

# Identifying and Responding to Bullying and Discriminatory Harassment

Massachusetts Association of School Personnel  
Administrators



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1

## Headlines

- ***Newton Principal Failed to Report Anti-Semitic Graffiti - Boston Globe, March 2, 2016***
- ***AG: Easthampton district ignored ‘serious’ warnings of racism, tension last school year - Daily Hampshire Gazette, August 26, 2017***
- ***At the high-ranked Mystic Valley Regional Charter School, a troubling pattern on issues of race - Boston Globe, July 7, 2020***
- ***Study finds Black girls in Massachusetts 4x more likely to be disciplined at school than white classmates - Boston Herald, September 7, 2020***
- ***Hamilton-Wenham Regional High School prom ends early after racial slur yelled, school officials say. - WCVB, Channel 5, May 6, 2022***

2

## The Massachusetts Bullying Prevention Act M.G.L. c. 71, § 37O Definition

### Bullying is 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.**

3

3



## Cyber-bullying

- bullying through the use of technology or any electronic communication, including 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. Also includes:
  - the creation of a web page or blog in which the creator assumes the identity of another person.
  - 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 the definition of bullying.
  - 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 in the definition of bullying



4

4



## Bullying Prevention and Intervention

M.G.L. c. 71, § 37O prohibits acts of bullying, cyberbullying, and retaliation:

- 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/or
- 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: (1) creates a hostile environment at school for the target; (2) infringes on the target's rights at school; or (3) materially and substantially disrupts the education process or the orderly operation of a school.

\*The school district is not required to staff any nonschool related activities, functions, or programs.

5



## Bullying Amendments

*Chapter 86 of the Acts of 2014*  
Data Collection



- Requires school districts to collect and to annually report the following data to the DESE:
  - The number of reported allegations of bullying or retaliation;
  - The number of substantiated incidents of bullying and retaliation;
  - The number of students disciplined for engaging in bullying or retaliation; and
  - Other information required by the Department.
- At least once every 4 years, school districts are required to administer a Department-developed student survey to assess:
  - “school climate and the prevalence, nature and severity of bullying in schools.”

6



## Reporting Bullying

### Obligation to Report

- Staff:** A staff member must promptly report to the principal or the principal's designee any instances of bullying or retaliation witnessed by the staff member or that is reported to the staff member by a student, parent, or other individual and then follow up with an Incident Referral Form. Staff may not make anonymous reports.
- Students and Parents:** Students and parents are strongly encouraged to report any instances of bullying of which they become aware.

### Form of Report

Reports of bullying may be made orally or in writing (use of District reporting form not required.) All oral reports must be reduced to writing by school staff.

Reports from students and/or parents may be made anonymously. Anonymous reports must be investigated (to the extent possible) but may not result in the imposition of student discipline.

7



## Initial Response to a Bullying Complaint

Upon receipt of a complaint of bullying, the Principal, or a designee, must promptly initiate an investigation...Preliminary determinations when starting investigation:

- Is there a need for interim measures to support the alleged target's safety or wellbeing?
- Is there a basis for immediate notification of law enforcement authorities?
- Is there a need to notify another school district or school principal?
- Could the conduct complained of constitute harassment based on the victim's membership in a protected class ("Discriminatory Harassment") in violation of federal or state civil rights laws?

8

8



## Interim Supportive Measures

Interim measures are individualized services/supports offered as appropriate before an investigation, and/or while the investigation is pending.

Examples:

- Designed to restore a sense of safety to the student(s)
- identification of trusted adult/safe person;
- access to a school counselor or trusted adult;
- modifications of class seating assignments or schedules;
- increased supervision;
- campus escort services;
- administrative leave;
- restrictions on direct contact between the parties.

9

## IMPORTANT!

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Evaluate whether the allegations, if true, would also constitute discriminatory harassment under state and/or federal law.

If yes –include discriminatory harassment in the scope of the investigation.

