



Student Discipline, Bullying, Harassment/Civil Rights, First Amendment Issue

Martha's Vineyard Public Schools

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Agenda

- ▶ Student Discipline
- ▶ Bullying
- ▶ Civil Rights/Harassment
- ▶ Student First Amendment



Student Discipline

Current Foundations of Student Discipline

4

Student handbook/school policy

Constitutional Law

State law:

1. MGL c. 71, § 37H addresses possession of drugs, weapons and assault on staff.
2. MGL c. 71, § 37H ½ permits discipline based on felony charges that have a substantial detrimental effect on the school community
3. MGL c. 71 § 37H ¾ addresses all other forms of discipline
4. MGL c. 71 § 84 provides that conduct subject to discipline must be school-related

M.G.L. c. 71, §37H

Students subject to suspension/expulsion for:

1. possession of dangerous weapon;
2. possession of controlled substance; or
3. assault upon educational staff person

M.G.L. c. 71, §37H CONTINUED

On school premises or at school-sponsored event.

Student entitled to hearing prior to suspension/expulsion of more than 10 days.

Student entitled to appeal to Superintendent for expulsion (suspension over 90 school days) unless District provides for greater due process.

Do not delegate decision-making.

M.G.L. c. 71, §37H½ (felony complaint, felony conviction)

- Student charged with felony criminal complaint subject to **suspension**.
- Student convicted of felony subject to **expulsion**.
- ONLY if the principal first determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.
 - **TIPS:**
 - Discuss at hearing and present concerns.
 - Memorialize reasoning in suspension letter.

Goodwin v. Lee Public Schools

475 Mass. 280 (2016)

- ▶ Former high school student brought tort action seeking monetary damages against public school, school superintendent, and town, alleging her suspension was unlawful, and seeking compensation for grief and stigmatization caused by not being permitted to participate in her senior year on school grounds, or in graduation.
- ▶ Principal suspended a student under 37H ½ for charges he believed she was facing for theft and weapons. **No charges were actually filed until later – then misdemeanor charges.**
- ▶ COURT HELD: Case against school, superintendent and town can proceed.

TIP: CONFIRM THAT CHARGES HAVE ACTUALLY ISSUED/STUDENT HAS BEEN ARRAIGNED!!

Doe v. Rizzi, Town of Stoughton, NORFOLK, SUPERIOR COURT NO. 13- 780 (2013)

- ▶ A 15-year-old student charged with multiple felonies – attempted robbery outside of school.
- ▶ Student suspended pending the outcome of the felony charges, and the school provided about three hours a week of tutoring.
- ▶ **HELD: Court returned student to school. Court noted that 37H 1/2 is discretionary and intended to apply to serious violent felonies which did not describe the student's alleged actions.**
- ▶ School did not prove student posed a substantial risk of harm to the school, and that the harm to student of not attending school "outweighs any harm that might be visited upon the defendants if they are enjoined from their unlawful actions."

M.G.L. c. 71, 37H³/₄ - Overview

The “Catch-All” of Discipline Law
(Code of Conduct/Handbook Violations)



Everything else besides

37H – Dangerous Weapons, Controlled Substances, and Assault on Educational Staff

37H¹/₂ - Felony Charge or Conviction

Purpose of Changing § 37H ³/₄

Address Mental
Health Needs
of Children

Lessens Impact
of School to
Prison Pipeline

Moving Away
from Punitive to
Restorative

Keeping Kids In
School

Changes to M.G.L. c. 71, s. 37H^{3/4}

Effective November 8, 2022

Changes specific to section (b)

- Re-engagement & Restorative Justice
- Documentation
- Change in Decision-Maker's Role

The Law – As Amended

- ▶ Any principal, headmaster, superintendent or person acting as a decision-maker at a student meeting or hearing, when deciding the consequences for the student, **shall consider ways to re-engage the student in the learning process;**
- ▶ **and shall not suspend or expel a student until alternative remedies have been employed and their use and results documented,** following and in direct response to a specific incident or incidents,
- ▶ **unless specific reasons are documented** as to why such alternative remedies are **unsuitable or counter-productive,** **OR**
- ▶ and in cases where the student's continued presence in school would **pose a specific, documentable concern** about the infliction of serious bodily injury or other serious harm upon another person while in school.
- ▶ Alternative remedies may include, but shall not be limited to: (i) mediation; (ii) conflict resolution; (iii) restorative justice; and (iv) collaborative problem solving."

In-School Suspension and Emergency Removal

- ▶ Based on the DESE Guidance issued in February 2023, these new requirements do NOT appear to apply to In-School Suspension.
 - ▶ **FAQ #2 regarding ISS:**
 - ▶ Question: Which types of suspensions are covered by section 37H^{3/4}?
 - ▶ Answer: “Consistent with the plain language of the statute as amended, the requirements apply to every **out-of-school suspension**, short-term or long-term, under § 37H ^{3/4}... .”
 - ▶ **With regard to Emergency Removal**, “Schools may also remove a student on an emergency basis, without employing alternative remedies, according to the criteria set forth in the Student Discipline regulations at 603 CMR 53.07.”

