

IV. MISC

A. CORI AND FINGERPRINT BASED BACKGROUND CHECKS

1. 2013 Amendments of Law

Obtaining Criminal Record Information

School officials are by now quite familiar with the duty to obtain CORI information regarding prospective and current employees. Massachusetts General Laws, Chapter 71, Section 38R, requires school districts to obtain from the Massachusetts Department of Criminal Justice Information Services all available criminal offender record information (CORI) regarding prospective or current employees at least every three (3) years.

Pursuant to amendments to Section 38R enacted in 2012 and 2013, school officials must now also obtain state and national fingerprint-based criminal background checks “to determine the suitability of current and prospective employees who may have direct and unmonitored contact with children. “ School officials are also now required to submit to the Commissioner of Education “any criminal record information relevant to the fitness for licensure of any holder of, or applicant for, an educator’s license in the commonwealth.” The statute does not define or describe the “criminal record information” that would be relevant to a teacher’s fitness to hold an educator license.

We note that teachers must be “of sound moral character” to be eligible for licensure (MGL, Chapter 71, s. 38G; 603 CMR 44.08), and they risk loss of license if they “have pleaded guilty, received deferred adjudication, or been convicted in a court of law” of a crime “involving moral turpitude” or “any other crime of such nature that in the opinion of the Commissioner the person so convicted discredits the profession, brings the license into disrepute or lacks good moral character.” 603 CMR 7.15(8)(a). In addition, MGL c. 71, s. 1 requires that school subjects be taught by teachers of “good morals.”

Teachers can also face discipline for their off-duty conduct. Certain behavior on the part of a teacher can constitute “misconduct in office,” even if committed off-duty, if a nexus exists between the conduct and the job position.

Use of Criminal Record Information

CORI checks reveal arrests and charges even if they do not result in convictions. As a result, they often raise questions but do not answer them. School officials have struggled, not so much with the exercise of obtaining CORI information, but rather what do with it. Before deciding what to do with CORI information, Superintendents and other administrators with whom they work closely often need to conduct some level of investigation in order to determine the scope of the issue, including the existence, nature and severity of the conduct at issue and whether employment action is warranted.

The state's Anti-Discrimination law contains two provisions with respect to permissible direct inquiry of applicants and current employees concerning CORI information. Specifically, MGL Chapter 151B, Section 4 makes it unlawful for an employer:

- Subsection 9: "...in connection with an application for employment, or the terms, conditions or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request information, to keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) if a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information."
- Subsection 9 ½ [added in 2010]: "to request on its initial application form criminal offender record information, provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses."

However, Chapter 71, Section 38R does contain the following language with respect to these restrictions:

Notwithstanding subsections 9 and 9 1/2 of section 4 of chapter 151B, if a school employer receives criminal record information from the state or national fingerprint-based criminal background checks that includes no disposition or is otherwise incomplete, the school employer may request that an individual provide additional information regarding the results of the criminal background checks to assist the school employer in determining the applicant's suitability for direct and unmonitored contact with children.

It appears that the restrictions imposed by Chapter 151B concerning the questioning of individuals about their criminal backgrounds have been eased somewhat, but not entirely. It is unclear whether the restrictions are eased with respect to applicants only, and not employees. The legislature chose the word "applicant" instead of the broader word "individual." In addition, such questioning appears to be permitted only where it is needed to make a suitability determination, and only where the criminal background information is incomplete or there is no disposition.

It should be noted that the above referenced limitations imposed by Chapter 151B only apply to requests for information directly from an employee or applicant, not to the collection of such information from other sources. Moreover, these subsections do not restrict an employer from taking adverse employment action based on such independently obtained information. Of course, in all cases involving suspension or dismissal of teachers with professional teacher status (and often teachers without professional teacher status, if collective bargaining agreements so provide), the “just cause” standard must be met. This includes not only the severity of the conduct at issue, but the provision of due process to the employee.

Suitability Determinations

The law now requires school employers to affirmatively make a determination about an applicant’s “suitability for direct and unmonitored contact with children.” DESE has issued regulations, at 603 CMR 51.00, enclosed with these materials, on this topic as well as other aspects of Section 38R.

Conclusion

If an authorized school official receives a CORI report that raises the possibility that a teacher has engaged in misconduct that renders him/her unfit to teach, an investigation is warranted. However, school officials must be mindful of the limits placed on his or her ability to question the employee. The following considerations should be kept in mind:

- School Employers should avoid asking applicants and employees, “have you ever been arrested/charged with a crime” or “were you arrested/charged?” The employer likely has this information already, via the CORI report.
- Employees and applicants should not be asked to produce a copy of their own CORI reports.
- The decision not to hire an applicant based on a CORI check is permissible. However, if an employer relies on a CORI report or the like in making an adverse decision against an applicant, it must provide the applicant a copy of the report and an opportunity to dispute its accuracy (see 803 CMR 2.17 and 2.18).
- As for current teachers, an arrest or issuance of criminal charges may prompt an investigation, but disciplinary action should not be based on an arrest or a criminal charge alone.
- There is a distinction between criminal behavior and off-duty misconduct. While sometimes they are one and the same, the two are not interchangeable. Criminal behavior, even if proved, does not automatically establish just cause for discipline of a teacher. An arbitrator might decide that the particular crime at issue does not reflect lack of “good morals.” Conversely, off duty conduct that does not result in a conviction may warrant disciplinary action. The investigation should be aimed at determining whether misconduct has occurred, and whether there is a nexus between the misconduct and the teacher’s employment, not whether the elements of a crime have been established.

- School districts must make affirmative suitability determinations, unless the circumstances permit reliance on another district's suitability determination.
- School districts have a duty to report to DESE any criminal record information relevant to the fitness for licensure of any holder of, or applicant for, an educator's license in the commonwealth.

DESE regulations require that school districts have Criminal History Record Information policies in place.

2. DESE Regulations

*Massachusetts Department of
Elementary & Secondary Education*

Education Laws and

Regulations 603 CMR

51.00

Criminal History Checks for School

Employees Section:

51.01: Authority, Scope, and Purpose 51.02:

Definitions

51.03: Individuals Subject to National Checks for Suitability Determinations

51.04: School Employer Policies on National Criminal History Checks and Suitability

Determinations; Confidentiality; Dissemination; Audit 51.05: Timing of National Criminal History Checks

51.06: Employer Documentation of Suitability Determination; Reliance Thereon; Subsequent

Checks 51.07: Reporting National Criminal History Check Results to the Commissioner View All Sections

Adopted by the Board of Elementary and Secondary Education: December 17, 2013

51.01: Authority, Scope, and Purpose

(1) Authority: 603 CMR 51.00 is promulgated pursuant to the authority of the Board of Elementary and Secondary Education under M.G.L. c. 71, §38R, and St. 2013, c.77..

(2) Scope: 603 CMR 51.00 governs the state and national criminal history checks of individuals working in or applying to work in Massachusetts public and private schools as required and permitted by M.G.L. c. 71 § 38R. M.G.L. c. 6, §§ 167-178B and 803 CMR 2.00: Criminal Records Information (CORI) also apply to such criminal history checks

(3) Purpose: The purpose of 603 CMR 51.00 is to provide school employers and employees with consistent rules and procedures regarding criminal history background checks.

51.02: Definitions

As used in 603 CMR 51.00, unless the context clearly requires otherwise, terms shall have the following meanings: Board: The Massachusetts Board of Elementary and Secondary Education or a person duly authorized by the Board. Commissioner: The Massachusetts Commissioner of Elementary and Secondary Education or his or her designee.

Conditional Employee: An individual who may have direct and unmonitored contact with children hired by a school employer without the employer first obtaining the results of a state and national fingerprint-based criminal history check because the school employer determines that exigent circumstances exist as set forth in 603 CMR 51.05(4).

Criminal History Record Information (CHRI): Information provided by the FBI and the Massachusetts State Police State Identification Section, through the Massachusetts Department of Criminal Justice Information Services (DCJIS). CHRI is defined by the FBI as any notations or other written or electronic evidence of an arrest, detention, complaint, indictment, information or other formal criminal charge relating to an identifiable person that includes identifying information regarding the individual as well as the disposition of any charges.

Criminal Justice Information (CJI): For the purposes of 603 CMR 51.00, CJI refers to data provided by the Federal Bureau of Investigation (FBI) Criminal Justice Information Services Division (CJIS) to civil agencies to perform their mission; including, but not limited to data used to make hiring decisions.

Criminal Offender Record Information (CORI): Records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 17 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person younger than 17 years old; provided, however, that if a person younger than 17 years old is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration. Massachusetts school employers' access to, and treatment of, CORI is governed by M.G.L. c. 71, § 38R, M.G.L. c. 6, §§ 167-178B and 803 CMR 2.00: Criminal Offender Record Information (CORI).

Department: The Massachusetts Department of Elementary and Secondary Education.

Department of Criminal Justice Information Services (DCJIS): The Commonwealth agency statutorily designated to provide a public safety information system and network to support data collection, information sharing and interoperability for the Commonwealth's criminal justice and law enforcement community and to oversee the authorized provision of CORI to the non-criminal justice community.

Direct and unmonitored contact with children: Contact with students when no other employee, for whom the employer has made a suitability determination pursuant to 603 CMR 51.00 of the school or district is present. "Contact" refers to any contact with a student that provides the individual with opportunity for physical touch or personal communication. The school employer may determine when there is potential for direct and unmonitored contact with children by assessing the circumstances and specific factors including but not limited to, whether the individual will be working in proximity with students, the amount of time the individual will spend on school grounds, and whether the individual will be working independently or with others. An individual shall not be considered to have the potential for direct and unmonitored contact with children if he or she has only the potential for incidental unsupervised contact in commonly used areas of the school grounds.

Employee: An individual working, or applying to work, in a Massachusetts public or private school. Employees shall include any apprentice, intern, or student teacher or individuals in similar positions.

National Criminal History Check: The process of submitting fingerprints to the FBI and Massachusetts State Police (MSP) State Identification Section to obtain state and national criminal history record information.

School: A Massachusetts public school, including a collaborative school, charter school, virtual school or innovation school; or a Massachusetts private day or residential school, including a special education school program approved under M.G.L. c. 71B; or a Massachusetts independent or parochial school or schools.

School Employer: The superintendent of any city, town, or regional school district, principal, or other administrator of Massachusetts public or private schools, including a special education school program approved under M.G.L. c. 71B. For the purposes of an individual directly hired by a Massachusetts school committee, the school committee is the school employer.

Subcontractor or Laborer: An individual not employed by the school employer but commissioned by the school committee or school, or employed by the city or town, or employed by a non-school employer under contract or lease with the school, school district, city, or town to perform work on school grounds or with students. Such individuals may be the employees of a contractor or vendor hired by a school, or may be independent contractors or service providers hired by a school or may be performing services on school grounds under a contract or lease with the school, school district, city or town.

Substitute Employee: An individual who is employed, on a temporary basis, to take the place of an employee who is absent.

Suitability Determination: A determination made by a school employer concerning whether anything contained in the individual's CHRI renders the individual unfit for employment that may include direct and unmonitored contact with children. A

suitability determination may also be made by the Department of Elementary and Secondary Education.

Volunteer: An individual who performs a service for a school employer on an unpaid basis, who is not an apprentice, intern or student teacher. 51.03:

Individuals Subject to a National Criminal History Check for Suitability Determinations.

(1) School employers shall review the results of a national criminal history check for all current and prospective school employees in the following categories:

- (a) Any full or part-time employee who may have direct and unmonitored contact with children;*
- (b) Any substitute employee who may have direct and unmonitored contact with children;*
- (c) Any student teacher, apprentice or intern working at a school who may have direct and unmonitored contact with children; and*
- (d) Any individual who regularly provides school related transportation to children.*

(2) School employers may review the results of a national criminal history check for certain individuals who may have direct and unmonitored contact with children, including:

- (a) Any volunteer; and*
- (b) Any subcontractor or laborer commissioned by the school employer, or employed by the city or town, to perform work on school grounds or with students.*

(3) In the case of an individual directly hired by the school committee, such as a superintendent of schools, the chair of the school committee shall review the results of the national criminal history check.

51.04: School Employer Policies on National Criminal History Checks and Suitability Determinations; Confidentiality; Dissemination; Audit.

(1) Each school employer that receives CHRI shall maintain a written CHRI policy that meets the minimum standards of the DCJIS model CORI Policy and that complies with all federal rules and regulations regarding CHRI, including limitations on record retention and the requirement of CHRI consent forms.

(2) Security of CHRI: School employers will conform to all of the requirements of the FBI Criminal Justice Information System (CJIS) security policy and the DCJIS security policies and procedures pertaining to the use, storage, dissemination, and destruction of CHRI and CJI.

(3) Before taking any adverse action based on CHRI, a school employer shall:

- (a) comply with applicable federal and state laws and regulations, which may include, but are not limited to, M.G.L. c. 71, §§ 42 and 42D, and c. 150E, if applicable;*

- (b) notify the individual in person, by telephone, fax, or electronic or hard copy correspondence of the potential determination;**
- (c) provide a copy of the individual's CHRI to the individual;**
- (d) provide a copy of the employer's CHRI policy to the individual;**
- (e) identify the information in the individual's CHRI that is the basis for the potential determination;**
- (f) provide the individual with the opportunity to dispute the accuracy of the information contained in the CHRI;**
- (g) provide the individual with a copy of state and FBI information regarding the process for correcting CHRI; and**
- (h) document all steps taken to comply with 603 CMR 51.04.**

(4) Dissemination. Upon receiving the national criminal history check results for a given employee, a school employer shall disseminate those results to only the following recipients:

- (a) the employee, in a confidential and secure manner, pursuant to the standards for providing CORI information under 803 CMR 2.13: Required Dissemination of Criminal Offender Record Information (CORI) by an Employer or Governmental Licensing Agency or upon the employee's request; and**
- (b) the Department, if reporting to the Commissioner is required pursuant to section 603 CMR 51.07, Reporting National Check Results to the Commissioner.**

(5) Confidentiality, Storage and Destruction. A school employer shall adhere to the following standards regarding the confidentiality, storage and destruction of national criminal history check results:

- (a) The employer may not receive an individual's national criminal history check results unless the individual has authorized the employer to receive the results through a CHRI consent form;**
- (b) While employment decisions are pending, the employer shall store the national criminal history check results pursuant to the restrictions regarding CORI storage set forth in 803 CMR 2.11(1) through (3); and**
- (c) Once employment decisions are complete and the requirements set forth in 603 CMR 51.07, if applicable, are met, the employer shall destroy national criminal history check results pursuant to the requirements regarding CORI destruction set forth in 803 CMR 2.12: Destruction of Criminal Offender Record Information (CORI).**

(6) Audit. School employers are subject to Compliance Audits by the DCJIS and the FBI. These audits will assess the adherence to DCJIS, FBI CHRI and CJI handling laws, regulations, policies, and procedures.

51.05: Timing of National Criminal History Checks

(1) For individuals who began work or service before the 2013-2014 school year:

- (a) An employee, subcontractor, laborer, individual who regularly provides school related transportation to children, volunteer or other individual will be considered to have begun work or service for a school employer before the**

2013-2014 school year if he or she performed work for that school employer prior to July 1, 2013.

(b) Before the start of the 2016-2017 school year and according to a schedule established by the Department, school employers shall obtain and review national criminal history checks, and make required suitability determinations, for all employees who began work before the 2013-2014 school year and for all individuals who regularly provide school related transportation to children and who began work before the 2013-2014 school year.

(c) School employers may obtain and review national criminal history checks, and make suitability determinations for subcontractors, laborers or volunteers who began work or service before the 2013-2014 school year according to a schedule established by the Department.

(2) For individuals who begin work or service during the 2013-2014 school year:

(a) For employees who may have direct and unmonitored access to children, and for individuals who regularly provide school related transportation to children, school employers shall:

- 1. Obtain and review the applicant's Massachusetts CORI and determine whether the CORI results preclude employment before hiring the individual;**
- 2. If the Massachusetts CORI results do not preclude employment, the employer shall require the individual to submit his or her fingerprints for a national criminal history check according to the process created by the Commonwealth and according to a schedule established by the Department; and**
- 3. Make a suitability determination after the results of the national criminal history check are available; or, if permitted by 603 CMR 51.06, obtain documentation of a previous suitability determination.**

(b) For subcontractors, laborers and volunteers who begin work or service during the 2013-2014 school year, the school employer may require the individual to submit fingerprints for a national criminal history check according to the procedures set out in 603 CMR 51.05(2)(a).

(3) For individuals who begin work or service during or after the 2014-2015 school year, school employers shall secure national criminal history checks before finalizing an offer of employment, as follows:

(a) Obtain and review the applicant's Massachusetts CORI and determine whether the CORI results preclude employment;

(b) If the CORI results do not preclude employment, require the individual to submit his or her fingerprints for a national criminal history check according to the process created by the Commonwealth and according to a schedule established by the Department, unless permitted by 603 CMR 51.06, to rely on a previous suitability determination; and

(c) Make a suitability determination after the results of the national criminal history check are available; or, if permitted by 603 CMR 51.06, obtain documentation of a previous suitability determination.

(4) In exigent circumstances, a school employer may hire an employee conditionally for whom a national criminal history check is required, or permit a subcontractor, laborer or volunteer for whom the school employer seeks a national criminal history check to begin service, without first receiving the results of a national criminal history check.