10



## Discriminatory Harassment Protected Classes Under Federal and State Law

### Gender, Sexual Orientation and/or Gender Identity

- Title IX of the Education Amendments of 1972 (students and employees)
- 34 CFR Part 106 (2020 Title IX Sexual Harassment regulations)
- M.G.L. c. 76, § 5
- M.G.L. c. 151B (employees); M.G.L. c. 151C (students)

### Race, Color, National Origin

- Title VI of the Civil Rights Act of 1964, M.G.L. c. 76, § 5

### Religion

- M.G.L. c. 76, §5, and Title VI of the Civil Rights Act of 1964

### Disability

- Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act

11

## What Title IX Requires

Title IX requires that educational programs receiving federal funds:

- Prohibit discrimination on the basis of sex/gender in educational programs and in employment practices;
- Establish prompt and comprehensive grievance procedures to address claims of discrimination;
- Provide students, regardless of gender, with comparable facilities and equal educational and extracurricular opportunities; and
- **Respond to and investigate both student and staff claims of sexual harassment in accordance with the requirements of the 2020 Title IX regulations.**

12



## The Title IX Sexual Harassment Regulations 34 CFR Part 106 Overview

New Title IX Sexual Harassment regulations went into effect on August 14, 2020.

These regulations:

- Established a new definition of “Title IX Sexual Harassment.”
- Required all districts (and colleges) to adopt an extremely prescriptive grievance process
- Provide significantly greater protections for individuals accused of Title IX sexual harassment.
  - Prohibit investigating conduct within the scope of Title IX through any less formal or alternative process.
  - Prohibit imposition of disciplinary sanctions before completing the full Title IX Grievance Process.

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13

## Title IX 2020 New Definition of Sexual Harassment

- (1) *Quid pro quo* harassment by an employee;
- (2) Unwelcome conduct on the basis of sex **that is sufficiently severe and pervasive and objectively offensive** as to deny a person equal access to the District’s educational program and activities; or
- (3) Sexual assault, dating violence, domestic violence, or stalking as defined by the Clery Act and the Violence Against Women Act.

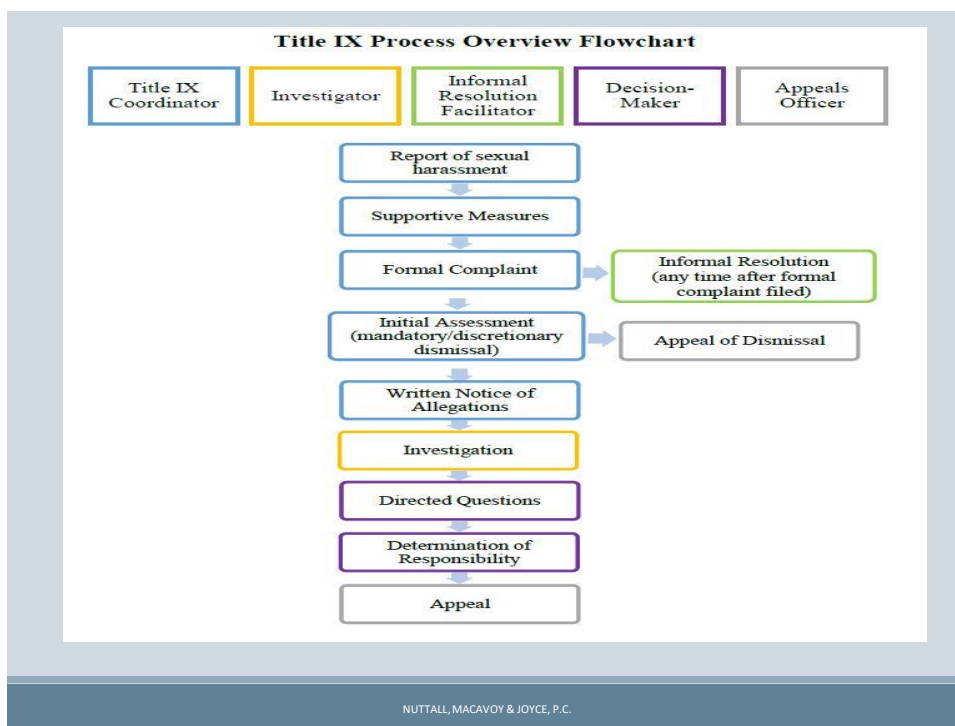
14



# Impact of Title IX Sexual Harassment Regulations

If a report of bullying and/or harassment is made that includes any allegation of conduct within the definition of “Sexual Harassment” under Title IX, the District **must** proceed in accordance with the Title IX Sexual Harassment Grievance Procedure **and may not** simply conduct an investigation in accordance with the District’s Bullying Prevention and Intervention Plan or standard Civil Rights Grievance Procedure.