Employment of Alternative Remedies

Schools need to develop the ability to respond to instances of student misconduct with employment of developmentally-appropriate alternative remedies, including:

- Mediation
- Conflict Resolution
- Restorative Justice
- Collaborative Problem-Solving Strategies

Per DESE Guidance:

- Engage community stakeholders discussion;
- Provide training for staff members; and
- Monitor implementation.

Alternative Remedies Unsuitable or Counterproductive

- ▶ There will be circumstances where alternative remedies may be unsuitable or counterproductive.
- ▶ DESE Guidance has NOT defined these terms or provided examples.
 - ▶ Consider:
 - ▶ Nature of misconduct at issue
 - ▶ Student(s) involved (age, maturity, ability, history of student or between students)
 - ▶ History of student at issue with regard to use of alternative remedies

Concern of Serious Bodily Injury or Other Serious Harm Upon Person

- ▶ Focus seems to be on risk of harm/injury to persons as opposed to property
- ▶ Note that the statute distinguishes between bodily injury/harm to a person- it does not necessarily need to be physical harm; could be emotional etc.
 - ▶ Example: Student walking through the halls and yelling racial slurs may not present as a risk of bodily injury, but could cause serious harm to a person
 - ▶ Example: A physical altercation between students would likely meet the threshold of concern for serious bodily injury

Emergency Removal

- ▶ Based on the DESE Guidance issued in February 2023, these new requirements also do NOT appear to impact a Principal's right to emergency remove.
- ▶ Requirements for Emergency Removal:
 - ▶ When: the Principal determines that continued presence of the student poses a danger to persons or property, or materially and substantially disrupts the order of the school, and, in principal's (or their designee's) judgment, there is no alternative available to alleviate the danger or disruption.
 - ▶ How:
 1. Not exceed two (2) school days.
 2. Oral and written notice and opportunity for hearing.
 3. Must determine no alternatives are available to alleviate the danger or disruption
 4. Only after student's safety and transportation considered

What is an Emergency?

What IS an Emergency:

1. Student assault
2. Student threat (that is credible)
3. Student distributing/using drugs at school

What is NOT an Emergency:

1. Student swearing at teacher/staff
2. Student who was dysregulated, but has been able to calm and return to class
2. When you need to call mobile crisis
3. When parents dismiss student

In-School Suspension

WITH NOTICE:

A student may be removed from regular classroom activities, but not from the school premises, for up to 10 consecutive school days or up to 10 school days cumulatively for multiple infractions during the school year.

DUE PROCESS:

- On same day as decision, notify the parent orally of the disciplinary offense, the reasons and the length of the in-school suspension.
- Invite the parent to a meeting to discuss the student's academic performance and behavior – same day if possible.

TIP: Consider building in alternative remedies to ISS; document use and result.

Out-of-School Suspensions

- ▶ No Out-of-School Suspensions Without Oral and **Written** Notice
- ▶ No matter how short of a suspension it is, the Principal must make REASONABLE EFFORTS to notify parents of opportunity to attend hearing.
 - ▶ Letter plus 2 attempts
 - ▶ **MUST DOCUMENT ATTEMPTS TO CONTACT**
 - ▶ **Written notice must be in the primary language of the home**
 - ▶ **Parent cannot be required to attend a meeting or conference with school personnel (reentry meeting) before student returns to school after an out-of-school suspension.**

Special Process for Kindergarten – Grade 3 Students

For any OSS, the principal must:

- ▶ Notify the Superintendent in writing prior to such suspension taking effect; and
- ▶ The writing must describe the alleged misconduct
- ▶ Does not include ISS

How do I get the notice letter to parents prior to the hearing?

1. Email to email address on emergency card.
2. Call and explain the hearing process and give them the letter when they come for the hearing. Give them time to review the letter.
3. If needed, translate/interpret – use language line!

What if the parent is unable to participate in the hearing on the day scheduled but would be willing to attend the next day?

Answer: an extension of a day or two would be reasonable in most cases

Options:

1. Allow student to attend school normally until hearing;
2. Place the student in ISS while awaiting the hearing;
3. Parent can agree to keep student out of school pending hearing and have days count towards suspension.
4. Principal and parent can make arrangements or agreements with respect to the hearing or any other aspect of the process that serves their mutual interests.

Principal's Hearing - Short-term Suspension

Consider information and determine if student committed disciplinary offense and any consequences and considering mitigating circumstances

Written determination to student and parents that includes reasoning, type and duration of suspension, and opportunity to make academic progress during removal

For preschool – grade 3: prior notice and reasoning to Superintendent

Principal's Hearing - Long-term Suspension

- ▶ Same as for short-term, PLUS, other rights:
 - ▶ In advance of hearing, student gets copy of student's record and documents that Principal may rely upon; and
 - ▶ Right to representation at hearing (parents' expense);
 - ▶ right to produce, examine and cross-examine witnesses; and
 - ▶ right to request that hearing be recorded by principal.

Expulsion

- **Expulsion:** the removal for **more than 90 school days**, indefinitely, or permanently, as permitted under M.G.L. c. 71, § 37H or 37H $\frac{1}{2}$
- **Only allowed under M.G.L. c. 71, § § 37H (drugs, weapons, assault on staff) and 37H $\frac{1}{2}$ (felony charges)**

“Opportunity for Academic Progress”

Suspensions Less Than 10 Days, Student Gets:

1. To make up assignments and earn credits.

Suspensions 10 Days or More, Student Gets:

1. Participation in the school-wide Educational Service Plan; and
2. List of available alternative educational services (tutoring, alternative placement, Saturday school, online learning)

You need at least 2 choices!