(a) The exigent circumstances in which a school employer may hire a conditional employee include:

- 1. The school determines it must fill a position that is created or becomes open during the school year;**
- 2. The school seeks to fill a position less than one month before the start of a school year;**
- 3. The school seeks to hire an individual for whom a national criminal history check has been requested, but the school employer is unlikely to receive the results before the individual's employment will begin;**
- 4. The school requires the service of a subcontractor, laborer or volunteer who has submitted fingerprints for the purposes of a national criminal history check, but the school employer has not yet received the results of the national criminal history check.**

(b) In order to hire a conditional employee or permit an individual to begin providing services under 603 CMR 51.05(4)(a), a school employer:

- 1. Shall obtain and review the results of a Massachusetts CORI check;**
- 2. Shall require the individual to submit fingerprints for a national criminal history check, unless the school employer first obtains the CORI results and determines they preclude employment, or unless the school employer is permitted by 603 CMR 51.06 to rely on a previous suitability determination;**
- 3. May, until the school employer makes a suitability determination based on the results of a national criminal history check or documentation of a previous suitability determination is received, require an individual to provide information regarding the individual's history of criminal convictions; however, the individual cannot be asked to provide information about juvenile adjudications or sealed convictions; and**
- 4. Shall make a suitability determination after the results of the national criminal history check become available, or, if permitted by 603 CMR 51.06, obtain documentation of a previous suitability determination.**

51.06: Employer Documentation of Suitability Determination; Reliance Thereon; Subsequent Checks.

(1) Employer Documentation of Suitability Determination. Employers must retain documentation of the school employer's review of an employee, applicant, subcontractor, laborer, school transportation provider, or volunteer's national criminal history check results for the duration of an employee's employment or for seven years, whichever is longer. The documentation must include, and is limited to, the following:

- (a) The name and date of birth of the employee or applicant;**
- (b) The date on which the school employer received the national criminal history check results; and, (c) The suitability determination (either "suitable" or "unsuitable").**

(2) Documentation to be Provided upon Request. A school employer must provide a copy of the documentation of the suitability determination of an individual to another school employer, or to the individual, upon request of the individual for whom the school employer conducted a suitability determination.

(3) Reliance on a Favorable Suitability Determination. When an individual for whom a school employer or the Department of Elementary and Secondary Education has made a suitability determination applies to work for a school employer, the school employer may obtain and may rely on a favorable suitability determination, if the following criteria are met:

- (a)** The suitability determination was made within the last seven years; and
- (b)** The individual has not resided outside Massachusetts for any period longer than three years since the suitability determination was made; and either
- (c)** The individual has been employed continuously for one or more school employers or has gaps totaling no more than two years in his or her employment for school employers; or
- (d)** If the individual works as a substitute employee, the individual is still deemed suitable for employment by the school employer who made a favorable suitability determination. Upon request of another school employer, the initial school employer shall provide documentation that the individual is still deemed suitable for employment by the initial school employer.

(4) Documentation of Reliance on a Previous Favorable Suitability Determination. In any instance where a school employer relies on a suitability determination made by another school employer or by the Department of Elementary and Secondary Education, the relying school employer shall retain the following documentation:

- (a)** A copy of the documentation received from the school employer or agency that made the relied-upon suitability determination, and
- (b)** Documentation establishing that the individual met the criteria of 603 CMR 51.06 (3) (a), (b), and either (c) or (d).

(5) Subsequent Checks; Fees.

- (a)** Unless a school employer may rely on a previous determination pursuant to 603 CMR 51.06(3), the school employer shall require a new national criminal history check at the individual's expense.
- (b)** If a previous school employer's documentation demonstrates the employee was deemed "unsuitable" for employment, another school employer shall require a new national criminal history check at the individual's expense.
- (c)** A school employer may choose to perform a new national criminal history check on an individual rather than rely on a previous favorable suitability determination. The school employer shall bear the cost of such a new check.

51.07: Reporting National Criminal History Check Results to the Commissioner.

(1) Any school employer who has dismissed, declined to renew the employment of, obtained the resignation of, or declined to hire a licensed educator or an applicant for a Massachusetts educator license because of information discovered through a

national criminal history check shall report such decision or action to the Commissioner in writing within 30 days of the employer action or educator resignation. The report shall be in a form requested by the Department and shall include the reason for the action or resignation as well as a copy of the national criminal history check results. The school employer shall notify the employee or applicant that it has made a report pursuant to 603 CMR 51.07(1) to the Commissioner.

(2)Any school employer who discovers information from a national criminal history check about a licensed educator or an applicant for a Massachusetts educator license that implicates grounds for license action pursuant to 603 CMR 7.15(8)(a): Grounds for License Action shall report to the Commissioner in writing within 30 days of the discovery, regardless of whether the employer retains or hires the educator as an employee. The report must include a copy of the national criminal history check results. The school employer shall notify the employee or applicant that it has made a report pursuant to 603 CMR 51.07(2) to the Commissioner and shall also send a copy of the national criminal history check results to the employee or applicant.

(3)The failure of a school administrator who holds an educator license to make any such report to the Commissioner shall be grounds for license sanction pursuant to 603 CMR 7.15(8)(h): Administrator's Obligation to Report.

(4)The Department shall treat CHRI in a manner consistent with the DCJIS model CORI Policy and in compliance with all federal rules and regulations regarding CHRI, including limitations on record retention.

Regulatory Authority:

M.G.L. c. 71 § 38R and Chapter 77 of the Acts of 2013 Disclaimer:

For an official copy of these regulations, please contact the State House Bookstore, at 617-727-2834 or visit <http://www.state.ma.us/sec/spr/sprinf/infocode.htm>

B. SCHOOL BULLYING

1. APRIL 2014 AMENDMENTS TO SCHOOL BULLYING LAW INTRODUCTION

On April 24, 2014, Governor Patrick signed into law “An Act Relative to Bulling in Schools,” Chapter 86 of the Acts of 2014, which legislation expands the protections of the 2010 anti-bullying law. The law goes into effect 90 days after April 24, that is, July 25, 2014. The new law revises certain provisions of the current anti-bullying law, G.L. c. 71, § 38O, and adds several new subsections to that statute.

There are four main components of the new law: (1) it requires schools’ anti-bullying plans to recognize that certain enumerated categories of students may be more susceptible to bullying, including LGBTQ students; (2) it requires school districts to annually report bullying incident data to DESE; (3) it requires DESE to develop and school districts to administer surveys at least once every four years on the climate of the school district and prevalence of bullying; and (4) it grants DESE the power to investigate certain alleged incidents of bullying. The law also permits school

districts to “adopt an anti-bullying seal to represent the district’s or school’s commitment to bullying prevention and intervention.”

The four main components of the law are discussed in turn below.

IDENTIFICATION OF CATEGORIES OF VULNERABLE STUDENTS

The new law expands the language of the 2010 anti-bullying law by requiring schools’ anti-bullying plans to “recognize that certain students may be more vulnerable to becoming a target of bullying or harassment based on actual or perceived differentiating characteristics.” Chapter 86 of the Acts of 2014 at Section 1(3). The new law goes on to identify categories of “differentiating characteristics” that may make certain students more vulnerable to bullying, including:

race, color, religion, ancestry, national origin, sex, socioeconomic status, homelessness, academic status, gender identity or expression, physical appearance, pregnant or parenting status, sexual orientation, mental, physical, developmental or sensory disability or by association with a person who has or is perceived to have 1 or more of these characteristics.

The law also permits schools to establish separate discrimination or harassment policies that include additional categories of students.

This revision revises and expands the language of the 2010 law, which states that a school “may establish separate discrimination or harassment policies that include categories of students,” without specifically identify categories of more vulnerable students. G.L. c. 71, § 38O. Because the new law specifically recognizes that LGBTQ students generally are more vulnerable to bullying, it is being lauded by gay-rights groups.

In addition, the new law requires schools’ anti-bullying plans to include the “specific steps” the school will take “to support vulnerable students and to provide all students with the skills, knowledge and strategies needed to prevent or respond to bullying or harassment.”

Practice Note: In practice, this revision to the law should not have a major impact on school districts since districts have been implementing anti-bullying plans for several years and those plans intrinsically should have addressed the needs of more vulnerable students. The only real change for most school districts will be to revise their anti-bullying plans to specifically reference the categories of more vulnerable students and to enumerate the steps for bullying prevention and to support vulnerable students. DESE has revised its model plan to reflect these revisions. A copy of the revised model plan follows. For districts that choose not to use the model plan, DESE has created a checklist to ensure that districts’ plans contain the required elements. A copy of that checklist also follows.

ANNUAL REPORTING TO DESE

Under the second main component of the new law, school districts will be required to report bullying incident data to DESE annually. This is an additional requirement of the current bullying law, G.L. c. 71, § 38O. DESE is tasked with establishing the form and manner for reporting the data, which shall include at least the following information: “(i) the number of reported allegations of bullying or retaliation; (ii) the number and nature of substantiated incidents of bullying or retaliation; (iii) the number of students disciplined for engaging in bullying or retaliation; and (iv) any other information required by the department.” Chapter 86 of the Acts of 2014 at Section 4(k). DESE will then collect and analyze the data and file an annual report. The new law also states that DESE “shall minimize costs and resources needed to comply with said reporting requirement” and that DESE may use existing data collection and reporting mechanisms to collect this information.

STUDENT SURVEY

In addition to collecting yearly data from schools, DESE is also required, under the new law, to develop a student survey to assess the climate of schools and the prevalence of bullying. DESE must develop the survey within 12 months of the effective date of the new law for its administration in the 2016 school year. Chapter 86 of the Acts of 2014 at Sections 4(l) & 5. School districts will be responsible for administering the survey at least once every four years, with the person identified in the bullying prevention plan as responsible for receiving reports also responsible for the completion of the surveys. Surveys may be done anonymously and will be forwarded to DESE. DESE will analyze the survey results, including comparing them against the bullying data collected yearly. DESE has not yet released the survey.

DESE INVESTIGATIONS

The final main component of the new law is a provision that states DESE “may investigate certain alleged incidents of bullying.” Chapter 86 of the Acts of 2014 at Section 4(n). If, after the investigation, DESE finds that a school has not properly implemented its bullying prevention plan, DESE may require the district to properly implement the plan “or take other actions to address the findings of the investigation.” *Id.* The law does not define precisely which alleged claims of bullying DESE may investigate or what “other actions” it may take to address the findings of its investigation.

In a similar vein, the new law revises G.L. c. 71, § 38O to add a requirement that the school principal or designee notify the parents or guardian of a victim about DESE problem resolution system, currently administered by PQA, and the process for seeking assistance or filing a claim under the problem resolution system. The principal or designee is required to provide that information when he or she notifies the parent or guardian about the bullying incident.

LIABILITY FOR BULLYING

As a reminder, in addition to any consequences under the state bullying laws, school districts may be liable for a teacher’s harassment of a student and even some student-on-student harassment under established Supreme Court precedent. *Davis v. Monroe County Bd. of Educ.*,

526 U.S. 629 (1999) (districts may be liable for student-on-student harassment); *Gebser v. Lago Vista Inde. Sch. Dist.*, 524 U.S. 274 (1998) (districts may be liable for teacher's harassment of student). In those instances, a school district may be liable for monetary damages under Title IX for its deliberate indifference to known acts that cause a student to undergo sexual harassment or make the student more vulnerable to harassment, especially if the harassment occurs on school grounds during school hours.

Those Supreme Court cases are not new and do not specifically reference LGBTQ students. Given the confluence of that precedent and the new anti-bullying law, however, school districts should be vigilant in their efforts to prevent all bullying, especially of LGBTQ students, and to immediately address all instances of harassment.

CONCLUSION

The new law expands the current bullying law and creates several new requirements for school districts. Although the precise impact on these revisions to G.L. c. 71, § 38O are still coming into focus, and likely will remain nebulous until DESE implements its initial requirements under the law, the changes should have a relatively low impact on school districts that have properly implemented the bullying prevention programs under the 2010 law. At the same time we expect a positive impact on LGBTQ students who can be assured they will have access to the protections of the law.

Districts should review their anti-bullying policies over the next several weeks and prepare necessary amendments in conjunction with district counsel. Necessary changes must be in place when students return in the fall.

2. Massachusetts Department of Elementary and Secondary Education

Model Bullying Prevention and Intervention Plan

The Department of Elementary and Secondary Education (Department) created the Model Bullying Prevention and Intervention Plan required under M.G.L. c. 71, § 37O, in consultation with state agencies, school personnel, advocacy organizations, and other interested parties. The Model Plan's format parallels the draft *Behavioral Health and Public Schools Framework*, and is designed to be used by schools and school districts as a framework for developing local Plans. In some sections there are examples of specific language that can be incorporated into local Plans, and in others there are recommendations for decision-making and planning strategies. Schools and districts may choose to use this format for creating their own Bullying Prevention and Intervention Plans, or develop an alternative format. A sample incident reporting form is attached as Appendix A.

Please note that in the Model Plan and in other Department publications we use the word "target" instead of "victim" and "aggressor" instead of "perpetrator."

Schools and districts should make clear that the plan applies to students and members of a school staff, including, but not limited to educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to an extracurricular activity and paraprofessionals.

1

The Department issues this update to reflect Chapter 86 of the Acts of 2014, <https://malegislature.gov/Laws/SessionLaws/Acts/2014/Chapter86>, which amended G.L. c. 71, §37O, the anti-bullying statute, and was signed into law on April 24, 2014. G.L. c. 71, §37O, as amended, requires school districts, charter schools, approved private day or residential schools, and collaborative schools to "recognize" in their bullying prevention and intervention plans that certain enumerated categories of students² may be more vulnerable to being targets of bullying based on actual or perceived differentiating characteristics. Such districts and schools must also include in the plan the specific steps they will take to support these vulnerable students and provide all students the skills, knowledge and strategies they need to prevent or respond to bullying or harassment. Under the new law, school

districts, charter schools, approved private day or residential schools, and collaborative schools must notify parents and guardians of targets of bullying of the availability of the Department's problem resolution system and assist these parents and guardians in understanding the problem resolution process.

Chapter 86 also addresses the data reporting and collection obligations of school districts, charter schools, approved private day or residential schools, and collaborative schools, requiring them to collect and report the following data to the Department: 1) the number of reported allegations of

bullying or retaliation; 2) the number and nature of substantiated incidents of bullying and retaliation; 3) the number of students disciplined for engaging in bullying or retaliation, and 4) other information required by the Department.³ (The Department is required to analyze the data and to issue a report annually to the legislature which contains statewide aggregated data on the nature and frequency of bullying in schools.)

Additionally, Chapter 86 requires school districts, charter schools, approved private day or residential schools, and collaborative schools, to administer a Department-developed student survey at least once every four years to assess "school climate and the prevalence, nature and severity of bullying in schools."⁴ (The Department will use survey results to, among other things, assess the effectiveness of bullying prevention curricula and instruction and identify long-term trends and areas of improvement, and will make its findings available to school officials.) The law also authorizes school districts, charter schools, approved private day or residential schools, and collaborative schools to adopt an anti-bullying seal to represent its commitment to bullying prevention and intervention.

The Department has posted two versions of the updated Model Plan, one of which contains new language highlighted in yellow for easy reference.

TABLE OF CONTENTS

(4) LEADERSHIP..... 2

² Newly amended G.L. c. 71, §37O(d)(3) reads in relevant part: *Each plan shall recognize that certain students may be more vulnerable to becoming a target of bullying or harassment based on actual or perceived differentiating characteristics, including race, color, religion, ancestry, national origin, sex, socioeconomic status, homelessness, academic status, gender identity or expression, physical appearance, pregnant or parenting status, sexual orientation, mental, physical, developmental or sensory disability, or by association with a person who has or is perceived to have 1 or more of these characteristics.*

³ G.L. c. 71 §37O(k). *The Department is required to analyze the data and to issue a report annually to the legislature which contains statewide aggregated data on the nature and frequency of bullying in schools.*

⁴ G.L. c. 71, §37O(k).

(5)	TRAINING AND PROFESSIONAL DEVELOPMENT.....	5
(6)	ACCESS TO RESOURCES AND SERVICES.....	6
(7)	ACADEMIC AND NON-ACADEMIC ACTIVITIES	7
V. POLICIES AND PROCEDURES FOR REPORTING AND RESPONDING TO BULLYING AND RETALIATION		8
(1)	COLLABORATION WITH FAMILIES.....	13
(2)	PROHIBITION AGAINST BULLYING AND RETALIATION	14
(3)	PROBLEM RESOLUTION SYSTEM.....	15
(4)	DEFINITIONS.....	15
(5)	RELATIONSHIP TO OTHER LAWS.....	16

APPENDIX A: SAMPLE BULLYING PREVENTION AND INTERVENTION INCIDENT REPORTING FORM

I. LEADERSHIP

Leadership at all levels will play a critical role in developing and implementing Bullying Prevention and Intervention Plans ("the Plan") in the context of other whole school and community efforts to promote positive school climate. Leaders have a primary role in teaching students to be civil to one another and promoting understanding of and respect for diversity and difference. Leadership should be defined by the district or school, depending on existing roles and responsibilities and locally identified priorities for this initiative. Leadership is responsible for setting priorities and for staying up-to-date with current research on ways to prevent and effectively respond to bullying. It is also the responsibility of leaders to involve representatives from the greater school and local community in developing and implementing the Plan.

A. Public involvement in developing the Plan. As required by M.G.L. c. 71, § 37O, the Plan must be developed in consultation with teachers, school staff, professional support personnel, school volunteers, administrators, community representatives, local law enforcement agencies, students, parents, and guardians. Consultation must include, at a minimum, notice and a public comment period before the Plan is adopted by the school committee or equivalent authority. Schools and districts may choose to involve representatives from each of these constituencies in other aspects of Plan development, including needs assessments, working groups, task forces, and public meetings. The Plan should identify the ways that each of the various constituencies will be involved.

