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I'll See You in Court, but Not Pursuant to DASA

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I. INTRODUCTION

In 2018, both New York State and New York City strengthened their laws designed to prevent incidents of workplace sexual harassment.[1] #MeToo has been a constant source of media coverage and public discussion.

But the goal of ending all types of harassment is not a new one. It has been a legislative focus for years, especially in public schools. In the wake of the shooting at Columbine high school in 1999, states across the country began passing anti-bullying laws to address and prevent incidents of violence and harassment in our schools' halls.[2]

For its part, New York passed the Dignity for All Students Act (hereinafter "DASA") in 2010.[3] The goal of DASA is to provide students with an educational environment free of discrimination, harassment, and bullying through the implementation of proactive and preventative policies and procedures. But what is the remedy for a student who claims his or her school has failed to live up to its obligations under DASA? Does the statute provide a mechanism to recover monetary damages in a civil lawsuit?

While the New York State and City statutes referenced above permit a private right of action and an award of monetary damages, whether DASA permitted these has been an open question in the Appellate Division, Second Department since the statute's enactment.

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[1] *See* Kristin Klein Wheaton, *New Legislation on Sexual Harassment*, N.Y. ST. BAR ASSOC., http://www.nysba.org/Section/Municipal_Lawyer/New_Legislation_on_Sexual_Harassment_Will_Significantly_Affect_the_Handling_of_These_Cases_for_Municipalities/ (last visited Jan. 31, 2019).

[2] Dimitrios Nikolaou, *Do Anti-Bullying Policies Deter In-School Bullying Victimization?*, 50 INT'L REV. L. & ECON. 1, 1-2 (2017).

[3] 2010 N.Y. Laws 482 (codified at N.Y. EDUC. LAW §§ 10-18).

Until recently, that is. The Appellate Division has now answered the question.

II. WHAT IS DASA?

On September 13, 2010, New York State Governor David Paterson signed New York State's DASA into law.[4] The statute took effect on July 1, 2012 with amendments effective on July 1, 2013.[5]

DASA amended New York Education Law by creating a new section (Article 2—Dignity for All Students)[6] and amending Section 801-a of New York Education Law.[7] According to the New York State Education Department, DASA requires

> instruction in civility, citizenship, and character education by expanding the concepts of tolerance, respect for others and dignity to include: an awareness and sensitivity in the relations of people, including but not limited to, different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, gender identity, and sexes.[8]

The statute further amended Section 2801 of the Education Law by requiring the boards of education of public school districts to include DASA requirements in their codes of conduct. School districts must also collect and report data regarding "material incidents of discrimination, harassment, and bullying."[9] All of this is to "provide the State's public elementary and secondary school students with a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying on school property, a school bus and/or at a school function."[10]

These goals seem beyond cavil. Who would argue that children should be subjected to hostile learning environments or that school districts need not discourage and prohibit them?

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[4] *The Dignity Act*, N.Y. ST. EDUC. DEP'T, http://www.p12.nysed.gov/dignityact/ (last updated July 9, 2018).

[5] *Id*.

[6] N.Y. EDUC. LAW §§ 10-18 (McKinney 2018).

[7] *Id.* § 801-a.

[8] *The Dignity Act*, *supra* note 4.

[9] *Id*.

[10] *Id*.

A question arises when there is an allegation a school district has not met its DASA requirements. In that situation, who is the arbiter of such a claim and what remedies may be awarded?

III. THE *ESKENAZI* CASE

J.E.M. was a high school student enrolled at Connetquot High School, part of the Connetquot Central School District (hereinafter "Connetquot").[11] He also received additional special education instruction from Eastern Suffolk BOCES (hereinafter "ESB") at a separate location.[12]

During the 2012-13 school year, J.E.M. rode the morning school bus to Connetquot, took a bus from Connetquot to ESB for an afternoon program, and rode the school bus home from ESB at the end of the day.[13] J.E.M. alleged another special education student harassed him throughout the school year.[14]