Removal from Extra-Curricular Activities

- Not subject to the procedural requirements of Massachusetts Laws Chapter 37H^{3/4}
- Not a suspension
- Parents should be notified **in writing**
- **ANY OTHER INVOLUNTARY REMOVAL IS A SUSPENSION!**

Mobile Crisis

If the removal is to secure medical or clinical treatment and is not a disciplinary response, the student's absence from school is not considered a suspension or a removal for disciplinary purposes requiring due process.

In contrast, calling a parent to come pick up a dysregulated student without following due process is NOT permitted!!!

Burden of Proof

- It IS NOT beyond a reasonable doubt!
- It IS a preponderance of the evidence!
 - ▶ More likely than not
 - ▶ 51% sure

Principal's Discretion: Do Not Delegate to SRO

- Principal/designee makes disciplinary decisions in the building, NOT SRO
- Rights of principal may NOT be delegated to the SRO
- Most disciplinary issues should be handled by the principal/designee, not the police
- Student's rights change depending on whether actions are taken by the school or by the police (ex: search)

Scenario #1

- ▶ Middle school student is found, in school, to be in a possession of a knife.
- ▶ Another student reports that he has been brought the knife to school on more than one occasion and used it to threaten a student in the bathroom.
- ▶ Student has prior disciplinary history for aggression with peers and non-compliance
- ▶ Student is on an IEP and has already been suspended for 7 days this school year
 - ▶ What are your procedural action steps?
 - ▶ What are the substantive considerations?

Scenario #2

- ▶ Student chokes another student in the cafeteria; SRO is notified and informs the Principal that felony charges will likely be filed.
 - ▶ What are your immediate action steps?
 - ▶ What are your longer-term considerations?

Scenario #3

- ▶ Principal receives notice that student has outstanding felony charge for domestic assault in the home setting.
 - ▶ Incident involved fight with Parent
 - ▶ Student has no prior disciplinary history in school
 - ▶ Procedural action steps?
 - ▶ Substantive considerations?

Scenario #4

- ▶ Principal receives notice that student has outstanding felony charge for sexual assault of another student in the same school
 - ▶ Students are in the same grade and have multiple classes together
 - ▶ Student has history of wandering the building, failure to comply with staff etc.
 - ▶ Procedural steps?
 - ▶ Substantive considerations?

Scenarios #5 and #6

- ▶ Two friends engage in a shoving match during gym class over a game of flag football.
 - ▶ Procedural steps?
 - ▶ Substantive considerations?

- ▶ Two female students have falling out over social media, plan to meet in the bathroom to fight, and do in fact engage in a significant physical altercation in the bathroom during school.
 - ▶ Procedural steps?
 - ▶ Substantive considerations?



Bullying

KNOWING WHAT IT IS, INVESTIGATING APPROPRIATELY,
AND RESPONDING THE RIGHT WAY

Definition of Bullying

Bullying is:

- A **repeated** action by one or more students or staff
- A written, verbal or electronic expression or a physical act or gesture or any combination thereof
- Directed at a target (victim)

M.G.L. Chapter 71, Section 37O

Bullying is Directed at a Target and Causes

- Physical or emotional harm
- Damage to the target's property
- Places the target in reasonable fear of harm to themselves or of damage to their property
- Creates a hostile environment at school for the target
- Infringes on the rights of the target at school; OR
- Materially and substantially disrupts education process

Cyberbullying = Bullying

- ▶ Bullying through the use of technology or any electronic communication
 - E-mail
 - Texting
 - Internet - web pages, blogs
 - Social Media – Facebook, Twitter, Instagram, Snapchat, Tik Tok
 - Can include IMPERSONATION of another (catfishing)

Who is a Bully?

- Students
- Member of school staff
 - Educator
 - Administrator
 - School Cafeteria Worker
 - Bus Driver
 - Coach
 - Advisor
 - Paraprofessional

Scope of the Law

- ▶ Applies to ALL sites and activities under control of district, including school grounds, bus stops, at school functions or events, or through use of school-owned technology or device
- ▶ Applies to NON-SCHOOL related sites/activities/technology IF the acts create a hostile environment at school for the target or materially and substantially disrupt the education process or the orderly operation of the school
 - ▶ Think about SOCIAL MEDIA!!!

Mahanoy Area School District v. B.L., 594 U.S. ____ (2021)

- ▶ Snapchat post: “F ____ school f ____ softball f ____ cheer f ____ everything.” Post seen by about 250 people, including fellow students and cheerleaders. The coaches learned of the post and decided it violated team and school rules. B.L. suspended for a year from the cheerleading team.
- ▶ Standard: Can discipline off-campus speech that “materially disrupts class work or involves substantial disorder or invasion of the rights of others.”
- ▶ Court considerations:
 - ▶ (1) off-campus speech normally falls within the zone of parental responsibility, rather than school responsibility,
 - ▶ (2) off-campus speech regulations coupled with on-campus speech regulations would mean a student cannot engage in the regulated type of speech at all, and
 - ▶ (3) the school itself has an interest in protecting a student’s unpopular off-campus expression because the free marketplace of ideas is a cornerstone of our representative democracy.
- ▶ Court finding: Her off-campus speech was protected by the First Amendment, and the school’s decision to suspend her violated her First Amendment rights.

