

## **WEBINAR FOLLOW-UP QUESTIONS**

### **PEER-TO-PEER BULLYING AND HARASSMENT IN SCHOOLS**

Thank you again for participating in the webinar entitled “Peer-to-Peer Bullying and Harassment in Schools: School Responsibilities and Liability Exposure,” hosted by the Massachusetts Charter Public School Association on September 26, 2019. This client alert provides answers to questions that were posed during and after the webinar.

A copy of the slide presentation used during the webinar is available [here](#).

Can you clarify which Massachusetts and federal laws apply to reporting bullying? The Massachusetts Bullying Statute (G.L. c. 71, § 37O) and regulations (603 CMR 23.00 et seq.) set forth the specific requirements for reporting bullying, including notice to parents and law enforcement. As with all communication about students, bullying reporting must be conducted within the contours of student confidentiality laws, such as the Massachusetts Student Record Regulations (603 CMR 23.00 et seq.) and the Family Educational Rights and Privacy Act (“FERPA”) (20 U.S.C. § 1232g; 34 CFR Part 99).

What should we do when the aggressor is a SPED student?

This is a great question because it highlights the importance of identifying whether the students involved in a bullying incident receive or are eligible for special education (“SPED”) services. If any student involved in a bullying incident -- including the aggressor -- receives or is eligible for SPED services, the school must first determine whether:

1. The student’s disability impacts his or her social skills development (note that DESE has taken the position that most emotional impairments, developmental delays, health impairments, communication disorders, and neurological impairments are likely to affect a student’s social skills development);
2. The student’s disability makes him or her vulnerable to bullying, harassment, or teasing; or
3. The student has a disability on the autism spectrum.

To assist in making this determination, a school should consider whether:

1. It is aware of the student's involvement in prior bullying incidents, and the nature of those incidents, if any;
2. The student has a clear understanding of what bullying is (including teasing and harassment);

3. The student engages in behavior that might be identified as bullying, or whether there is concern about new or emerging behavior that might be identified as bullying;
4. The student is able to access the general education curriculum, including the bullying prevention and intervention curriculum;
5. There are skills that the student could learn that would help him or her address potentially problematic behaviors;
6. The student is socially isolated and what steps are being taken to integrate the student into student social life both during the school day and during extracurricular activities;
7. It would be appropriate to give the student an aide to prevent him or her from engaging in or being subjected to bullying behaviors during at-risk times, such as recess or lunch; and
8. There is a bullying intervention plan in place for the student and, if so, if it is being followed, or, if not, whether one would be appropriate.

Using these inquiries for guidance, if the school determines that the aggressor's disability impacts his or her social skills development or makes him or her vulnerable to bullying, harassment, or teasing, or that he or she is on the autism spectrum, then the school should check the student's IEP to ensure compliance with the Massachusetts Bullying Statute. If such a determination is made, the Massachusetts Bullying Statute requires that the student's IEP specifically address the skills and proficiencies needed to avoid and respond to bullying, harassment, and teasing. In the event that the student is the aggressor, the IEP should include the skills and proficiencies needed to keep the child from engaging in bullying, harassing, and teasing behaviors, and address how to respond to such episodes if and when they occur. The skills and proficiencies that an IEP team may identify in an IEP may include, but would not be limited to, self-awareness, self-management, social awareness, relationship skills, and responsible decision-making. A team meeting may be necessary to either add these sections to the student's IEP or otherwise revise the student's IEP.

### **Do you have to tell the target's parents the name of the aggressor?**

No. In fact, schools are not allowed to tell the target's parents the name of the aggressor. The Massachusetts student record regulations prohibit schools from revealing student record information about the aggressor, including the aggressor's identity, to the target's parent. When talking to the target's parent, try to refocus the discussion towards what the school is doing to protect the target going forward.

### **What if a parent contacts law enforcement and not the school? Is the school still responsible for reporting to DESE?**

Charter schools are required to notify DESE of all "significant matters" within two business days. 603 CMR 1.08(10). "Significant matters" include "all communications made or received by or on behalf of the school with any government audit, investigative, or law enforcement agency." *Id.* As emphasized, this requirement applies to "all communications," regardless of who initiates the communication. Therefore, if a parent contacts law enforcement, and law enforcement then contacts the school, this would be considered a "significant matter" that must be reported to DESE.

**Is it true that the different legal regimes that apply to sharing student record information and responding to bullying do not align perfectly?**

Yes. On one hand, the bullying law requires schools to give notice to the parents of the target and the aggressor once it makes a determination that bullying or retaliation has occurred. In fact, as described above, the school is required to specifically inform the parent of the target about the actions that are being taken to prevent further acts of bullying or retaliation. However, on the other hand, as described above, student confidentiality laws prohibit the school from disclosing information about other students to the target's parents, including information about the aggressor.