J.E.M. first sued Connetquot and ESB in the United States District Court for the Eastern District of New York, alleging violations of federal and state law for failing to prevent another student from allegedly harassing him.[15] After the Eastern District dismissed all federal causes of action and declined to assert jurisdiction over the state law claims, J.E.M. re-filed the state law claims in the Suffolk County Supreme Court.[16] One of the state law claims was for an alleged violation of DASA.[17]

A. The Trial Court Decision

Defendants filed a pre-answer motion to dismiss portions of the complaint, including those seeking recovery under DASA.[18] The trial court denied the motion to dismiss the DASA claim.[19]

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[11] Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 89 N.Y.S.3d 295, 296 (App. Div., 2d Dep't 2018).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 84 F. Supp. 3d 221 (E.D.N.Y. 2015).

[16] *Eskenazi-McGibney*, 89 N.Y.S.3d at 295.

[17] *Id.*

[18] Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., No. 15-11449, slip op. at 2 (N.Y. Sup. Ct. Apr. 18, 2016).

[19] *Id.* at 5.

The trial court found that the text of DASA does not include any express private cause of action for an aggrieved student.[20] Specifically, the trial court found "[DASA] does not provide any enforcement mechanisms, and it is silent with respect to remedies for a violation."[21]

Accordingly, a plaintiff may only assert a DASA claim if the principles of statutory construction allow for an implied right of action for a violation of the statute. Here, the trial court reasoned DASA allows an implied right of action under "the long-standing rule of statutory construction . . . that a private right of action for the violation of a statute exists for the benefit of persons injured by that violation."[22]

In determining whether DASA provides a private right of action, the trial court found an implied claim promotes the legislative purpose of the statute because it "would provide an incentive to enforce the anti-bullying policy and create a deterrent for those officials who would ignore the complaints of those students who the statute seeks to protect," and followed DASA's legislative scheme because DASA "and its implementing regulations are not simply remedial in nature but afford the students various rights and impose an affirmative duty on school officials to provide the students with an environment that is free from discrimination, bullying and harassment."[23]

Neither the New York State Court of Appeals nor the Second Department had decided this issue whether DASA affords an implied private cause of action. However, in an unpublished 2014 short form order, a Nassau County Supreme Court trial court dismissed all of a student-plaintiff's causes of action against a public school district except for a claim under DASA.[24]

B. Decisions in Other Courts

While the Second Department had not yet addressed this issue, the Third Department had in 2016. In *Motta ex rel. Motta v. Eldred Central School District*,[25] the Third Department became the first of the Appellate Division Departments to decide the issue and held:

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[20] *Id.*; *see also* N.Y. EDUC. LAW §§ 10-18 (McKinney 2018).

[21] *Eskenazi-McGibney*, No. 15-11449, slip op. at 3.

[22] *Id.*

[23] *Id.* at 4.

[24] Simon v. Bellmore-Merrick Cent. High Sch. Dist., No. 0139012013, 2014 WL 11189280 (N.Y. Sup. Ct. May 14, 2014).

[25] 36 N.Y.S.3d 239 (App. Div., 3d Dep't 2016).

> There is no explicit private right of action in the statutory scheme nor can one be implied from the statutory language and the legislative history (*see* Education Law § 10 *et seq.*). DASA is intended to create and implement school board policies in order to "afford all students in public schools an environment free of discrimination and harassment" caused by incidents of "bullying, taunting or intimidation" (Education Law § 10) "through the appropriate training of personnel, mandatory instruction for students on civility and tolerance, and reporting requirements" (*see* Education Law § 13). *To imply a private right of action would not further the legislative purpose or comport with the statutory scheme.*[26]

Both before, and after *Motta*, two federal district courts, relying on principles of statutory interpretation to DASA's text and legislative history, also held the statute does not afford an implied private cause of action.[27] Besides these cases, there were not any reported decisions on whether DASA provided an implied cause of action.

C. The Appeal

Defendants appealed the trial court's decision in *Eskenazi*. There was no dispute DASA contains no private cause of action under which J.E.M. or any other litigant may sue. Defendants disputed the finding of an implied claim in the statute, arguing the legislative history explicitly indicates the statute is not meant to serve as means for a private right of action.

