a position that the City Council lacked jurisdiction over the DOE. Three years after the enactment of Local Law 42, however, in the midst of horrific reports of bias-based violence against students, the DOE undertook to offer optional anti-bullying training to school employees as part of a program titled “Respect for All.” Under increasing pressure from advocacy groups, then-Chancellor Klein issued a regulation in 2008 that picked up some of the provisions of Local Law 42 (Chancellor’s Regulation A-832: Student-to-Student Bias-Based Harassment, Intimidation, and/or Bullying). The regulation prohibits conduct that adversely affects a student’s educational opportunities.

Unfortunately A-832 is less meaningful than Local Law 42 in many ways. For example, it does not require training for educators or any other school employees (though the DOE has maintained an informal goal of training two individuals at each school). A-832 does not have a reporting requirement, nor does it prohibit conduct by adults in the schools.

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represents a step in the right direction for the DOE, but falls far short of the DOE’s legal obligations under both City and State anti-bullying laws.

**III. Effectiveness of Respect for All**

In a 2010 evaluation of the New York City Respect for All program, the Gay, Lesbian & Straight Education Network (GLSEN) found that trained teachers demonstrate greater empathy for LGBTQ students, are more likely to use proper terminology and are more likely to participate in activities that create a safer school for LGBTQ students. The 816 teachers who were surveyed also “demonstrated increased…frequency of intervention in anti-LGBTQ name-calling, bullying, and harassment.” GLSEN’s primary recommendation was that the DOE train more teachers and administrators, stating “providing such training to all school staff, including administrators, would result in an even stronger effect on the school environment” and that ongoing professional development opportunities would “enhance the effectiveness of trainings.”

It is unclear whether there has been an actual reduction in the number and severity of bias-based incidents in the schools as a result of Respect for All trainings. What is clear is that bias-based harassment is an ongoing problem. A 2011 survey of educators at nearly 200 schools found that 70% of teachers said they witness bias-based harassment in their school—yet few were aware of Respect for All or felt that they had the training to recognize or intervene in bullying. A 2008-2009 DOE audit of discipline in schools found that 5 percent of all discipline incidents (more than 6,000 incidents) were “bias-related.” Of those, the majority were relatively serious (categorized as “Level 4” on the DOE’s 5-level discipline scale) and three quarters of all

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6 Id. at v.
7 Sikh Coalition, Asian American Legal Defense and Education Fund and New York Civil Liberties Union, “Bullying in New York City Schools: Educators Speak Out.” 2011. While the survey was limited in scope, it provided valuable insight into most teachers’ daily reality with regard to bullying interventions.
incidents were motivated by a racial or gender bias.\textsuperscript{8} To our knowledge there has not been an 
update of the 2009 audit, and the DOE has not reported any other information publicly about the 
incidence of bullying in schools. It remains nearly impossible to find any information on the 
Respect for All Program on the DOE’s website, including on a page that lists the district’s “non 
aademic support services.”\textsuperscript{9} Updated analysis is necessary to judge the effectiveness of Respect 
for All in reducing incidents.

\textbf{IV. New Obligations Under The Dignity Act}

The New York State legislature enacted the Dignity for All Students Act (“The Dignity 
(1)-(2) 2010). The new law is similar to Local Law 42 and goes into effect at the beginning of 
the 2012-2013 school year.

Since September 2010, the DOE has been a member of a statewide task force charged 
with helping districts implement The Dignity Act. DOE’s participation on the Task Force is an 
acknowledgement of its dedication to effective implementation of the new law. Due to the size of 
the City school district, and its experience implementing anti-bullying programs since 2008, it is 
likely that other school districts will look to New York City when preparing to implement The 
Dignity Act over the next calendar year. For that reason, we hope the DOE will recognize and 
address the areas where its anti-bullying work has failed to live up to its obligations under Local 
Law 42, and where it will need to improve to meet the obligations of The Dignity Act.