Doe et al., v. Hopkinton Public Schools,
Civil Action No. 19-11384-WGY, 2020 WL 5638019
(D. Mass. Sept. 22, 2020)

- ▶ 8 members of a high school hockey team accused of bullying a fellow teammate in a Snapchat group and during bus rides
- ▶ After investigation, all 8 students were suspended from the hockey team for the remainder of the season and each received a short-term suspension
- ▶ Court: although the 2 students' involvement in the group bullying of the victim was minimal compared to the other students involved, school officials "have broad discretion to protect students from bullying, and if in the course of their investigations they sometimes draw in the students at the periphery of the group, that does not mean they have violated those student's constitutional rights."
- ▶ Out-of-school speech may infringe on the rights of other students to attend school free from bullying and harassment, and when it does, it is not considered protected speech

Responding to Reports of Bullying

Be aware that reports can come in many forms –

- From staff, students, parents
- Can be verbal, via email or via formal Bullying Report
- Report does not have to specifically allege “bullying” if the conduct described could potentially be bullying
- CANNOT require that the formal Bullying Report Form be completed in order to consider it a report of bullying necessitating investigation
- **Also, be careful NOT to dismiss reports as simply peer conflict without first conducting a DOCUMENTED investigation and making a formal determination**

Process Overview

- ▶ Receipt of Report
- ▶ Written Notice of Complaint and Investigation
- ▶ Support Plan During Investigation
- ▶ Conduct Investigation and Make Findings – IN WRITING
- ▶ Written Notice of Findings to both Parties
- ▶ If Bullying:
 - ▶ Safety Plan for Target
 - ▶ Responsive measures to address bullying and prevent reoccurrence
- ▶ If NOT Bullying:
 - ▶ Support Plan for Target Continues

Bullying vs. Peer Conflict

- ▶ Not all situations that students share with their parents or school personnel are examples of bullying.
- ▶ Some behaviors or incidents may be examples of a more EQUAL type of conflict, such as an argument or disagreement.
- ▶ *Students with disabilities may have difficulty navigating peer interactions and understanding social expectations and pragmatics.*

Students with Disabilities

- ▶ Students with disabilities are going to be more vulnerable to bullying, and by virtue of their status as a protected class, more vulnerable to harassment.
- ▶ How do we address this through the special education process?

Students on IEPs

For a student on an IEP who has disability which affects social skills development or who is vulnerable to bullying, teasing or harassment, the IEP MUST address the skills and proficiencies needed to avoid and respond to the bullying, teasing or harassment

This is an ANNUAL consideration.

But what are the district's obligations when a special education student is dealing with alleged bullying/harassment outside of the regular IEP cycle?

Huntington Beach City (CA) Sch. Dist.

115 LRP 17622 (OCR 2015)

- ▶ In addition to conducting an initial evaluation, school districts also have child find obligations to reevaluate as necessary/appropriate:
- ▶ Here, OCR responded to a parent complaint that the district failed to protect a student with a health impairment from anti-Semitic peer harassment.
- ▶ OCR noted that, although the district attempted to end the harassment by assigned an aide to escort the student around the school, the district never re-evaluated the student **to determine whether the bullying affected his ability to learn.**
- ▶ OCR commented, “as part of a school’s appropriate response to bullying on any basis, the school should convene the IEP team or Section 504 team of [the] student to determine whether ... the student’s needs have changed.”

Westford Public Schools

OCR Complaint No. 01-16-1282

- ▶ Complainant alleged that the District discriminated against Student on the basis of disability by failing to provide her with FAPE when it did not convene IEP meeting, despite notice that student was subjected to ongoing bullying
- ▶ Bullying included incidents on social media, including posting photos
- ▶ District was on notice that that bullying was adversely affecting the student
 - ▶ Emails stated the student was “nervous,” “very upset,” and “came home crying”

Westford Public Schools, cont.

- ▶ Consider additional indicators that alleged bullying may be adversely affecting a student
 - ▶ Decrease in grades
 - ▶ Increased absences



Civil Rights

SCHOOL DISTRICT RESPONSIBILITIES GENERALLY AND
UNDER SPECIFIC FEDERAL AND STATE CIVIL RIGHTS LAWS

Relevant Federal Laws Addressing Civil Rights

- ▶ Civil Rights Laws prohibiting discrimination:
 - ▶ **Title VI – race, color, national origin**
 - ▶ **Title IX – sex/gender**
 - ▶ **Section 504 and Title II – disability**

Massachusetts Civil Rights Laws

Article 114 of the Amendments to the Massachusetts Constitution

- ▶ Prohibits discrimination, exclusion from participation, and denial of benefits on the basis of disability in any program or activity in the Commonwealth

Massachusetts Civil Rights Act

- ▶ Protects citizen's civil rights, including right to attend public school

Civil Rights Laws and School Districts

- ▶ The District as an entity is responsible for proper implementation of the civil rights entitlements established under the federal and state constitutions and statutes.
- ▶ The District must establish defined roles and responsibilities for general and special education personnel to meet all aspects of the District's legal responsibilities.
- ▶ **Staff must know whom, how and what to report!**

Nature of School's Responsibility to Address Harassment

Must promptly and effectively respond to claims of harassment as shown by taking corrective steps to:

- Stop the harassment;
- Prevent its recurrence; **AND**
- Remedy the effects of the harassment – individual remedies and school-wide remedies

What is Harassment?

