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## **Attorney General Office's Guidance on Schools' Legal Obligations to Prevent and Address Hate and Bias Incidents**

The Office of the Attorney General has recently engaged with school administrators, teachers, staff, parents, students, and community members who are concerned about hate incidents in the Commonwealth's elementary and secondary schools, and who are reexamining the role of schools in preventing and addressing these incidents. Student misconduct that involves hate, bias, or prejudice can have a devastating impact on victims and severely disrupt the school environment. State law requires schools to take steps to prevent this type of misconduct and respond when it occurs. This Guidance is designed to assist schools in their continuing efforts to combat hate and foster a safe, supportive, and inclusive educational environment, consistent with their legal obligations.

### **Massachusetts Prohibits Bias-Related Bullying and Harassment in Schools**

The Massachusetts Anti-Bullying Law (G.L. c. 71, § 37O) and Student Anti-Discrimination Act (G.L. c. 76, § 5) require schools to take steps to prevent bias-related bullying and harassment by students and respond effectively when it occurs.<sup>1</sup> Bullying and harassment are similar, but not identical, types of misconduct. Bullying generally includes any repeated, targeted behavior that harms a student or disrupts the school environment. Although not all bullying is bias-related, bullying often stems from or involves bias, prejudice, or hate. Harassment is conduct that creates, or contributes to the creation of, an intimidating or hostile environment for a student because of their race, color, religion, national origin, sex, gender identity, or sexual orientation. Like bullying, harassment can take many forms, including verbal statements, online or social media activity, graffiti, and violent or threatening physical conduct. Unlike bullying, harassment does not have to be repeated or targeted at a particular victim. A single, severe hate incident may create an intimidating or hostile environment—so too may a series or pattern of incidents.

Schools should understand that the protections against harassment provided by the Anti-Discrimination Act are closely analogous to those provided by Title VI of the Civil Rights Act of 1964.<sup>2</sup> However, Title VI applies only to harassment based on race, color, or national origin,

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<sup>1</sup> Federal law also imposes requirements on schools to address bias-related misconduct by students. *See, e.g.*, 42 U.S.C. § 2000d *et seq.* ("Title VI") (covering race, color and national origin); 20 U.S.C. § 1681 *et seq.* ("Title IX") (covering sex); 42 U.S.C. § 12131 *et seq.* (Americans with Disabilities Act) (covering disability).

<sup>2</sup> Under the Anti-Discrimination Act and Title VI, students may not be discriminated against, excluded from, or denied the advantages or benefits of school programs because of their protected characteristics. *See* G.L. c. 76, § 5; 42 U.S.C. § 2000d. This broad prohibition requires schools to protect students from peer harassment that

whereas the Anti-Discrimination Act extends the same protections to cover religion, sex, gender identity, and sexual orientation. While schools' responsibilities under Massachusetts law are independent of federal law, school officials may use longstanding federal guidance applying Title VI as a complementary resource that addresses many of their obligations under the Anti-Discrimination Act.<sup>3</sup>

### Schools Must Respond to Hate and Bias Incidents Involving Students

Schools must take prompt and effective action to address hate incidents involving students. When a school receives notice of an alleged hate incident, it has a legal responsibility to investigate and to respond to any bullying or harassment that is found to have occurred. Because hate incidents may involve bullying, harassment, or both bullying and harassment, schools must ensure that their response complies with both the Anti-Bullying Law and the Anti-Discrimination Act. Moreover, even if a school determines that a hate incident does not rise to the level of bullying or harassment, it should still address behavior that violates its code of conduct or other disciplinary rules. Among other issues, a school may violate the Anti-Discrimination Act if it fails to address misconduct and that misconduct continues and eventually creates or contributes to an intimidating or hostile environment.