The Dignity Act will obligate the DOE to take certain steps above and beyond the 
requirements of A-832; however, in those areas where Local Law 42 or A-832 exceed the

requirements of The Dignity Act, we hope the DOE will view Dignity as a floor, not a ceiling, for anti-bullying efforts. For example, we urge the DOE to maintain its commitment to training a minimum of two staff members in each school\(^\text{10}\), though The Dignity Act may require only one. Research by GLSEN has found that students report additional improvement in school climate when six or more teachers in the school are effectively trained.\(^\text{11}\) We hope the DOE will consider the importance of which individuals are able to avail themselves of trainings in each school, and include non-pedagogical staff such as school safety officers, bus drivers, and food service personnel in future trainings.

The Dignity Act prohibits not only student-to-student harassment, which is currently contemplated by A-832, but also adult-to-student harassment. The DOE must be prepared to investigate and intervene in situations where teachers, staff, volunteers, and NYPD personnel are the subject of harassment complaints. The tension between NYPD and DOE employees working side by side in schools cannot be an excuse for the DOE to permit the harassment of students by school safety or police officers. The NYCLU has received complaints of students being harassed by NYPD employees in schools, particularly immigrant students.

Finally, The Dignity Act will require the annual reporting of “material incidents” of bullying and bias-based harassment to the State Education Department. With the sophisticated data analysis tools at its disposal, we hope the city DOE will become a model district for reporting and transparency regarding bias-based incidents. In the past, the DOE has shied away from public reporting of incidents out of a fear of “shaming” schools into underreporting. This is a concern shared by the NYCLU and the State Education Department. Designing a reporting scheme that doesn't shame schools, but still provides a mechanism for parents, policy makers and

\(^{10}\) According to DOE officials, over 80% of schools now have at least one trained individual.


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researchers to evaluate the success of anti-bullying efforts (and costs) is a key goal of the Task Force. We are confident that the DOE’s participation at the decision-making level on this policy will help to alleviate its concerns about reporting, and will ensure its compliance with whatever scheme is ultimately created.

V. Concerns Moving Forward

a. Cyberbullying

No discussion of bias-based harassment in schools can be complete without addressing the issue of bullying via electronic means, or cyberbullying. While the relationship between cyberbullying and in-person bullying is unclear (research has found both strong and weak correlations\(^\text{12}\)), educators are increasingly concerned about the effects of vicious online bullying on students’ ability to succeed in school. At the same time, educators are often confused or hesitant to intervene in cyberbullying situations because the actual communications are sent and received away from school grounds.

As a primary matter, the NYCLU is concerned about the erosion of students’ First Amendment and privacy rights. By virtue of their status as public school students, young people cannot be relegated to second-class citizenship, their private lives constantly coming under the auspices of a school discipline code. We hope the DOE will respect students’ free speech rights outside of school, even when addressing bullying relationships that may exist outside the physical boundaries of the classroom. Young people have the unequivocal right to express their views outside of school, including unpleasant or even mean ones.

The simplest way for schools to address cyberbullying without infringing on the rights of students is to be proactive. Rather than censoring and punishing students, the DOE’s

responsibility is to teach them the potential harm of such speech. In addition, schools should employ non-punitive responses to protected speech that has a negative effect on other students in the school, such as counseling, support groups, and restorative practices.

b. Discipline

It is not an exaggeration to say that school discipline in the New York City school district has reached a crisis. The number of suspensions has increased by an average of 27% each year since Mayor Bloomberg took control of the DOE in 2002, rising to a level of over 70,000 suspensions during the 2008-2009 school year. Hundreds of thousands of students, mostly black and many with diagnosed disabilities, have served long-term suspensions under an increasingly strict discipline policy, and an ever-lengthening list of “zero tolerance” infractions. Students—particularly those who have the greatest needs from teachers and schools—are regularly suspended for minor misbehavior, adding up to hundreds of thousands of missed school days.