15



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16



## Potential Changes to Title IX (*these are not yet in effect*)

The anticipated changes may include:

- Clarification that “sex discrimination” includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity, thereby strengthening protections for LGBTQIA+ individuals.
- The proposed regulations reinforce that schools are prohibited from discriminating against pregnant and parenting students and employees. They would amend the definition of “pregnancy or related conditions” to include lactation and pregnancy-related medical conditions, in addition to pregnancy, childbirth, termination of pregnancy and recovery from those conditions.
- The proposed regulations require explicitly that schools make available dedicated lactation spaces, other than bathrooms, that are clean, private and accessible and may be used for expressing breast milk or breast-feeding.
- Training for *all* employees about the schools’ obligations to address sex discrimination, a requirement that goes beyond the mandates of the existing Title IX requirements.
- Under the proposed Regulations, school districts will be permitted to designate certain employees as confidential resources to provide services to individuals in connection with sex discrimination claims. Those confidential employees must still be trained but will not be required to report complaints of sex discrimination if they are functioning in their confidential role as opposed to an additional role not associated with providing confidential resource services. Schools may begin to identify which, if any, employees they would like to designate confidential.

17

## Forms of Discrimination

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- Different treatment
  - Limitation – participation in sports, field trips, etc.
  - Exclusion (from school or a dance)
  - Suspension
- Disparate Impact/Discriminatory Effects
- Harassment

18

18

## What is different treatment?

When a student or employee is subject to different treatment because of his or her race, color, national origin, age, sexual orientation, gender, gender identity, or disability.

Most often arises in the context of:

- Discipline (suspension, expulsion)
- School/ Classroom assignment
- Grading
- Athletics
- Minority placement in special education
- Exclusive affinity groups
- Field trips
- No trespass orders

Applies to alleged actions/statements of discrimination by staff (in addition to hostile environment)

19

19

## Disability Based Discrimination Section 504

- Discrimination
  - Accessibility
  - Restriction from field trips, extra-curricular activities
  - Inadequate services, lack of access to programs
  - Web accessibility.
  - Identifying students as students with disabilities classrooms with signage
  - Not fully integrating students with mobility impairments
  - Sarcastic remarks or complaining about student's disability accommodations
  - Questioning the student's disability status in a unprofessional way
  - Failure to implement the IEP or Section 504 plan

20

20

## OSEP, July 29, 2022 Dear Colleague Letter on Implementation of IDEA Discipline Provisions

- School-age students with disabilities served under the IDEA represented 13.2% of total student enrollment.
- Those same students received 20.5% of 1 or more in-school suspensions and 24.5% of one or more out-of-school suspension.
- During the 2019-2020 school year, Black children with disabilities made up 17.2% of children with disabilities served under IDEA.
- Black children, however, accounted for 43.5% of all children with disabilities served under IDEA that were suspended out of school or expelled for more than 10 school days.

21

## Different Treatment Analysis

### Multi-step analysis:

- (1) whether the individual is a member of a protected class, (e.g., based on race);
- (2) if so, whether the individual was treated differently than similarly situated individuals outside the protected class (e.g., non-African-American students if alleged victim was African American).
  - These similarly situated persons are generally referred to as “comparators” because the investigator compares the treatment of the individuals outside of the protected class to the treatment received by the individual or group of individuals alleged to have been discriminated against.

22

## Different Treatment Analysis

3) If the investigation determines that the staff treated a comparator or group of comparators differently than it treated the individual or group of individuals alleged to have been discriminated against, then

- the next inquiry is whether there are non-discriminatory reasons or justifications for the different treatment.

4) The District must then scrutinize these reasons or justifications to ensure that they are legitimate and not merely a pretext for discrimination.

Note well: Direct evidence of different treatment may also provide evidence of bias by the individual against a student(s) based on race, color or national origin.

- E.g., statement evidencing specific race-based animus or prejudice.

23

## Disparate Impact

- Policies, practices and procedures that appear neutral but have discriminatory effect on a group based on a protected class (e.g., disability, race, color, national origin, gender....)
1. Has the discipline policy resulted in an adverse impact on students within a particular protected class as compared with students of other races?
  2. Is the discipline policy necessary to meet an important educational goal?
  3. Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group or is the school's proffered justification a pretext for discrimination?
- See *OCR Dear Colleague Letter* regarding school discipline and disparate impact on January 8, 2014; however, the *Dear Colleague Letter* was revoked by the U.S. DOE on December 21, 2018. The revocation is available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> . Despite this revocation, the recent 504 policy guidance from U.S. DOE makes clear that disparate treatment or policies and practices that have discriminatory effects may constitute a violation of law.