The legal obligations imposed by the Anti-Bullying Law and the Anti-Discrimination Act are not limited by the physical boundaries of the school campus. Schools are responsible for addressing incidents that occur at school or school-related events, including activity on school buses to and from school or school-related events.<sup>4</sup> Schools are also responsible for addressing "off-campus" bullying or harassment that has a serious carry-over effect on the victim at school.<sup>5</sup>

If a school determines that an incident involves bullying, it must take steps to stop the bullying behavior, protect the victim, and restore their sense of safety at school. Schools must have specific plans in place to deal with bullying that targets a student based on their race, color,

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unreasonably interferes with their education—that is, harassment that creates an intimidating or hostile school environment. *See* 603 CMR §§ 26.07(2) and 26.08 (schools must take steps to prevent harassment and respond when it occurs); *see also* United States Department of Education, "[Dear Colleague Letter: Harassment and Bullying](#)" (discussing legal obligations to address harassment under Title VI and other federal laws); United States Department of Education, "[Race and National Origin Discrimination: Frequently Asked Questions](#)."

<sup>3</sup> Courts generally look to interpretations of federal statutes when applying similar state statutes, and protections against harassment and hostile environment discrimination are generally as extensive or more extensive under Massachusetts civil rights law as under federal law. *See, e.g., College-Town, v. Mass. Com'n Against Disc.*, 400 Mass. 156, 163-64 (1987); *see also* "[Dear Colleague Letter: Harassment and Bullying](#)" (acknowledging that state laws may provide "additional civil rights protections" for students).

<sup>4</sup> An incident that occurs during remote learning, or on a remote learning platform, should generally be treated as occurring in school or at a school-related event. Further, schools must be aware that incidents that involve social media, texting, or other online activity may qualify as in-school incidents even if some of the activity originates outside of school during non-school hours. Because of its pervasive presence in students' lives, social media activity, in particular, may contribute to in-school bullying or harassment regardless of when or where it originally occurs.

<sup>5</sup> Specifically, schools must address off-campus bullying and harassment that create or contribute to a hostile environment at school—as well as off-campus bullying that infringes on a victim's rights or causes a substantial disruption at school. *See, e.g., G.L. c. 71, § 370(b).*

religion, national origin, sex, gender identity, sexual orientation, or disability, among other characteristics.<sup>6</sup> The Department of Elementary and Secondary Education (DESE) offers [comprehensive guidance](#) concerning schools' responsibilities under the Anti-Bullying Law.

Schools must also evaluate whether a hate incident has created or contributed to an intimidating or hostile school environment.<sup>7</sup> Some misconduct that does not qualify as bullying—for example, because it is not repeated—may still qualify as harassment that creates or contributes to an intimidating or hostile environment. Further, some misconduct that qualifies as bullying may also trigger responsibilities under the Anti-Discrimination Act. And a school's responsibilities under the Anti-Discrimination Act may differ from its obligations under the Anti-Bullying Law. As such, a school that labels an incident as “bullying,” and limits its response accordingly, may fail to identify or properly address violations of students' civil rights.

When a school receives notice of an incident that may involve harassment, it must conduct a prompt and impartial investigation that is sufficiently thorough to determine whether an intimidating or hostile environment exists for any affected student.<sup>8</sup> A school may receive notice that harassment is occurring in any number of ways. For example, harassing conduct may be reported to an administrator, may be witnessed by a teacher, or may be so open and notorious as to place the school on notice that it is occurring. A student does not need to report that they are being harassed, identify the conduct at issue as “harassment,” or request that the school intervene in order to be protected by the Anti-Discrimination Act.<sup>9</sup> If a school determines that harassment has occurred, it must take appropriate remedial action to end the harassment, prevent it from recurring, and eliminate the intimidating or hostile environment. Depending on the severity of the situation, a school may need to undertake systemic changes, including altering relevant policies and procedures and implementing training and educational programs, to effectively respond to an intimidating or hostile environment.

Schools must take a balanced approach to imposing discipline when responding to hate incidents. On the one hand, an inadequate disciplinary response can encourage bias-related misconduct and contribute to the creation of, or exacerbate, an intimidating or hostile

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<sup>6</sup> See G.L. c 71, § 37O(d)(3).

<sup>7</sup> Harassment creates an intimidating or hostile school environment when it is sufficiently severe or pervasive to unreasonably interfere with a student's educational performance or ability to participate in, or benefit from, school programs, activities, and services.