"A statutory command . . . does not necessarily carry with it a right of private enforcement by means of tort litigation."[28] "When a statute is silent . . . courts have had to determine whether a private right of action may be fairly implied."[29]

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[26] *Id.* at 239 (emphasis added) (internal case citations omitted).

[27] *See* C.T. v. Valley Stream Union Free Sch. Dist., 201 F. Supp. 3d 307, 327 (E.D.N.Y. 2016) (referencing *Motta* and holding "there is no private right of action under DASA"); Terrill v. Windham-Ashland-Jewett Cent. Sch. Dist., 176 F. Supp. 3d 101, 109 (N.D.N.Y. 2016) (noting the court found no "reported decisions permitting a private right of action . . . under DASA," reviewed the legislative history, and held DASA does not permit an implied right of action).

[28] Uhr v. E. Greenbush Cent. Sch. Dist., 720 N.E.2d 886, 888 (N.Y. 1999).

[29] *Id.*

The Court of Appeals has developed a three-factor test to determine whether such an implied right of action exists, which considers:

> (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted;
> (2) whether recognition of a private right of action would promote the legislative purpose; and
> (3) whether creation of such a right would be consistent with the legislative scheme.[30]

Applying these factors, the Court of Appeals has "established that the most critical inquiry in determining whether to recognize a private cause of action where one is not expressly provided is whether such action would be consistent with the over-all legislative scheme."[31]

Here, DASA is intended to "afford all students in public schools an environment free of discrimination and harassment."[32] As a public school student alleging in-school harassment, J.E.M. likely falls within "the class for whose particular benefit the statute was enacted."[33] But the important factors regarding legislative purpose and scheme precluded an implied cause of action.

1. A Private Cause of Action Would Contradict DASA's Legislative Purpose and Scheme

The plain text and legislative history of DASA demonstrate that an implied private right of action contradicts the statute's legislative purpose and scheme.

DASA's plain text is focused on prevention and enforcement. "A private right of action for a new type of claim should not be judicially recognized by implication 'where the statutes in question already contain[] substantial enforcement mechanisms, indicating that

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[30] *Id.* (citing Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18 (N.Y. 1989)); *see also In re* Stray from Heart, Inc. v. Dep't of Health & Mental Hygiene of City of N.Y., 982 N.E.2d 594, 595 (N.Y. 2012).

[31] Brian Hoxie's Painting Co. v. Cato-Meridian Cent. Sch. Dist., 556 N.E.2d 1087, 1089 (N.Y. 1990) (collecting cases).

[32] N.Y. EDUC. LAW § 10 (McKinney 2018).

[33] Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 89 N.Y.S.3d 295, 297 (App. Div., 2d Dep't 2018).

the Legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted.'"[34]

DASA's language contains no indication the Legislature intended the statute to serve any private remedial function. Rather, DASA requires schools to impose policies and guidelines to prevent bullying,[35] mandates State Education Department reporting and other responsibilities regarding the law's implementation,[36] and establishes protections for individuals reporting harassment.[37] This focus on preventive functions and State regulation shows a private right of action contradicts DASA's preventive legislative scheme.[38]

Also, Education Law § 17 specifically provides that nothing in DASA will "[p]reclude or limit any right or cause of action under any local, state or federal ordinance, law or regulation including but not limited to any rights or remedies available under" the IDEA, Title VII, Section 504 of the Rehabilitation Act or the ADA.[39] Had the legislature intended any private right of action, it could have specifically included such a right in Education Law § 17, or elsewhere, in the legislation. This also indicates no implied action is available.[40]

And if DASA's text was not telling enough, the statute's legislative history explicitly indicates, often, that the Legislature did not intend for the statute to be used as a private right of action. One federal court, describing the contents of DASA's legislative "bill jacket," noted:

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[34] Flagstar Bank, FSB v. State, 978 N.Y.S.2d 266, 273 (App. Div., 2d Dep't 2013) (alteration in original) (citing Cruz v. TD Bank, N.A., 2 N.E.3d 221, 227 (N.Y. 2013)).

[35] N.Y. EDUC. LAW § 13.