24

Discriminatory Harassment under Laws other than Title IX

- unwelcome conduct, whether verbal or physical
- that is based on: race, color, national origin, sex, sexual orientation, gender identity, religion, or disability,
- that creates a hostile school environment

25

25

## Examples of Unwelcome Conduct

- Display or circulation of written materials or pictures (in person or electronic)
- Verbal abuse or insults
- Physical acts or gestures

26

## Based on a Protected Category



27

## Hostile Environment

A hostile environment is created when

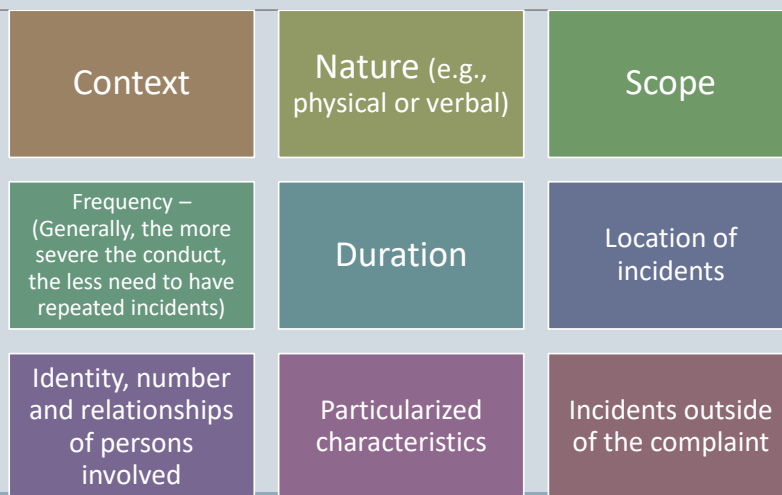
- The harassing conduct is sufficiently:
  - severe, or
  - pervasive, or
  - persistent
- such that it denies or limits the ability of an individual to participate in, or benefit from, the services, activities or privileges provided by the school.



28

28

## Hostile Environment Factors to Consider



29

29

## When must the District respond to alleged bullying or discriminatory harassment?

- **Bullying** - whenever a staff member “has witnessed or become aware of” an instance of bullying.
- **Discriminatory Harassment** - When the District, through the exercise of due care, should have known of the harassing conduct.
- Staff members can “become aware of” harassment/bullying through a variety of sources:
  - Reports/complaints from students
  - Parental reports/complaints
  - Staff observations
  - Indirect notice from community sources such as newspapers, etc.

30

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## Response

Once a school has notice of possible bullying or discriminatory harassment, it must:

- **Bullying**
  - Take immediate and appropriate steps to investigate or otherwise determine what occurred.
- **Discriminatory Harassment**
  - Take prompt and effective steps reasonably calculated to end any harassment.

31

31



## Investigation Timelines

### **Bullying**

- No specific statutory timeline
- Will investigate “promptly.”

### **Discriminatory Harassment**

- No specific statutory timelines - “Prompt”
- Generally, investigation to be completed within 20 school days and decision issued within 25 school days of receipt of complaint.
  - Timeline may be extended for good cause

32

32





## Investigation of the Complaint

### The nature of the alleged conduct – not the label – is what determines the school’s response

- The label used by a victim or witness to describe an incident (*e.g.*, “bullying,” “harassing”) does not determine how a school is obligated to respond.
- If there is an allegation of conduct that could meet the definition of bullying, and it is unwelcome conduct made on the basis of race, color, national origin, religion, sex, sexual orientation, or disability, which may have created a hostile environment:
  - Respond pursuant to both the **District’s Civil Rights Grievance Procedure** and the **Bullying Prevention and Intervention Plan**.

33

33

## Investigating Complaints of Bullying and/or Discriminatory Harassment

Identify appropriate personnel to conduct investigation.

- Bullying
  - Principal, or designee, must conduct a prompt and thorough investigation of all reports of bullying.
- Discriminatory Harassment
  - Investigator must be knowledgeable about the controlling law (Section 504, Title VI, etc.)
  - Must be impartial.



34

34

## Anonymous Complaint

If the complainant asks to remain anonymous, then:

- Discriminatory Harassment - the school should take all reasonable steps to investigate and respond to the complaint consistent with that request as long as doing so does not preclude the school from responding effectively to the harassment and the harassing behavior.
- Bullying – Conduct an investigation to the extent possible. Note that an anonymous report cannot lead to discipline of the alleged Aggressor.

35



## Considering the Evidence

Standard of Proof:

- Preponderance of the evidence:
  - “More probable than not that the conduct complained of occurred”
  - “50% + a feather”

Evidence to be considered:

- Witness interviews (teachers, students, etc).
- Written statements from witnesses
- Documentary evidence (emails, papers)
- Physical evidence (injuries, cell phones, text messages, etc.)