The NYCLU is extremely concerned about the effects of anti-bullying policies on discipline and school safety practices in New York City. The New York City Department of Education and the New York Police Department have sacrificed many things on the altar of keeping schools nominally “safe,” including students’ personal privacy, freedom of movement, freedom of expression and their right to be free from unreasonable searches and seizures. Due to increased parent concern and media scrutiny of bullying, districts are under immense pressure to “crack down” on students, and police departments around the country have begun to enforce criminal harassment statutes against young people who bully.

Most bias-based harassment and bullying, however, is not a crime. Nor is bullying best addressed through tough “zero tolerance” discipline. The poor judgment and mistakes of childhood should never prohibit a student from accessing a free education or land him or her in
handcuffs. In the case of bullying in particular, suspension is a band-aid. It may remove the offending student from the immediate vicinity of the target, but this “solution” is temporary at best. At worst, it can inflame the bully’s frustration and anger towards the target, and the bullying can start anew, or even escalate, upon his or her return to school. Arresting a student for bullying or harassment can do immense and lasting damage to that student’s ability to succeed in school—and does very little to teach him or her a better way to handle differences.

To avoid endlessly suspending students for bullying, schools must seek long-term solutions, including educational approaches, to creating calmer, safer school environments. Educators, not the police, should be primarily responsible for addressing bullying and bias incidents, and all reasonable efforts should be made to preserve the continuity of both the bully’s and target’s education. Disciplining a bully is not the same thing as supporting the target of bullying.

We urge the City Council to take an active role in monitoring the effects of The Dignity Act and other legislation on City suspension rates, and arrests of students for school misbehavior. Beginning this summer, this exact information will be reported to the Council several times a year pursuant to Local Law 6/2011, and we urge the Council to be vigilant in detecting troubling patterns in student discipline and NYPD responses to student misbehavior, including bullying.

VI. Recommendations

Halfway through the implementation period for the Dignity Act (which must be operating in schools by the beginning of the 2012-2013 school year), the DOE has some advantages over

other school districts in the state, but also has a long way to go to be in compliance. We recommend the DOE take the following steps:

1. **Institute a public reporting scheme:** The Dignity Act requires that material incidents of bullying be reported to the State Education Department. As explained above, great care is being taken to ensure the reporting requirement does not shame schools for having “too many” bullying incidents, but instead focuses on their interventions. We recommend that the DOE also report some information on bullying incidents to the public—through school report cards as required by Local Law 42, or using some other mechanism. This is an important measure of school climate and parents, students, and advocates should know what the landscape of bias-based harassment is in their school compared to similar schools.

2. **Expand training opportunities.** Creating trained teams of educators in schools provides additional protections for students, particularly LGBTQ students. The DOE must step up its commitment to training school personnel, and set a goal to train as many teachers in the district as possible on effective prevention and intervention in bullying situations. It should focus its training efforts on classroom teachers and administrators, but also offer training opportunities to non-pedagogical staff including school safety agents, bus drivers, school nurses, food service personnel, and other support staff.

3. **Focus on prevention and effective intervention over punishment.** New York City schools do not need additional reasons to suspend students—effectively denying them access to their state-mandated education for misbehavior. Suspension is not an effective method for addressing bullying and has been demonstrated to be enforced in a discriminatory manner. Instead, the DOE must focus on implementing pro-social,
culturally relevant curricula, including LGBTQ-positive curriculum and meaningful training on internet safety and responsibility. It should step up its efforts to implement positive discipline alternatives, and move away from harmful zero tolerance discipline codes.

Councilmember Jackson, Speaker Quinn, and the entire City Council, we thank you for your attention to this important issue. New York’s constitution guarantees education to every young person in the state, and improving school climate for all students will help to ensure that students aren’t forced to miss school out of fear. Continued monitoring of discipline and criminal justice policies in school will ensure they don’t miss school for making mistakes. We hope the Council continues to take an active role in making our schools safe and nurturing for all students.