

# **Massachusetts' Anti-Bullying Law Updated Training 2020**

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# #1 Mistake Schools Make When Bullying Is Reported

- Addressing alleged misconduct as bullying only.
  - Allegation of student-on-student or staff-on-student bullying or harassment based on:
    - Race
    - Religion
    - Gender
    - National Origin
    - Disability
    - Sexual Orientation (Mass.)
    - Gender Identity (Mass.)

**can give rise to responsibilities under state and federal law, distinct from the School District's responsibilities under the state bullying statute.**

# Other Ongoing Issues

- Ineffectual communication with parents
- Mishandling student records
- Allegations of bullying as a basis to claim a denial of FAPE in program/placement disputes
- Litigation of money damages (tort) claims

# Definitions and Standards

# The Massachusetts Anti-Bullying Act

- 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
    - Through the use of technology or an electronic device owned, leased or used by a school district or school

# The Massachusetts Anti-Bullying Act

- M.G.L. c.71, §370
  - Prohibits acts of bullying, cyberbullying, and retaliation:
    - 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 target, infringes on their rights at school or materially and substantially disrupts the education process or the orderly operation of a school.*
      - Schools are not required to staff any nonschool related activities, functions, or programs.
  - \*See regulations at:
    - <https://www.doe.mass.edu/lawsregs/603cmr49.html?section=all>

# Definitions: Bullying

- The **repeated** use by one or more students **or staff** of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that:
  - causes physical or emotional harm to the victim or damage to the victim's property;
  - places the victim in reasonable fear of harm to himself or of damage to his property;
  - 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.

## Definitions: Cyber Bullying

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



# Other Key Definitions

- **Perpetrator**
  - A student or staff member who engages in bullying or retaliation
    - “**Aggressor**” per DESE.
    - “Victim” is referred to as the “**Target.**”
- **Hostile Environment**
  - A situation where bullying causes the school environment to be permeated with intimidation, ridicule or insult that is sufficiently severe or pervasive to alter the conditions of the student’s education.
- **Retaliation**
  - Any form of intimidation, reprisal, or harassment directed against a person who reports bullying, provides information during an investigation of bullying, or witnesses or has reliable information about bullying.

# Roles and Responsibilities

# Overview of a District's Obligations

- Must develop and file a Bullying Prevention and Intervention Plan (BPIP).
  - BPIPs must be reviewed/updated every other year.
- Must train all staff annually regarding BPIP.
- Must develop internet safety plan.
- Must review/update student handbooks to ensure consistency with the statute.
  - Reference M.G.L. c.71, §37O
  - Include age-appropriate definitions of bullying and description of anti-bullying policies and procedures.

## Overview of a District's Obligations

- Must report bullying that may result in a criminal charge to law enforcement authorities.
- Must implement an appropriate anti-bullying curriculum throughout grades K-12 and notify parents of the curriculum content.

# Roles and Responsibilities: Principal

- Principal or a designee shall promptly commence an investigation.
    - Make a preliminary determination regarding the need for referral to law enforcement and need for immediate intervention to protect the victim's safety.
    - If the principal or designee determines, following investigation, that bullying or retaliation has occurred, the principal shall:
      - Notify the local law enforcement agency if the principal believes that criminal charges may be pursued against an aggressor;
      - Take appropriate disciplinary action;
      - Notify the parents or guardians of the aggressor;
      - Notify the parents or guardians of the target, and to the extent consistent with state and federal law, of the action taken to prevent any further acts of bullying or retaliation.
- \*Consider whether the alleged bullying may constitute discrimination or harassment.
- \*Complete investigation report form in BPIP.

# Roles and Responsibilities: School Staff

- Any staff member who witnesses or becomes aware of bullying or retaliation must promptly report it to the principal or to the school official identified in the BPIP as responsible for receiving such reports or both.

# Discrimination and Harassment

# Discrimination & Harassment

- Discrimination is unfair treatment because of an individual's actual or perceived membership in a particular group:
  - Race
  - Color
  - Gender
  - National origin
  - Religion
  - Sexual orientation/identity
- Harassment occurs when a student's or adult's behavior or inappropriate conduct creates a hostile environment.



# Money Damages Standard vs. OCR Discrimination Standard

## Damages

- Severe and pervasive;
- Deprives student of educational benefits;
- Deliberate indifference to the harassment by school.

## OCR Investigations

- Sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the educational program; or
- To create a hostile or abusive educational environment.
- Known or "should have known"
  - Actual knowledge not required.

# Harassment: Additional Obligations

- Schools have specific obligations separate and apart from its duties under the state anti-bullying statute.
- Obligation to prevent, investigate and remedy harassment include:
  - Publicized policies prohibiting disability-based harassment
  - Procedures for reporting complaints
  - Duty to investigate
  - Duty to take prompt and effective steps to remedy harassment
  - Procedures for resolving complaints
  - Published grievance procedures providing for prompt resolution of discrimination complaints.