[36] *Id.* §§ 13-24.

[37] *Id.* § 16.

[38] *See* Mark G. v. Sabol, 717 N.E.2d 1067, 1071 (N.Y. 1999) (explaining that the preventive services provisions of Child Welfare Reform Act, which provided for comprehensive enforcement mechanisms centered on local social services districts, did not create implied private right of action).

[39] N.Y. EDUC. LAW § 17.

[40] *See* Flagstar Bank, FSB v. State, 978 N.Y.S.2d 266, 273 (App. Div., 2d Dep't 2013) ("[T]he Legislature clearly knew how to include a private right of action when it intended to do so, and the omission of any similar language . . . evinces a legislative intent not to provide for a private right of action."); Davis v. State, 937 N.Y.S.2d 521, 523 (App. Div., 4th Dep't 2012) (citing Mark G., 717 N.E.2d at 1071) ("It is beyond cavil that the Legislature knew how to include a private right of action in the former statute if it intended to do so and, '[c]onsidering that the statute gives no hint of any private enforcement remedy for money damages,' we will not infer that the Legislature in fact intended to do so." (alteration in original)).

> [I]n a letter from Assemblyman Daniel O'Donnell, who sponsored DASA in the New York State Assembly, to Governor David Patterson, Mr. O'Donnell stated that "*the Legislature intends [DASA] to be primarily a preventive, rather than punitive, measure; it should therefore be implemented accordingly*, with the emphasis on proactive techniques such as training and early intervention to prevent discrimination and harassment." N.Y. Bill Jacket, 2010 A.B. 3661, Ch. 482 (Letter dated Sept. 7, 2010, from N.Y.S. Assemblyman Daniel O'Donnell, 69th Assembly District, to N.Y. Gov. Patterson [sic]) (emphasis added). Similarly, Senator Thomas Duane wrote to Governor Patterson [sic] that "DASA focuses on education and prevention of harassment and discrimination *before* it begins rather than punishment after the fact." N.Y. Bill Jacket, 2010 A.B. 3661, Ch. 482 (Letter dated July 16, 2010, from N.Y. Senator Thomas Duane, 29th District, to N.Y. Gov. Patterson [sic]) (emphasis in original).[41]

And during the Assembly floor debate of DASA, one legislator asked "[w]hat is the remedy, if you will, for a student who feels that they were harassed and the school has this policy in place, but doesn't abide by the policy?"[42] The Assembly sponsor of the bill responded:

> *This bill does not address any remedy beyond internally to the school.* The school has an obligation to have a policy. The school has an obligation to have people on staff who know how to deal with the policy. The school has an obligation to protect all children from that conduct. *If, in fact, the school fails, then the school fails. This bill has nothing to do with the remedy outside the school failing*. This bill requires the State Education Department to promulgate regulations to assist schools, if they need assisting, on how to make sure that schools

[41] Terrill v. Windham-Ashland-Jewett Cent. Sch. Dist., 176 F. Supp. 3d 101, 107-08 (N.D.N.Y. 2016) (alteration in original).

[42] *Id.* at 108.

> remain an environment that are free from harassment and discrimination.[43]

The Legislature also drafted the bill "to be integrated with existing SED programs—such as the Safe Schools Against Violence Education Program (Project SAVE)."[44] DASA extended some of the same training and reporting obligations previously imposed by Project SAVE.[45] Education Law § 15 specifically provides that the Commissioner could establish a procedure for school district submission of annual reports of material incidents of harassment, bullying and discrimination through the "use of the existing uniform violent incident reporting system."[46] But the Project SAVE legislation also does not provide a private right of action.

D. The Appellate Decision

On December 12, 2018, the Second Department found in Defendants' favor and ruled there is no implied private right of action under DASA for an alleged failure to enforce policies prohibiting discrimination and harassment.[47]

In line with Court of Appeals jurisprudence, the Second Department focused on whether recognition of an implied right of action would be consistent with DASA's legislative scheme. In the court's words, this inquiry

> is the most critical because "the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme."[48]

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[43] *Id.* at 108-09; Assemb. 3661, 223d Leg., Reg. Sess., at 17-18 (N.Y. 2010) (emphasis added).