B. Assessing needs and resources. The Plan should be the school's or district's blueprint for enhancing capacity to prevent and respond to issues of bullying within the context of other healthy school climate initiatives. As part of the planning process, school leaders, with input from families and staff, should assess the adequacy of current programs; review current policies and procedures; review available data on bullying and behavioral incidents; and assess available resources including curricula, training programs, and behavioral health services. This "mapping" process will assist schools and districts in identifying resource gaps and the most significant areas of need. Based on these findings, schools and districts should revise or develop policies and procedures; establish partnerships with community agencies, including law enforcement; and set priorities. The following language can be included in local Plans to inform the community of the new data collection and reporting requirements:

at least once every four years beginning with 2015/16 school year, the district will administer a Department of Elementary and Secondary-developed student survey to assess school climate and the prevalence, nature, and severity of bullying in our schools. Additionally, the school or district will annually report bullying incident data to the Department.

Consider doing the following to allow for initial and periodic needs assessments: 1) surveying students, on school climate and school safety issues; and 2) collecting and analyzing building-specific data on the prevalence and characteristics of bullying (e.g., focusing on identifying vulnerable populations and "hot spots" in school buildings, on school grounds, or on school buses). Similar tools to the student survey can be used with faculty, staff, and parents/guardians to assist in determining school climate needs. This information will help to identify patterns of behaviors and areas of concern, and will inform decision-making for prevention strategies including, but not limited to, adult supervision, professional development, age-appropriate curricula, and in-school support services. The Plan should describe the methods the school will use to conduct needs assessments, including timelines and leadership roles.

C. Planning and oversight. Plans should identify the school or district leaders responsible for the following tasks under the Plan: 1) receiving reports on bullying; 2) collecting and analyzing building-and/or school-wide data on bullying to assess the present problem and to measure improved outcomes; 3) creating a process for recording and tracking incident reports, and for accessing information related to targets and aggressors; 4) planning for the ongoing professional development that is required by the law; 5) planning supports that respond to the needs of targets and aggressors; 6) choosing and implementing the curricula that the school or district will use; 7) developing new or revising current policies and protocols under the Plan, including an Internet safety policy, and designating key staff to be in charge of implementation of them; 8) amending student and staff handbooks and codes of conduct to, among other things, make clear that bullying of students by school staff or other students will not be tolerated; 9) leading the parent or family engagement efforts and drafting parent information materials; and 10) reviewing and updating the Plan each year, or more frequently.

D. Developing priority statements. Priority statements can be used to communicate within the Plan the school's or district's vision in creating and implementing its bullying prevention and intervention strategies. The following are examples of priority statements that may be included in local Plans:

The school or district expects that all members of the school community will treat each other in a civil manner and with respect for differences.

The school or district is committed to providing all students with a safe learning environment that is free from bullying and cyberbullying. This commitment is an integral part of our comprehensive efforts to promote learning, and to prevent and eliminate all forms of bullying and other harmful and disruptive behavior that can impede the learning process.

We recognize that certain students may be more vulnerable to become targets of bullying, harassment, or teasing based on actual or perceived characteristics, including race, color, religion, ancestry, national origin, sex, socioeconomic status, homelessness, academic status, gender identity or expression, physical appearance, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics. The school or district will identify specific steps it will take to create a safe, supportive environment for vulnerable populations in the school community, and provide all students with the skills, knowledge, and strategies to prevent or respond to bullying, harassment, or teasing.

A school district, charter school, non-public school, approved private day or residential school or collaborative school may establish separate discrimination or harassment policies that include these or other categories of students. Nothing in this section shall alter the obligations of a school district, charter school, non-public school, approved private day or residential school or collaborative school to remediate any discrimination or harassment based on a person's membership in a legally protected category under local, state or federal law

We will not tolerate any unlawful or disruptive behavior, including any form of bullying, cyberbullying, or retaliation, in our school buildings, on school grounds, or in school-related activities. We will investigate promptly all reports and complaints of bullying, cyberbullying, and retaliation, and take prompt action to end that behavior and restore the target's sense of safety. We will support this commitment in all aspects of our school community, including curricula, instructional programs, staff development, extracurricular activities, and parent or guardian involvement.

The Bullying Prevention and Intervention Plan ("Plan") is a comprehensive approach to addressing bullying and cyberbullying, and the school or district is committed to working with students, staff, families, law enforcement agencies, and the community to prevent issues of violence. In consultation with these constituencies, we have established this Plan for preventing, intervening, and responding to incidents of bullying, cyberbullying, and retaliation. The principal is responsible for the implementation and oversight of the Plan except when a reported bullying incident involves the principal or the assistant principal as the alleged aggressor. In such cases, the Superintendent or designee shall be responsible for investigating the report, and other steps necessary to implement the Plan, including addressing the safety of the alleged target. If the Superintendent is the alleged aggressor, the School Committee, or its designee shall be responsible for investigating the report, and other steps necessary to implement the Plan, including addressing the safety of the alleged victim.

II. TRAINING AND PROFESSIONAL DEVELOPMENT

The Plan must reflect the requirements under M.G.L. c. 71, § 370 to provide ongoing professional development for all staff, including but not limited to, educators, administrators, counselors, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities, and

paraprofessionals. The Plan should state the content and frequency of staff training and ongoing professional development as determined by the school's or district's needs, and list other topics to be included in these staff programs. The locally identified additional areas of training should be based on needs and concerns identified by school and district staff.

The law lists six topics that must be included in professional development. Additional topics may be identified by the school or district leadership as they consider the unique needs of the school or district community. Plans should also identify which trainings will be provided districtwide and which will be school-based.

The following is sample language for Plans:

(6) Annual staff training on the Plan. Annual training for all school staff on the Plan will include staff duties under the Plan, an overview of the steps that the principal or designee will follow upon receipt of a report of bullying or retaliation, and an overview of the bullying prevention curricula to be offered at all grades throughout the school or district. Staff members hired after the start of the school year are required to participate in school-based training during the school year in which they are hired, unless they can demonstrate participation in an acceptable and comparable program within the last two years.

(7) Ongoing professional development. The goal of professional development is to establish a common understanding of tools necessary for staff to create a school climate that promotes safety, civil communication, and respect for differences. Professional development will build the skills of staff members to prevent, identify, and respond to bullying. As required by M.G.L. c. 71, § 37O, the content of schoolwide and district wide professional development will be informed by research and will include information on:

- (a)** developmentally (or age-) appropriate strategies to prevent bullying;
- (b)** developmentally (or age-) appropriate strategies for immediate, effective interventions to stop bullying incidents;
- (c)** information regarding the complex interaction and power differential that can take place between and among an aggressor, target, and witnesses to the bullying;
- (d)** research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment;
- (e)** information on the incidence and nature of cyberbullying; and
- (vi)** Internet safety issues as they relate to cyberbullying.

Professional development will also address ways to prevent and respond to bullying or retaliation for students with disabilities that must be considered when developing students' Individualized Education Programs (IEPs). This will include a particular focus on the needs of students with autism or students whose disability affects social skills development.

Additional areas identified by the school or district for professional development include:

- promoting and modeling the use of respectful language;
- fostering an understanding of and respect for diversity and difference;
- building relationships and communicating with families;
- constructively managing classroom behaviors;

- using positive behavioral intervention strategies;
- applying constructive disciplinary practices;
- teaching students skills including positive communication, anger management, and empathy for others;
- engaging students in school or classroom planning and decision-making;
- maintaining a safe and caring classroom for all students; and
- engaging staff and those responsible for the implementation and oversight of the Plan to distinguish between acceptable managerial behaviors designed to correct misconduct, instill accountability in the school setting, etc and bullying behaviors

C. Written notice to staff. The school or district will provide all staff with an annual written notice of the Plan by publishing information about it, including sections related to staff duties and bullying of students by school staff, in the school or district employee handbook and the code of conduct.

III. ACCESS TO RESOURCES AND SERVICES

A key aspect of promoting positive school climates is ensuring that the underlying emotional needs of targets, student aggressors, families, and others are addressed. The Plan should describe the strategies for providing supports and services necessary to meet these needs. In order to enhance the school's or district's capacity to prevent, intervene early, and respond effectively to bullying, available services should reflect an understanding of the dynamics of bullying and provide approaches to address the needs of targets and student aggressors. Plans must include a strategy for providing counseling or referral to appropriate services for student aggressors, targets, and family members of those students. These locally established strategies should be reflected in the school or district Plan.

A. Identifying resources. The Plan should include the school's or district's process for identifying its capacity to provide counseling and other services for targets, student aggressors, and their families. This will include a review of current staffing and programs that support the creation of positive school environments by focusing on early interventions and intensive services. Once this mapping of resources is complete, the school or district can develop recommendations and action steps to fill resource and service gaps. This may include adopting new curricula, reorganizing staff, establishing safety planning teams, and identifying other agencies that can provide services. The Plan should outline the local processes for identifying existing and needed resources.

B. Counseling and other services. The Plan should identify the availability of culturally and linguistically appropriate resources within the school and district. If resources need to be developed, the Plan should identify linkages with community based organizations, including Community Service Agencies (CSAs) for Medicaid eligible students. In addition, the Plan should identify staff and service providers who assist schools in developing safety plans for students who have been targets of bullying or retaliation, providing social skills programs to prevent bullying, and offering education and/or intervention services for students exhibiting bullying behaviors. Schools may consider current tools including, but not limited to, behavioral intervention plans, social skills groups, and individually focused curricula.

C. Students with disabilities. As required by M.G.L. c. 71B, § 3, as amended by Chapter 92 of the Acts of 2010, when the IEP Team determines the student has a disability that affects social skills development or the student may participate in or is vulnerable to bullying, harassment, or teasing because of his/her

disability, the Team will consider what should be included in the IEP to develop the student's skills and proficiencies to avoid and respond to bullying, harassment, or teasing.

D. Referral to outside services. Schools and districts should establish a referral protocol for referring students and families to outside services. Clear protocols will help students and families access appropriate and timely services. Referrals must comply with relevant laws and policies. Current local referral protocols should be evaluated to assess their relevance to the Plan, and revised as needed.

IV. ACADEMIC AND NON-ACADEMIC ACTIVITIES

The law requires each school or district to provide age-appropriate instruction on bullying prevention in each grade that is incorporated into the school's or district's curricula. Curricula must be evidence-based. Effective instruction will include classroom approaches, whole school initiatives, and focused strategies for bullying prevention and social skills development. Other resources are currently available on the Department's website at <http://www.doe.mass.edu/ssce/bullying/> including social and emotional learning guidelines. Plans should include specific information about local priorities and approaches that will be used, and how schools and districts will integrate the Plan into the school's and/or district's curricula.

The following is sample language that may be amended to reflect locally established priorities:

A. Specific bullying prevention approaches. Bullying prevention curricula will be informed by current research which, among other things, emphasizes the following approaches:

- using scripts and role plays to develop skills;
- empowering students to take action by knowing what to do when they witness other students or school staff engaged in acts of bullying or retaliation, including seeking adult assistance;
- helping students understand the dynamics of bullying and cyberbullying, including the underlying power imbalance;
- emphasizing cybersafety, including safe and appropriate use of electronic communication technologies;
- enhancing students' skills for engaging in healthy relationships and respectful communications; and
- engaging students in a safe, supportive school environment that is respectful of diversity and difference.

Initiatives will also teach students about the student-related sections of the Bullying Prevention and Intervention Plan. The Plan should include specific information about how and when the school or district will review the Plan with students.

B. General teaching approaches that support bullying prevention efforts. The following approaches are integral to establishing a safe and supportive school environment. These underscore the importance of our bullying intervention and prevention initiatives:

- setting clear expectations for students and establishing school and classroom routines;

- creating safe school and classroom environments for all students, including for students with disabilities, lesbian, gay, bisexual, transgender students, and homeless students;
- using appropriate and positive responses and reinforcement, even when students require discipline;
- using positive behavioral supports;
- encouraging adults to develop positive relationships with students;
- modeling, teaching, and rewarding pro-social, healthy, and respectful behaviors;
- using positive approaches to behavioral health, including collaborative problem-solving, conflict resolution training, teamwork, and positive behavioral supports that aid in social and emotional development;
- using the Internet safely; and
- supporting students' interest and participation in non-academic and extracurricular activities, particularly in their areas of strength.

V. POLICIES AND PROCEDURES FOR REPORTING AND RESPONDING TO BULLYING AND RETALIATION

To support efforts to respond promptly and effectively to bullying and retaliation, schools or districts must put in place policies and procedures for receiving and responding to reports of bullying or retaliation. These policies and procedures will ensure that members of the school community - students, parents, and school staff - know what will happen when incidents of bullying occur. Schools and districts should describe in the Plan detailed procedures for staff reporting of incidents, processes for communicating to students and families how reports can be made (including anonymous reports), and procedures to be followed by the principal or designee, or the superintendent or designee when the principal or assistant principal is the alleged aggressor, or the school committee or designee when the superintendent is the alleged aggressor once a report is made. The Department recommends that districts and schools develop different procedures for reviewing and investigating reports of bullying by students, and of bullying by school staff. Incorporate these procedures into the local Plan.

A school district, charter school, non-public school, approved private day or residential school or collaborative school may establish separate discrimination or harassment policies that include these or other categories of students. Nothing in this section shall alter the obligations of a school district, charter school, non-public school, approved private day or residential school or collaborative school to remediate any discrimination or harassment based on a person's membership in a legally protected category under local, state or federal law.

The following is sample language that may be included in a Plan. Schools or districts may modify this to include local procedures and provide due process as required. Schools also may choose to address the reporting of bullying by school staff in proposed section F.

- A. Reporting bullying or retaliation. Reports of bullying or retaliation may be made by staff, students, parents or guardians, or others, and may be oral or written. Oral reports made by or to a staff member shall be recorded in writing. A school or district staff member is required to report immediately to the principal or designee or to the superintendent or designee when the principal or assistant principal is the alleged aggressor or to the school committee or designee when the superintendent is the alleged aggressor, any

instance of bullying or retaliation the staff member becomes aware of or witnesses. Reports made by students, parents or guardians, or other individuals who are not school or district staff members, may be made anonymously. The school or district will make a variety of reporting resources available to the school community including, but not limited to, an Incident Reporting Form,⁵ a voicemail box, a dedicated mailing address, and an email address.

Use of an Incident Reporting Form is not required as a condition of making a report. The school or district will: 1) include a copy of the Incident Reporting Form in the beginning of the year packets for students and parents or guardians; 2) make it available in the school's main office, the counseling office, the school nurse's office, and other locations determined by the principal or designee; and 3) post it on the school's website. The Incident Reporting Form will be made available in the most prevalent language(s) of origin of students and parents or guardians.

At the beginning of each school year, the school or district will provide the school community, including, but not limited to, educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities, paraprofessionals, students, and parents or guardians, with written notice of its policies for reporting acts of bullying and retaliation. A description of the reporting procedures and resources, including the name and contact information of the principal or designee, and the superintendent or designee when the principal or the assistant principal is the alleged aggressor, will be incorporated in student and staff handbooks, on the school or district website, and in information about the Plan that is made available to parents or guardians.

1. Reporting by Staff

A staff member will report immediately to the principal or designee, or to the superintendent or designee when the principal or the assistant principal is the alleged aggressor, or to the school committee or designee when the superintendent is the alleged aggressor when he/she witnesses or becomes aware of conduct that may be bullying or retaliation. The requirement to report as provided does not limit the authority of the staff member to respond to behavioral or disciplinary incidents consistent with school or district policies and procedures for behavior management and discipline.

2. Reporting by Students, Parents or Guardians, and Others

The school or district expects students, parents or guardians, and others who witness or become aware of an instance of bullying or retaliation involving a student to report it to the principal or designee, or superintendent or designee when the principal or assistant principal is the alleged aggressor. Reports may be made anonymously, but no disciplinary action will be taken against an alleged aggressor solely on the basis of an anonymous report. Students, parents or guardians, and others may request assistance from a staff member to complete a written report. Students will be provided practical, safe, private, and age-appropriate ways to report and discuss an incident of bullying with a staff member, or with the principal or designee, or superintendent or designee when the principal or assistant principal is the alleged aggressor.

⁵ See Appendix A for Sample Incident Reporting Form.

B. Responding to a report of bullying or retaliation - Allegations of Bullying by a Student.

1. Safety

Before fully investigating the allegations of bullying or retaliation, the principal or designee will take steps to assess the need to restore a sense of safety to the alleged target and/or to protect the alleged target from possible further incidents. Responses to promote safety may include, but not be limited to, creating a personal safety plan; pre-determining seating arrangements for the target and/or the aggressor in the classroom, at lunch, or on the bus; identifying a staff member who will act as a "safe person" for the target; and altering the aggressor's schedule and access to the target. The principal or designee will take additional steps to promote safety during the course of and after the investigation, as necessary.

The principal or designee will implement appropriate strategies for protecting from bullying or retaliation a student who has reported bullying or retaliation, a student who has witnessed bullying or retaliation, a student who provides information during an investigation, or a student who has reliable information about a reported act of bullying or retaliation. (Include locally established student safety planning policies and procedures here.)