Similarly, the bullying law requires the school to notify the local law enforcement agency if the school has a "reasonable basis to believe that criminal charges may be pursued against the aggressor." However, again, student confidentiality laws significantly limit when schools can disclose student record information to third parties, including local law enforcement. To somewhat resolve this conflict, DESE regulations permit a school to choose not to make a report to local law enforcement -- even if it has a reasonable basis to believe that criminal charges may be pursued against the aggressor -- if the school believes it can handle the incident appropriately without doing so. The school must carefully document the reasons for the decision to notify (or not notify) law enforcement.

Finally, as an exception to the student confidentiality laws, schools are permitted to disclose student record information to law enforcement if doing so is necessary to protect the health or safety of a student or other individuals.

**Are there any examples of a checklist of steps to take when a student with a disability is involved in a bullying incident?**

We are not aware of a general checklist of this sort, but are happy to work with your individual school to put one together in a way that best suits your school's particular needs.

**Does the Massachusetts Bullying Statute address school responsibilities when a student bullies a student from a different school?**

If an incident of bullying or retaliation involves students from multiple school districts, the Bullying Statute requires the school which first learns about the bullying to contact the appropriate administrator at the other school(s). If a school learns from another school that one of its students engaged in bullying behavior towards a student of a different school, the bullying statute technically still requires the school to conduct an investigation, give the required notices, and take appropriate disciplinary action. However, what constitutes "appropriate" disciplinary action may reasonably differ when the students who must be protected go to different schools.

**What are the students' rights to access an investigation report or other documents in advance of a disciplinary hearing?**

Student access to reports in advance of disciplinary hearings depends on the nature of the underlying behavior and the ultimate discipline imposed against the student. If a

school is considering imposing a long-term suspension, the student must be given the opportunity, in advance of the disciplinary hearing, to review his or her own student record, as well as any documents upon which the school may rely in making the determination as to whether or not to suspend the student. In addition, if the conduct falls within the purview of Title IX (sexual misconduct), the school must give each party “the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.” DOE, [Q&A on Campus Sexual Misconduct](#) (Sept. 2017). In any event, each student has a right to access his or her own student record, which may include investigative reports and other documents related to discipline, within 10 days of a request. 603 CMR 23.07(2). Moreover, the school may have an obligation to produce redacted versions of such records in response to a public records request, in accordance with the Massachusetts Public Records Law (see, for example, [Champa v. Weston](#), 472 Mass. 86 (2015)).

### **What about interactions that happen outside of school rather than in school?**

The Massachusetts Bullying Statute applies to bullying that occurs both within and outside of school. The Massachusetts Bullying Statute applies to bullying that occurs within school, and to bullying conducted outside of school when the bullying conduct impacts the target’s school experience. The statute specifically defines bullying to include conduct that “creates a hostile environment at school” for the target and that “infringes on the rights of the [target] at school.” It also includes cyber-bullying, which may not necessarily occur on school property.

### **To your point on having a different investigator and adjudicator, does it apply to any disciplinary offense or just in harassment/discrimination situations?**

In schools with the personnel capacity to assign different individuals as investigator and adjudicator, it would be considered best practice in all disciplinary situations.

One of the purposes of a student disciplinary hearing is “to hear and consider information regarding the alleged incident.” 603 CMR 53.08(2)(a), 53.08(3)(a). Another is to “provide the student an opportunity to dispute the charges and explain the circumstances surrounding the alleged incident.” *Id.* More generally, the ultimate purpose of a hearing is for the principal (or his or her designee) to determine whether the student committed a disciplinary offense. *Id.* The person who is making that determination at the hearing should not have any preconceived notions about the underlying conduct, which may be the case if the person conducting the hearing also conducted the investigation. If the investigator were also the adjudicator, it could call into question the meaningfulness of the student’s opportunity to explain his or her side of the story at the hearing.

As a practical matter, keeping these two roles separate also helps maintain important relationships between students and staff. In order for an investigation to bear any fruit, the person conducting the investigation should be someone whom the involved students trust and to whom they feel comfortable sharing potentially sensitive information; this requires a pre-existing trusting relationship, such as one between a guidance counselor

and student. If that individual were to also be an adjudicator who has decided to impose discipline against a student, that trust would likely be broken, which could hinder the student's comfort level at school and ultimately cut off a previously open line of communication.

**What are things to consider when a peer-to-staff sexual harassment situation emerges?**

The Massachusetts Bullying Statute only applies to actions taken by a perpetrator against a “victim,” which is defined only as “a student against whom bullying or retaliation has been perpetrated.” Accordingly, when a staff member is the victim of an incident, the bullying law does not apply. However, this question may trigger the application of a number of employment laws, such as laws about workplace violence and those that require an employer to protect its employees from discriminatory harassment. Because employment law is outside the scope of this webinar, we encourage you to direct questions regarding your obligations as an employer to our labor and employment team. Paul Holtzman, the head of our employment practice, can be reached at ([pholtzman@kb-law.com](mailto:pholtzman@kb-law.com)).

If you have any further questions about peer-to peer bullying and harassment, please do not hesitate to reach out to Attorneys Elka Sachs ([esachs@kb-law.com](mailto:esachs@kb-law.com)) or Allison Belanger ([abelanger@kb-law.com](mailto:abelanger@kb-law.com)).