Conduct in any form (verbal, written, electronic, physical) that is:

- Unwelcome
- On school grounds or in any school-related event or activity (or out-of-school conduct if it creates a hostile environment)
- Relating to a student's status as a member of a protected class
- Sufficiently severe, persistent or pervasive
- Creates a hostile, harmful or humiliating environment at school

Considerations in Evaluating Harassment Claims

- Context, expectations and relationships of the parties
- Age and maturity of students
- Age/gender of perpetrator compared to target
- Any disability of perpetrator or victim
- Whether conduct falls outside scope of general student misconduct or is atypical for age of perpetrator

School District Response to Harassment Claim

- Follow school policies and procedures
 - Notice of complaint and investigation
 - Offering of Interim Measures during Investigation
- Investigate with integrity (more on this later...)
- **Considerations of Culture and Climate**
- Reasonable, timely, age-appropriate and effective corrective action required
- Discipline if appropriate

Retaliation Prohibited

- It is illegal to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title VI, Section 504, or any other civil rights law, or because he/she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing.
- Remember that persons other than the student can engage in protected activity (parent, teacher, coach, student witness)

Woburn Public Schools

121 LRP 6864 (2000)

- ▶ Parents sent an email to Student's teacher, to advocate on behalf of the Student as a student with a disability (protected activity)
- ▶ Teacher filed a grievance, Parent meeting with the Principal, and other actions taken (adverse action)
- ▶ Parents emailed Superintendent multiple times regarding retaliation claims
- ▶ OCR made a finding that District did not respond to Parents' retaliation concerns, despite the fact that the Parents repeatedly brought them to the District's attention, and the District failed to provide a prompt equitable response

TIP: Make sure to investigate claims of retaliation and document investigation.



TITLE VI

*Prohibition of Discrimination on the
Basis of RACE, COLOR, NATIONAL ORIGIN*

Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 guarantees that "no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Two Types of Discrimination

- ▶ District policies and the administration of student discipline can result in unlawful discrimination based on race in 2 ways:
 1. If the student is subject to DIFFERENT TREATMENT based on the student's race; and
 2. If the policy is neutral on its face, and is administered in an even-handed manner, but has a DISPARATE IMPACT, i.e. a disproportionate and unjustified effect on students of a particular race.

Examples of Different Treatment

- ▶ When similarly situated students of different races are disciplined differently for the same offense.
 - ▶ EX: Two students with no prior disciplinary action get into a fight. The white student receives a 3-day suspension and the Hispanic student receives a 5-day suspension. There are no other factors at play, i.e. could not determine who started fight, neither student used a weapon, etc.
- ▶ Selective enforcement of a facially neutral policy against students of one race.
 - ▶ EX: School official overlooks the violation of a policy by an Asian student, but enforces the policy when the same violation is committed by an African-American student.

Questions that DOJ and OCR will ask

- ▶ Did the school limit or deny educational services, benefits or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race?
- ▶ Can the school articulate a legitimate, non-discriminatory basis for the different treatment?
 - ▶ If not, then could find intentional discrimination.
- ▶ Is the reason articulated a pretext for discrimination?
 - ▶ If yes, could find intentional discrimination.

Disparate Impact

- ▶ In determining whether a facially neutral policy has an unlawful disparate impact, OCR will apply the following inquiry:
 - ▶ Has the policy resulted in an adverse impact on students of a particular race as compared to students of other races? *If yes, then:*
 - ▶ Is the policy necessary to meet an important educational goal? *If yes, then:*
 - ▶ Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less burden or adverse impact on the disproportionately affected racial group, or is the school's justification a pretext for discrimination?
 - ▶ If answer is yes to either question, could find discrimination.

Hostile Environment

A racially hostile environment may be created by oral, written, graphic or physical conduct related to an individual's race, color, or national origin that is sufficiently severe, persistent or pervasive so as to interfere with or limit the ability of an individual to participate in or benefit from the recipient's programs or activities

It is a Hostile Environment When:

1. A racially hostile environment existed;
2. the recipient had actual or constructive notice of the racially hostile environment; and
3. the recipient failed to respond adequately to redress the racially hostile environment.

Whether conduct constitutes a hostile environment must be determined from the totality of the circumstances.

Factors to be Considered:

- ▶ Conduct that is severe, pervasive or persistent
 - ▶ looking at context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of persons involved.
- ▶ The harassment must in most cases consist of more than casual or isolated racial incidents to establish a Title VI violation.
- ▶ Notice - can be direct or indirect.
- ▶ Appropriate Response - a legal duty to take reasonable steps to eliminate it and remedy the effects.