2. Obligations to Notify Others

- a. Notice to parents or guardians. Upon determining that bullying or retaliation has occurred, the principal or designee will promptly notify the parents or guardians of the target and the student aggressor of this, and of the procedures for responding to it. There may be circumstances in which the principal or designee contacts parents or guardians prior to any investigation. Notice will be consistent with state regulations at 603 CMR 49.00.
- b. Notice to Another School or District. If the reported incident involves students from more than one school district, charter school, non-public school, approved private special education day or residential school, or collaborative school, the principal or designee first informed of the incident will promptly notify by telephone the principal or designee of the other school(s) of the incident so that each school may take appropriate action. All communications will be in accordance with state and federal privacy laws and regulations, and 603 CMR 49.00.
- c. Notice to Law Enforcement. At any point after receiving a report of bullying or retaliation, including after an investigation, if the principal or designee has a reasonable basis to believe that criminal charges may be pursued against the aggressor, the principal will notify the local law enforcement agency. Notice will be consistent with the requirements of 603 CMR 49.00 and locally established agreements with the local law enforcement agency. Also, if an incident occurs on school grounds and involves a former student under the age of 21 who is no longer enrolled in school, the principal or designee shall contact the local law enforcement agency if he or she has a reasonable basis to believe that criminal charges may be pursued against the student aggressor.

In making this determination, the principal will, consistent with the Plan and with applicable school or district policies and procedures, consult with the school resource officer, if any, and other individuals the principal or designee deems appropriate.

- C. Investigation. The principal or designee will investigate promptly all reports of bullying or retaliation and, in doing so, will consider all available information known, including the nature of the allegation(s) and the ages of the students involved.

During the investigation the principal or designee will, among other things, interview students, staff, witnesses, parents or guardians, and others as necessary. The principal or designee (or whoever is conducting the investigation) will remind the alleged student aggressor, target, and witnesses of the importance of the investigation, their obligation to be truthful and that retaliation against someone who reports bullying or provides information during a bullying investigation is strictly prohibited and will result in disciplinary action.

Interviews may be conducted by the principal or designee, other staff members as determined by the principal or designee, and in consultation with the school counselor, as appropriate. To the extent practicable, and given his/her obligation to investigate and address the matter, the principal or designee will maintain confidentiality during the investigative process. The principal or designee will maintain a written record of the investigation.

Procedures for investigating reports of bullying and retaliation will be consistent with school or district policies and procedures for investigations. If necessary, the principal or designee will consult with legal counsel about the investigation. (Align this with school or district procedures.)

- D. Determinations. The principal or designee will make a determination based upon all of the facts and circumstances. If, after investigation, bullying or retaliation is substantiated, the principal or designee will take steps reasonably calculated to prevent recurrence and to ensure that the target is not restricted in participating in school or in benefiting from school activities. The principal or designee will: 1) determine what remedial action is required, if any, and 2) determine what responsive actions and/or disciplinary action is necessary.

Depending upon the circumstances, the principal or designee may choose to consult with the students' teacher(s) and/or school counselor, and the target's or student aggressor's parents or guardians, to identify any underlying social or emotional issue(s) that may have contributed to the bullying behavior and to assess the level of need for additional social skills development.

The principal or designee will promptly notify the parents or guardians of the target and the aggressor about the results of the investigation and, if bullying or retaliation is found, what action is being taken to prevent further acts of bullying or retaliation. All notice to parents must comply with applicable state and federal privacy laws and regulations. Because of the legal requirements regarding the confidentiality of student records, the principal or designee cannot report specific information to the target's parent or guardian about the disciplinary action taken unless it involves a "stay away" order or other directive that the target must be aware of in order to report violations.

The principal or designee shall inform the parent or guardian of the target about the Department of Elementary and Secondary Education's problem resolution system and the process for accessing that system, regardless of the outcome of the bullying determination.

E. Responses to Bullying. Use this section of the Plan to enumerate the school's or district's chosen strategies for building students' skills, and other individualized interventions that the school or district may take in response to remediate or prevent further bullying and retaliation. The following is sample language that may be included in school or district Plans:

1. Teaching Appropriate Behavior Through Skills-building

Upon the principal or designee determining that bullying or retaliation has occurred, the law requires that the school or district use a range of responses that balance the need for accountability with the need to teach appropriate behavior. M.G.L. c. 71, § 37O (d) (v). Skill-building approaches that the principal or designee may consider include:

- offering individualized skill-building sessions based on the school's/district's anti-bullying curricula;
- providing relevant educational activities for individual students or groups of students, in consultation with guidance counselors and other appropriate school personnel;
- implementing a range of academic and nonacademic positive behavioral supports to help students understand pro-social ways to achieve their goals;
- meeting with parents and guardians to engage parental support and to reinforce the anti-bullying curricula and social skills building activities at home;
- adopting behavioral plans to include a focus on developing specific social skills; and
- making a referral for evaluation.

2. Taking Disciplinary Action

If the principal or designee decides that disciplinary action is appropriate, the disciplinary action will be determined on the basis of facts found by the principal or designee, including the nature of the conduct, the age of the student(s) involved, and the need to balance accountability with the teaching of appropriate behavior. Discipline will be consistent with the Plan and with the school's or district's code of conduct.

Discipline procedures for students with disabilities are governed by the federal Individuals with Disabilities Education Improvement Act (IDEA), which should be read in cooperation with state laws regarding student discipline.

If the principal or designee determines that a student knowingly made a false allegation of bullying or retaliation, that student may be subject to disciplinary action.

3. Promoting Safety for the Target and Others

The principal or designee will consider what adjustments, if any, are needed in the school environment to enhance the target's sense of safety and that of others as well. One strategy that the principal or designee may use is to increase adult supervision at transition times and in locations where bullying is known to have occurred or is likely to occur.

Within a reasonable period of time following the determination and the ordering of remedial and/or disciplinary action, the principal or designee will contact the target to determine whether there has

been a recurrence of the prohibited conduct and whether additional supportive measures are needed. If so, the principal or designee will work with appropriate school staff to implement them immediately.

F. Responding to a Report of Bullying by School Staff

Schools and districts need to develop policies and procedures that address how school or district administration will respond to and resolve a report of bullying of a student by school staff. The policies and procedures must address safety planning, notification to parent or guardians and others, investigation, and response - areas that are addressed when a student is alleged to have bullied another student (see Section V. B - E above). Schools and districts should consider consulting with local counsel in developing and administering these policies and procedures. They should emphasize the importance of the investigation, the need for the aggressor, target, and witnesses to be truthful, and that retaliation against someone who reports bullying or provides information during a bullying investigation is strictly prohibited and will result in disciplinary action.

VI. COLLABORATION WITH FAMILIES

Effective Plans will include strategies to engage and collaborate with students' families in order to increase the capacity of the school or district to prevent and respond to bullying. Resources for families and communication with them are essential aspects of effective collaboration. The law requires the district or school Plan to include provisions for informing parents or guardians about the bullying prevention and intervention curricula used by the school district or school including: (i) how parents and guardians can reinforce the curricula at home and support the school or district plan; (ii) the dynamics of bullying; and (iii) online safety and cyberbullying. Parents and guardians must also be notified in writing each year about the student-related sections of the Bullying Prevention and Intervention Plan, in the language(s) most prevalent among the parents or guardians. School- or district-specific approaches to collaboration should take into account age, climate, socio-economic factors, linguistic, and cultural make-up of students and the parents.

Identify in local Plans the parent resource and information networks that the school or district will collaborate with in working with parents and guardians.

- A.** Parent education and resources. The school or district will offer education programs for parents and guardians that are focused on the parental components of the anti-bullying curricula and any social competency curricula used by the district or school. The programs will be offered in collaboration with the PTO, PTA, School Councils, Special Education Parent Advisory Council, or similar organizations.

- B.** Notification requirements. Each year the school or district will inform parents or guardians of enrolled students about the anti-bullying curricula that are being used. This notice will include information about the dynamics of bullying, including cyberbullying and online safety. The school or district will send parents written notice each year about the student-related sections of the Plan and the school's or district's Internet safety policy. All notices and information made available to parents or guardians will be in hard copy and electronic formats, and will be available in the language(s) most prevalent among parents or guardians. The school or district will post the Plan and related information on its website.

VII. PROHIBITION AGAINST BULLYING AND RETALIATION

The law requires each Plan to include a statement prohibiting bullying, cyberbullying, and retaliation. The statement must be included in the Plan and included in the student code of conduct, the student handbook, and the staff handbook. The following statement is incorporated directly from M.G.L. c. 71, § 370(b), and describes the law's requirements for the prohibition of bullying. It may be tailored to meet the specific priorities of the school or district. Alternative language is included in the draft priority statements in Part I.D above.

Acts of bullying, which include cyberbullying, are prohibited:

- (i) on school grounds and 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
- (ii) at a location, activity, function, or program that is not school-related through the use of technology or an electronic device that is not owned, leased, or used by a school district or school, if the acts create a hostile environment at school for the target or witnesses, infringe on their rights at school, or materially and substantially disrupt the education process or the orderly operation of a school.

Retaliation against a person who reports bullying, provides information during an investigation of bullying, or witnesses or has reliable information about bullying is also prohibited.

As stated in M.G.L. c. 71, § 370, nothing in this Plan requires the district or school to staff any non-school related activities, functions, or programs.

VIII. Problem Resolution System:

Chapter 86 of the Acts of 2014 amended Section 370 of chapter 71 of the General Laws to include (g) (v): The Plan shall inform parents or guardians of the target about the Department's problem resolution system and the process for seeking assistance or filing a claim through the problem resolution system. This information will be made available in both hard copy and electronic formats:

Any parent wishing to file a claim/concern or seeking assistance outside of the district may do so with the Department of Elementary and Secondary Education Program Resolution System (PRS). That information can be found at: <http://www.doe.mass.edu/pqa>, emails can be sent to compliance@doe.mass.edu or individuals can call 781-338-3700. Hard copies of this information is also available at the Superintendent's office.

IX. DEFINITIONS

Several of the following definitions are copied directly from M.G.L. c. 71, § 370, as noted below. Schools or districts may add specific language to these definitions to clarify them, but may not alter their meaning or scope. Plans may also include additional definitions that are aligned with local policies and procedures.

Aggressor is a student or a member of a school staff who engages in bullying, cyberbullying, or retaliation towards a student.

Bullying, as defined in M.G.L. c. 71, § 370, is the repeated use by one or more students or a member of a school staff of a written, verbal, or electronic expression or a physical act or gesture or any combination thereof, directed at a target that:

- i. causes physical or emotional harm to the target or damage to the target's property;
- ii. places the target in reasonable fear of harm to himself or herself or of damage to his or her property;
- iii. creates a hostile environment at school for the target;
- iv. infringes on the rights of the target at school; or
- v. materially and substantially disrupts the education process or the orderly operation of a school.

Cyberbullying, is bullying through the use of technology or electronic devices such as telephones, cell phones, computers, and the Internet. It includes, but is not limited to, email, instant messages, text messages, and Internet postings. See M.G.L. c. 71, § 370 for the legal definition of cyberbullying.

Hostile environment, as defined in M.G.L. c. 71, § 370, is a situation in which bullying causes the school environment to be permeated with intimidation, ridicule, or insult that is sufficiently severe or pervasive to alter the conditions of a student's education.

Retaliation is any form of intimidation, reprisal, or harassment directed against a student who reports bullying, provides information during an investigation of bullying, or witnesses or has reliable information about bullying.

School Staff includes, but is not limited to, educators, administrators, counselors, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities, support staff, or paraprofessionals.

Target is a student against whom bullying, cyberbullying, or retaliation has been perpetrated.

X. RELATIONSHIP TO OTHER LAWS

Consistent with state and federal laws, and the policies of the school or district, no person shall be discriminated against in admission to a public school of any town or in obtaining the advantages, privilege and courses of study of such public school on account of race, color, religion, ancestry, national origin, sex, socioeconomic status, academic status, gender identity or expression, physical appearance, sexual orientation, or mental, physical, developmental, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics. Nothing in the Plan prevents the school or district from taking action to remediate discrimination or harassment based on a person's membership in a legally protected category under local, state, or federal law, or school or district policies.

In addition, nothing in the Plan is designed or intended to limit the authority of the school or district to take disciplinary action or other action under M.G.L. c. 71, §§ 37H or 37H%, M.G.L. c. 71, §§41 and 42, M.G.L.c 76 § 5, or other applicable laws, or local school or district policies, or collective bargaining agreements, in response to violent, harmful, or disruptive behavior, regardless of whether the Plan covers the behavior.

¹The **Model Bullying Prevention and Intervention Plan** was also revised in 2013 to reflect the change in the definition of "perpetrator" to include a member of the school staff.

Massachusetts Department of Elementary and Secondary Education

Checklist - Required Content of Bullying Prevention and Intervention Plans under G.L. c. 71, §370

This checklist is provided by the Department of Elementary and Secondary Education for optional local use. Some schools and districts may find it helpful to use when creating or reviewing their Plans for inclusion of all elements required by the Massachusetts General Laws, Chapter 71, section 370.

School districts, charter schools, Department-approved private* special education schools, and collaborative schools must submit their Model Bullying Prevention and Intervention Plans to the Department by December 31, 2010. These Plans must be submitted via the Security Portal's Bullying Prevention and Intervention Plan DropBox or via email to ssces@doe.mass.edu. *NOTE: Other non-public schools (those that are not Department approved special education schools) are required to create Plans, but NOT to submit them to the Department. See <http://www.doe.mass.edu/bullying/> for more information, including a Model Plan and a Sample Incident Reporting Form.

What is Required by the Law to Be Included in the Plan	Elements (key words)	In the Plan?	
		yes	Not yet
i. Descriptions of and statements prohibiting bullying, cyberbullying, and retaliation.	bullying		
	cyberbullying		
	retaliation		
ii. Clear procedures for students, staff, parents, guardians and others to report bullying or retaliation. a. Identifies the principal or another school official as responsible for receiving reports.	reporting procedures for students, staff, parents/guardians, others		
	school official identified to receive reports		

What is Required by the Law to Be Included in the Plan	Elements (key words)	In the Plan?	
		yes	Not yet
iii. A provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report.	anonymous reporting allowed		
	no discipline solely because of an anonymous report		
iv. Clear procedures for promptly responding to and investigating reports of bullying or retaliation.	procedures for responding to reports		
	investigative procedures		
v. The range of disciplinary actions that may be taken against an aggressor for bullying or retaliation; provided, however, that the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior.	range of possible disciplinary actions		
	balance discipline with teaching appropriate behavior		
vi. Clear procedures for restoring a sense of safety for a target and assessing that target's needs for protection.	procedures for restoring target's safety		
	assessing target's needs		
vii. Strategies for protecting from bullying or retaliation a person who reports bullying, provides information during an investigation of bullying, witnesses bullying, or has reliable information about an act of bullying.	protections for reporters, witnesses, or interviewees regarding bullying		

What is Required by the Law to Be Included in the Plan	Elements (key words)	In the Plan?	
		yes	Not yet
viii. Procedures consistent with state and federal law for promptly notifying the parents or guardians of a target and an aggressor; provided, further, that the parents or guardians of a target shall also be notified of the action taken to prevent any further acts of bullying or retaliation; and provided, further, that the procedures shall provide for immediate notification pursuant to regulations promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the aggressor.	When investigations conclude that bullying occurred: notice to parents/guardians of target (includes notice of actions to prevention further incidents) notice to parents/guardians of aggressor Immediate notice to law enforcement pursuant to regulations		
Provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action.	possible disciplinary actions for false accusations and consequences		
x. A strategy for providing counseling or referral to appropriate services for aggressors and targets and for appropriate family members of said students.	counseling or referral for targets, aggressors, and families		
xi. Affords all students the same protection regardless of their status under the law.	protection for all students regardless of legal status		

What is Required by the Law to Be Included in the Plan	Elements (key words)	In the Plan?	
		yes	Not yet
<p>xii. A provision for ongoing professional development to build the skills of all staff members, including, but not limited to, educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities and paraprofessionals, to prevent, identify and respond to bullying. The content of such professional development shall include, but not be limited to: (i) developmentally appropriate strategies to prevent bullying incidents; (ii) developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents; (iii) information regarding the complex interaction and power differential that can take place between and among an aggressor, target and witnesses to the bullying; (iv) research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment; (v) information on the incidence and nature of cyberbullying; and (vi) Internet safety issues as they relate to cyberbullying.</p>	ongoing professional development for all staff		
	strategies to prevent bullying incidents		
	strategies for interventions to stop incidents		
	information regarding the complex interaction and power differential		
	research findings, including information on vulnerable or at-risk students		
	cyberbullying		
	Internet safety as it relates to cyberbullying		
<p>xiii. Provisions for informing parents and guardians about the bullying prevention curriculum of the school district or school and shall include, but not be limited to: (i) how parents and guardians can reinforce the curriculum at home and support the school district or school Plan; (ii) the dynamics of bullying; and (iii) online safety and cyberbullying.</p>	how parents will be told about		
	curriculum reinforcing it at home		
	bullying dynamics online safety and cyberbullying		

What is Required by the Law to Be Included in the Plan	Elements (key words)	In the Plan?	
		yes	Not yet
xiv. Each plan shall recognize that certain students may be more vulnerable to becoming a target of bullying or harassment based on actual or perceived differentiating characteristics, including race, color, religion, ancestry, national origin, sex, socioeconomic status, homelessness, academic status, gender identity or expression, physical appearance, pregnant or parenting status, sexual orientation, mental, physical, developmental or sensory disability, or by association with a person who has or is perceived to have 1 or more of these characteristics.	recognize that certain students may be more vulnerable to becoming a target of bullying or harassment based on actual or perceived differentiating characteristics or by association with a person who has or is perceived to have 1 or more of the characteristics.		
xv. Chapter 86 requires schools and districts to administer a student survey developed by the Department every four years to assess "school climate and the prevalence, nature and severity of bullying in schools." ⁶ The survey results will be used to assess the effectiveness of bullying prevention curricula and instruction that is required under the bullying prevention and intervention statute.	administer a student survey every four years to assess "school climate and the prevalence, nature and severity of bullying in schools.		
xvi. The Plan shall inform parents or guardians of the target about the Department's problem resolution system and the process for seeking assistance or filing a claim through the problem resolution system. This information will be made available in both hard copy and electronic formats	inform parents or guardians about: Department's problem resolution system process for seeking assistance or filing a claim		

OTHER REMINDERS RELATED TO THE LOCAL PLANS:

The Plan shall be developed in consultation with teachers, school staff, professional support personnel, school volunteers, administrators, community representatives, local law enforcement agencies, students, parents and guardians. Furthermore, the consultation shall include, but not be limited to, notice and a public comment period (although non-public schools shall only be required to give notice to and provide a comment period for families that have a child attending the school).