<sup>8</sup> Upon receiving notice of a hate incident, schools should also consider whether the alleged incident is serious enough (e.g., a hate crime) to necessitate outreach to law enforcement. The model [Memorandum of Understanding for School Resource Officers](#), released by the Office of the Attorney General, the Department of Elementary and Secondary Education, and the Executive Office of Public Safety and Security, offers guidelines for involvement of and information sharing with law enforcement. The Office reminds schools that, under state law, they must not involve law enforcement in traditional school discipline issues, and they should only make law enforcement referrals where the incident rises to the level of criminal conduct that poses real and substantial harm or threat of harm to the well-being of students or others in the school community or to property of the school.

<sup>9</sup> A school cannot turn a blind eye to information it learns as part of an investigation: if an investigation into an initial incident uncovers evidence of additional harassing conduct, the school is responsible for investigating and addressing that conduct as well. See, e.g., 603 CMR § 26.07(2) (schools are responsible for addressing harassment “when they have knowledge of its occurrence”).

environment. On the other hand, schools must ensure that any disciplinary action is both consistent with laws and regulations regarding school discipline and an effective response to the misconduct at issue. In particular, schools should carefully consider alternative measures before suspending or expelling students.<sup>10</sup> In addition to state legal requirements, “[r]esearch has shown that suspending students from school for non-violent offenses, and particularly suspending them repeatedly, has limited effectiveness in improving their behavior.”<sup>11</sup> Evidence-based approaches, such as Positive Behavioral Interventions and Supports (or PBIS), may be more effective at deterring bias-related misconduct and remediating an intimidating or hostile environment.

Schools should be confident that they can effectively respond to harassment and bias-related bullying without infringing on legal protections for student speech. Most incidents of bullying and harassment involve either conduct or types of speech—including threats and fighting words—not protected by the First Amendment or state law. Further, schools may discipline students for protected speech that causes, or is likely to cause, a substantial disruption or interferes with the rights of others, including the right to attend school free from bullying or harassment.<sup>12</sup> Additionally, schools may always respond to hateful speech with their own speech condemning bias and hate; by providing support for the victim and their community; and by conducting outreach, training, and educational programs.

### Schools Must Take Affirmative Steps to Prevent Hate and Bias Incidents

Schools cannot wait until after a hate incident has occurred to take action. State law and DESE regulations require schools to take affirmative steps to create a positive school climate where all students feel safe, supported, and respected, and to implement rules, policies, and procedures to combat bullying and harassment. Schools that neglect these obligations risk creating an environment in which hate incidents are more likely to occur and are more difficult to address. To comply with state laws and regulations, schools must fulfill the following affirmative responsibilities:

- Review curriculum to ensure that it promotes tolerance and does not perpetuate discriminatory or demeaning stereotypes;<sup>13</sup>
- Provide students at all grade levels the “skills, knowledge, and strategies” necessary to prevent and respond to bullying and harassment;<sup>14</sup>

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<sup>10</sup> See G.L. c. 71, § 37H¾; 603 CMR § 53.05.

<sup>11</sup> Department of Elementary and Secondary Education, “[Advisory on Student Discipline under Chapter 222 of the Acts of 2012](#)” (Feb. 28, 2015).

<sup>12</sup> See *Tinker v. Des Moines Ind. Com. School Dist.*, 393 U.S. 503, 509-10 (1969); G.L. c. 71, § 82. Schools may generally sanction students for otherwise protected speech, including political speech, that “crosses the line...[into] bullying and harassment.” See *Norris v. Cape Elizabeth High School*, 969 F.3d 12, 29 & n. 18 (1<sup>st</sup> Cir. 2020). While school officials are owed significant deference in determining when speech crosses this line, they must make certain that students are not sanctioned because the beliefs or positions they have expressed are unpopular, discomfoting, or “merely offensive to the listener.” *Id.*

<sup>13</sup> See 603 CMR §§ 26.05(1) and (2).

<sup>14</sup> See G.L. c. 71, § 37O(d)(3).