36

36



## Bullying: Notice of Determination

Although the BPIP requires that written notice be provided only upon a determination that bullying or retaliation has occurred, **it is strongly recommended that both the alleged target and the alleged aggressor be notified of the outcome of any investigation conducted.**

May not divulge any student record information pertaining to student who is not the child of the parent(s) being notified

- A principal's notification to a parent about an incident or a report of bullying or retaliation must comply with confidentiality requirements of the Massachusetts Student Records Regulations and the Family Educational Rights and Privacy Act.” 603 CMR 49.00
  - “Except where necessary to protect the victim’s immediate health and safety or to provide necessary notice of corrective actions or restraining orders.”

**Notice of determination to target must include notice of the right to access DESE Problem Resolution System (PRS).**

37

37



## Notice of Determination

- **In cases of bullying/harassment based upon sexual orientation or gender identity, ensure individualized notice in accordance with DESE Guidance on Notification of Bullying based on Sexual Orientation/Gender Identity, available at:**

<https://www.doe.mass.edu/sfs/bullying/PNguidance.html>

38

38



## Discriminatory Harassment: Notice of Determination

- Whether or not a hostile environment is established:
  - The investigator must notify the alleged victim and the accused in writing of the outcome of the investigation; and
  - Right to appeal under the District's Civil Rights Grievance Procedure (which states they may appeal to Superintendent within 7 calendar days of receipt of written determination).

If the District determines that a hostile environment exists, must take steps to:

- End the harassment;
- Eliminate any hostile environment that has been created;
  - In some situations, remedy the effects of the harassment (e.g., tutoring, counseling, possible academic remedies, development of new policies or procedures, etc.).
- Prevent any further harassment.
- Prevent retaliatory actions - *Should be explicitly written into outcome letter and/or investigative report.*

39

39



## Remedial and Corrective Actions

- Adjustments to perpetrator's class schedule.
- Access as needed to school guidance counselors, psychologist, etc.
- Identification of a "safe person" for the student to contact on demand.
- Groupings with "safe" peers.
- Schedule/seating modifications
- Required sessions with school administrator to review District policies and school rules relative to appropriate interactions with peers
- Disciplinary action against the offender(s)
- Access as needed to Principal or building level civil rights coordinator.
- Reaffirming school's policy against discrimination.
- Conduct follow up interview with target and reporters/witnesses to monitor effectiveness of interventions and claims of retaliatory treatment
- Conduct outreach to involve parents in an effort to identify problems and improve school climate
- Counsel perpetrators about the hurtful effects of their conduct
- Disciplinary action against the offender(s)

40

40

## Disciplinary Action

Disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior.

- Principal may not take disciplinary action based on an anonymous complaint.
- Bullying and/or harassment are, in most instances, school rules violations, subject to the due process requirements and limitations of M.G.L. c. 71, § 37H3/4 and 603 CMR 53.00.
- **Under 603 CMR 53.00, a student may not be suspended in excess of 90 cumulative school days in a school year for one or more school rules violations.**
- There is no legal requirement that every student who engages in bullying or harassment be suspended.
- For employees, after the civil rights/bullying investigation, make sure you follow your grievance process if you intend to take any disciplinary action.

41

41

## Monitor the Effectiveness of Interventions

- Conduct follow up interviews with the target and reporters/witnesses regularly to monitor effectiveness of interventions and any claims of retaliatory treatment.
- Document all follow-up contacts, meetings and activities.

42



## Liability

- Can the District be held liable for failing to respond appropriately to complaints of discrimination or harassment?
  - Yes. The District will be strictly liable for the actions or inaction of District staff.
- Can individual staff members be held liable for failing to respond appropriately to complaints of discrimination or harassment?
  - Yes. In addition to employment related consequences, school employees may be held personally liable for intentional, willful or reckless violations of federal law through a civil claim pursuant to 20 U.S.C. § 1983 for monetary damages.
- No private right of action for violations of state Bullying statute.
  - Generally, District's and district staff are immune from liability for any harm or injury suffered as the result of bullying. Cormier v. Lynn, 479 Mass. 35 (2018)

43

43

## Harassment Investigation Guidance

- Racial Incidents and Harassment Against Students, Notice of Investigative Guidance  
<http://www2.ed.gov/about/offices/list/ocr/docs/race394.html>
- OCR Checklist for a Comprehensive Approach to Addressing Harassment  
<https://www2.ed.gov/about/offices/list/ocr/checklist.html>

44

44