The Plan shall be updated at least biennially.

The school/district shall provide to students and parents or guardians, in age-appropriate terms and in the languages which are most prevalent among the students, parents or guardians, annual written notice of the relevant student-related sections of the Plan.

The school/district shall provide to all school staff annual written notice of the Plan. The faculty and staff at each school shall be trained annually on the Plan applicable to the school. Relevant sections of the Plan relating to the duties of faculty and staff shall be included in a school district or school employee handbook.

The Plan shall be posted on the website of each school district, charter school, non-public school, approved private day or residential school and collaborative school.

⁶ G.L. c. 71, §370(k).

Each school principal or the person who holds a comparable position shall be responsible for the implementation and oversight of the Plan at his school.

Lastly, while not required, some communities may wish to include a timeline for implementation of training and professional development efforts, changes and/or additions to the curricula, and collaboration with families.

4.Addressing Bullying in the Context of Special Education

In the course of drafting IEPs, remember that, pursuant to M.G.L. c.71B, §3, you must take into consideration whether a particular student may be the subject of bullying. The Federal Office of Special Education and Rehabilitative Services (OSERS) issued a lengthy memorandum and supporting documentation late last August discussing the need to address bullying of disabled students. In the course of your annual or tri-annual reviews you might want to consider some of this information, which is attached.

Attached are two documents. The first is a four page letter from OSERS explaining the research establishing a direct link between bullying and students with disabilities. The second, longer, document highlights a number of evidence-based practices to incorporate in bullying situations. Both documents are available at <http://www.ed.gov/blog/2013/08/keeping-students-with-disabilities-safe-from-bullying/>.

Since 2010 Massachusetts has asked school districts to focus on identification of bullying behavior and means or methods to reduce the behavior and to protect students from such behavior. M.G.L. c. 71, §37O sets out requirements for a district-wide anti-bullying policy and steps districts must take to report and investigate allegations of bullying. That statutory provision was recently amended to broaden its protections.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Aug. 20, 2013

Dear Colleague:

The U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) is committed to working with States to ensure that school districts provide all children with positive, safe, and nurturing school environments in which they can learn, develop, and participate. OSERS is issuing this letter to provide an overview of a school district's responsibilities under the Individuals with Disabilities Education Act (IDEA) to address bullying of students with disabilities.⁷

As discussed in this letter, and consistent with prior Dear Colleague Letters the Department has published, bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied.⁸ However, even when situations do not rise to a level that constitutes a denial of FAPE, bullying can undermine a student's ability to achieve his or her full academic potential. Attached to this letter are specific strategies that school districts and schools⁹ can implement to effectively prevent and respond to bullying, and resources for obtaining additional information.

Bullying of any student by another student, for any reason, cannot be tolerated in our schools.¹⁰ Bullying is no longer dismissed as an ordinary part of growing up, and every effort should be made to structure environments and provide supports to students and staff so that bullying does not occur. Teachers and adults should respond quickly and consistently to bullying behavior and send a message that bullying is not acceptable. Intervening immediately to stop bullying on the spot can help ensure a safer school environment.

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time.

⁷ This letter is intended to supplement the July 25, 2000, joint Dear Colleague Letter from OSERS and the Department's Office for Civil Rights (OCR), which addressed disability harassment under Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA), and the IDEA (available at: <http://www.ed.gov/ocr/docs/disabharassltr.html>).

⁸ Some bullying of students with disabilities may also constitute discriminatory harassment and trigger additional responsibilities under the civil rights laws that OCR enforces, including Section 504, Title II of the ADA, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. See OCR's October 26, 2010, Dear Colleague Letter on Harassment and Bullying (available at: <http://www.ed.gov/ocr/letters/colleague-201010.html>).

⁹ In the context of this letter "school" includes public preschools; elementary, middle, and high schools; and public agencies, including the State Educational Agency (SEA), Educational Service Agencies (ESA), Local Educational Agencies (LEA), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. See 34 C.F.R. §300.33.

¹⁰ Although the focus of this letter is peer-to-peer bullying, it is important to acknowledge that it is also intolerable for teachers and school staff to be party to school bullying and disability harassment (*i.e.*, being active participants in bullying), or observers to school bullying without taking action to address the behavior. While teacher-student disability harassment also may constitute a denial of FAPE, those issues are beyond the scope of this letter. We recommend that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel, including taking the matter seriously, and promptly addressing any problematic behaviors.

Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (*e.g.*, excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (*e.g.*, cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

Addressing and reporting bullying is critical. Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression.¹¹ Bystanders, or those who only see or hear about bullying, also may be negatively affected as bullying tends to have harmful effects on overall school climate. Bullying can foster fear and disrespect and negatively affect the school experience, norms, and relationships of all students, families, and school personnel.¹² The consequences may result in students changing their patterns of school participation or schools eliminating school activities (*e.g.*, dances, sporting events) where bullying has occurred. Teachers, school personnel, parents, and students should report bullying when they become aware of it.

Students with disabilities are disproportionately affected by bullying.¹³ For example, students with learning disabilities, attention deficit or hyperactivity disorder, and autism are more likely to be bullied than their peers.¹⁴ Any number of factors -- physical characteristics, processing and social skills, or intolerant environments -- may increase the risk that students with disabilities will be bullied. Due to the characteristics of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand the extent to which bullying behaviors are harmful, or may be unable to make the situation known to an adult who can help. In circumstances involving a student who has not previously been identified as a child with a disability under the IDEA, bullying may also trigger a school's child find obligations under the IDEA. 34 C.F.R. §§300.111, 300.201.

Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.¹⁵ States and school districts have a responsibility under the IDEA, 20 U.S.C. § 1400, *et seq.*, to ensure that FAPE in the least restrictive environment (LRE) is made available to eligible students with disabilities. In order for a student to receive FAPE, the student's individualized education program (IEP) must be reasonably calculated to provide meaningful educational benefit.¹⁶

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying,

¹¹ Gini G., & Pozzoli T. (2009). Association between bullying and psychosomatic problems: A meta-analysis. *Pediatrics*, 123(3):1059-1065.

¹² O'Brennan, L. M., Bradshaw, C. P., & Sawyer, A. L. (2009). Examining developmental differences in the social-emotional problems among frequent bullies, victim, and bully/victims. *Psychology in the Schools*, 46(2), 100-115.

¹³ Swearer, S. M., Wang, C., Maag, J. M., Siebecker, A., B., & Frerichs, L. J. (2012). Understanding the bullying dynamic among students in special and general education. *Journal of School Psychology*, 50, 503-520.

¹⁴ Twyman, K. A., Saylor, C. F., Saia, D., Macias, M. M., Taylor, L. A., & Spratt, E. (2010). Bullying and ostracism experiences in children with special health care needs. *Journal of Developmental Behavioral Pediatrics*, 31, 1-8.

¹⁵ OCR also has authority to investigate complaints alleging denial of FAPE under Section 504 and Title II. See the July 25, 2000, joint Dear Colleague Letter on Disability Harassment; (available at: <http://www.ed.gov/ocr/docs/disabharassltr.html>); and OCR's October 26, 2010, Dear Colleague Letter on Harassment and Bullying (available at: <http://www.ed.gov/ocr/letters/colleague-201010.html>).

¹⁶ See *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982).

the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying. The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. While it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive "protected" setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation.

If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted.

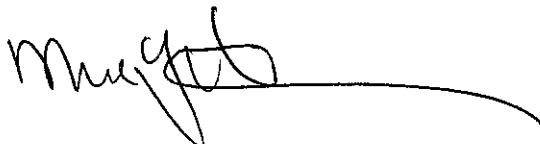
As discussed above, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit from the special education and related services provided by the school is a denial of FAPE. A student must feel safe in school in order to fulfill his or her full academic potential. We encourage States and school districts to alert Boards of Education, school administrators, teachers, and staff that bullying can result in a denial of FAPE for students with disabilities. We also encourage States and school districts to reevaluate their policies and practices addressing problematic behaviors, including bullying, in light of the information provided in this letter, as well as in OSERS' July 25, 2000, joint Dear Colleague Letter and OCR's October 26, 2010, Dear Colleague Letter. The enclosure to this letter, "Effective Evidence-based Practices for Preventing and Addressing Bullying," includes practices for use as part of any bullying prevention and intervention program to help ensure that school and classroom settings are positive, safe, and nurturing environments for all children and adults.

We look forward to continuing to work with you to ensure that students with disabilities have access to high-quality services in positive, safe, and respectful school environments.

Sincerely,



Melody Musgrove, Ed. D.
Director
Office of Special Education Programs



Michael K. Yudin
Acting Assistant Secretary

Enclosure: Effective Evidence-based Practices for Preventing and Addressing Bullying

ENCLOSURES

Effective Evidence-based Practices for Preventing and Addressing Bullying

There is no one-size-fits-all or simple solution for addressing bullying behavior. Rather, efforts to prevent and address bullying behavior should be embedded within a comprehensive, multitiered behavioral framework used to establish a positive school environment, set high academic and behavioral expectations for all students, and guide delivery of evidence-based instruction and interventions that address the needs of students, including students with disabilities. In such a framework, policies and practices would be aligned and consistently implemented school wide; that is, across general and special education, each grade level, and in all school settings and activities. Data-based decision making would be used to identify needs, analyze problem situations, outline clear evidence-based practices to be used in delivery of instruction and implementation of interventions, and monitor progress toward clear, positive academic and behavioral outcomes as part of an ongoing, continuous improvement model.

When deciding which strategy or strategies to use to address bullying behavior, each school needs to consider the relevant factors given its school environment, students' social and cognitive development, and the evidence on programmatic prevention and intervention. Teachers, administrators, and staff understand that students' social behavior affects their academic learning. In many high-performing schools, academic instruction is combined with effective behavioral supports to maximize academic engagement and in turn, student achievement. That is, successful schools focus on decreasing academic failure and problem behaviors, including bullying, and increasing opportunities for all students to fully participate in learning. There is a growing body of research on promising school bullying interventions that can inform practice. For example, a meta-analysis of research across a 25-year period found that school bullying prevention programs led to changes in knowledge, attitudes, and self-perceptions of those targeted by bullying, engaging in bullying, and bystanders.¹⁷ Another meta-analysis of school-based programs implemented in the United States and internationally to reduce bullying concluded that overall school-based antibullying programs were often effective in reducing bullying, and identified program elements (*i.e.*, critical practices or strategies) associated with effective programs; but results varied based on context.¹⁸ Experimental research has also demonstrated lower rates of bullying and peer rejection when critical practices or strategies were used within a multitiered behavioral framework.¹⁹

The following effective evidence-based practices are found in many multitiered behavioral frameworks. We encourage you to carefully consider each of these practices as part of any bullying prevention and intervention program you undertake to help ensure that your school and classroom settings are positive, safe, and nurturing environments for all children and adults.

¹⁷ Merrell, K. W., Gueldner, B. A., Ross, S. W., & Isava, D. M. (2008). How effective are school bullying intervention programs? Meta-analysis of intervention research. *School Psychology Quarterly, 23*, 26-42.

¹⁸ Farrington, D. P., & Ttofi, M. M. (2009). School-based programs to reduce bullying and victimization. *Campbell Systemic Reviews, 2009:6*.

¹⁹ Bradshaw, C. P., Mitchell, M. M., & Leaf, P. J. (2010). Examining the effects of school-wide Positive Behavioral Interventions and Supports on student outcomes: Results from a randomized controlled effectiveness trial in elementary schools. *Journal of Positive Behavior Interventions, 12*, 133-148.

Use a comprehensive multitiered behavioral framework

Just as important as determining which strategies will be used is knowing how, when, and by whom those strategies will be implemented. Evidence-based instructional and intervention strategies for preventing and addressing bullying of students, including students with disabilities, are most effective when used as part of a comprehensive multitiered behavioral framework that engages the whole school community, and establishes and maintains positive, safe, and nurturing school environments conducive to learning for all students. Providing clear and formal instruction for all students, and staff on how to behave in respectful and responsible ways across all school settings and activities is a vital component of this approach.

Issues related to the bullying of students with disabilities should be included in the topics addressed by the school's comprehensive multitiered behavioral framework, and also as a specific area of focus in policies and practices addressing behavioral expectations. In addition to implementing certain steps for the whole school (e.g., consistent rules and rewards for good behavior), a comprehensive multitiered behavioral framework of instruction and interventions also includes using strategies that address bullying and other problematic behaviors, such as steps for groups of students exhibiting at-risk behavior and individual services for students who continue to exhibit troubling behavior.

Using a comprehensive multitiered behavioral framework for making decisions on identifying, implementing, and evaluating effective evidence-based practices helps schools to: (a) organize evidence-based practices, including those that will be used to address bullying of students with disabilities; (b) support the use of evidence-based practices according to the practice guidelines; and (c) monitor the outcomes for students to determine the effectiveness of the evidence-based practices and need for any additional instruction and intervention. Preventing and addressing bullying of students with disabilities needs to be aligned with, and embedded as part of each school's comprehensive multitiered behavioral planning, and given explicit consideration to ensure that the individual needs of each student with a disability are addressed fully in the school-wide plans for creating and sustaining a positive, safe, and nurturing school environment.

One example of a multitiered behavior framework that school personnel can use to plan, implement, and evaluate evidence-based instruction and intervention practices is Positive Behavioral Interventions and Supports (PBIS). The PBIS framework can help to create an appropriate social culture, learning and teaching environment, achieve academic and social success, and minimize problem behavior, including reducing the risks and decreasing the occurrence of bullying. Using this multitiered framework, school personnel establish a continuum of evidence-based behavioral practices that include school-wide strategies, more intense strategies for groups of students exhibiting at-risk behaviors, and individual services for students who continue to exhibit problematic behavior and need additional support.²⁰ Rather than offering a packaged curriculum, a manualized strategy, or a prescribed intervention, PBIS provides school personnel with a decision-making structure that they can use to identify, implement, and evaluate effective evidence-based instruction and intervention strategies within a comprehensive multitiered framework to prevent and respond to bullying in their school setting.²¹ By outlining a comprehensive school-wide approach with multitiered instruction and intervention, schools work to create school cultures that prevent the development and reduce the occurrence of bullying. In addition, schools are prepared to respond to problematic behavior using a team-based, data-driven problem-solving process when needed.

²⁰ Bradshaw et al. (2010).

²¹ Sugai, G., Horner, R.H., Algozzine, R., Barrett, S., Lewis, T., Anderson, C., Bradley, R., Choi, J. H., Dunlap, G., Eber, L., George, H., Kincaid, D., McCart, A., Nelson, M., Newcomer, L., Putnam, R., Riffel, L., Rovins, M., Sailor, W., & Simonsen, B. (2010). *School-Wide Positive Behavior Support: Implementers' Blueprint and Self-Assessment*. Eugene, OR: University of Oregon.

The following are practices found in many effective, evidence-based behavioral prevention and intervention school-wide frameworks.

Teach appropriate behaviors and how to respond

Preventing bullying begins by actively and formally teaching all students and all school personnel: (1) what behaviors are expected at school and during school activities; (2) what bullying looks like; and (3) how to appropriately respond to any bullying that does occur. Specifically, clear behavioral expectations are taught to students and adults in the same manner as any core curriculum subject.²² Consistency in behavioral expectations from class to class, adult to adult, and across settings is very important in establishing shared and predictable expectations that both students and school personnel understand and follow.

Provide active adult supervision

Adults play an important role in actively supervising and intervening early to correct behavior problems, especially in common areas (*e.g.*, hallways, cafeteria, playgrounds, and extracurricular events). By moving continuously throughout an area and having positive interactions with students, adults are able to teach and model expected behavior and routines, notice and reward appropriate behavior, and intervene early so that minor rule violations are handled effectively before problematic behaviors escalate.

Train and provide ongoing support for staff and students

Training, ongoing professional development, and support, including coaching, to all personnel on the use of effective evidence-based strategies for responding to inappropriate behavior, including bullying, as well as evidence-based instruction and classroom management practices, are important tools to ensure that school staff are equipped to effectively address bullying. In addition, clear guidance on legal requirements, policy, and practice implications for students with disabilities needs to be explicitly provided in training.

School personnel need to be aware that students with disabilities are significantly more likely than their peers without disabilities to be the targets of bullying.²³ Any number of factors may explain their increased risk of being bullied, including but not limited to the student's physical characteristics, processing and social skills, or simply being in environments with others who are intolerant.²⁴

Training is essential in helping school personnel recognize the different forms of bullying that may be directed at students with disabilities, and the unique vulnerabilities these students may have to social isolation, manipulation, conditional friendships, and exploitive behaviors. Students, with and without disabilities, do not always recognize problem behaviors as bullying, or may be reluctant to stand up for themselves or others, seek help, or report bullying due to fear of retaliation, particularly if adults are involved. Due to the complexities of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand manipulation or exploitive behavior as harmful, or have the knowledge and skills to explain the situation to an adult who can help.