- Develop and implement plans to support and protect students who are vulnerable to becoming victims of bullying or harassment because of their race, color, religion, national origin, sex, gender identity, sexual orientation, or disability, among other identifying characteristics;<sup>15</sup>
- Prohibit students from engaging in bullying or harassment and prescribe disciplinary measures that may be imposed for violations;<sup>16</sup>
- Implement comprehensive policies and procedures for reporting, investigating, and responding to bullying and harassment;<sup>17</sup> and
- Train administrators, teachers, and staff to successfully implement anti-bullying and anti-harassment policies and procedures, including by providing teachers with sufficient professional development opportunities to ensure that they can carry out the educational requirements above.<sup>18</sup>

### Schools Should Adopt Best Practices to Help Them Implement Their Legal Obligations

Schools are encouraged to develop educational programs, prevention initiatives, and remediation measures that both incorporate best practices and meet the particular needs of their local community.

Based on the research and input of national and local experts, and consistent with schools' legal obligations, the Office recommends that all schools in the Commonwealth consider the following best practices, among others:

- *Engagement with the School Community.* Building a climate of inclusivity where every student, no matter their racial, ethnic, or other identity, feels safe and valued requires ongoing learning and work by the entire school community, including administrators, teachers, staff, students, and parents. Adults within the school community hold a special responsibility, given their positions of power and authority. If they fail to comprehensively address hate or bias incidents among students, or if they engage in hateful or biased conduct or speech themselves, they may be signaling that such behavior is acceptable.
- *Underlying Causes and Difficult Conversations.* In order to prevent, identify, and appropriately address hate, bias and prejudice, the school community should engage with related issues, such as the role of unconscious bias, the histories of marginalized groups, and the continuing impact of racism in our society. Schools

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<sup>15</sup> See G.L. c. 71, § 37O(d)(3).

<sup>16</sup> See G.L. c. 71, § 37O; 603 CMR § 26.08(1).

<sup>17</sup> See G.L. c. 71, §§ 37O(d)(1)-(3); 603 CMR §§ 26.07(1)-(2), (4) and 26.08(1).

<sup>18</sup> See G.L. c. 71, §§ 37O(d)(4) and (e)(2); 603 CMR 26.07(3).

should ensure that the school community receives the appropriate training and education to understand these issues and incorporate a shared understanding into the school culture. In addition, schools should train teachers and others in how to engage in and moderate difficult conversations. Districts should also consider offering [guidelines](#) and skills support on the use of hurtful terms in classrooms studying relevant history and literature. This set of work can often benefit from conversation and engagement with those who have relevant cultural expertise.

- *Transparency.* Hate incidents can have a significant and disruptive impact on the school community and are frequently the subject of broad community interest. Schools should strongly consider issuing a prompt and clear communication to the school community when a hate incident occurs, particularly when dealing with incidents that are serious, public, or likely to be the subject of rumors and gossip. The communication should vigorously condemn hateful or biased conduct, explain the steps that the school is taking to address the incident, and reaffirm the shared values of the school community, such as respect for differences and a commitment to inclusivity, equity, and safety for all students. The communication may also direct readers to resources or provide contact information for students who want to talk or have information to share. Email communications from the [Framingham](#), [Wellesley](#), and [Marblehead](#) school districts provide examples. Any such communication must comply with applicable privacy laws and regulations, including the Federal Educational Rights and Privacy Act (or FERPA).
- *Student Leadership.* Schools should foster and support student leadership groups representing marginalized communities (e.g., Black Student Union, Asian American Students Association, Gay-Straight Alliance/Gender Sexuality Alliance). Not only do student leadership groups support students and their allies and help build resilience, they increase acceptance and understanding among the school community and contribute to a positive school climate.
- *Notification to Parents of LGBTQ Students.* Schools should consider the unique concerns around notifying parents of LGBTQ students about bullying and harassment related to sexual orientation or gender identity/expression. For example, parents may not be aware of their child's sexual orientation or gender identity/expression. For additional information and guidance, consult DESE's [Guidance on Notifying Parents When A Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression](#).

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The Office of the Attorney General is committed to securing the civil rights of all students in the Commonwealth. If you have questions about this Guidance or other civil rights concerns, you may contact the Office [online](#) or at 617-963-2917.

Dated: November 17, 2020