[44] Assemb. 3661, at 9.

[45] *See id.* at 3.

[46] N.Y. EDUC. LAW § 15 (McKinney 2018).

[47] *See* Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 89 N.Y.S.3d 295, 299 (App. Div., 2d Dep't 2018).

[48] *Id*. at 297 (quoting Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18, 21 (N.Y. 1989)).

Turning to DASA, the court concluded that "[a] review of DASA's legislative history shows that finding a private right of action under the act would be inconsistent with the legislative scheme."[49] For example, the court cited Senator Duane's letter to the Governor in which he described DASA as focusing "on the education and prevention of harassment and discrimination before it begins rather than punishment after the fact."[50] The court also honed in on Senator Duane's observation that under the existing regime, school districts were paying "a high cost in civil damages for failure to prevent bullying," thereby suggesting that implementing DASA would alleviate such costs.[51] Similarly, the court relied on the bill sponsor's statement "the Legislature intends [DASA] to be primarily a preventive, rather than punitive, measure; it should therefore be implemented accordingly, with the emphasis on proactive techniques such as training and early intervention to prevent discrimination and harassment."[52] The court concluded, "[t]he legislative history plainly demonstrates that the Legislature did not intend to provide for civil damages for a violation of DASA, and that recognizing one would be inconsistent with the legislative scheme."[53]

IV. CONCLUSION

So, should bullies be rejoicing about this legal development? Of course not. Indeed, the Second Department made clear, "DASA does not prevent a student from bringing other statutory claims against a school district, and thus, holding that DASA does not provide a private right of action does not leave students without enforcement mechanisms and remedies."[54] Families can still commence claims of negligent supervision and possibly violations of federal statutes depending on the particulars.

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[49] *Id.*

[50] *Id.* at 298 (quoting Senate Introducer's Letter in Support, Bill Jacket, L. 2010 ch. 482 at 7).

[51] *Id.*

[52] *Id.* (alteration in original) (quoting Assembly Sponsor's Letter in Support, Bill Jacket, L. 2010 ch. 482 at 11).

[53] *Id.*

[54] *Id.* (citing Terrill v. Windham-Ashland-Jewett Cent. Sch. Dist., 176 F. Supp. 3d 101, 109 (N.D.N.Y. 2016)).

Further, as addressed in the Second Department decision of *SC v. Monroe-Woodbury Central School District*,[55] a parent may file a complaint with the New York State Commissioner of Education when seeking to challenge a school district's policies.[56] "Allegations that a public school failed to adopt and implement adequate policies and procedures to prevent bullying and harassment should be addressed, in the first instance, to the Commissioner of Education."[57]

This is because Education Law § 310 provides that an aggrieved party may appeal to the commissioner of education "any . . . official act or decision of any officer, school authorities, or meetings concerning any other matter under [the New York Education Law], or any other act pertaining to common schools."[58] This provision provides the commissioner with "broad discretion" to review a "wide range of actions."[59]

In conclusion, DASA has been an effective tool in reducing incidents of student harassment. It just will not be an effective tool in generating litigation.[60]

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[55] 23 N.Y.S.3d 906 (App. Div., 2d Dep't 2016), *leave to appeal denied sub nom.* SC v. Monroe Woodbury Cent. Sch. Dist., 56 N.E.3d 898 (N.Y. 2016).

[56] *Id.* at 906.

[57] *Id.* (citing N.Y. EDUC. LAW § 310; *cf.* Matter of N. Syracuse Cent. School Dist. v. N.Y. State Div. of Human Rights, 973 N.E.2d 162 (N.Y. 2012).

[58] N.Y. EDUC. LAW § 310(7) (McKinney 2018).

[59] Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 248 (2d Cir. 2006); *see also* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979) (in dismissing a claim of "educational malpractice," citing, under New York Education Law § 310(7), "the right of students presently enrolled in public schools, and their parents, to take advantage of the administrative processes provided by statute to enlist the aid of the Commissioner of Education in ensuring that such students receive a proper education").

[60] The authors represented ESB in the referenced litigation.