²² Sugai et al. (2010).

²³ Young, J., Ne'eman, A., & Gelser, S. (2011). *Bullying and Students with Disabilities. A Briefing Paper from the National Council on Disability*. Washington, DC: National Council on Disability (available at: <http://www.ncd.gov/publications/2011/March92011><http://www.ncd.gov/publications/2011/March92011>).

²⁴ Young et al. (2011).

All students should receive clear, explicit instruction on how to respond to and report bullying. For students with disabilities, instruction on how to respond to and report bullying needs to be provided in a manner consistent with their IEPs and any accommodations that are provided to support learning. In addition, school staff should monitor for bullying and its possible effects on FAPE for students with disabilities, as it is not sufficient for school personnel to rely only on students to report bullying or identify how the bullying is interfering with FAPE.

Develop and implement clear policies to address bullying

We encourage schools to develop clear policies and procedures, consistent with Federal, State, and local laws, to prevent and appropriately address bullying of students, including students with disabilities.²⁵ In these antibullying policies, schools may want to include a reminder that harassment against a student on the basis of disability and retaliation against any student or other person are also prohibited under Section 504, Title II, and other Federal civil rights laws enforced by the U.S. Department of Education's Office for Civil Rights.²⁶

Schools should widely disseminate their antibullying policies and procedures to staff, parents, and students, and post the policies in the school and on the school's website. Any published policies and procedures must be accessible to students with visual or other disabilities. Schools should provide ongoing training to staff, parents, and students on their antibullying policies and procedures so that everyone in the school community is aware that bullying behavior will not be tolerated.

When bullying occurs, school personnel need to respond quickly, to act in accordance with school policies and procedures, and to address the issue in a professional manner. School personnel should be sure to document the response to a bullying incident in writing.

Monitor and track bullying behaviors

Collecting and analyzing data on bullying behaviors can provide a clearer picture of what is happening in school and school activities, guide planning of prevention, instruction, and intervention efforts, and inform decision making on the effectiveness of current policies and practices over time. Adults tend to underestimate the rates of bullying because students rarely report it, and it often happens when adults are not around.²⁷ Thus, data collected from multiple sources, including surveys of students, will help establish a more accurate understanding of bullying behaviors occurring in school and school activities. Data collection should be linked to existing data systems (e.g., attendance, discipline) when possible, and include information such as the frequency, types, and location of bullying behavior, other contextual factors, adult and peer responses, and also perceptions of safety and school climate.

²⁵ Under Title II and Section 504, school districts must notify students, parents, and school personnel (including persons with impaired vision or hearing) that the district does not discriminate on the basis of disability; must adopt grievance procedures providing for the prompt and equitable resolution of complaints alleging disability discrimination (including harassment); and must designate at least one person to coordinate compliance with those laws. See 28 C.F.R. § 35.106; 28 C.F.R. § 35.107; 34 C.F.R. § 104.7; 34 C.F.R. § 104.8.

²⁶ It is unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by Section 504, Title II, Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975 (Age Act), or the Boy Scouts of America Equal Access Act (BSA Act). See 34 C.F.R. § 100.7(e) (Title VI); 34 C.F.R. § 104.61 (Section 504) (incorporating 34 C.F.R. § 100.7(e) by reference); 28 C.F.R. § 35.134 (Title II); 34 C.F.R. § 106.71 (Title IX) (incorporating 34 C.F.R. § 100.7(e) by reference); 34 C.F.R. § 110.34 (Age Act); and 34 C.F.R. § 108.9 (BSA Act) (incorporating 34 C.F.R. § 100.7(e) by reference).

²⁷ Cohen et al. (2009).

Notify parents when bullying occurs

Parents or guardians should be promptly notified of any report of bullying that directly relates to their child in accordance with Federal, State, and local law, policies, and procedures. Clear and accurate communication is needed to inform the parents or guardians of both the student who was the target of bullying behavior and the student who engaged in the bullying behavior.²⁸ Parents and guardians should also be encouraged to work with their child's teachers and other school personnel to determine the steps that need to be taken to address the bullying and prevent its recurrence.

Address ongoing concerns

Expected school behaviors and routines should be taught to and known by all students and staff. Students whose school behavior is not safe, responsible, and respectable, and consistent with the established school expectations may need: (a) more focused social skills instruction; (b) frequent, specific feedback on their behavior, or (c) increased adult engagement.²⁹ School personnel should use data measuring an individual student's responsiveness to antibullying instruction and intervention to determine the need for continued, more intensive, and specialized assistance for each student.

Additionally, if a school suspects that bullying is becoming a problem school-wide, a team-based and data-driven problem-solving process should be initiated. Such an approach should examine discipline and performance data to determine: (1) the current status of bullying, including how often, when, and where specific bullying incidents occur, how many and which students are involved, including whether any are students with disabilities, and which adults, if any, are involved; (2) the extent to which positive school-wide behavioral expectations have been explicitly taught, as well as the extent to which students easily and naturally meet those expectations by routinely behaving in a manner consistent with the expectations at school and school activities; and (3) whether all students are actively academically engaged, successful, and appropriately challenged. Based on the data, a common strategy should be outlined to address the settings (*e.g.*, hallways, cafeterias, and buses) and situations (*e.g.*, unstructured class time, transitions, field trips, and during assemblies) in which bullying frequently occurs. The strategy should include certain steps that will be taken for the whole school (*e.g.*, consistent rules and rewards for good behavior), more intense steps that will be taken for groups of students exhibiting at-risk behavior, and individual services that will be provided for students who continue to exhibit problematic behavior.

Sustain bullying prevention efforts over time

Prevention of bullying should be ongoing, and accepted as an integral component of the school's overall behavioral framework that delineates a school's environment and routine operation. We must remain mindful of the importance of providing positive, safe, and nurturing environments in which all children can learn, develop, and participate. Just as each year schools work to maximize academic engagement and learning outcomes for all students, including students with disabilities, we also must take steps to prevent and address bullying behavior. Effective, evidence-based practices created and sustained within a comprehensive

²⁸ The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, restricts the nonconsensual disclosure of personally identifiable information from a student's education record, including information on disciplinary actions taken against a student. State and local officials are encouraged to seek guidance to be sure that all policies are implemented consistent with these provisions.

²⁹ Sugai et al. (2010).

multitiered framework will prevent the occurrence and reduce the impact of bullying in our schools, and also enhance learning and developmental outcomes for all students.

Resources on Preventing and Addressing Bullying

Additional information about preventing and addressing bullying behavior is available from the resources listed below.

- **StopBullying.gov** – This U.S. government website is hosted by the U.S. Department of Health and Human Services in partnership with the U.S. Department of Education. It provides information on how kids, teens, young adults, parents, educators, and others in the community can address bullying behaviors. Information about cyberbullying also is available. <http://www.stopbullying.gov>
- **PACER.org/bullying/** – This National Parent Center funded by the Office of Special Education Programs (OSEP) supports families with children with disabilities by providing assistance to individual families, conducting workshops, and providing information through materials and websites. PACER’s National Bullying Prevention Center educates communities nationwide to address bullying through creative, relevant, and interactive resources. PACER’s bullying prevention resources are designed to benefit all students, including students with disabilities. PACER also hosts TeensAgainstBullying.org, created by and for teens to address bullying. In addition, PACER hosts KidsAgainstBullying.org, designed by and for elementary school students to learn about bullying prevention. <http://www.pacer.org/bullying/>
- **PBIS.org** – The Technical Assistance Center on Positive Behavioral Interventions and Supports (PBIS), funded by OSEP, gives schools capacity-building information and technical assistance for identifying, adapting, and sustaining effective school-wide disciplinary practices. It also: (a) provides technical assistance to encourage large-scale implementation of PBIS; (b) provides the organizational models, demonstrations, dissemination, and evaluation tools needed to implement PBIS with greater depth and fidelity across an extended array of contexts; and (c) extends the lessons learned from PBIS implementation to the broader agenda of educational reform. <http://www.pbis.org>
- **NICHCY.org** – This national dissemination center funded by OSEP provides a wealth of information on disabilities in children and youth; programs and services available for infants, toddlers, children, and youth with disabilities under IDEA; and research-based information on effective practices for children with disabilities (birth through 21 years of age). Information and links to resources that address bullying relative to children with disabilities are also provided. <http://nichcy.org/schoolage/behavior/bullying/>
- **FindYouthInfo.gov** – This U.S. government website was developed by 12 Federal agencies, including the Department of Education, in partnership with the White House, to disseminate information and to leverage resources to support programs and services focusing on positive, healthy outcomes for youth. The website provides facts and information on a wide range of topics including bullying, cyberbullying, and positive youth development. It also contains information on assessing community assets, generating maps of local and Federal resources, searching for evidence-based youth programs, and keeping up-to-date on the latest, youth-related news. Information is provided on funding opportunities available to those interested in addressing bullying and related topics, as well as on Federal funds awarded to states and communities for use in locating potential resources or partners already available. <http://www.FindYouthInfo.gov/>
- **Safesupportiveschools.ed.gov** – The National Center on Safe Supportive Learning Environments is funded by the U.S. Department of Education’s Office of Safe and Healthy Students, and the U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (SAMHSA) to

help schools and communities contend with many factors that impact the conditions for learning, such as bullying, harassment, violence, and substance abuse. The Center provides resources, training, and technical assistance for State and local educational agency administrators, teachers, and staff; institutions of higher education; communities, families, and students seeking to improve schools' conditions for learning through measurement and program implementation, so that all students have the opportunity to realize academic success in safe and supportive environments. <http://safesupportiveschools.ed.gov/index.php?id=01>

C. FMLA UPDATE

1. **UPDATES ON CASES DISCUSSED LAST YEAR**

Two cases we discussed last year were affirmed on appeal by the First Circuit.

McArdle v. Town of Dracut/Dracut Public Schools

In *McArdle v. Town of Dracut/Dracut Public Schools*, the First Circuit Court of Appeals affirmed the District Court's decision to grant summary judgment dismissing all of a former teacher's claims on the grounds that he had not worked enough to be eligible for FMLA leave and his other claims were meritless. 732 F.3d 29 (1st Cir. 2013).

Mr. McArdle was a teacher who taught in Dracut from 1997 until 2009. In 2007, he entered divorce proceedings, leading to depression, anxiety, foreclosure on his home, and excessive drinking. As a result, he repeatedly missed work, working only 82 days in the 2008-2009 school year. On the first day of the 2009-2010 school year, Mr. McArdle informed his principal by phone that he decided he should not come back to school and indicated that he wanted to apply for FMLA leave. The principal directed Mr. McArdle to contact the Superintendent's office, which he did. The Superintendent's assistant sent Mr. McArdle a medical certificate form that he never returned. There were communications back and forth between Mr. McArdle and the Superintendent's office but Mr. McArdle never provided the information necessary to request FMLA leave. At the end of September 2009, the Superintendent terminated him for abandoning his position but later agreed to accept his resignation.

Mr. McArdle brought suit, claiming that he was denied FMLA leave and that the District was estopped from arguing that he was not entitled to FMLA leave, among other claims. The District Court dismissed all of his claims at summary judgment and Mr. McArdle appealed to the First Circuit. The First Circuit affirmed, holding that Mr. McArdle was not eligible for FMLA leave because he did not work the 1,250 hours necessary for eligibility. Since Mr. McArdle worked only 82 days and testified that he worked approximately 7.5 hours when he was at school, he worked only approximately 615 hours in the previous 12 months. Even considering extra hours he likely worked at home preparing for school and correcting, the difference between the 615 hours he worked and the 1250 hours threshold for FMLA eligibility was so great, the First Circuit held that the District Court did not err in finding him ineligible under the FMLA.

Mr. McArdle also argued that the District interfered with his right to take a leave. The argument boiled down to a claim that the District failed to provide proper notice of his FMLA rights. The First Circuit declined to decide that issue because there was no evidence that Mr. McArdle would have acted any differently (such as reporting to work) had he known FMLA leave was not available to him.

With respect to Mr. McArdle's claim that he was retaliated against for requesting FMLA leave, the First Circuit held that it was "not convinced that an employee who is ineligible for FMLA leave can never bring a retaliation claim." In this case, however, the Court did not decide

the question because the only reasonable reading of the record was that he was terminated because of his substantial absences without notice and not because he asked for FMLA leave.

Finally, like the District Court, the First Circuit summarily dismissed Mr. McArdle's state law claims for intentional infliction of emotional distress and intentional interference with advantageous business relations as "entirely without merit." The emotional distress claim was barred by the workers' compensation law and the interference with business relations claim failed because there was no evidence of malice, which is a required element of the claim.

Bellone v. Southwick-Tolland Regional School District

In *Bellone v. Southwick-Tolland Regional School District*, the First Circuit affirmed the District Court's grant of summary judgment in favor of Southwick-Tolland. 748 F.3d 418 (1st Cir. 2014). There, the First Circuit held that the District did not interfere with a teacher's FMLA rights by failing to timely provide FMLA notices, that the District did not violate the FMLA by failing to reinstate him to his previous position or an equivalent position upon his return from leave, and that the District's request for fitness-for-duty certification did not interfere with the teacher's FMLA rights.

With respect to the insufficient notices claim, the FMLA regulations require an employer to notify an employee of his eligibility within five business days of the employer acquiring knowledge that the employee's leave may be FMLA-qualifying. The regulations also require employers to notify employees whether the leave will be designated as FMLA leave within five business days of the employer determining whether the leave being taken is FMLA-qualifying. The District Court found, and Southwick-Tolland did not challenge, that its notices were untimely and did not contain all of the required information. Nor did the District challenge the validity of the regulations, which provide that an employer's failure to provide proper notices may constitute interference with an employee's rights. Nonetheless, the First Circuit affirmed the District Court's conclusion that Mr. Bellone could not prevail because late or inadequate notices are only actionable if they harm the employee and there was no evidence of any harm to Mr. Bellone. To the contrary, the evidence indicated that Mr. Bellone was medically unfit to return to work throughout the period designated as FMLA leave and afterwards.

With respect to Mr. Bellone's claim that the District violated his FMLA rights by not returning him to an equivalent position upon his return, the First Circuit again affirmed the District Court's dismissal of that claim. The First Circuit noted that "an employee is not entitled to reinstatement under the FMLA if he is unable to work until after the expiration of his leave." In this case, Mr. Bellone was unable to work for a period of 15 weeks, which exceeded the 12 weeks of leave provided under the FMLA. Since he was not entitled to be returned to an equivalent position, the First Circuit did not analyze whether the position he was offered upon his return was equivalent.

Finally, the First Circuit rejected an argument that the District did not uniformly apply its fitness-for-duty certification. The Superintendent had put forth an affidavit averring that the District consistently requires fitness-for-duty certifications for employees returning after serious illness. Bellone did not offer any evidence to refute that affidavit.

Practice Note: Although the Courts ruled in favor of the District here, in spite of the fact that the notices were untimely and may not have contained all necessary information, please do not assume that errors with respect to notices will always be harmless. Districts should strive to meet all notice requirements under the FMLA and its regulations.

2. ILLUSTRATIVE CASES – WHAT NOT TO DO

Two cases from the past year serve as good examples of “what not to do” with respect to employees’ FMLA leave.

The first is *McAleer v. Starbucks Corp.*, in which case the Federal District Court for the District of Massachusetts denied Starbucks’ motion for summary judgment on an employee’s FMLA retaliation claim. Civ. A. No. 12-11631-RGS (D. Mass. Jan. 31, 2014). In that case, a Starbucks manager brought suit against Starbucks for interfering with his rights under the FMLA and for retaliation for his exercise of his FMLA rights to care for his wife during her cancer treatment. In support of his position, the Plaintiff presented evidence showing “close temporal proximity” between his notice to the employer about his plans to take FMLA leave and adverse action from the employer, including putting him on an improvement plan and ultimately, terminating him. While that temporal proximity may give rise to an inference of causal connection between the employee’s exercise of his rights and adverse employment actions, the main reason the Court denied summary judgment is because the Plaintiff presented evidence that two other similarly-situated managers with similar performance ratings did not take FMLA leave and were not placed on performance plans. There was additional evidence that during the relevant time period between 9 and 13 other stores were performing as poorly as Mr. McAleer’s but none of the other managers were placed on performance plans or terminated. Thus, the Court denied Starbucks’ motion for summary judgment so that a jury could decide whether Starbucks would have fired Mr. McAleer absent retaliatory intent.

In the second case, *Chase v. U.S. Postal Service*, a postal worker brought suit against the post office and his former manager, alleging violations of the FMLA and various other actions arising out of his termination. Civ. A. No. 12-11182-DPW (D. Mass. Nov. 4, 2013). As with the Starbucks case, the Court granted the Defendant employer’s motion for summary judgment on all claims except for the FMLA claim. In that case, Mr. Chase had been injured on the job, was out of work on FMLA leave, and received worker’s compensation. The supervisor, who expressed some bias against employees on medical leave, made numerous public statements to the effect that the employee was engaged in fraud. Mr. Chase was later arrested on drug charges and was terminated from the post office. With respect to the summary judgment motion, the Court found that Mr. Chase presented enough evidence to permit a reasonable trier of fact to conclude that he was terminated as retaliation for taking FMLA leave and that citing the arrest was mere pretext. In reaching that decision, the Court noted that the U.S. Department of Labor has made clear that employers may not use the taking of FMLA leave as a negative factor in employment actions. Slip Op. at 26.