504 and TITLE II

*Prohibition of Harassment/Discrimination on the
Basis of DISABILITY*

Section 504

- ▶ Section 504 of the Rehabilitation Act is an anti-discrimination act that prohibits discrimination against people with disabilities, **including students, employees, and other members of the school community.**
- ▶ This law applies to all school districts that receive Federal financial aid and it covers all programs and activities that the school district offers.
- ▶ The responsibility of the district is to identify, evaluate, and provide appropriate services to those individuals who meet the criteria set forth by the Act (“Child Find”).
- ▶ **Failure to follow a Section 504 Plan could be a violation of a student’s CIVIL RIGHTS.**

Complaints and Process

- ▶ Section 504 requires that the district have an internal grievance process
- ▶ Additional Forums
 - ▶ OCR – Focus on PROCEDURE
 - ▶ BSEA - Considers both substantive and procedural issues

Districts should have a process in place to ensure Team reconvenes to consider bullying/harassment of students with disabilities.

Districts should also have a process for referring for SPED evaluation when eligibility under the IDEA is suspected.



Title IX Regulations and Responsibilities

Title IX of the Education Amendments of 1972

- ▶ Prohibits discrimination based on sex in education programs and activities at all levels.
- ▶ Title IX protects students and employees from all forms of sex discrimination, including discrimination based on gender identity.
- ▶ Essence of the Law: You cannot exclude, separate, deny benefits to, or otherwise treat differently any person on the basis of sex (unless expressly authorized by the regulations – exceptions to the general rule).

Title IX

Summary of Major Changes

- ▶ Narrows definition of Sexual Harassment (3 types of misconduct)
- ▶ School district obligation to respond based on “Actual Knowledge” of sexual harassment in a manner that is not “Deliberately Indifferent”
- ▶ Increases the rights of the accused – presumption accused is NOT responsible
- ▶ No Gag Orders - cannot restrict parties from discussing
- ▶ Supportive Interim Measures available to BOTH Respondent and Complainant
- ▶ Respondent must be provided detailed notice of allegations; both parties must be provided with a copy of the Investigation Report and opportunity to respond prior to final determination
- ▶ Appeals Process (new)

New Definition of Sexual Harassment

3 Types of Misconduct

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1. **Quid Pro Quo Sexual Harassment** - conditioning provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct; or
2. **Hostile Environment** - unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive, that it effectively denies a person equal access to the district education program or activity; or
3. **Sexual assault** (as defined in the Clery Act), including "dating violence", "domestic violence" or "stalking" (as defined in the Violence Against Women Act (VAWA)).

Definition more narrow than previously, but likely to change AGAIN this fall.

New Title IX Regulations and State Law

- ▶ School districts are required to comply with BOTH federal law and Massachusetts law
- ▶ Massachusetts definition of Sexual Harassment is more BROAD
 - ▶ MA law definition **still includes conduct/speech that creates a hostile environment**, but the new federal regulations dial that back and require the heightened proof that the unwelcome conduct be “**severe, pervasive AND objectively offensive.**”
- ▶ So, under state law, comments that in and of themselves would not be offensive might still be considered to contribute to a hostile environment but under the federal regulations might not meet that stricter standard.

Examples of Sexually Harassing Conduct

- ▶ Requests for sexual favors
- ▶ Jokes about sex or making fun of someone or a group based upon gender identity or sexuality.
- ▶ Inappropriate or lewd comments repeatedly said about or around someone, including body or appearance.
- ▶ Spreading rumors or gossip about someone's relationships or sexuality or sex life.
- ▶ Unwanted or inappropriate touching or unwanted staring or gestures of a sexual nature.
- ▶ Showing vulgar pictures or pornography (even if do not involve the parties involved).

Remember that the test is whether the unwelcome conduct would be determined by a reasonable person to be so severe, pervasive, and objectively offensive, that it effectively denies a person equal access to the district's education program or activity.

Reasonable Judgment and Common Sense

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It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists – consider both subjective and objective perspective.

School personnel are advised to use common sense and to consider factors such as the age and maturity of the students.

Duty of School District to Respond

- ▶ Duty to respond when school has “actual knowledge” of “sexual harassment or allegations of sexual harassment.”
 - ▶ Actual knowledge: Notice to a Title IX Coordinator or an official with authority to institute corrective measures on District’s behalf.
- ▶ Any employee that becomes aware of sexual harassment/allegations has a duty to report.
- ▶ Schools must respond promptly in a manner that is not deliberately indifferent.
 - ▶ Deliberate Indifference = District must respond in a manner that is not clearly unreasonable in light of the known circumstances.

Obligation to Respond - Jurisdiction

- ▶ Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.
- ▶ Includes locations, events or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred.
- ▶ The definition of sexual harassment covers the in-program effects of out-of-program misconduct, but not the misconduct itself.