# Disability Based Bullying, Harassment and Discrimination

# Disability Based Bullying: Students in Public School Settings

- Section 504 and ADA – prohibit discrimination on the basis of disability in public schools.
  - Includes students who are “regarded as” having a disability.
- Higher standard for monetary damages claims than is applied by OCR in its investigations of disability based harassment.
  - The legal standards for harassment under the ADA and Section 504 have primarily arisen out of court rulings and interpretations by OCR under Title IX (sex discrimination).

# Duties Under 504 and ADA

- Clarify policies and practices prohibiting discrimination based on actual or perceived physical or mental impairment.
  - Teasing, bullying, harassing conduct that is directed at actual or perceived physical or mental impairments, regardless of whether the actual or perceived impairment substantially limits a major life activity is prohibited.

# Bullying Under the IDEA

- Issue is whether the eligible student is receiving FAPE.
  - If not, what is required to provide FAPE.
  - Remedies under the IDEA are equitable: educational services, programs, or placements.
  - No money damages under the IDEA.\*
- Potential scenarios involving special education students:
  - Target is a special education student
  - Aggressor is a special education student
  - Both the target and the aggressor are special education students

# IEP Requirements for Children with Disabilities

- M.G.L. c.71B, §3 – as amended:
  1. Disabled students on the **autism** spectrum:
    - The IEP Team must consider and specifically address the skills and proficiencies needed to avoid and respond to bullying, harassment, or teasing.
  2. If the IEP team determines the child's disability 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 and proficiencies needed to avoid and respond to bullying, harassment or teasing.

# What law applies?

1. Aggressor is not disabled and target is not disabled
  - MA bullying law applies.
2. Aggressor is disabled and in special education and the target is not disabled
  - MA bullying law applies however,
  - The IDEA affects the nature of the consequence imposed but not the goal of the consequence (to ensure the behavior does not recur).
3. Aggressor is not disabled but the target is disabled and in special education
  - MA bullying law AND response but be completely consistent with 504/ADA.
  - Possible FAPE issues for target.
4. Aggressor is disabled and in special education and the target is disabled and in special education.
  - Must be sure that response is completely consistent with 504/ADA.
  - IDEA may affect nature of consequence but not the goal of the consequence.
  - Possible FAPE issues for both the target and the aggressor.



# What to do?

- Disability based harassment almost always constitutes bullying under MA bullying law.
- If bullying is disability based, schools *must* address the issue consistent with its anti-discrimination policies under 504/ADA.
- If the disability based bullying behavior interferes or limits a target's ability to participate in or benefit from educational services, the school must take prompt and effective means to remedy the problem.
- Remedy should include broader issues in the school that might create or reflect a hostile school environment.
- If the target is a special education student, the school should consider convening the Team to address the student's educational program.
- If the aggressor is a special education student, the Team should convene and implement behavior intervention services to address the behavior so that it does not recur.

# Communicating with Parents

# Communicating with Parents

- Establish requirements and procedures for communicating with parents and include them in the BPIP.
  - Principals have discretion in notifying parent after receipt of report, prior to the investigation and determination whether bullying occurred.
  - Principals are specifically prohibited from revealing any student record information of any target or aggressor who is a student and not the parent's child.
    - Exception for health and safety emergencies
      - Information must be necessary to protect the health or safety of a student
      - Must be an immediate threat to the health or safety of the student or another.

## Bullying Investigations - Notice of Decision

- Upon completion of investigation, Principal shall send separate written notices of the Principal's decision to the target and aggressor.
  - May not divulge any student record information pertaining to student who is not the child of the parent(s) being notified.
    - \*Redaction required for written reports.
  - Where bullying is confirmed, notify victim that the school and District have taken appropriate disciplinary action against the perpetrator.
  - Notify victim of the services to be provided to restore a non-hostile environment for the victim.

# Bullying Investigations - Following Up with Parents

- Conduct parent conferences with parents of victim and parents of complainant if appropriate or requested
- Conduct follow up interview with complainant to monitor effectiveness of interventions and claims of retaliatory treatment

# Intervention

# 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.
  - Principal must still investigate, however.
- Retaliation is strictly prohibited.
- If aggressor is a student with an IEP or §504 Plan or is a student whom the District had reason to know, prior to the incident giving rise to the disciplinary action, might be eligible for special education, the District must provide the aggressor with the heightened procedural protections set forth in the Individuals with Disabilities Education Act (IDEA).

# Intervention/ Corrective Action

- Provide support services to the target, aggressor, and witnesses:
  - Restore a sense of safety for the target and assess the need for protection;
  - Protection of any person who reports bullying, provides information during an investigation of bullying or witnesses or has reliable information about an act of bullying from bullying or retaliation;
  - Counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students.



# Intervention/ Corrective Action

- Student support services will be made available for the target and aggressor, as well as witnesses or other bystanders:
- Safety plans will be provided to protect the target from further bullying or retaliation.
- Behavioral health or other support/counseling services for the target in collaboration with community providers.
- Education/intervention services for students exhibiting bullying behaviors will address the social-emotional, behavioral, and academic needs of students to correct the bullying behavior and prevent re-occurrence.