The lesson of both of these cases is clear: Do not take adverse actions against employees because they take FMLA leave. Do not treat employees who take FMLA leave more harshly than those who have not and do not use FMLA leave against employees. Do not express animus

or mistrust toward employees because they take FMLA leave. Moreover, while the FMLA does not prevent you from taking adverse action against an employee for reasons unrelated to FMLA leave, if you are considering taking adverse actions against an employee near to the time when they request or take FMLA leave, you should consult District counsel as to how to minimize the risks against claims of discrimination or retaliation.

3. FREQUENTLY ASKED QUESTIONS

Below are some of the questions we have fielded several times this year:

Q. How does FMLA impact the calculation of three consecutive years of service for a teacher to attain PTS under G.L. c. 71, § 41?

A. This is an open question. In fact, we are in litigation on this exact issue. Our argument on behalf of the school District is that Massachusetts maternity leave precedent applies. That precedent holds that partial years of service do not count toward the three years of service required for PTS but that a maternity leave does not break the consecutive nature of the service. *Solomon v. Sch. Comm. of Boston*, 395 Mass. 12 (1985); *Fortunato v. King Philip Reg. Sch. Dist. Comm.*, 10 Mass. App. Ct. 200 (1980). We argue that this system is consistent with the FMLA's dictate that employees neither gain nor lose benefits while on FMLA leave. The Union argues that the FMLA overturns the Massachusetts precedent and requires that the time on FMLA leave either be counted toward the three years of service requirement or that an amount of time equal to the length of the leave be "tacked on" to the next year.

The question was submitted to an arbitrator but before the arbitrator issued a ruling, the Superior Court ruled that the arbitrator did not have jurisdiction to hear the case under G.L. c. 71, § 42 because there was a question as to whether the teacher had PTS and statutory arbitration is available to only teachers with PTS. We expect the issue to move forward in Superior Court.

Q. Does summer vacation count against FMLA leave time?

A. No. Time off for school vacations does not count toward an employee's FMLA allotment. Thus, if a teacher is entitled to 12 weeks of maternity leave, has a baby in early June, and uses 2 weeks of FMLA at that time, she is entitled to 10 weeks of FMLA during the next school year to care for her child.

As to the question of payment and benefits, the answer depends on your District's CBA and the teacher's precise circumstances. Usually, we assume six weeks of recovery following birth that can be used as paid sick leave, again, depending on the terms of the applicable CBA. Unless the teacher is able to document illness or complications following childbirth that extend beyond that time, however, she typically cannot use sick leave the following school year. Thus, using the example above, the teacher could use sick leave for the two weeks of leave in June following birth, as she recuperates but, unless she has a continuing illness, the remaining 10 weeks of her leave the next fall would be unpaid child rearing leave under FMLA. Employees generally do retain their rights to benefits, such as health insurance, during the entire FMLA leave, however. Please consult the applicable CBA and local counsel with respect to the policy and practices of your District.

Q. How frequently may I ask for medical certifications for an on-going serious health condition and can I require submission to a fitness-for-duty evaluation?

A. You may ask for medical certifications every 30 days unless the serious health condition is expected to last more than 30 days. In that case, the employer must wait to request recertification until the specified time for leave has passed or every 6 months, whichever is sooner. You also may request recertification in less than 30 days if the employee requests an extension of the leave, the circumstances of the previous certification have changed significantly, or you receive information that calls into question the veracity of the employee's stated reason for absence. For conditions lasting more than a year, you may request a new certification each year and those certifications may be subject to second and third opinions.

With respect to a fitness-for-duty certification, you may require employees to submit to such an evaluation before the return to work. The policy must be uniformly applied to require all similarly-situated employees to submit a certification from their own health care providers. For employees on intermittent leave or a reduced schedule under the FMLA, you may require fitness-for-duty certifications once every 30 days if reasonable safety concerns exist.

Please note that medical certifications and fitness-for-duty certifications are a mandatory subject of bargaining under G.L. c. 150E. You should review applicable CBAs with local counsel before requiring employees to submit those certifications or implementing any policies regarding certifications.

D. TRANSGENDER LAW UPDATE

1. UPDATES ON TRANSGENDER EQUAL RIGHTS LAW

In addition to the updates to the anti-bullying laws regarding LGBTQ students, there have been some developments following the implementation of the transgender equal rights law that took effect on July 1, 2012.

BACKGROUND ON TRANSGENDER EQUAL RIGHTS LAW

By way of brief background, the transgender equal rights law, known as "An Act Relative to Gender Identity," Chapter 199 of the 2011 Acts, amended a number of Massachusetts antidiscrimination laws to include "gender identity" as a protected category. "Gender identity" is defined in the law as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Under the new law, transgender people are protected from discrimination in employment, education, housing, mortgages, and credit. The new law also extends existing hate crime laws to specifically cover transgender people.

With respect to employment discrimination, the new law amends G.L. c. 151B, § 4 to make it unlawful for an employer to "refuse to hire or employ or to bar or to discharge from employment" a person on the grounds of gender identity or to alter the terms, conditions,

compensation or privileges of employment for such a person, “unless based upon a bona fide occupational qualification.” To that end, employers may not express any limitation or discrimination based on gender identity when they advertise or inquire in an employment application, unless based upon a bona fide occupational qualification. Likewise, labor organizations may not discriminate against or exclude from membership persons based on gender identity unless based upon a bona fide occupational qualification. “Bona fide occupational qualification” is not defined in the legislation. However, we anticipate that the term will be defined by the Massachusetts courts in connection with discrimination law suits in the upcoming years.

DESE GUIDANCE

DESE issued a guidance for implementing the transgender equal rights law in schools. A copy of the guidance follows and may be located at <http://www.doe.mass.edu/ssce/genderidentity.pdf>. The guidance provides an overview of the law and some general information about understanding gender identity. We urge you to read the guidance in its entirety if you have not already done so. A few key points from the guidance are:

- School districts should accept a student’s assertion of his or her gender identity when there is “consistent and uniform assertion of the gender-related identity, or other evidence that the gender-related identity is sincerely held as part of a person’s core identity.” Thus, if a student’s gender-related identity, appearance, or behavior meets that standard, a school district may not question the student’s asserted gender identity unless the district has a credible basis for believing that the student’s gender-related identity is being asserted for some improper purpose.
- School districts should engage the student and, when appropriate, the parents to agree on a plan to initiate any name changes and pronoun uses in school. Schools generally should use the student’s chosen name and pronoun.
- Any information about the student’s assigned birth sex, name change for gender identity purposes, gender transition, medical or mental health treatment related to gender identity, and similar information is part of the student record and must be kept confidential and secure.
- School districts should meet with the student and parents to address the student’s access to restrooms, locker rooms and changing facilities. Each situation must be addressed based on the unique circumstances. The district must make clear, however, that the student may access the restroom, locker room, and changing facilities that correspond to the student’s gender identity.
- DESE recommends that districts review their gender-based rules, programs, and policies and maintain only those that have a clear and sound pedagogical purpose. Whenever students are separated by gender, transgender students must be permitted to participate or conform to such rule or policy consistent with their gender identities. This includes sports.
- School districts should include education and training on gender identity and gender non-conforming students in their anti-bullying curriculum, student leadership training, and staff professional development. Districts also should

review existing policies and handbooks to ensure the materials include references to gender identity in the student antidiscrimination law.

Since the bathroom and locker room question will likely be the most controversial, as DESE recognizes, it is worth repeating that districts may NOT bar students from the facilities that correspond to the student's gender identity. You should, however, engage in discussions with the parents and student about the available options and it may be necessary to revisit the topic as the student progresses in his or her transition and as he or she ages. According to the DESE guidance, during those discussions, you must make clear that the student may use the single-sex facilities that correspond to the student's gender identity. If the student is uncomfortable with that arrangement, DESE advises that you offer a "safe and adequate alternative," such as a gender-neutral facility or the nurse's office. A practical solution in locker rooms may be to install privacy curtains. For districts designing new buildings, DESE advises that you include appropriate gender-neutral restrooms commensurate with the size of the school and at least one gender-neutral changing facility.

TRANSGENDER TEACHER CASE

To-date, there have been no published decisions applying the new transgender equal rights law. As a case reported in the December 24, 2012 Massachusetts Lawyers Weekly (pg 6) indicates, however, lawsuits over discrimination of transgender people have already begun. That case, which is not identified by name, concerned a transgender elementary school teacher and settled prior to a court decision.³⁰

According to the article, the teacher signed a one-year employment contract with a charter school at the end of June 2012. Shortly after, when the transgender equal rights law went into effect on July 1, 2012, she notified her employer that she intended to transition from male to female and return to school in September identifying as female. The teacher also provided the principal with information on gender identity expression, proposed letters to teachers and staff concerning her transition, and contact information on consultants to aid in the transition. In response, the principal allegedly told the teacher to get a lawyer to discuss the matter further. The article indicates that the teacher's lawyer spoke with the lawyer for the school district, who acknowledged the new transgender equal rights law and suggested the creation of a new position for the teacher so that she would not be serving in the classroom. The teacher reluctantly agreed but, as the deal was being finalized, the school district proposed to instead provide the teacher with a one-year paid sabbatical. The teacher agreed, according to the article, because she had only been employed by the charter school for a brief time, her contract guaranteed only another year of employment, and she had no union or other protection. A dispute ensued and, Massachusetts Lawyers Weekly reports the amount of the settlement to be equal to \$50,000 plus benefits.

That case serves as both a reminder of the new transgender equal rights law and as an example of the real world application of that law. There, the charter school was able to settle the matter for the relatively low amount of \$50,000 plus benefits, likely because the teacher did not have the protections afforded through professional teacher status or union representation.

³⁰ We contacted the attorney for the teacher for more details on the case. Although she was not permitted to provide more details, she confirmed that the facts set forth in the article were accurate.

However, we anticipate that in most situations, the potential liability for gender identity discrimination could far exceed that settlement amount.

Accordingly, we renew our advice that school districts ensure that they comply with the new law by, among other things, offering transgender employees and students the same rights and benefits as any other employees. For example, school districts should not decline to hire or promote an employee because he or she is transgender. Nor should the school district propose to create a new position for that person on the basis of being transgender or deny that person access to programs or facilities on the basis of being transgender.

2. DESE Transgender Guidance

Massachusetts Department of Elementary and Secondary Education

75 Pleasant Street, Maiden, Massachusetts 02148-4906

Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment

Nondiscrimination on the Basis of Gender Identity

An Act Relative to Gender Identity (Chapter 199 of the Acts of 2011),¹ which became effective on July 1, 2012, amended several Massachusetts statutes prohibiting discrimination on the basis of specified categories, to include discrimination on the basis of gender identity. Among the statutes amended is G.L. c. 76, § 5, prohibiting discrimination on the basis of gender identity against students who enroll in or attend the public schools. G.L. c. 76, §5 now reads as follows:

Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. **No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.** (Emphasis added)

In June 2012, the Massachusetts Board of Elementary and Secondary Education (Board) adopted revised Access to Equal Education Opportunity Regulations, 603 CMR 26.00, and Charter School

Regulations, 603 CMR 1.00, to reflect the broadened student anti-discrimination provision in G.L. c. 76, §5. The Board also directed the Department of Elementary and Secondary Education (Department) to provide guidance to school districts to assist in implementing the gender identity provision.

All students need a safe and supportive school environment to progress academically and developmentally. Administrators, faculty, staff, and students each play an important part in creating and sustaining that environment. This guidance is intended to help school and district administrators take steps to create a culture in which transgender and gender nonconforming students feel safe, supported, and fully included, and to meet each school's obligation to provide equal educational opportunities for all students, in compliance with G.L. c. 76, §5 and the state regulations. The guidance sets out general principles based on the law, and addresses

1 The Act can be found at <http://www.malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter199>,

common issues regarding transgender and gender nonconforming students. It offers case studies based on experiences of schools and students in Massachusetts, and reflects the need to consider issues on a case-by-case basis. The list of issues is not exhaustive, and the examples are intended to be illustrative, not prescriptive.

In preparing this guidance, the Department reviewed policies and guidance from several states, organizations, and athletic associations and consulted with the field. We appreciate the input we received from school and district administrators, advocacy groups, parents, students, and other interested constituents.

Definitions

Understanding the terminology associated with gender identity is important to providing a safe and supportive school environment for students whose rights are protected under the law. The following terms appear in this document and are defined to assist in understanding the guidance presented. Although these are the most commonly used terms, students may prefer other terms to describe their gender identity, appearance, or behavior. The term "gender identity" is specifically defined in the Mass. General Laws, as amended by *An Act Relative to Gender Identity* (the gender identity law).

- (8)** *Gender expression*: the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.
- (9)** *Gender identity*: as defined in part at G.L. c. 4, § 7, is "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth..."
- (10)** *Gender nonconforming*: a term used to describe people whose gender expression differs from stereotypic expectations. The terms "gender variant" or "gender atypical" are also used.
- (11)** *Transgender*: an umbrella term used to describe a person whose gender identity or gender expression is different from that traditionally associated with the assigned sex at birth.

The Law

The gender identity law amended G.L. c. 76, § 5,2 to establish that no person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of *gender identity*, among other characteristics. The amended Access to Equal Educational Opportunity regulations, 603 CMR 26.00, and the non-discrimination provision of the Charter School

2 The Act amends several other statutes as well, including G.L. c. 151B (governing nondiscrimination in employment), to prohibit discrimination on the basis of gender identity. regulations, 603 CMR 1.00, require schools to establish policies and procedures, provide training, and implement and monitor practices to ensure that obstacles to equal access to

school programs are removed for all students, including transgender and gender nonconforming students.

All districts and schools should review existing policies, handbooks, and other written materials to ensure that they are updated to reflect the new law. At a minimum, this means including the category of "gender identity" within the identification of legally protected characteristics. For example:

The [] Public Schools strives to provide a safe, respectful, and supportive learning environment in which all students can thrive and succeed in its schools. The [] Public Schools prohibits discrimination on the basis of race, color, sex, gender identity, religion, national origin, or sexual orientation and ensures that all students have equal rights of access and equal enjoyment of the opportunities, advantages, privileges, and courses of study.

The gender identity law reflects the reality that transgender and gender nonconforming students are enrolled in Massachusetts public schools. These students, because of widespread misunderstanding and lack of knowledge about their lives, are at a higher risk for peer ostracism, victimization, and bullying. The 2011 National School Climate Survey by the Gay, Lesbian & Straight Education Network (GLSEN), found that 75.4% of transgender students had been verbally harassed in the previous year, 32.1% had been physically harassed, and 16.8% had been physically assaulted. Educators play an essential role in advocating for the well-being of these students and creating a school culture that supports them.

Understanding Gender Identity

The gender identity law defines "gender identity" to mean "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth."³ The law also states that "[g]ender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose."⁴

Transgender youth are those whose assigned birth sex does not match their internalized sense of their gender (their "gender-related identity"), and gender nonconforming youth are those whose gender-related identity does not meet the stereotypically expected norms associated with their assigned sex at birth. A transgender boy, for example, is a youth who was assigned

(1) Mass. Gen. Laws. Ch. 4, § 7 (2012).

(2) *Id.*

the sex of female at birth but has a clear and persistent identity as male. A transgender girl is a youth who was assigned the sex of male at birth but has a clear and persistent identity as female. Gender nonconforming youth range in the ways in which they identify as male, female, some combination of both, or neither.

The responsibility for determining a student's gender identity rests with the student or, in the case of young students not yet able to advocate for themselves, with the parent.⁵ One's gender identity is an innate, largely inflexible characteristic of each individual's personality that is generally established by age four, although the age at which individuals come to understand and express their gender identity may vary based on each person's social and familial social development.⁶ As a result, the person best situated to determine a student's gender identity is that student himself or herself.

In one Massachusetts town, the parents of a pre-school-age biologically female child noted throughout the child's early years that their child identified as a boy. For as long as the parents could remember, the child preferred to play with boys rather than girls, wanted a short haircut, rejected wearing any clothing that the child identified as "something a girl would wear," and ignored anyone who called him by his stereotypically feminine name. When it was time for the child to enter kindergarten, the child said to his parents, "You have to tell them when I go to kindergarten that I'm a boy."

Consistent with the statutory standard, a school should accept a student's assertion of his or her gender identity when there is "consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity." If a student's gender-related identity, appearance, or behavior meets this standard, the only circumstance in which a school may question a student's asserted gender identity is where school personnel have a credible basis for believing that the student's gender-related identity is being asserted for some improper purpose.

In most situations, determining a student's gender identity is simple. A student who says she is a girl and wishes to be regarded that way throughout the school day and throughout every, or almost every, other area of her life, should be respected and treated like a girl. So too with a student who says he is a boy and wishes to be regarded that way throughout the school day and throughout every, or almost every, other area of his life. Such a student should be respected and treated like a boy.

The statute does not *require* consistent and uniform assertion of gender identity as long as there is "other evidence that the gender-related identity is sincerely held as part of [the] person's core identity." Many transgender people experience discrimination, and some

(3) When used in this document, the term "parent" refers to parent as well as legal guardian.