Process Overview

Actual Knowledge

Initial Contact with Supportive Measures

Formal Complaint

Written Notice of Formal Complaint

Investigation

Written Investigation Report

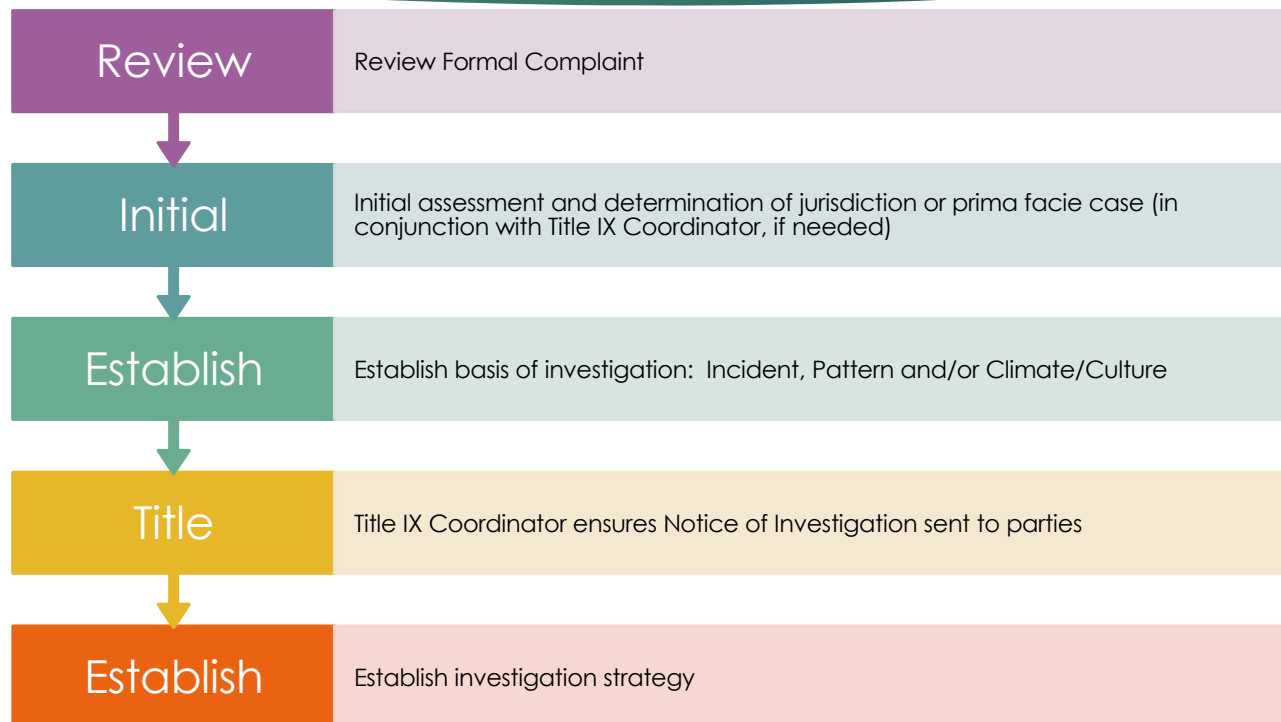
Hearing (not required at K-12 level)

Decision-making Process

Appeal

Key Steps in investigation

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Key Steps in Investigation Continued



Determination of Responsibility

- ▶ Decision-maker cannot be the investigator or Title IX Coordinator
- ▶ A live hearing is not required at the K-12 level*, but Decision-maker must allow each party to submit written, relevant questions to be asked of another party or witness.
- ▶ The decision-maker then must provide each party with the answers and the opportunity for follow-up questions.
- ▶ Written determination must be provided simultaneously to all parties.

*A live hearing is required at post-secondary institutions.

Determination of Responsibility Continued

- ▶ The Principal or designee (**decision-maker**) must issue written determination that includes the following:
 - Summary of allegations
 - Procedural steps taken
 - Application of student code of conduct to facts
 - Findings of fact
 - Conclusions whether alleged conduct occurred (**Preponderance Standard**)
 - Statement of rationale for determination with regards to each allegation
 - Recommended disciplinary or remedial action

Preventing Retaliation

- ▶ Inform victim and witnesses about their protections against retaliation
- ▶ Inform perpetrator against taking any action that could be viewed as retaliatory - ie. through friends, social media
- ▶ Separate, when necessary and appropriate, the victim and alleged perpetrator
- ▶ Provide a point person for reporting any concerns regarding retaliation
- ▶ Promptly investigate and respond to allegations of retaliation

Doe v. Boston

No. 22-CV-10917 (D.Mass. May 3, 2023)

- ▶ Complainant high school student alleged that a classmate sexually assaulted her at an off-campus part; both students attended Boston Arts Academy
- ▶ Complainant filed against City of Boston and BPS alleging that she was forced to be present in school with the perpetrator every day and was subject to bullying and harassment by her classmates.
- ▶ Perpetrator allegedly bragged to other students about the assault.
- ▶ Boston moved to dismiss the Title IX Claim.
- ▶ Court denied the motion, rejecting the typical “isolated event” defense and quoted an older decision which stated that actionable conduct under Title IX can be discerned by reviewing a “constellation of surrounding circumstances, expectations, and relationships.”

The Takeaway

- ▶ Schools are not liable for private, off-campus behavior, but MAY be responsible for subsequent conduct in school.
- ▶ This behavior may require response and intervention from the school district.
- ▶ Response could include:
 - ▶ Stay away order
 - ▶ Schedule changes
 - ▶ Meetings with students/families
 - ▶ Investigation of school-based conduct
 - ▶ Special education considerations

Doe v. North Andover

No. 20-CV-10310 (D.Mass. May 16, 2023)

- ▶ Student sexually assaulted twice outside of school by another student.
- ▶ Andover became aware of alleged conduct.
- ▶ Andover filed 51A and reported to police.
- ▶ Andover refused to conduct a Title IX investigation arguing jurisdiction did not extend to off-campus activity.
- ▶ Second student reported rape by the same perpetrator; Andover DID conduct a Title IX investigation and refer to police.
- ▶ Third student reported rape by the same perpetrator.