(4) See Gerald P. Mallon, "Practice with Transgendered Children," in *Social Services with Transgendered Youth* 49, 55-58 (Gerald P. Mallon ed., 1999). See also Stephanie Brill & Rachel Pepper, "Developmental Stages and the Transgender Child," in *The Transgender Child*, 61-64.

experience violence due to their status. Some environments may feel safe and inclusive, and others less so, challenging a person's ability to live consistently with one gender identity in all aspects of life. For example, it is possible that a biologically male student with a female gender identity who lives as a girl does not express her female gender identity all the time. In one case, such a student agreed to present as a boy when visiting relatives until the student's parents could explain the student's

transgender identity to them. The fact that the student did not exclusively assert her female identity did not alter the fact that she had a female gender identity.

Confirmation of a student's asserted gender identity may include a letter from a parent, health care provider, school staff member familiar with the student (a teacher, guidance counselor, or school psychologist, among others), or other family members or friends. A letter from a social worker, doctor, nurse practitioner, or other health care provider stating that a student is being provided medical care or treatment relating to her/his gender identity is one form of confirmation of an asserted gender identity. It is not, however, the exclusive form upon which the school or student may rely. A letter from a clergy member, coach, family friend, or relative stating that the student has asked to be treated consistent with her/his asserted gender identity, or photographs at public events or family gatherings, are other potential forms of confirmation. These examples are intended to be illustrative rather than comprehensive.

In one Massachusetts middle school, a biologically male student explained to her guidance counselor that she was a transgender girl who expressed her female gender identity only at home. The stress associated with having to hide her female gender identity at school was having a negative impact on her mental health, as well as on her academic performance. The student and her parents asked if it would be okay if she expressed her female gender identity at school. The guidance counselor assured the student and her parents that she could do so. The fact that the student presented no documentation to support her gender identity was not a concern since the school had no reason to believe the request was based on anything other than a sincerely held belief that she had a female gender identity.

Gender Transition

Many, though not all, transgender youth undergo the experience of gender transition. The term "gender transition" describes the experience by which a person goes from living and identifying as one gender to living and identifying as another. For most youth, and for all young children, the experience of gender transition involves no medical intervention. Rather, most transgender youth will undergo gender transition through a process commonly referred to as "social transition," whereby they begin to live and identify as the gender consistent with their gender-related identity. Some transgender youth who are close to reaching puberty, or after commencing puberty, may complement social transition with medical intervention that may include hormone suppressants, cross-gender hormone therapy, and, for a small number of young people, a range of gender-confirming surgeries. The decision about whether and how to undergo gender transition is personal and depends on the unique circumstances of each individual. There is no threshold medical or mental health diagnosis or treatment requirement that any student must meet in order to have his or her gender identity recognized and respected by a school.

Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance. School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian. For the same reasons, school personnel should discuss with the student how the school

should refer to the student, e.g., appropriate pronoun use, in written communication to the student's parent or guardian.

Names and Pronouns

The issue of the name and pronoun to use in referring to a transgender student is one of the first that schools must resolve to create an environment in which that student feels safe and supported. Transgender students often choose to change the name assigned to them at birth to a name that is associated with their gender identity. As with most other issues involved with creating a safe and supportive environment for transgender students, the best course is to engage the student, and in the case of a younger student, the parent, with respect to name and pronoun use, and agree on a plan to initiate that name and pronoun use within the school. The plan also could include when and how this is communicated to students and their parents. In the case of a transgender student who is enrolling at a new school, it is important that the school respect the student's privacy (see the following section) and chosen name.

In one situation where a transgender girl was entering high school, she and her parent asked the principal to inform her teachers that even though her school records indicate that her name is John, she goes by the name Jane and uses female pronouns. The school principal sent the following memorandum to the student's classroom teachers: "The student John Smith wishes to be referred to by the name Jane Smith, a name that is consistent with the student's female gender identity. Please be certain to use the student's preferred name in all contexts, as well as the corresponding pronouns. It is my expectation that students will similarly refer to the student by her chosen name and preferred pronouns. Your role modeling will help make a smooth transition for all concerned. If students do not act accordingly, you may speak to them privately after class to request that they do. Continued, repeated, and intentional misuse of names and pronouns may erode the educational environment for Jane. It should not be tolerated and can be grounds for student discipline. If you need any assistance to make sure that Jane Smith experiences a safe, nondiscriminatory classroom atmosphere, please contact me or Ms. O'Neill. - Mr. Jones, Principal."

Massachusetts' law recognizes common law name changes. An individual may adopt a name that is different from the name that appears on his or her birth certificate provided the change of name is done for an honest reason, with no fraudulent intent. Nothing more formal than usage is required.⁷ Hence, when requested, schools should accurately record the student's chosen name on all records, whether or not the student, parent, or guardian provides the school with a court order formalizing a name change.

The Department has a procedure in place to update name changes and gender markers in the Student Information Management System (SIMS) upon request. The document *Assigning State Assigned Student Identifiers (SASIDs) to Massachusetts' Public School Students*, which may be found at <http://www.doe.mass.edu/infoservices/data/sims/sasid/>, guides schools through changing names and gender markers on school records.

In sum, school personnel should use the student's chosen name and pronouns appropriate to a student's gender identity, regardless of the student's assigned birth sex. For those students who have

been attending a school and undergo gender transition while attending the same school, it is important to develop a plan for initiating use of the chosen name and pronouns consistent with the student's gender identity.

Privacy, Confidentiality, and Student Records

Under state law, information about a student's assigned birth sex, name change for gender identity purposes, gender transition, medical or mental health treatment related to gender identity, or any other information of a similar nature, regardless of its form, is part of the individual's student record (see Massachusetts Student Records Regulations, 603 CMR 23.00), is confidential, and must be kept private and secure, except in limited circumstances. 603 CMR § 23.04.8 One circumstance is when authorized school personnel require the information to provide administrative, teaching, counseling, or other services to the student in the performance of their official duties. For transgender students, authorized school personnel could include individuals such as the principal, school nurse, classroom teacher(s), or guidance or adjustment counselor.

When a student new to a school is using a chosen name, the birth name is considered private information and may be disclosed only with authorization as provided under the Massachusetts Student Records Regulations. If the student has previously been known at school or in school records by his or her birth name, the principal should direct school personnel to use the student's chosen name. Every effort should be made to update student records (for example, Individualized Education Programs) with the student's chosen name and not circulate records with the student's assigned birth name. Records with the student's assigned birth name should

(8) For certain transactions, such as banking and applying for governmental benefits or licenses, it may be necessary to have a formal legal document establishing one's change of name for identity and other purposes.

(9) The federal Family Educational Rights and Privacy Act, 20 USC 1232g, also protects the privacy of education records and requires that personally identifiable information be kept secure and confidential. be kept in a separate, confidential file.

One school nurse dealt with information in the student's file by starting a new file with the student's chosen name, entered previous medical information (for example, immunizations) under the student's chosen name, and created a separate, confidential folder that contained the student's past information and birth name.

When determining which, if any, staff or students should be informed that a student's gender identity is different from the assigned birth sex, decisions should be made in consultation with the student, or in the case of a young student, the student's parent or guardian. The key question is whether and how sharing the information will benefit the student.

In one case, parents of a transgender male-to-female elementary school student requested that only the school principal and the school nurse be aware that the student was assigned the sex of male at birth. After a discussion with the school principal, the parents agreed that the student's teacher, the school secretary, and the district superintendent would also be informed. In this situation, the school principal kept the student's birth certificate in a

separate, locked file that only the principal could access, and put a note in the student's other file saying that the principal had viewed the student's birth certificate. In another situation, where a biological male came to school after April vacation as a girl, the school principal and guidance counselor, in collaboration with the student and her parents, developed a plan for communicating information regarding the student's transition to staff, parents, and students. The plan included who was going to say what to whom, and when the communication would take place.

Transgender and gender nonconforming students may decide to discuss and express their gender identity openly and may decide when, with whom, and how much to share private information. A student who is 14 years of age or older, or who has entered the ninth grade, may consent to disclosure of information from his or her student record. If a student is under 14 and is not yet in the ninth grade, the student's parent (alone) has the authority to decide on disclosures and other student record matters. 9

Gender Markers on Student Records

A gender marker is the designation on school and other records that indicates a student's gender. For most students, records that include an indication of a student's gender will reflect a student's assigned birth sex. For transgender students, however, a documented gender marker (for example, "male" or "female" on a permanent record) should reflect the student's

9 See 603 CMR §§23.01 and 23.07. If a student is from 14 through 17 years of age or has entered ninth grade, both the parent and the student may make decisions concerning the student record, or either the student or the parent acting alone may decide.

gender identity, not the student's assigned sex. This means that if a transgender student whose gender identity is male has a school record that reflects an assigned birth sex as female, then upon request by the student or, in the case of young students not yet able to advocate for themselves, by the parent or guardian, the school should change the gender marker on the record to male.¹⁰ Schools are advised to collect or maintain information about students' gender only when necessary.

One school reviewed the documentation requests it sent out to families and noticed that field trip permission forms included a line to fill in indicating the student's gender. Upon consideration, the school determined that the requested information was irrelevant to the field trip activities and deleted the line with the gender marker request.

In addition, transgender students who transition after having completed high school, may ask their previous schools to amend school records or a diploma or transcript that include the student's birth name and gender. When requested, and when satisfied with the gender identity information provided, schools should amend the student's record, including reissuing a high school diploma or transcript, to reflect the student's current name and gender.

Restrooms, Locker Rooms, and Changing Facilities

All students are entitled to have access to restrooms, locker rooms and changing facilities that are sanitary, safe, and adequate, so they can comfortably and fully engage in their school program and activities. In meeting with the transgender student (and parent) to discuss the issues set forth in this memorandum, it is essential that the principal and student address the student's access to the restrooms, locker room and changing facility. Each situation needs to be reviewed and addressed based on the particular circumstances of the student and the school facilities. In all cases, the principal should be clear with the student (and parent) that the student may access the restroom, locker room, and changing facility that corresponds to the student's gender identity. While some transgender students will want that arrangement, others will not be comfortable with it. Transgender students who are uncomfortable using a sex-segregated restroom should be provided with a safe and adequate alternative, such as a single "unisex" restroom or the nurse's restroom. Similarly, some transgender students may not be comfortable undressing in the changing facilities that correspond to the student's gender identity. The following are examples of ways in which school officials have responded to these situations:

In one elementary school, a transgender second-grader socially transitioned from female to male. The principal informed the staff: For the remainder of this year, he will use Nurse Margaret's restroom, and toward the end of the year we will make future

10 As discussed in the section on Names and Pronouns, the Department's publication *Assigning State Assigned Student Identifiers (SASIDs) to Massachusetts' Public School Students* guides district staff through the process of adding or revising SIMS data.

determinations of restroom use in consultation with his family.

In one middle school, a male-to-female transgender sixth-grader socially transitioned after spring break. For the rest of the school year, she used the nurse's restroom and the other unisex restrooms at the school. Beginning in seventh grade, she used the girls' restroom.

In one high school, a transgender male-to-female student was given access to the female changing facility, but the student was uncomfortable using the female changing facility with other female students because there were no private changing areas within the facility. The principal examined the changing facility and determined that curtains could easily be put up along one side of a row of benches near the group lockers, providing private changing areas for any students who wished to use them. After the school put up the curtains, the student was comfortable using the changing facility.

Some students may feel uncomfortable with a transgender student using the same sex-segregated restroom, locker room or changing facility. This discomfort is not a reason to deny access to the transgender student. School administrators and counseling staff should work with students to address the discomfort and to foster understanding of gender identity, to create a school culture that respects and values all students.

The Department strongly recommends that districts include an appropriate number of gender-neutral restrooms commensurate with the size of the school, and at least one gender-neutral changing facility, into the design of new schools and school renovations.

School staff as well as students and their families may find the use of restrooms and changing facilities to be among the more challenging issues presented by the gender identity law, perhaps due to issues of personal privacy. As emphasized in other sections of this guidance, these issues should be resolved on a case-by-case basis, through dialogue with students and parents, and through leadership in creating safe and supportive learning environments.

Physical Education Classes and Intramural and Interscholastic Athletic Activities

Physical education is a required course in all grades in Massachusetts' public schools, and school-based athletics are an important part of many students' lives. Most physical education classes in Massachusetts' schools are coed, so the gender identity of students should not be an issue with respect to these classes. Where there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity. With respect to interscholastic athletics, the Massachusetts Interscholastic Athletic Association will rely on the gender determination made by the student's district; it will not make separate gender identity determinations.

At one school, a transgender girl joined the girls' cheerleading squad. The school supported the student's participation on the team. When the team was going to a regional competition, however, several of the team members raised a concern that the school would be made to compete in the coed cheerleading portion of the competition rather than in the all-girls portion for which they prepared. With the permission of the student, the principal wrote a letter that she gave to the coach to take to the competition in case officials at the competition questioned the team's participation in the all-girls' portion of the event. The letter explained: "Student, Jane Smith, is a transgender girl who has been a member of the girls' team since (date). Jane has a sincerely held female gender identity and, therefore, according to state law must be permitted to participate as a girl on the girls' cheerleading team." The team participated in the regional competition without incident.

Other Gender-Based Activities, Rules, Policies, and Practices

As a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose. Gender-based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, whether they are gender nonconforming or not. In some circumstances, these policies, rules, and practices may violate federal and state law. For these reasons, schools should consider alternatives to them.

Whenever students are separated by gender in school activities or are subject to an otherwise lawful gender-specific rule, policy, or practice, students must be permitted to participate in such activities or conform to such rule, policy, or practice consistent with their gender identity.

The new law on gender identity provides a good opportunity for schools to review their gender-distinct policies. For example, some schools require students to wear gender-based garb for graduation or have gender-based dress codes for prom, special events, and daily attire. Schools should eliminate gendered policies and practices such as these. For example, one school that previously had blue graduation gowns for boys and white ones for girls switched to blue gowns for all graduates. The school also changed its gender-based dress code for the National Honor Society ceremony, which had required girls to wear dresses.

Similarly, some classroom teachers may routinely include gender-based practices in the classroom. For example, some teachers may have boys and girls line up separately to leave the classroom to go to lunch, the gymnasium, restrooms, or recess, and may never have considered the educational value of non-gendered alternatives, such as having students line up in the order of their birthdays, or alphabetically by name, or in the order in which they are sitting.¹¹

¹¹ Gender and Children: A Place to Begin for Educators www.welcomingschools.org
Education and Training

In order to further a safe and supportive school environment for all students, schools should incorporate education and training about transgender and gender nonconforming students into their anti-bullying curriculum, student leadership trainings, and staff professional development.

As with other efforts to promote a positive school culture, it is important that student leaders and school personnel, particularly school administrators, become familiar with the gender identity law, regulations, guidance, and related resources, and that they communicate and model respect for the gender identity of all students.

Professional development for school staff could include topics on gender identity and gender nonconformity such as: the *Massachusetts Student Anti-discrimination Law and Regulations*; the ESE *Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression*; key terms related to gender identity and expression; the development of gender identity; the experiences of transgender and other gender nonconforming students; risk and resilience data regarding transgender and gender nonconforming students; ways to support transgender students and to improve the school climate for gender nonconforming students; gender-neutral language and practices; and this guidance.

Communication with School Community and Families

Superintendents and principals need to review existing policies, handbooks, and other written materials to ensure that they are updated to reflect the inclusion of *gender identity* in the student antidiscrimination law, and may wish to inform all members of the school community, including school personnel, students, and families, of the recent change to state law and its implications for school policy and practice. This could take the form of a letter that states the school's commitment to being a supportive, inclusive environment for all students, as well as the school's legal obligation to provide equal educational opportunities for all students. Such a letter might include the definitions provided at the beginning of this document and some basic information about transgender and gender nonconforming youth; a link to the school's anti-bullying and anti-harassment policies; a link to this guidance; and other resources, including individuals to contact with additional questions. 12

12 For example, a letter from one principal explained: *"All people have a gender identity. For most people, their gender identity matches their assigned sex at birth. For transgender people, that is not the case. Transgender girls are individuals who were assigned the male sex at birth but whose lived experience of who they are is female. Transgender boys are individuals who were assigned the female sex at birth but whose lived experience of who they are is male. As a school community, we want to provide a safe environment and support all of our students so they can achieve academically. That means making sure that our school's policies and practices are inclusive and respectful of all students, including transgender students. Toward that end, we have ...[describe steps taken to implement the law]."*

Conclusion

This guidance cannot anticipate every situation in which questions may come up in the implementation of this law, and the needs of each transgender or gender nonconforming student should be assessed and addressed on a case-by-case basis. The Department will continue to provide assistance, support, and resources as we work together to create a safe and supportive school environment for all students.

For further information or questions about the content of this guidance, please contact Center for Student Support @ ssca@doe.mass.edu.

E. SEARCH AND SEIZURE: CELL PHONE INFORMATION

Two cases, decided this year, underscore the proposition that the law against unreasonable search and seizure applies to cellular telephone information.

Commonwealth v. Augustine
467 Mass. 230 (2014)
Decided Feb. 18, 2014

The police obtained from a third party phone provider a two-week sweep of cell phone tower locations specific to one telephone to track the defendant's whereabouts at the time of a murder. The Court, rejecting the notion that the records belonged to the third party phone provider, found that the defendant had a reasonable expectation of privacy in this information and, thus probable cause was needed for the government to obtain it.

Riley v. California
2014 WL 2864483
Decided: June 25, 2014

The U.S. Supreme Court issued a decision ruling that an individual has a reasonable expectation of privacy in his/her cell phone. Thus, a search warrant is necessary for police to be able to search an individual's cell phone.

Neither of these cases directly involved schools and students, and they involved criminal cases. However, they do establish that an individual has a reasonable expectation of privacy in his or her cell phone contents. Therefore, in order for a school district to search and seize such property, it must establish that the search and seizure is reasonable in its inception and its scope.