- ▶ Staff at Andover received Title IX training, coordination with law enforcement was established, charges had been filed.
- ▶ School officials had created safety plans and written expectations for behavior.
- ▶ **Based on complaint, it appears NONE of this had the effect of protecting the victims from ongoing encounters in passing in school.**
- ▶ **Motion to Dismiss was DENIED.**


Changes Likely This Fall

- ▶ Respond to all forms of sex-based harassment, including pregnancy, parenting status, sexual orientation, and Gender identity
- ▶ Definition of “hostile environment” will become more broad
- ▶ Will need to address hostile environment caused by off-campus conduct if the respondent represents the school or engages in conduct “under the [school’s] disciplinary authority” Ex. Study abroad program
- ▶ Changes to the procedural requirements, with K-12 having less requirements than higher education institutions

Scenario #1

- ▶ Parent emails the elementary school Principal to report that her child is being bullied.
- ▶ Specifically, parent alleges that, on the bus ride home the previous day, a peer called her child her stupid and “sped.”
- ▶ The child is on an IEP for a language-based learning disability.
 - ▶ What are the school's action steps?
 - ▶ What law/policy is applicable?

Student Free Speech



Tinker v. Des Moines Indep. Sch. Dist., (393 U.S. 503 (1969))

- ▶ Facts: Three public school students were suspended for wearing black armbands to protest the Vietnam War. Students sued. Ultimately, Supreme Court found for students.
- ▶ Holding:
 - ▶ Students and teachers do not “shed their rights to freedom of speech or expression at the schoolhouse gate.”
 - ▶ Schools cannot regulate student speech unless it materially and substantially interferes with the operations of the school or impinges on the rights of others.

Material and Substantial Disruption

In years following *Tinker*, the Supreme Court has further held that in addition to speech that causes a material and substantial disruption or interference with the rights of others, schools may limit student speech that:

- ▶ Is lewd, vulgar or obscene (*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986))
- ▶ Is School-sponsored speech (*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)), such as school newspaper.
 - ▶ Also held that “First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment.”
- ▶ Promotes activities that are illegal, such as illegal drug use. (*Morse v. Frederick*, 551 U.S. 393 (2007)).

Impingement on Rights of Others

- ▶ Not a lot of cases
- ▶ But clear that “it is not enough that the speech is merely offensive to some listener.” *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 176 (D. Mass. 2007).
- ▶ Schools need not tolerate speech that is “inconsistent with its basic educational mission.” (*Hazelwood*, quoting *Fraser*)

Threats of Violence

Schools not required to wait for an actual disruption to act; discipline

- ▶ Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013)
- ▶ Student bragged to friends over MySpace about his collection of weapons and ammunition; throughout the school year friends noticed his postings became increasingly violent and disturbing and included specific threats to shoot up the school, including specific individuals. Friends reported to coaches and school suspended Student.
- ▶ Student sued claiming violation of First Amendment rights.
- ▶ Held: The nature of the threats here was alarming and explosive. Confronted with a challenge to the safety of its students, School did not need to wait for an actual disruption to materialize before taking action. "*Tinker* does not require school officials to wait until disruption actually occurs before they may act.... 'In fact, they have a duty to prevent the occurrence of disturbances.' " . . . We look to "all of the circumstances confronting the school officials that might reasonably portend disruption."

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- ▶ It was reasonable for School to interpret the messages as a real risk and to forecast a substantial disruption.

Mahoney Area School District v. B.L., 141 S. Ct. 2038 (2021)

- ▶ Schools are limited in regulating speech that occurs off-campus.
- ▶ Off-campus speech causing substantial disruption or interfering with the rights of others, is not protected.
- ▶ BUT mere criticism of school programs or policies, vulgar venting without disruption or targeting of/harm to an individual may not be enough for schools to regulate student speech.
- ▶ Bullying and harassment generally may be addressed if it impacts the school community

ONLINE BULLYING

Doe et al. v. Hopkinton Public Schools,
19 F4th 493 (2021)

- ▶ Facts: Eight students were found to have bullied a fellow student athlete in a private group SnapChat and on bus rides to hockey games. Target was not part of the group SnapChat.
- ▶ All eight were given short-term suspensions based up on their individual involvement.
- ▶ Two students sued in federal court claiming violation of free speech rights and rights to freely associate under the First Amendment.

Doe et al. v. Hopkinton (continued)

First Circuit held:

- High School's decision to discipline two students involved in an environment of group bullying did not violate those students' First Amendment Rights.
- students' speech and conduct in encouraging direct bullying by others was not protected under the First Amendment;
- students' suspensions did not violate their First Amendment rights to free association;
- The Court additionally held that the Massachusetts anti-bullying statute, G.L. c. 71, § 37O, "is neither so broad nor so vague" as to render it unconstitutional.

Scenario #2

- ▶ Angry parent seeks to file a Title IX Complaint alleging that his 6 year-old son was smacked on the butt by same-aged peer on two separate occasions during a game of tag at recess.
- ▶ The alleged target did not report any concerns or seem affected by the conduct.
- ▶ The alleged perpetrator reported that he thought it was funny and was just joking with his friend.



Questions?

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Thank you for your attention and please do not hesitate to
contact me with any questions!